

# DIRECTORS' DUTIES DURING THE GREEN TRANSITION UNDER EU LAW - REFORM AND RAMIFICATIONS FROM CORPORATE SUSTAINABILITY DUE DILIGENCE

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*In response to the climate emergency, the European Union seeks to establish a new model of inclusive growth and depicts this shift as a 'green, fair and competitive transition'. The article examines the EU sustainable corporate governance initiative commenced in 2018 that has crystalized after four years in a Commission's proposal for a Directive on corporate due diligence, which is expected to be adopted by early 2024. The focus herein is on why and how directors' duties under company law are being discussed and potentially reformed in the EU through this new Directive. At stake are current corporate governance arrangements that have enshrined powerful norms regarding profit-maximization and shareholder primacy that can hinder the green transition. This inquiry aims to map, simplify and explain the vast and rapidly evolving EU regulatory landscape. Drawing on EU materials from 2018 to 2023, the article documents the 'misunderstanding problem' and the 'incentives problem' that create a dissonance between the legal norm advanced by company law and the business norm practiced by the corporate governance system. Currently mired by profound disagreements between the Commission and the Council, the EU has a rare opportunity to deliver an innovative and noteworthy reform of directors' duties in company law by creating new legal and market incentives while remaining faithful to the core tenets of this body of law.*

## 1 INTRODUCTION

Recognizing the climate emergency and the imperative for the green transition, the EU set in motion a comprehensive regulatory agenda to advance sustainable business conduct. In this unprecedented legislative process started in 2018, the EU is turning many stones. One such stone is company laws (CL) as embedded in the wider corporate governance (CG) regime.<sup>1</sup> Misgivings about CG stem from the norm of profit-maximization, especially when set against short-term horizons and reduced to financial value measurements. This turn to financialization and short-termism coupled with an almost exclusive focus on shareholder interests can be seen as a cause of undesirable business conduct generating externalities and inefficiencies.

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<sup>1</sup> Corporate governance, according to the OECD, refers to 'a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.' OECD, 'OECD/G20 Principles on corporate governance' (OECD Publishing Paris 2015) (hereinafter OECD Principles) 9.

With its sustainable finance agenda, the EU seeks to systematically integrate sustainability in economic decision-making, mobilize private finance and incentivize the real economy to adopt responsible business practice throughout supply chains.<sup>2</sup> In this context, the EU has examined the need for reforming corporate governance. That includes reforming directors' duties<sup>3</sup> under CL so at the minimum they do not hinder, and preferably contribute to, this large-scale transformation. In its analysis the European Commission acknowledged 'market failures' and 'regulatory failures'<sup>4</sup> in CG that present a major obstacle in the green transition. What separates this EU setting from previous critiques and reforms is the EU willingness to regulate comprehensively a variety of sustainability-related aspects of CG in both the real economy and finance.

The article focuses on directors' duties under CL and related CG aspects in the EU space. It looks into the 'sustainable corporate governance' process initiated in 2018<sup>5</sup> that advanced in 2022 with the proposed Corporate Sustainability Due Diligence Directive (CSDDD),<sup>6</sup> which is a component of the broader EU policy framework for the green transition. The article aims to document and explain the impetus and features of a remarkable EU legislative reform. What is the need for such reform of directors' duties under CL? What are the features of the EU regulatory reform that might distinguish it from other precedents?

It was aptly noted that 'the ecosystem is buzzing with activity'.<sup>7</sup> The sources for the present analysis consist of a multitude of EU laws and policies, European Commission's assessments and proposals, the negotiation positions of the Council and Parliament, expert studies, feedback during public consultations, and academic commentary. As these EU initiatives are approaching the level of an impenetrable jungle,<sup>8</sup> the article seeks to map the instruments, explain key features and inflection points throughout the process, and thus facilitate further evaluation of this potential reform of CL. For those interested in externalities and distributional aspects of economic activity, this legislative agenda is unprecedented: not only is the EU ahead globally, but the days when the EU was extolling the virtues of corporate voluntarism and soft law are gone.<sup>9</sup>

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<sup>2</sup> Commission, 'Sustainable finance' <[https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance_en)> accessed 1 October 2023.

<sup>3</sup> In line with the proposed Directive, this article refers to 'directors' to encompass both executive and non-executive members of the board, which fulfils a supervisory function in the company. Commission, 'Proposal for a Directive on Corporate Sustainability Due Diligence' COM (2022) 71 final (hereinafter CSDDD), Art 3(o-p).

<sup>4</sup> See Table in section 2.2.

<sup>5</sup> Commission, 'Action Plan on Financing Sustainable Growth' COM (2018) 97 final (hereinafter 2018 Action Plan) 11.

<sup>6</sup> CSDDD (n 3).

<sup>7</sup> World Economic Forum, 'Measuring Stakeholder Capitalism - Towards Common Metrics and Consistent Reporting of Sustainable Value Creation' (in collaboration with Deloitte, EY, KPMG and PwC) White Paper (2020), 44 <[www3.weforum.org/docs/WEF\\_IBC\\_Measuring\\_Stakeholder\\_Capitalism\\_Report\\_2020.pdf](http://www3.weforum.org/docs/WEF_IBC_Measuring_Stakeholder_Capitalism_Report_2020.pdf)> accessed 1 October 2023.

<sup>8</sup> Charlotte Villiers, 'New Directions in the European Union's Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: The Challenge of Complexity' (2022) 13(4) *European Journal of Risk Regulation* 548.

<sup>9</sup> Radu Mares, 'Corporate self-regulation and the climate: The legal trajectory of sustainability due diligence in the European Union' in Ottavio Quirico and Walter F Baber (eds), *Implementing Climate Policies* (Cambridge University Press 2023).

## 2 THE CASE FOR REFORM OF CORPORATE GOVERNANCE

In its proposed CSDDD, the Commission insists on directors' supervisory role to ensure that sustainability due diligence is embedded in corporate strategies and thus is given more weight in corporate decision making and effective compliance.<sup>10</sup> Indeed, the focus of the CSDDD is on corporations rather than directors, and on rendering mandatory human rights and environmental due diligence<sup>11</sup> ('sustainability due diligence'). This legislative design combines corporate governance (i.e., directors' duties) and corporate accountability (i.e., corporate due diligence and liability), but has proven controversial. Criticized as redundant and/or intrusive, the proposed CSDDD does not contemplate more prescriptive options such as directors' individual liability<sup>12</sup> or independent and non-executive directors being appointed on the board to further sustainability due diligence.<sup>13</sup> Even so, the Council's position is to remove all provisions on directors' duties except those related to climate change<sup>14</sup> while the Parliament wishes to retain only a general directors' duty while removing the specific duties the Commission proposed.<sup>15</sup>

This section examines the directors' duties and their enforcement in a comparative perspective and accounts for the core tenets of CL. It explains the difficulties posed by diverging norms promoted by CL and the CG system, and then synthesizes the EU process leading to the CSDDD proposal in early 2022.

### 2.1 DIRECTORS' DUTIES UNDER COMPANY LAW

There are three elements that form the bedrock of company law approach to directors' duties in most advanced jurisdictions around the world. First, despite national variations, it is generally understood that directors must comply with legal duties of care and loyalty.<sup>16</sup> Second, these duties are commonly owed to their company and not to their shareholders. Third, directors are protected by the 'business judgement rule' – or judicial self-restraint – against overreaching minority shareholders and intrusive judicial oversight. Methodologically, this section points at commonalities and foundational aspects about

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<sup>10</sup> CSDDD (n 3) 16 and para 63.

<sup>11</sup> *ibid* Art 4.

<sup>12</sup> Nick Friedman, 'Corporate Liability Design for Human Rights Abuses: Individual and Entity Liability for Due Diligence' (2021) 41(2) *Oxford Journal of Legal Studies* 289.

<sup>13</sup> The study written for the European Commission only refers briefly to such aspects when summarizing its survey responses. Some respondents suggested non-executive directors for trade unions or an external stakeholders committee. E&Y, 'Study on directors' duties and sustainable corporate governance - Final Report' (2020) 57-58.

<sup>14</sup> The Council deleted the relevant articles (25 and 26 as well 15(3)) due to the 'strong concerns' expressed by Member States that considered these to be 'an inappropriate interference with national provisions regarding directors' duty of care, and potentially undermining directors' duty to act in the best interest of the company'. Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach' 2022/0051 (COD) (30 November 2022) 9-10.

<sup>15</sup> The Parliament deleted article 26 (specific duties) while retaining unchanged article 25 (general duty), in a deviance from the Parliament's own JURI report that embraced the Commission's proposal in its Report of 8.5.2023 (pp. 443-4). European Parliament, 'Amendments on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence' 2022/0051 (COD) (1 June 2023) Amendment 391.

<sup>16</sup> OECD Principles (n 1) 45-46.

directors' duties by noting the principles distilled in international soft law instruments such as the OECD Principles for corporate governance, and the convergence of civil law and common law jurisdictions.<sup>17</sup> Therefore, the following comparative analysis does not insist on specificities and details on national jurisdictions in order not to risk missing the forest for the trees. Furthermore, the CSDDD is a regional, EU wide instrument which means the EU lawmakers seek to accommodate differences among EU national traditions of corporate governance while still harmonizing the directors' duties under company laws.

