Review of European and Comparative Law | 2023
Vol. 52, No. 1, 143–168
https://doi.org/10.31743/recl.14630
Received: 19 October 2022 | Accepted: 22 January 2022 | Published: 30 March 2023

Harmonizing Duties of Board Members in the Anthropocene: When Expectations Meet Reality

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Keywords:
sunstability, board members, duty of care, company's interest, harmonisation

Abstract: The article confronts the European Commission's climate policy-seconded endeavors regarding board members' duties which it has expressed in its proposal for a Corporate Sustainability Due Diligence Directive (CSDDD Proposal) published in February 2022 with a comparative analysis of the current legal state of play in Germany and Poland. We claim that the Commission has neglected to adequately address the current understanding of board members' duties across the Member States, which has ultimately led to the deletion of the Proposals' provisions' referring to the board members' duty of care in the legislative work conducted within the Council of the European Union in November 2022. There is a possibility that these provisions (Art. 25 and 26 CSDDD Proposal) will be reinserted during the trialogue, but this is unlikely at this point. Notably, the Commission's declaration on a mere clarifying role of the proposed harmonization measure regarding board members' duties seems imprecise and prompts a weak interpretation of the proposed

The Authors' research has been supported by a grant from the Polish-German Science Foundation within the project "Das Unternehmensinteresse in Deutschland und Polen – eine rechtsvergleichende Analyse im Kontext der europäischen Sustainable Corporate Governance-Initiative".

ISSN 2545-384X (Online)

provisions, which contradicts the proclaimed policy goals. Germany might serve as an example of a Member State in which implementing the Commission's understanding of the board members' duty of care would not have significantly modified national company law, regardless of the interpretation chosen for the depth of the provision. If, however, a strong or medium mode of interpretation was applicable, Poland would actually be obliged to amend its legal framework fundamentally. Therefore, we contend that the legislative work on the discussed proposal was tainted by the flawed presumption that the proposed harmonization measure would merely summarize existing rules for board members' duties. Based on the observations from our emblematic comparative juxtaposition, we argue that the idiosyncratic concepts of board members' duties across Member States have not been sufficiently recognized as a harmonization challenge by the Commission. We contend that these methodological deficiencies led to an inconclusive wording of Article 25 of the Commission's proposal and ultimately created an insurmountable barrier to political agreement within the Council and the "fall" of the complete concept of setting a standard of due care for board members in the proposed directive. Consequently, we claim that when jostling such a controversial and deep harmonization measure, the Commission must play its legislative A-game to have a shot at approval by the Council and later effective implementation by the Member States.

1. Introductory remarks

In light of the newest evidence from the natural sciences,[1] human-induced climate change along with its social impacts is increasingly being understood as the defining global challenge of our age. This progressively resonates in political action and legislative measures. International commitments, such as the Paris Agreement[2] and UN Agenda for Sustainable

1 Intergovernmental Panel on Climate Change (IPCC), *Sixth Assessment Report – Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022).

2 United Nations, *Paris Agreement* (December 12, 2015).

Development 2030[3], are shaping the global direction of sustainability policy. In Brussels, the call for a sustainable economy is no longer seen as an ideological belief but as a fundamental determinant of the EU's political agenda: The European Green Deal[4] and the ensuing European Climate Law[5] intend to pave the way toward a sustainable economy.

Whereas public law instruments, for example, direct regulatory controls on emissions or market solutions (emission fees or tradeable emissions permits), have a long-standing tradition of serving as a policy instrument for protecting the environment, most recent legislative efforts are increasingly stressing the role of private law in implementing climate policy goals. Since the desired reorientation of the economy entails the necessity to adjust prevailing economic behaviors, companies, as crucial economic actors, must fall under scrutiny[6]. It is discussed whether company law reforms could 'repurpose' companies to align their strategy and conduct with climate policy objectives. 'Corporate sustainability' is the flag under which the emerging debate sails.

The EU is in the vanguard of recognizing companies as agents for the sustainability transformation. Pivotal regulatory milestones for a more substantial responsibility of companies to achieving sustainability objectives were the Non-Financial Reporting Directive 2014/95/EU and the Shareholder Rights Directive II 2017/828. While both directives did not interfere with the company laws of the EU member states *per se* and thus refrained from imposing any specific 'sustainability duties' onto companies and their

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3 United Nations, "Transforming our world: the 2030 Agenda for Sustainable Development. UN-Doc. A/RES/70/1/L.1," Sustainable Development Goals. Knowledge Platform, accessed February 3, 2023, https://sustainabledevelopment.un.org/post2015/transformingourworld/publication.