The basic legal norm in CL is that directors are expected to pursue the best interests of the company and make their business decisions with due care while enjoying a fair amount of discretion to discharge their mandate. However, this legal picture is at odds with perceptions that directors are legally obliged to pursue the interest of their shareholders. Thus, directors' duties are at times understood as being about the exclusive pursuit of shareholder interests (exclusivity), about pursuing short term profitability rather than for the longer-term (short-termism), and about measuring corporate success solely/primarily in financial value terms (financialization). By now, corporate governance has become the home of powerful norms such as profit-maximization and shareholder primacy.<sup>18</sup> Therefore the question is whether these two norms thus defined are legal norms under CL, and if not, what is exactly the contribution of CL to these business norms taking hold in practice in the CG system?

A comparative review reveals that each of the above elements of profit-maximization and shareholder primacy can be countered by a textual reading of hard and soft law instruments in CL. Exclusivity and financialization elements are absent in the legal formulations of directors' duties. Short-termism is equally absent or at times expressly rejected by reference to long termism, as international soft law indicates.<sup>19</sup> As to the shareholders as beneficiaries of directors' duties, company laws sometimes omit shareholders altogether and refer solely to the 'interest of the company'.<sup>20</sup> Other times, shareholders are mentioned but with various additions. Thus, the OECD indicates that 'Board members

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<sup>17</sup> Robert McCorquodale and Stuart Neely, 'Directors duties and human rights impacts: a comparative approach' (2022) 22(2) *Journal of Corporate Law Studies* 605.

<sup>18</sup> Lynn Stout, *The shareholder value myth: How putting shareholders first Harms investors, corporations, and the public*, (Berrett-Koehler Publishers 2012).

<sup>19</sup> The OECD points out that 'The governance framework should recognise the interests of stakeholders and their contribution to the long-term success of the corporation' (OECD Principles (n 1)). The investor-led International Corporate Governance Network, states that 'The board should promote the long-term best interests of the company by acting on an informed basis with good faith, care and loyalty, for the benefit of shareholders, while having regard to relevant stakeholders'. (ICGN, 'ICGN Global Governance Principles' (2021), Principle 1 <<https://www.icgn.org/sites/default/files/2021-11/ICGN%20Global%20Governance%20Principles%202021.pdf>> accessed 1 October 2023).

<sup>20</sup> In Germany, both the Management Board and the Supervisory Board are bound to pursue the 'best interests of the enterprise' (Principles 1 and 10 of German Corporate Governance Code (2019)). That applies even to employee representatives on the Supervisory Board: 'Shareholder representatives and employee representatives are obliged in equal measure to act in the best interests of the enterprise' (Principle 10) <[www.dcgk.de//files/dcgk/usercontent/en/download/code/191216\\_German\\_Corporate\\_Governance\\_Code.pdf](http://www.dcgk.de//files/dcgk/usercontent/en/download/code/191216_German_Corporate_Governance_Code.pdf)> accessed 1 October 2023. In France, 'the manager may undertake all managerial decisions in the interest of the company' (Article 13 of the 1966 Company Law). In the US, a director should act 'in a manner the director reasonably believes to be in the best interests of the corporation' (§ 8.30 of American Bar Association, 'Model Business Corporation Act' (2016). <[www.americanbar.org/content/dam/aba/administrative/business\\_law/corplaws/2016\\_mbca.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf)> accessed 1 October 2023.

should act [...] in the best interest of the company and the shareholders.<sup>21</sup> Still other times company laws add qualifications and use varying terms: ‘collective’,<sup>22</sup> ‘long-term’<sup>23</sup> or ‘common’<sup>24</sup> interests of shareholders. Finally, company laws can refer explicitly to the interests of stakeholders (e.g., employees, customers, the community and even the market system) that should be taken into account.<sup>25</sup>

From a director perspective, conceptually and practically, there is nothing like ‘THE interest of the shareholders. Cadbury noted that ‘interests differ among shareholders. Some are more concerned with trading in a company’s shares than in holding them; others will differ over the relative importance which they attach to dividends and to capital appreciation. Shareholders are not a homogenous group with a common set of interests, as chairmen soon discover’.<sup>26</sup> It is counterproductive to conceive the interests of the company simply as the sum of interests of stakeholders,<sup>27</sup> or even of its shareholders.<sup>28</sup>

It appears that legal texts on directors’ duties do not explicitly support the norms of shareholder primacy and profit-maximisation. On the contrary, other concepts are employed in CL to guide managerial decision-making and clarify directors’ duties. In law, shareholders do not own the company, but shares. This is not a legal technicality, but a fundamental aspect resulting from the existence of the firm as a legal person.<sup>29</sup> Thus the shareholders’ interests are transformed once they are pursued in a corporate form:

[A] company is an association of shareholders who have agreed to subordinate their individual interests in the undertaking and to organise their protection in accordance with a set of jointly accepted rules and institutions – the company’s constitution. Shareholders therefore normally assert their rights *collectively* in accordance with those rules (to the extent that they have not been delegated to directors) and are bound to accept the decisions which emerge.<sup>30</sup>

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<sup>21</sup> OECD Principles (n 1) Art VI.A.

<sup>22</sup> In the UK, CL ‘sets as the basic goal for directors the success of the company in the collective best interests of shareholders’. Company Law Review Steering Group, Company Law Review Steering Group, ‘Modern Company Law for a Competitive Economy: Final Report’ (2001) para 3.8.

<sup>23</sup> In the UK, directors shall have regard to ‘the likely consequences of any decision in the long term’, Companies Act 2006, Art 172.1.

<sup>24</sup> In France, the company contract should have as its main objective ‘the common interest of the company members’ (Article 1833 of the Civil Code).

<sup>25</sup> Under UK law, directors shall ‘promote the success of the company for the benefit of its members as a whole’ and have regard to employees, the community and the environment (Companies Act 2006, Art 172.1). See also OECD Principles (n 1) Art VI.C.

<sup>26</sup> Sir Adrian Cadbury, *Corporate Governance and Chairmanship: A Personal View* (Oxford University Press 2002) 42–43.

<sup>27</sup> ‘The interest of the company may be understood as the over-riding claim of the company considered as a separate economic agent, pursuing its own objectives which are distinct from those of shareholders, employees, creditors including the internal revenue authorities, suppliers and customers. It nonetheless represents the common interest of all of these persons, which is for the company to remain in business and prosper. The Committee thus believes that directors should at all times be concerned solely to promote the interests of the company’ - Viénot I Report, ‘The Boards of Directors of Listed Companies in France’ (1995), 7 <[https://www.ecgi.global/sites/default/files/codes/documents/vienot1\\_en.pdf](https://www.ecgi.global/sites/default/files/codes/documents/vienot1_en.pdf)> accessed 1 October 2023.

<sup>28</sup> Thus ‘the board of directors collectively represents all company shareholders, and is not the sum of conflicting interests’ (ibid 12).

<sup>29</sup> Jean-Philippe Robé, ‘The Legal Structure of the Firm’ (2011) 1(1) Accounting, Economics, and Law.

<sup>30</sup> Company Law Review Steering Group, ‘Modern Company Law for a Competitive Economy – Developing

To clarify what directors are ‘actually’ expected to do, theories wedded to the shareholder primacy norm argue for the resolute protection of shareholders in different ways. Such economic theories recognize as fundamental the ‘agency problem’ since the separation of ownership and control in modern corporations, falling on the corporate governance system to address this problem first and foremost.<sup>31</sup> On the one hand, Friedman and ‘property rights’ models of corporate governance saw shareholders as ‘owners’ and directors as owing them ‘fiduciary duties’ based on trust; solely pursuing profitability for shareholders is an ethical imperative but also a political economy necessity or else socialism ensues, Friedman argued in his famous rebuttal of CSR and unchecked managerial discretion.<sup>32</sup>

On the other hand, the ‘nexus of contracts’ theory of the firm or ‘finance model’ of corporate governance sees shareholders as residual risk-bearers that are uniquely vulnerable to directors’ misconduct as well as uniquely positioned to hold them accountable. However, faith is placed in the market as the ultimate means of disciplining management and protecting shareholders, rather than counting on boards and directors’ duties enforced in court. As Hill noted,

While the contractual theory deprecates shareholder participatory rights in corporate governance, it resurrects shareholder interests to preeminence, through the guiding principle of ‘profit maximization’ [...] [Thus] the hub of shareholder protection should be located outside the corporation, in ensuring a fair and open market, offering shareholders ease of entry and, crucially, exit.<sup>33</sup>

In short, such shareholder-oriented models deem the directors’ (management, corporate) duties in CL as either oriented exclusively towards the interests of shareholders, as ‘owners’, or as a practically unimportant, according to the nexus of contracts view. Furthermore, affording directors the power to pursue and balance stakeholders’ interests widens the discretion of managers aggravating the agency problem; a legal duty to do such balancing also creates discretion for courts leading to a judiciary management of companies.<sup>34</sup>

So, what causes the misunderstanding problem around directors’ duties? This has to do with the silence and generality in CL formulations (section 2.2 *infra*) and with the peculiar enforcement of the directors’ duty of care under CL. A core tenet of CL is the ‘business judgement rule’ (BJR) that grants managers large discretion in making decisions. As long as they operate with good faith and not in terms of their own interest, and the business complies with the law, courts will be disinclined to review their business decisions and thus not hold

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the Framework’, para 4.19 (emphasis added)

<<https://webarchive.nationalarchives.gov.uk/ukgwa/20070603235054/http://www.dti.gov.uk/bbf/co-act-2006/clr-review/page25086.html>> accessed 1 October 2023.

<sup>31</sup> Lynn Stout, ‘Corporate Entities: Their Ownership, Control, and Purpose’ (2016) 16-38 Cornell Legal Studies Research Paper <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841875](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841875)> accessed 1 October 2023.

<sup>32</sup> Milton Friedman, ‘The Social Responsibility of Business is to Increase its Profits’ (September 13, 1970) *The New York Times Magazine* 17.

<sup>33</sup> Jennifer Hill, ‘Visions and Revisions of the Shareholder’ (2000) 48(1) *American Journal of Comparative Law* 39, 58.

<sup>34</sup> Company Law Review Steering Group, ‘Modern Company Law for a Competitive Economy – Completing the Structure’ (2000), 34 <<https://webarchive.nationalarchives.gov.uk/ukgwa/+http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006/clr-review/page25080.html>> accessed 1 October 2023.

them liable for lapses of care. That entails two aspects: the standard of care triggering a director's liability is gross negligence rather than ordinary negligence, and courts will exercise self-restraint rather than interfere in business decisions.

The BJR is recognized in soft law such as the OECD Principles and explained for example in the US as following:

In determining the corporation's 'best interests', the director has wide discretion in deciding how to weigh near-term opportunities versus long-term benefits as well as in making judgments where the interests of various groups of shareholders or other corporate constituencies may differ.<sup>35</sup>

Across jurisdictions, company laws converge on similar reasoning: courts should not rule on the wisdom of a business decisions with hindsight; instead, it is directors – as influenced by investors and other actors – that are rightfully positioned to discharge the task. The BJR creates a divergence of standards of conduct and review that Eisenberg persuasively explained.<sup>36</sup> Basically, the BJR robs company law of judicial enforcement normally expected from other bodies of law.<sup>37</sup>

CL in the formulations and enforcement of directors' duties is biased towards directors and fundamentally protects their discretion against encroachment by disaffected shareholders. That means CL is a sharp sword with one edge only in the relation between directors and shareholders: it protects directors but cannot compel them to use higher levels of care, that is, making decisions for longer time horizons, encompassing more stakeholders, and undertaking different balancing acts. This extremely limited enforcement potential for the directors' duty of care together with silences and generalities in CL formulations have generated diverging interpretations and even misunderstanding around the legal duties of directors, especially the duty of care.

## 2.2 PROBLEMS RAISED BY DIRECTORS' DUTIES

The analysis so far points to a 'misunderstanding problem': the legal norm CL explicitly advances through the duty of care is at odds with how CG actors interpret it. This problem pales in significance when the set of incentives the CG system delivers toward shareholder primacy and profit-maximization (the 'incentive problem') are accounted for. Thus, the very weak enforcement of the duty of care translates into almost no legal incentives to observe the legal norm while the market system advances very strong incentives aligned with a different norm. Such skewed incentives render directors' duties at best ripe to be misunderstood, and at worst irrelevant. How does the EU 'sustainable corporate governance' process account for the misunderstanding and incentives problems in CG?

The regulatory impact assessment (IA) for the CSDDD contains the problem tree (table) identifying the problem and two subproblems the CSDDD seeks to address, as well as the drivers (underlying causes). Starting with the latter, the IA speaks of market and regulatory failures: 'Problem drivers are market failures, like short-term focus of companies

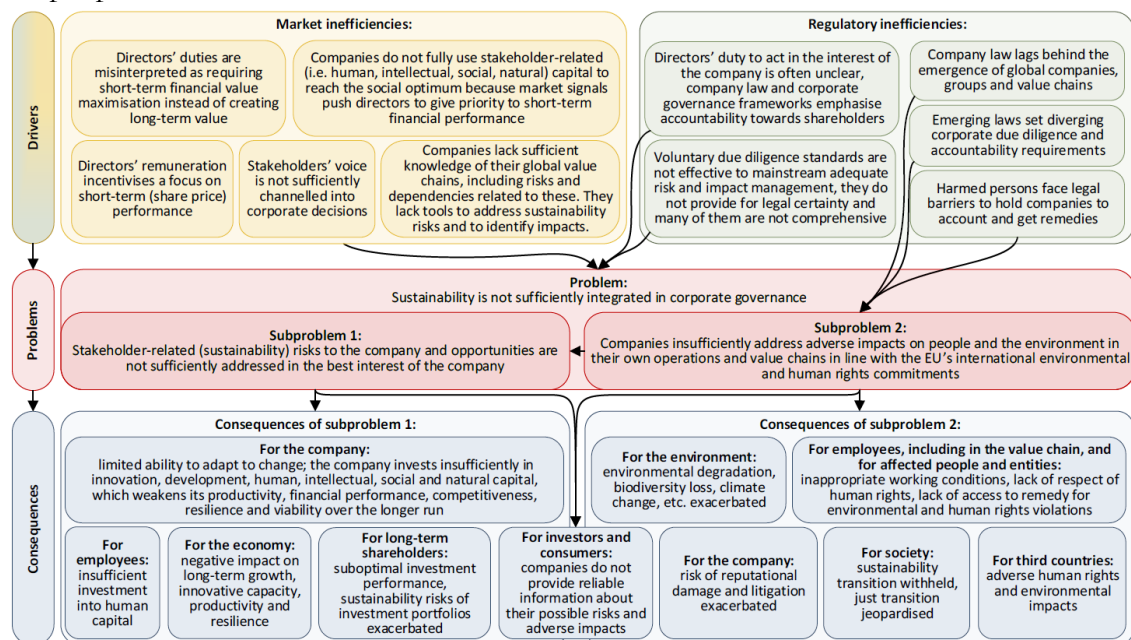
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<sup>35</sup> Commentary to § 8.30 of Model Business Corporation Act (n 20).

<sup>36</sup> Melvin Aron Eisenberg, 'The Divergence of Standards of Conduct and Standards of Review in Corporate Law' (1993) 62(3) *Fordham Law Review* 437.

<sup>37</sup> Radu Mares, *The Dynamics of Corporate Social Responsibilities* (Brill Nijhoff 2007) 27-72.

and directors, and regulatory failures from unclear and diverging national rules (including emerging ones) and ineffective voluntary frameworks'.<sup>38</sup> These generate the main problem: 'sustainability is not sufficiently integrated in corporate governance' which contains two sub-problems: one for companies as they do not sufficiently address stakeholder-related risks to the company, and another for society as companies do not sufficiently manage their impact on people and the environment.



Commission, 'Impact Assessment Report on Corporate Sustainability Due Diligence' SWD (2022) 42 final, 7

The European Commission sees the subproblems as interlinked and creating a lose-lose dynamic that the CSDDD should reverse. In this way, the IA recognizes the misunderstanding problem and further indicates that the incentive problem is composed of undesirable incentives (linked to short termism) as well as missing incentives (due to failure to regulate). In diagnosing the problems, the Commission looks beyond directors' duties and their legal enforcement under CL and expands to the entire CG system and the role of investors and markets. Indeed, the CG reform is part of the EU push for sustainable finance<sup>39</sup> commended in 2018 under the European Green Deal.

Regarding the misunderstanding problem, the Commission noted that CL in all EU Member States already provides that the directors owe their duties to the company, and they are to act in the best interest of the company.<sup>40</sup> However laws are silent on what the interest of the company means, what specific interests should be taken into account, how to balance and prioritize some stakeholder interests, and how to handle the long-term consequences of

<sup>38</sup> Commission, 'Impact Assessment Report on Corporate Sustainability Due Diligence – Executive Summary' SWD (2022) 43 final (hereinafter Impact Assessment, Summary), 3.

<sup>39</sup> 'Sustainable finance generally refers to the process of taking due account of environmental and social considerations in investment decision-making, leading to increased investments in longer-term and sustainable activities' - 2018 Action Plan (n 5) 2.

<sup>40</sup> Commission, 'Impact Assessment Report on Corporate Sustainability Due Diligence' SWD (2022) 42 final (hereinafter Impact Assessment CSDDD), 24.



decisions.<sup>41</sup> ‘As a result, interpretations, mostly by courts or academia, diverge in terms of interests to be protected [and] the focus of directors on the short-term financial performance has become a widely used practice [...]’.<sup>42</sup> Arguably it is impossible altogether for a legal formulation of the duty of care to meet such expectations for clarity and specificity. What a reform of CL can do is to dispel misleading simplifications and refer expressly to long-term horizons and sustainability issues (or stakeholders). But such references in themselves are not sufficient; they leave legal enforcement untouched (BJR) and market failures unaddressed.<sup>43</sup> Dealing only with the misunderstanding problem ignores that other (market) incentives bear much more forcefully on directors’ conduct than their (unenforceable) legal duties under CL. The ‘incentives problem’ remains and takes two forms.