4 European Commission, *The European Green Deal, COM(2019) 640 final* (Brussels: December 11, 2019).

5 European Parliament, European Council, *Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law')*, ABl. EU L 243/1, 9.7.2021 (June 30, 2021).

6 Beate Sjåfjell, Christopher M. Bruner, "Corporations and Sustainability," in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, ed. Beate Sjåfjell, Christopher M. Bruner (Cambridge: Cambridge University Press, 2020), 6; Lela Melon, *Shareholder Primacy and Global Business. Re-clothing the EU Corporate Law* (London: Routledge, 2019), 120–195.

board members, they certainly introduced the concept of sustainability to the corporate governance debate and practice[7]. Since the Action Plan on Financing Sustainable Growth in 2018, the idea of 'sustainable companies' has been firmly anchored in the EU Commission's political agenda[8]. Even though the Action Plan focused on how to finance the green transformation of the economy (sustainable finance), action No. 10 of the declared agenda envisaged the inclusion of corporate governance instruments into the policy toolbox.

Consequently, in July 2020, the Commission launched the Sustainable Corporate Governance Initiative ("SCG Initiative"), which aimed to adapt the EU's regulatory framework on company law and corporate governance to sustainability-driven challenges. The Commission's proposal of a directive on Corporate Sustainability Due Diligence ("CSDDD Proposal", "the Proposal", "the proposed Directive") was published on 23 February 2022,[9] having previously been red-carded twice by the Commission's regulatory scrutiny board. Aside from a complex regulatory framework on due diligence within the company's value chain, through Art. 25 sec. 1 of the CSDDD Proposal, the Commission has endeavored to introduce the sustainability idea into a harmonized understanding of the board members' duty of care. The legislative work on the original draft of the Commission's CSDDD Proposal was continued within the Council of the European Union (the "Council") under the French and then Czech presidencies throughout 2022 in order to develop a negotiating position for the European Parliament. On 30 November 2022, the Council adopted and presented a revised compromise text of the proposed Directive. Although the Council approved the Proposals framework regarding companies' due diligence duties

7 Peter Hommelhoff, "Nichtfinanzielle Ziele in Unternehmen von öffentlichem Interesse. Die Revolution übers Bilanzrecht," in *Festschrift für Bruno M. Kübler zum 70. Geburtstag*, ed. Reinhard Bork (München: C.H. Beck 2015), 291–299; Anne-Marie Weber, Zofia Mazur, Aleksandra Szczęsna, "Zrównoważony ład korporacyjny (sustainable corporate governance) kierunek ewolucji polskiego prawa spółek?," *Przegląd Prawa Handlowego,* no. 6 (Hürth: Wolters Kluwer, 2022): 23–25.

8 Anne-Christin Mittwoch, Florian Möslein "Der Europäische Aktionsplan zur Finanzierung eines nachhaltigen Wachstums," *Wertpapier-Mitteilungen*, no. 73 (2019): 481–489.

9 European Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, 2022/0051(COD)* (Brussels: February 23, 2022).

throughout their value chain certain corrections, Article 25 of the proposed Directive was deleted entirely.

This article aims to confront the Commission's climate policy-backed expectations regarding board members' duties in the EU with the current legal state of play. We focus our assessment on the methodological aspects of how the Commission has executed its harmonization concept throughout the legislative pathway so far[10]. We claim that the Commission has neglected to adequately determine the current understanding of board members' duties across the Member States. As a consequence, the legislative work on the CSDDD Proposal was tainted by the flawed assertion[11] that Art. 25 of the Proposal would merely summarize existing rules for board members' duties. We contend that these methodological deficiencies have created an unsurmountable barrier to achieving approval in the Council and ultimately led to the expunction of the concept to regulate board members' duties in the CSDDD Proposal. Also, we argue that even if Article 25 of the CSDDD Proposal will be reintroduced in the course of the trilogue prodecure, the Commission's feebly grounded approach and the resulting wording of this provision will hinder its effective implementation across Member States' national legal regimes.