Regarding one facet of the ‘incentives problem’ (i.e., missing legal incentives), the Commission clearly acknowledged that relying on corporate voluntarism is insufficient and deprives corporate governance and sustainability of much needed legal incentives. The IA as well as the three expert studies – on directors’ duties,<sup>44</sup> on due diligence in supply chains,<sup>45</sup> and on the operation of the NFRD<sup>46</sup> – revealed the inadequacy of soft law and the insufficiency of light-touch disclosure regulations. Based on this evidence and analysis, the Commission decided to propose new legislation: the Corporate Sustainability Reporting Directive (CSRD)<sup>47</sup> repeals the Non-Financial Reporting Directive (NFRD)<sup>48</sup> and renders reporting obligations more stringent, and the CSDDD seeks to reform directors’ duties under CL and couple them to new mandatory human rights and environmental due diligence for companies.

Regarding the other facet of the ‘incentives problem’ (i.e., undesirable market incentives), the 2018 High-Level Expert Group on Sustainable Finance (HLEG) report zeroed in on short-termism as a fundamental problem in corporate governance and as incompatible with the green transition which ‘axiomatically’ requires longer-term business horizons. Short-termism is referred to as the ‘tragedy of horizons’ and manifests itself in

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<sup>41</sup> ‘The law is often unclear about whether and how broader stakeholder interests have to be taken into account in directors’ decisions, i.e. when decisions are being made in the interest of the company. International policy frameworks and voluntary standards [...] because of their non-mandatory nature and guidance-like language, they do not provide legal certainty for businesses and cannot be expected to counter market pressure to reduce operating costs’ - Impact Assessment CSDDD (n 40) 10.

<sup>42</sup> Impact Assessment CSDDD (n 40) 24.

<sup>43</sup> These encompass both competitive pressures and investor short-termism: ‘As regards market failures, competitive pressure makes companies apply purchasing practices which prioritise short-term cost reductions. [...] Another well-documented pressure takes the form of short-termism of investors [...] Partly as a response to such pressures, and often reinforced by the incentives built in their remuneration schemes, corporate directors tend to interpret their duties vis-a-vis the company as requiring a focus on short-term financial performance’ (references omitted) - *ibid* 9.

<sup>44</sup> E&Y (n 13).

<sup>45</sup> Lise Smit et al, *Study on due diligence requirements through the supply chain - Final report* (Publications Office of the European Union 2020).

<sup>46</sup> Willem Pieter de Groen et al, *Study on the Non-Financial Reporting Directive - Final report* (Publications Office of the European Union 2020)

<sup>47</sup> 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, as regards corporate sustainability reporting [2022] OJ L 322/15.

<sup>48</sup> Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1.

both the financial economy and real economy.<sup>49</sup> As defined by HLEG, short-termism in finance is about placing ‘too much weight on short-run profitability at the expense of the long run’.<sup>50</sup> In the real economy, short-termism leads to under-investment and financialization.<sup>51</sup> As short-termism emerged on the agenda in 2018, the Commission proceeded agnostically and called for empirical evidence. ‘The key question is how finance contributes to such short-termism and influences the behaviour of executives to focus on short-term financial optimisation’,<sup>52</sup> the HLEG report wrote. Evidence that finance displays short-termism seemed strongest. What was unclear was the extent of short-termism in the real economy, and whether finance short-termism caused business short-termism. The HLEG report reviewed many types of financial intermediaries<sup>53</sup> and the extent to which they take ESG factors into account; this drew an informative baseline of the financial sector in Europe.

The Commission accepted the HLEG’s problem assessment and recommendation for further analysis on short-termism: ‘Sustainability and long-termism go hand in hand [...] [A] central focus of the sustainability agenda is to reduce the undue pressure for short-term performance in financial and economic decision-making [...]’.<sup>54</sup> The Commission’s Plan of Action maintained the same agnostic and tentative language and requested studies on shorter-termism in the financial sector<sup>55</sup> as well as the real economy. Regarding the latter, Ernst & Young (E&Y) was tasked with the corporate governance study and had as its objective to ‘assess the root causes of “short termism” in corporate governance’.<sup>56</sup> It found evidence of ‘a trend for publicly listed companies within the EU to focus on short-term benefits of shareholders rather than on the long-term interests of the company’.<sup>57</sup>

The E&Y study met massive criticism from academic<sup>58</sup> and business<sup>59</sup> quarters that

<sup>49</sup> However, see Mark J Roe, *Missing the Target: Why Stock Market Short-Termism Is Not the Problem* (Oxford University Press 2022) (challenging the evidence behind charges of short-termism).

<sup>50</sup> High-Level Expert Group on Sustainable Finance (HLEG), *Financing a Sustainable European Economy* (2018).

<sup>51</sup> As explained by HLEG, ‘Short-termism in business may be characterised as a tendency to under-investment, whether in physical assets or in intangibles such as product development, employee skills and reputation with customers, and as hyperactive behaviour by executives whose corporate strategy focuses on restructuring, financial re-engineering or mergers and acquisitions at the expense of developing the fundamental operational capabilities of the business’ - *ibid* 45.

<sup>52</sup> *ibid*.

<sup>53</sup> Banks, insurers, asset managers, pension funds, credit rating agencies, sustainability rating agencies stock exchanges, consultants, and investment banks.

<sup>54</sup> 2018 Action Plan (n 5) 3-4.

<sup>55</sup> The Commission requested studies from three European Supervisory Authorities within their respective areas of oversight. European Securities and Markets Authority, *Undue short-term pressure on corporations* (2019) Report ESMA30-22-762, 9.

<sup>56</sup> E&Y (n 13) vi.

<sup>57</sup> *ibid*.

<sup>58</sup> Copenhagen Business School indicated that ‘the report builds on the unsubstantiated assumption that management decisions suffer from short-termism. The whole report is biased by this basic assumption’ - Feedback from: Copenhagen Business School, Center for Corporate Governance (7 October 2020) <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F584003\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F584003_en)> accessed 1 October 2023. European Company Law Experts point out that ‘The study appears biased towards producing preconceived results rather than containing a dispassionate, impartial and comprehensive analysis. It proceeds by unsupported assertions – managers and investors are short-termist and corporate law is responsible for it – rather than rigorous demonstration’ - Feedback from: European Company Law Experts (28 September 2020) <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F555384\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F555384_en)> accessed 1 October 2023.

<sup>59</sup> ‘The underlying assumptions of the survey are simplistic and the questions are in many cases biased towards finding evidence of short-term value maximization on the part of EU companies’ - The Swedish Corporate

challenged its key findings regarding corporate short-termism in the EU. Some considered that the report's 'flaws are elementary and fundamental'.<sup>60</sup> While the Commission did not repudiate the study's findings despite acknowledging weaknesses, it still decided to remove references to short-termism from the proposed CSDDD at the last minute. This setback problematized the case for CG reform based on short-termism but did not extinguish it. As the Harvard feedback points out, the failure to empirically demonstrating short-termism in the EU real economy is a categorical failure rather than evidence that CL does not contribute to genuine problems:

The Report conflates externalities and distributional concerns with truncated, short-term horizons. While most of the Report's discussion and all of its ostensible evidence is framed in terms of short-termism, most of the troubling consequences it points to are externalities and inequitable distributions that have little to do with short-termism [...] [T]he Report's proposals stand on shaky foundations because their ostensible target — short-termism inducing declining investment — may be modest or even a mirage [...], whereas the real problems — externalities and distribution — are not even clearly articulated in the Report.<sup>61</sup>

In sum, CG faces a compounded problem that if left unaddressed can slow or derail the green transition. CL is a peculiar body of law marked by curtailed judicial enforcement of its legal norms, exhortations of acting with care with historically limited impact, and strong market incentives produced by the CG system. This creates a divergence of legal and market norms resulting in the preeminence of shareholder primacy and profit maximization,<sup>62</sup> as Sjøfjell noted:

Shareholder primacy, with its narrow and short-term fixation on maximization of returns for shareholders, is reinforced through the intermediary structures of capital markets. This social norm has taken over the space that company law gives to individual companies to define their own over-arching purpose, and for the board, to make its own assessment of what the interests of the company are and how they should be pursued. The systemically entrenched shareholder primacy drive has thereby taken the disembedding of the economy from society that Polanyi identified to an even deeper extreme of abstraction.<sup>63</sup>

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Governance Board, *The European Commission's study on directors' duties and sustainable corporate governance* (6 December 2019)

<[http://www.bolagsstyrning.se/Userfiles/Publikationer/Remissvar/191206\\_swedish\\_corporate\\_governance\\_board\\_re\\_study\\_on\\_directors\\_duties.pdf](http://www.bolagsstyrning.se/Userfiles/Publikationer/Remissvar/191206_swedish_corporate_governance_board_re_study_on_directors_duties.pdf)> accessed 1 October 2023.

<sup>60</sup> Harvard feedback (8 October 2020) <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F594640\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F594640_en)> accessed 1 October 2023.

<sup>61</sup> *ibid.*

<sup>62</sup> In short, 'while company law in general gives directors ample scope to take account of sustainability, company law has also facilitated the development of an almost exclusive focus on short-term financial value maximisation to the point of constituting the main barrier to more sustainable companies' - Impact Assessment CSDDD (n 40) 21.

<sup>63</sup> Beate Sjøfjell, 'How Company Law has Failed Human Rights – and What to Do About It' (2020) 5(2) *Business and Human Rights Journal* 179.

### 2.3 THE ROAD TO CSDDD

This section maps the CG provisions in the CSDDD and offers a succinct chronology of its place in the broader legislative ecosystem (see also Annex 1). The revised directors' duties in the Commission's proposal are contained in articles 15, 25 and 26. They provide for a general duty of care (art 25), specific duties regarding due diligence (art 26), and directors' obligations on climate (art 15).

As to the general duty of care, the CSDDD provides:

Member States shall ensure that, when fulfilling their duty to act in the best interest of the company, directors of companies referred to in Article 2(1) take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term.<sup>64</sup>

This is the *general* duty of care, reformulated to point expressly at social and environmental issues (or stakeholders<sup>65</sup>) and time horizons (the longer term). *Specific* duties are the novelty, creating distinct obligations on due diligence policy and strategy:

1. Member States shall ensure that directors of companies referred to in Article 2(1) are responsible for putting in place and overseeing the due diligence actions referred to in Article 4 and in particular the due diligence policy referred to in Article 5, with due consideration for relevant input from stakeholders and civil society organisations. The directors shall report to the board of directors in that respect.
2. Member States shall ensure that directors take steps to adapt the corporate strategy to take into account the actual and potential adverse impacts identified pursuant to Article 6 and any measures taken pursuant to Articles 7 to 9.<sup>66</sup>

By specifying the directors' duty of care to include 'Setting up and overseeing due diligence', the CSDDD thus requires the management of ESG risks to be formalized in policies, and the overall business strategy (or business model) should be reviewed to ensure consistency with due diligence. Further, specific directors' duties relate to combating climate change. Under article 15, directors are asked to adopt a climate plan (meant 'to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C'), identify risks (i.e., 'the extent to which climate change is a risk for, or an impact of, the company's operations'), and take action on such principal risks/impacts (e.g., adopt 'emission reduction objectives'). Director remuneration is also mentioned with the aim for variable remuneration be 'linked to the contribution of a director to the company's business strategy and long-term interests and sustainability'.<sup>67</sup>

This proposed Directive has a dual nature. It is a corporate accountability legislation because it protects societal interests from wrongful business conduct by mandating

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<sup>64</sup> CSDDD (n 3) Art 25.1.

<sup>65</sup> *ibid* Art 3(n) defines stakeholders as those affected by a company's operations.

<sup>66</sup> *ibid* Art 26.

<sup>67</sup> *ibid* Art 15

environmental and human rights due diligence (articles 4-22). It is also a corporate governance instrument requiring directors to discharge ‘their duty to act in the best interest of the company’ by taking a longer-term perspective, being more mindful of their stakeholders and overseeing corporate strategic outlook on sustainability. It is perhaps surprising that it has been the corporate governance elements that met more criticism and resistance in the business sector than the novel due diligence provisions. But how did sustainable CG and mandatory due diligence appear on the EU agenda?

The obscure origins of the CSDDD can be traced to the 2018 Final Report of the HLEG on sustainable finance. It made two recommendations regarding (1) the contribution of finance to sustainable growth; and (2) financial stability by incorporating ESG factors into investment.<sup>68</sup> In response, the EC identified three priorities, among which to ‘foster transparency and long-termism in financial and economic activity’.<sup>69</sup> Therefore the Commission committed to take two actions: regarding transparency, to revise the Non-Financial Reporting Directive (NFRD), and regarding long-termism, to reform corporate governance. As part of the latter reform, the Commission used tentative language and made an oblique reference to due diligence: the ‘Commission will carry out analytical and consultative work with relevant stakeholders to assess: (i) the possible need to require corporate boards to develop and disclose a sustainability strategy, including appropriate due diligence throughout the supply chain, and measurable sustainability targets.’<sup>70</sup>

The sustainable corporate governance agenda was set in motion with the Commission inviting three expert studies<sup>71</sup> that gathered evidence, analysed policy options and made a strong case for legislative intervention. Armed with these massive studies, the Commission announced in 2020 its intention to propose the CSDDD. The Commission produced a regulatory impact assessment for the CSDDD where it painstakingly outlined and weighed regulatory options. The Regulatory Board twice called into question the Commission’s proposal through ‘negative opinions’.<sup>72</sup> At the very last moment the CSDDD proposal was altered to eliminate references to short-termism and to narrow the provisions on directors’ duties. Public consultation on the CSDDD proposal has garnered almost 300 replies offering a wealth of insight from various CG actors.<sup>73</sup>

What are the key milestones and actors pushing forward this legislative reform around the Green Deal and sustainable finance? The sustainable finance agenda evolved through the work of expert groups that issued important reports every two years and enabled the Commission to advance with policy papers and legislative proposals. Three expert reports are notable. The High-Level Expert Group (HLEG) on sustainable finance appointed in December 2016 issued its final report in 2018;<sup>74</sup> it enabled the EC to issue its 2018 Action Plan on Financing Sustainable Growth.<sup>75</sup> The HLEG report was followed by the Technical

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<sup>68</sup> 2018 Action Plan (n 5) 1.

<sup>69</sup> *ibid* 2.

<sup>70</sup> *ibid* 11.

<sup>71</sup> See *supra* notes 44-46.

<sup>72</sup> Commission, ‘Follow-up to the second opinion of the Regulatory Scrutiny Board on Corporate Sustainability Due Diligence’ SWD (2022) 39 final.

<sup>73</sup> Feedback website for the CSDDD proposal <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/feedback\\_en?p\\_id=29288521](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/feedback_en?p_id=29288521)> accessed 1 October 2023.

<sup>74</sup> HLEG (n 50).

<sup>75</sup> 2018 Action Plan (n 5).

Expert Group (TEG) on sustainable finance set up in 2018, which issued its final report in 2020<sup>76</sup>; it enabled the EC to issue the 2020 Taxonomy Regulation.<sup>77</sup> Work continues now through the permanent Platform on Sustainable Finance (PSF) established in 2020.<sup>78</sup> It issued the Social Taxonomy Final report in 2022<sup>79</sup> and soon after the report on minimum (social) safeguards in the Green Taxonomy.<sup>80</sup>

Where does the CSDDD fit in the broader reform ecosystem? The EU policy framework for the green transition is made of two Communications: the 2019 Green Deal Communication<sup>81</sup> and the 2021 Fit for 55 Agenda.<sup>82</sup> The 2021 Financing strategy develops the sustainable finance framework as a key component of this broad policy framework.<sup>83</sup> The work on corporate governance is part of this sustainable finance push. Thus positioned, the twin obligations – directors’ duties under CL and corporate due diligence – are needed in a comprehensive reform agenda to mobilize sustainable private finance, which in turn is critical for funding the green transition.<sup>84</sup> It can be concluded that reforming directors’ duties appear as a distinct piece of the puzzle in the EU transformational push for a ‘green, fair and competitive transition’.<sup>85</sup>

### 3 REFORM THROUGH THE CSDDD AND ITS REGULATORY CONTEXT

The analysis so far presented the problems identified by the Commission and its choice to build on the established tenets of company law. What is then the novelty brought by CSDDD regarding directors’ duties? This section highlights two new linkages around the directors’ duty of care, and then compares CSDDD with two other reform options: the UK reform of CL undertaken in early 2000s and a reform proposal grounded in human rights. The analysis thus seeks to gauge the potential of modified directors’ duties by examining the legislative design of the CSDDD as part of the EU legislative ecosystem for the green transition.

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<sup>76</sup> TEG, ‘Taxonomy: Final report of the Technical Expert Group on Sustainable Finance’ (2020).

<sup>77</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L198/13.

<sup>78</sup> Platform on Sustainable Finance (*European Commission*, visited 25.11.2022)

<[https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/overview-sustainable-finance/platform-sustainable-finance\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/overview-sustainable-finance/platform-sustainable-finance_en)>.

<sup>79</sup> Platform on Sustainable Finance, ‘Final Report on Social Taxonomy’ (2022).

<sup>80</sup> Platform on Sustainable Finance, ‘Final Report on Minimum Safeguards’ (October 2022).

<sup>81</sup> Commission, ‘The European Green Deal’ COM (2019) 640 final.

<sup>82</sup> Commission, ‘“Fit for 55”: delivering the EU’s 2030 Climate Target on the way to climate neutrality’ COM (2021) 550 final.

<sup>83</sup> Commission, ‘Strategy for Financing the Transition to a Sustainable Economy’ COM (2021) 390 final (explaining that since 2018, the Commission has worked on financing sustainable growth and its framework has three building blocks: the ‘taxonomy’ as a classification system of sustainable activities, a disclosure framework for non-financial and financial companies, and investment tools, such as benchmarks, standards and labels).

<sup>84</sup> *ibid* - to reach its green transition objectives and mobilize ‘EUR 1 trillion in sustainable investments over the next decade from private and public actors’ the EU considers that ‘the alignment of all sources of finance – public and private, national and multilateral – is required’ as well as that ‘Risk-sharing between public and private investors can effectively address market failures’.

<sup>85</sup> Commission, ‘Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe’s recovery’ COM (2021) 350 final.

### 3.1 COUPLING 1: DIRECTORS' DUTIES – CORPORATE DUE DILIGENCE

The CSDDD puts forward a 'general directors' duty to act in the company's best interest [...] underpinned by some specific directors' duties'.<sup>86</sup> By inserting sustainability issues and long termism in the general duty of care, the CSDDD addresses the misunderstanding problem. Adding specific directors' duties to set up and oversee due diligence measures offers further clarity. Do these general specific duties also tackle the more serious incentives problem given the unchanged applicability of the BJR in CL, on the one hand, and the Commission's concerns about market pressures towards short termism, on the other?

To address short-termism, the CSDDD seeks integration of sustainability and CG through the double materiality concept.<sup>87</sup> Indeed, the two sub-problems identified in the IA are framed as risks to society and risks to companies.<sup>88</sup> 'Double materiality' covers 'the impact of a company's activities on the environment and society, as well as the business and financial risks faced by a company due to its sustainability exposures'.<sup>89</sup> It was the EU disclosure regulations that introduced 'double materiality' as a comprehensive approach – at times referred as 'outside-in' and 'inside-out' approach – to systematically integrate sustainability risks in corporate decision-making. With the CSDDD the legislators seek to apply this concept to the area of due diligence. The key vehicle in this effort are the specific directors' duties in article 26 rather than the general duty of care in article 25.

Earlier versions of CSDDD made double materiality more explicit through several specific directors' duties. Following criticism from the Regulatory Scrutiny Board and the business sector, the CSDDD text was scrubbed to eliminate references to risks to the company which are now left implicit in the general duty of care. Also, some specific duties were eliminated, as the EC explains:

The specific duty to identify stakeholders' interests and dependencies of the company on such stakeholder interests are not specified as a separate duty in the proposal (but are implicitly included in the clarified duty of care). The broader duty to manage risks to the company related to stakeholders and their dependencies, as well as the broader duty to include the management of sustainability risks to the company in the corporate strategy (going beyond the requirement to specify indicative emission reduction objectives in case climate change is a principal risk to, or a principal impact of, the company) were not retained. Similarly, the specific duty to set up and oversee the implementation of processes related to the management of sustainability risks to the company, and the mandatory adoption and disclosure of science-based targets were not retained either.<sup>90</sup>

Laying down specific *director* duties in article 26 (titled 'setting up and overseeing due diligence') is enabled by the momentum behind mandatory *corporate* due diligence. Indeed,

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<sup>86</sup> Impact Assessment, Summary (n 38) 3.

<sup>87</sup> 'Sustainability in corporate governance encompasses encouraging businesses to frame decisions in terms of their environmental, health, and human rights impact, as well as in terms of the company's good performance and resilience in the longer term' - Impact Assessment CSDDD (n 40) 2.

<sup>88</sup> Impact Assessment, Summary (n 38) 3.

<sup>89</sup> Commission, 'Strategy for Financing' (n 83) 3.

<sup>90</sup> Commission, 'Follow-up to the second opinion' (n 72).

the link directors' duties – corporate due diligence is the innovation pursued in the CSDDD proposal. This link however proved controversial in the feedback process. Critics questioned the necessity of specific directors' duties and pointed to their redundancy as the companies already must comply with their due diligence obligations, which constitute the bulk of the CSDDD. Thus, the Regulatory Scrutiny Board 'commented that the impact assessment is not sufficiently clear about the need to regulate directors' duties on top of due diligence requirements'.<sup>91</sup>

There are further reasons for scepticism. Some business feedback saw references to CL as a way for the state to intrude in private governance, and for the EU to encroach on national systems of corporate governance evolved with their own traditions and particularities.<sup>92</sup> However, the Commission saw the merits of maintaining the link as a way to 'embed' corporate due diligence in CG and prevent due diligence becoming a mere compliance exercise:

It allows due diligence to become strategic and to infiltrate into relevant corporate functions. A due diligence obligation without a proper corporate governance backing and without directors' responsibilities could become a mere compliance issue of secondary relevance.<sup>93</sup>

This reasoning is supported by data and analyses from the Corporate Human Rights Benchmark, which found that board and senior management level responsibility 'appears to be key for better action on human rights due diligence'.<sup>94</sup> In short, coupling directors' duties to corporate due diligence allows for developments in sustainability due diligence to slip into CL and reform what directors' care means. The linkage general duty of care – specific directors' duties – corporate due diligence is the novelty introduced through the CSDDD to alter the status quo in CL.

The existence of specified directors' duties deals with the misunderstanding problem in CL but also begins to address the 'incentive problem'. Some mild legal incentives might be generated through CL itself: the BJR continues to apply to duty of care aspects, but the more specific the duties are the less deferential courts need to be toward directors. Indeed, courts can make the process-versus-substance distinction already established in CL<sup>95</sup> to review compliance with proper decision-making processes necessary to discharge directors' duties (article 26); furthermore, these processes get specified through the risk management provisions on due diligence (articles 4-22). In this way, the specific directors' duties require some rather detailed actions that otherwise would have been optional and covered by the 'business judgement' of managers, a discretion conferred by company laws.

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<sup>91</sup> CSDDD (n 3) 22.

<sup>92</sup> See e.g. feedback from Federation of Finnish Enterprises (23 May 2022) and Confederation of Swedish Enterprise (23 May 2022), available at *supra* note 73.

<sup>93</sup> Commission, 'Follow-up to the second opinion' (n 72).

<sup>94</sup> World Benchmarking Alliance, 'Corporate Human Rights Benchmark 2022 - Insights Report' (2022), 3 <[https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report\\_FINAL\\_23.11.22.pdf](https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report_FINAL_23.11.22.pdf)> accessed 1 October 2023.

<sup>95</sup> In the 1990s, the American Law Institute's Principles of Corporate Governance indicated that the judicial review of the process that directors used to arrive at a decision can be tighter than the level of judicial scrutiny of the directors' decision itself. See also Franklin A Gevurtz, 'The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?' (1994) 67 Southern California Law Review 287, 297-303.



To summarize, the first coupling between directors' duties and corporate due diligence is made possible by the CSDDD having a dual nature as a corporate accountability and corporate governance instrument. While new legal incentives might emerge through judicial enforcement of directors' duties under CL, the BJR will cast a long shadow over attempts to tackle the incentives problem as it remains a fundamental tenet of CL that the CSDDD does not question. However, it is the broader EU regulatory ecosystem that mainly deals with the incentives problem, and this is enabled by the second linkage between the CSDDD and the new ecosystem.

### 3.2 COUPLING 2: CORPORATE DUE DILIGENCE – REGULATORY ECOSYSTEM

Since 2018 the EU moved at a furious pace and set up a regulatory ecosystem for the green transition. Indeed, the CSDDD does not exist in isolation but has wide ramifications in various policy areas. This ecosystem is generating new and likely significant incentives bearing on directors and their duties under CL. The EU's legislative 'jungle' could be mapped and simplified around three facets of the CSDDD.

First, in addition to its CL provisions discussed herein, CSDDD is mainly a corporate due diligence instrument. It delivers 'horizontal' due diligence applicable across all industries and sustainably issues, and the CSDDD points out to 'the strong consensus amongst stakeholder groups that a horizontal framework is necessary'.<sup>96</sup> The CSDDD provides thus a generic but mandatory risk management framework for corporate sustainability. There are also other EU laws as well as national laws in EU Member States that are referred to as 'vertical' due diligence, such as the Deforestation Regulation,<sup>97</sup> because they cover only selected sectors, products, or sustainability issues.<sup>98</sup> As the Commission indicates, the CSDDD has the role to 'complement' and fill gaps left open by a growing number of EU laws that deal with 'some specific sustainability challenges or apply in some specific sectors'.<sup>99</sup>

Second, the CSDDD is also a 'global value chains' instrument because due diligence covers not only the company's own operations but also those of its subsidiaries, suppliers and business partners. As a result the CSDDD is embedded in the EU's international trade and development frameworks, which increasingly refer to corporate responsibilities as well as to human rights and sustainability under the banner of 'value-based trade'.<sup>100</sup> Such frameworks are mentioned in the CSDDD because they have a supportive role in securing compliance with due diligence; indeed they are meant to incentivize and increase the capacity of developing countries and non-EU suppliers to participate in supply chain due diligence.<sup>101</sup>

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<sup>96</sup> CSDDD (n 3) 22.

<sup>97</sup> Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] OJ L 150/206 (hereinafter Deforestation Regulation).

<sup>98</sup> Gabrielle Holly and Signe Andreasen Lysgaard, 'How Do The Pieces Fit In The Puzzle? Making sense of EU regulatory initiatives related to business and human rights' (2022) The Danish Institute for Human Rights.

<sup>99</sup> CSDDD (n 3) 3.

<sup>100</sup> Commission, 'Trade Policy Review - An Open, Sustainable and Assertive Trade Policy' COM (2021) 66 final.

<sup>101</sup> International Trade Centre, 'Making Mandatory Human Rights and Environmental Due Diligence Work

The Commission recognizes the risk that, once subjected to mandatory due diligence, EU companies will either be in impossibility to comply or will be incentivized to simply offload responsibility for improvements to their partners in the supply chains.<sup>102</sup>

Third, being part of the sustainable finance package, CSDDD is part of an ecosystem of public and private finance. The EU legislative ecosystem on sustainable finance works the interface between the real economy and the financial economy. It is the supply-demand equation on sustainability/ESG data that the EU intends to regulate and facilitate. On the supply side, real economy companies have to supply sustainability information under the 2014 Non-Financial Reporting Directive (NFRD) to be replaced soon by a more stringent Corporate Sustainability Reporting Directive (CSRD).<sup>103</sup> The proposal of CSDDD is meant to further enhance the information flow as it mandates companies to set up risk management systems; previously, these due diligence systems were optional and expected as a by-product from a mere obligation to report under the NFRD. As real economy businesses come under new sustainability performance and reporting obligations, new data is generated that can address the needs of financial sector and create fresh opportunities to invest sustainably.

On the demand side, financial actors are obligated to be more transparent; the 2019 Sustainable Finance Disclosure Regulation (SFDR) mandates financial actors to disclose how they integrate sustainability risks in their decision-making.<sup>104</sup> Furthermore, to facilitate financial actors achieving such integration, the EU adopted the 2020 Taxonomy Regulation which provides criteria to distinguish green economic activities from the rest and contains reporting requirements.<sup>105</sup> Herein, respect for human rights is a criterion to qualify as taxonomy-compliant and are referred to as ‘minimum safeguards’. Work on a complementary Social Taxonomy legislation commenced in 2021<sup>106</sup> but was postponed; meanwhile the Commission began work to elaborate in more detail the minimum safeguards criterion.<sup>107</sup>

To further strengthen the demand from the financial sector, the Commission indicated the possibility to mandate due diligence for some financial actors.<sup>108</sup> Already now, some large financial companies within the scope of the proposed CSDDD will have to undertake their own environmental and human rights due diligence.<sup>109</sup> Other enabling measures have been outlined in the 2018 Plan, including eliciting preferences, labels, benchmarks, credit ratings.<sup>110</sup>

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for All, Guidance on designing effective and inclusive accompanying support to due diligence legislation’ (European Union 2022).

<sup>102</sup> CSDDD (n 3) 14.

<sup>103</sup> European Commission, ‘Corporate sustainability reporting’ (visited 25.11.2022)

<[https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting\\_en](https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en)>.

<sup>104</sup> Regulation (EU) 2019/2088 Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L 317/1 (hereinafter SFDR).

<sup>105</sup> Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (n 77) Arts 5-8.

<sup>106</sup> Final Report on Social Taxonomy (n 79).

<sup>107</sup> Final Report on Minimum Safeguards (n 80).

<sup>108</sup> Commission, ‘Strategy for Financing’ (n 83) 12-13 (indicating the possibility to mandate due diligence for some financial actors (banks, insurers, credit agencies), i.e., ‘ensure ESG factors are consistently included in the risk management systems’).

<sup>109</sup> Financial actors are insurance undertakings, credit institutions and investment firms (art 3.a.iv). A scaled-down due diligence obligation for such actors is in Arts 6.3 and 7.6.

<sup>110</sup> 2018 Action Plan (n 5) 4-5.

The demand from the investor side (sustainable finance) is notable which has translated into support for CSDDD, both for mandatory due diligence<sup>111</sup> and clarified directors' duties.<sup>112</sup> Through all these diverse interventions, the EU creates new legal and market incentives for the financial sector to invest sustainably and require improved ESG performance from the real economy.

The EU legislative ecosystem is rich in cross-references and shows how these laws are mutually reinforcing. Indeed, comprehensive frameworks for trade (Trade Policy Review), labour (Decent Work Communication), finance (Sustainable Finance Strategy), and the social side of the Taxonomy (minimum safeguards) offer different vantage points into the ecosystem. This boils down to the EU presenting a 'whole of the supply chain' approach for sustainable production, consumption and investment; the legislative ecosystem covers actors from investors to companies to consumers, and both public entities and private actors that affect the governance of European value chains. However, in the overarching green transition framework – the Green Deal and Fit for 55 communications – corporate governance is referred in passing and its significance as an enabler for sustainable finance seems understated.

How does this ecosystem approach respond to the two problems in CL? Regarding the misunderstanding problem in CL, the CSDDD presents corporate due diligence as a feasible and balanced approach grounded in established risk management principles as pioneered by the UN Guiding Principles on business and human rights.<sup>113</sup> The directors' duty of care is thus clarified and specified in new and potentially consequential ways through the corporate due diligence obligation. In parallel with these developments in the real economy, the EU work on sustainable finance has clarified the investors' fiduciary duties to their end beneficiaries, so ESG aspects can be legitimately considered.<sup>114</sup>

Regarding the incentives problem, the EU is keen to explain why it regulates as it pursues as 'a fair, competitive and green transition',<sup>115</sup> and emphasizes the crucial role – and information needs – of private finance in funding the transition. From the avalanche of laws targeting a multitude of actors throughout the real economy and financial sector as well as

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<sup>111</sup> Investor Alliance for Human Rights, 'The Investor Case for Mandatory Human Rights Due Diligence' (2020).

<sup>112</sup> The organization PRI (Principles for Responsible Investment) considered that the CSDDD is a missed opportunity regarding directors' duties: 'Compared to the Commission's initial impact assessment, the coverage of director's duties in this proposal is extremely limited. This is a missed opportunity. Furthermore, while we welcome the intention with regards to directors' duty of care and oversight of due diligence processes, the language used in Articles 15, 25 and 26 is too high-level to lead to strong, harmonised duties throughout the EU' PRI Statement (2 March 2022) <<https://www.unpri.org/download?ac=15897>>.

<sup>113</sup> UN Working Group, 'Guiding Principles on Business and Human Rights at 10: taking stock of the first decade' A/HRC/47/39 (2021) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPs10/Stocktaking-reader-friendly.pdf>> accessed 1 October 2023.

<sup>114</sup> The Commission adopted six amending Delegated Acts on fiduciary duties on 21 April 2021 – Commission, 'Sustainable Finance and EU Taxonomy: Commission takes further steps to channel money towards sustainable activities' (*European Commission Press Corner*, 21 April 2021) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_1804](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1804)> (financial actors have an obligation to take ESG into account and but the law falls short of a due diligence obligation. Beyond clarification of duties, enforcement is through disclosure obligations under the SFDR, which asks for a statement on ESG impacts and DD policies, or alternatively to provide reasons for not considering ESG impacts. SFDR n 104, Art 4.).

<sup>115</sup> Commission, 'Fit for 55 Communication' (n 82).

from the variety of enabling, light touch and prescriptive interventions, the EU demonstrates a willingness to produce a significant change in the incentives mix facing companies.

To summarise, the second coupling in the EU's attempt to reform directors' duties is between corporate sustainability due diligence and the new ecosystem. The CSDDD does not stand in isolation. By placing CSDDD as part of the sustainable finance package, the EU might tackle the incentives problem in CL in an unprecedentedly comprehensive manner. Both legal and market incentives are created through the green transition. This second linkage works on the shareholder side of corporate governance (including financial intermediaries) rather than solely on the directors' duties side. In this manner, the interface financial sector – real economy has the potential to problematize the norms of profit-maximization and shareholder primacy, at least in their more extreme forms.

Notably, corporate due diligence has emerged as the key connector between directors' duties in CL and the legislative ecosystem. A testament to lingering controversies and difficulties in corporate governance, there have been ebbs and flows in this CSDDD legislative process. It started as a 'sustainable *corporate governance*' initiative with a potential due diligence component mentioned in passing and has now mutated into a proposal for 'corporate sustainability *due diligence*' with a minuscule – and contested – CG element as the centre weight has moved towards the corporate due diligence element. It is this latter element that allows a fresh attempt to address the chronic problems regarding directors' duties.

### 3.3 ALTERNATIVE MODELS FOR REFORM

To evaluate the EU reform of directors' duties explained herein by the two linkages, one can further gauge new elements as well as continuity with established tenets in CL by looking at what the CSDDD does not challenge and what other models for reforming CL propose.

For sceptics, the CSDDD preserves too many elements of CL that allowed the norms of shareholder primacy and profit maximization to get entrenched. The Commission's Impact Assessment of the CSDDD explains the choices made. First, the BJR is not altered, thus perpetuating the judicial enforcement deficit in CL: 'the initiative does not aim at affecting the "business judgement rule" whereby the Courts refrain from substituting themselves for directors when it comes to business decision, nor enlarging the conditions for bringing enforcement actions'.<sup>116</sup> Second, the interests directors should pursue are not changed away from the company's interest: 'It should also be underlined that directors' duties do not go beyond the interest of the company and they do not require the directors to make, for example, environmental investments which are not in the (long-term) interest of the company (even if such investments would provide a general benefit)'.<sup>117</sup> Third, the personal liability of directors is not altered as 'the initiative does not aim at creating new actions against directors'.<sup>118</sup> Fourth, modifying the law on director remuneration (except the provisions in article 15) was postponed in order to wait for the impact of the Shareholder Rights Directive.<sup>119</sup> Finally, the directors' specific duties have been trimmed in face of sustained

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<sup>116</sup> Impact Assessment CSDDD (n 40) 75.

<sup>117</sup> *ibid* 76.

<sup>118</sup> *ibid* 75.

<sup>119</sup> *ibid*. With this directive, the EU promotes long termism for shareholders. Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L132/1.

criticism and might vanish from the final Directive.<sup>120</sup>

In this way the EU builds on the tenets of CL. This is hardly old wine in new bottles. Instead, the proposed CSDDD reform of directors' duties adds to the mix a new element (corporate due diligence), couples it with a reformulated general duty of care and some more specific directors' duties, and places these in a more enabling legislative ecosystem. It is a comprehensive design. However, there are suggestions for another comprehensive set of coherent tweaks undertaken at multiple levels of CL that could be undertaken.

According to Sjøfjell, such reform of CL entails first dealing with the *purpose of the company* and EU company law should set the purpose as 'creating sustainable value within planetary boundaries, respecting the interests of its investors and other involved and affected parties'.<sup>121</sup> This would be the overarching purpose while a company's articles of association could formulate 'a more detailed purpose, specific to the business of the company' consistent with the overarching purpose.<sup>122</sup> To operationalize the overarching purpose, directors' duties need to be redefined. Specifically such duties would relate to the model, strategy and managerial systems of the company: the duties entail 'the board (i) ensuring that the business model of the company is in line with the purpose and (ii) developing and publishing a strategy that enables the achievement of this purpose throughout the business, integrating it in the internal control and risk management systems'.<sup>123</sup> Finally, several tools would be needed to be deployed in such managerial systems: a sustainability assessment, sustainability due diligence, corrective actions as rectification and continuous improvement plan, annual reporting, and external audits of due diligence and corporate reports.<sup>124</sup>

The CSDDD proposal can be compared to the UK reform of CL from early 2000s.<sup>125</sup> How did those legislators address the two problems? On the one hand, both reforms deal similarly with the misunderstanding problem.<sup>126</sup> They promote the 'enlightened shareholder value' approach that refers explicitly to the long-term horizon and the various interests that directors should account for (i.e., diversity of stakeholders in the UK, and diversity of sustainability issues in the CSDDD). On the other hand, the EU and UK reforms deal differently with the incentives problem: while the UK remained wedded to light-touch regulation through disclosure obligations (i.e., mandatory 'business review' introduced in CL),<sup>127</sup> the EU goes further through mandatory corporate due diligence and a regulatory ecosystem. In comparison and retrospect, the UK reform of CL was light touch, compartmentalized to the real economy, and devoid of an enabling legislative environment. It could not generate the legal and market incentives to counter profit-maximization and

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<sup>120</sup> See text accompanying supra note 90.

<sup>121</sup> *ibid.* The British Academy considers that the purpose of business is 'to solve the problems of people and planet profitably, and not profit from causing problems'. British Academy, 'Principles for Purposeful Business' (Future of the Corporation project, 2019), 8  
<[www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf](http://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf)> accessed 1 October 2023.

<sup>122</sup> Sjøfjell (n 63).

<sup>123</sup> *ibid.*

<sup>124</sup> *ibid.*

<sup>125</sup> All documents from the UK company law review available at  
<<https://webarchive.nationalarchives.gov.uk/ukgwa/20070603185134/http://www.dti.gov.uk/bbf/co-act-2006/clar-review/page22794.html>> accessed 1 October 2023.

<sup>126</sup> Companies Act 2006, Art 172.

<sup>127</sup> *ibid* Art 417(2).

shareholder primacy and did not put a dent in the dissonance of norms plaguing directors' duties under CL.<sup>128</sup> It merely dealt with the misunderstanding problem in a formulaic manner counting on the expressive function of law.<sup>129</sup>

With the CSDDD embedded in a legislative ecosystem, the European Commission puts forward a multi-level and multi-actor form of supply chain governance to tackle some of the limitations of CL regarding the directors' duty of care. It takes such a comprehensive regulatory approach to regain the space CL has always created for directors (i.e., discretion to take sustainability aspects into account as needed to pursue the best interests of the company) and to guide them on aspects of care (i.e., exercise care by responding to new legal and especially market incentives created by the green transition). This is an attempt to reform and overcome the limitations of CL without sacrificing its three key tenets mentioned in the beginning, that is, directors' duties owed to the company, duties of care and loyalty, and the business judgement rule as the standard for judicial review. With its back to the basics of CL approach, the Commission seems intent to moderate and counter the norms of profit-maximization and shareholder primacy (exclusivity).

Still, critics challenge this proposed Directive for including specific duties of directors (article 26) and even for covering directors' duties to begin with. Thus, while some charge redundancy given that the CSDDD main thrust is on corporate due diligence, others charge intrusiveness in corporate governance of private entities. At the time of writing, the CSDDD is not finalized. Removing the specific directors' duties under article 26 would shortcut the first coupling between the directors' general duty of care and corporate due diligence, which brings the CSDDD close to the UK model and its unwarranted reliance on legal symbolism. Such specific duties of directors facilitate to some extent judicial enforcement within CL and stakeholder evaluations of corporate leadership; indeed, they add something to merely stating that directors should act 'with care'. However, the same comparison with the UK model shows that even a complete deletion of directors' duties does not nullify two ingredients the UK model never had: the mandatory corporate due diligence and the legislative ecosystem. Thus, even the extreme scenario (i.e., deletion) would not compromise the legal and market incentives the EU law has created for corporations; it possibly could reduce the clarity and coherence in this legislative ecosystem by keeping CL insulated from the sustainability imperative.

#### 4 CONCLUSIONS

The article examined why and how directors' duties under company laws and corporate governance are being reformed in the EU. In the assessment of the European Commission, directors' duties are affected by both a 'misunderstanding problem' and an 'incentives problem' that together ended up creating a striking dissonance between the legal norm in CL texts and the business norm that the CG system practices. With its 'sustainable corporate governance' initiative, the Commission decided in 2018 to apply the 'double materiality'

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<sup>128</sup> 'Enlightened Shareholder Value' as implemented in the 'has not had a major impact in the sense of making substantial changes to the way that boards and companies operate and/or report' – Andrew Keay and Taskin Iqbal, 'The Impact of Enlightened Shareholder Value' (2019) 4 *Journal of Business Law* 304, 327.

<sup>129</sup> Melvin Aron Eisenberg, 'Corporate Law and Social Norms' (1999) 99(5) *Columbia Law Review* 1253, 1269.

concept to the area of corporate governance. This ambition to cover both risks to the company and to society in one single initiative has now crystallized in the CSDDD proposal. Rather than existing in isolation, CSDDD is embedded in an EU legislative ecosystem, a comprehensive framework for ‘sustainable finance, sustainable production and consumption’.<sup>130</sup> In the transition to a green economy, CG appears as an important lever in a task that is politically important and urgent.<sup>131</sup> Thus contextualized, the CSDDD provisions on directors’ duties indicate that the Commission is outlining a fresh approach to the problematic norms of profit maximization and shareholder primacy (exclusivity) entrenched in CG.

The EU reform of directors’ duties under CL can be synthesized in terms of creating two new ‘couplings’: directors’ duties - corporate due diligence, and corporate due diligence - regulatory ecosystem. The former coupling reflects the dual nature of the CSDDD as a corporate accountability and corporate governance instrument; the latter coupling represents the comprehensive regulatory approach of the EU to the green transition. The CSDDD is not a revolutionary attempt in the meaning that it does not alter the foundational blocks of CL in a manner that Sjøfjell’s ambitious proposal would. It builds on the core tenets of CL and still the CSDDD is a noteworthy and unprecedented legislative design that creates new market and legal incentives in a way the UK reform of CL in early 2000s did not attempt with its ‘enlightened shareholder value’ approach. Years ago, the UNGPs put forward the human rights due diligence concept, rooted in risk management and backed by ‘policy mixes’, as the way to break the impasse in the business and human rights area. Corporate sustainability due diligence is now the centrepiece of the CSDDD and backed by a comprehensive regulatory ecosystem might hold one key to unlocking the modernization of directors’ duties under CL as well.

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<sup>130</sup> Commission, ‘Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on decent work worldwide for a global just transition and a sustainable recovery’ COM (2022) 66 final.

<sup>131</sup> CSDDD (n 3) 20-21.

## ANNEX 1

**Chronology and EU documents**

[NFRD – Non-financial Reporting Directive] *Directive 2014/95/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups* (2014) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095>

[SRD II - Shareholder rights directive] *Directive (EU) 2017/828 as regards the encouragement of long-term shareholder engagement* (2017) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L0828>

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European Commission, *Action Plan on Financing Sustainable Growth*, COM(2018) 97 final (2018) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0097>

[SFDR – Sustainable Finance Disclosure Regulation] *Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R2088>

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TEG, *Taxonomy: Final report of the Technical Expert Group on Sustainable Finance* (2020) [https://ec.europa.eu/info/sites/default/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy\\_en.pdf](https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy_en.pdf)

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European Commission, *Strategy for Financing the Transition to a Sustainable Economy*, COM(2021) 390 final (2021) [https://eur-lex.europa.eu/resource.html?uri=cellar:9f5e7e95-df06-11eb-895a-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:9f5e7e95-df06-11eb-895a-01aa75ed71a1.0001.02/DOC_1&format=PDF)

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[https://ec.europa.eu/finance/docs/level-2-measures/taxonomy-regulation-delegated-act-2021-4987\\_en.pdf](https://ec.europa.eu/finance/docs/level-2-measures/taxonomy-regulation-delegated-act-2021-4987_en.pdf)

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