To that end, we structure this article as follows: First, we briefly describe the content of the Commission's idea regarding board members' duties as delineated in its February CSDDD Proposal (see sec. 2). We then adopt a comparative perspective to spotlight the issue of fundamental divergences regarding the current legal state of play in two Member States – Poland and Germany[12] (sec. 3). Based on the observations from this emblematic juxtaposition we claim that the idiosyncratic concepts of board members' duties across Member States have not been sufficiently recognized and addressed as a harmonization challenge by the Commission which led to the lack of political approval during the Councils work on the draft (sec. 4). The last section contains concluding remarks (sec. 5).

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10 For the sake of complying with this publication's limitations of length, we do not elaborate on the substantive validity of the Commission's concept regarding board members' duties. In that respect see further: [...]

11 Explanatory Memorandum, 22.

12 To comply with this publication's limitations of length, we restrict the scope of our analysis to joint-stock companies, i.e., the German *Aktiengesellschaft* and the Polish *Spółka Akcyjna*.

2. The expectations: duties of board members in the CSDDD Proposal

2.1. Origination of the proposed measure

Following up on Action 10 of its 2018 Action Plan, the Commission launched the Sustainable Corporate Governance Initiative to "improve the EU regulatory framework on company law and corporate governance", "enable companies to focus on long-term sustainable value creation rather than short-term benefits" and "align the interests of companies, their shareholders, managers, stakeholders and society"[13]. The legislative goal was primarily to develop a proposal for a directive, which was accomplished by the publication of the CSDDD Proposal in February 2022.

Key components of the Commission's inceptive analytical work were two reports prepared by external advisors in 2020. The first report assessed due diligence procedures along a company's value chain in view of identifying, preventing, mitigating and enforcing liability in both social (i.e., violations of human rights, including children's rights and fundamental freedoms) and environmental (i.e., environmental damage, including climate damage) areas of sustainability[14]. The second report, prepared by E&Y, presented the results of a study on board members' duties in the context of sustainable corporate governance[15]. A key recommendation that emerged from this report was to adopt harmonizing measures regarding the inclusion of sustainability considerations into the scope of board members' duties. As part of the SCG Initiative, from October 2020 to February 2021, the Commission also conducted an open public consultation[16]. Upon its completion, a first draft directive was produced.

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13 See: "About this initiative. Summary," European Commission, accessed October 18, 2022, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en.

14 "Study on due diligence requirements through the supply chain. Final Report, 20.02.2022," Publications Office of the European Union, accessed October 18, 2022, https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83–11ea-b8b7–01aa75ed71a1/language-en.

15 "Study on directors' duties and sustainable corporate governance. Final report, 29.07.2020," Publications Office of the European Union, accessed October 18, 2022, https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7–01aa75ed71a1/language-en.

16 See: "Summary of the consultation," European Commission, accessed October 18, 2022, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation_en.

The Commission's draft was first rejected by the Regulatory Scrutiny Board in May 2021 and then, despite the inclusion of various amendments, once more in November 2021[17]. Along the lines of the heated debate revolving around the E&Y report[18], the final CSDD Proposal received a mixed first reception in academic commentary[19]. The fierce debate regarding

[17] See: "Regulatory Scrutiny Board Opinion, 26.11.2021, SEC(2022) 95," European Commission, accessed October 18, 2022, https://ec.europa.eu/transparency/documents-register/api/files/SEC(2022)95?ersIds=090166e5e99ec8f8; On the role of the EU Regulatory Scrutiny Board in the SCG Initiative see further: Klaas Hendrik Eller, Ioannis Kampourakis, "Quantifying 'Better Regulation': The EU Regulatory Scrutiny Board and the Sustainable Corporate Governance Initiative," Verfassungsblog, posted February 21, 2022, accessed May 18, 2022, https://verfassungsblog.de/quantifying-better-regulation.

[18] "EC Corporate Governance Initiative Series: A Critique of the Study on Directors' Duties and Sustainable Corporate Governance Prepared by Ernst & Young for the European Commission," European Company Law Experts Group, posted October 14, 2020, https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-critique-study-directors; Marcello Bianchi, Mateja Milič, "EC Corporate Governance Initiative Series: European Companies are Short-Term Oriented: The Unconvincing Analysis and Conclusions of the Ernst & Young Study," *Oxford Business Law Blog,* posted October 13, 2020, https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-european-companies-are; Alexander Bassen, Kerstin Lopatta, "EC Corporate Governance Initiative Series: The EU Sustainable Corporate Governance Initiative – room for improvement," *Oxford Business Law Blog*, posted October 15, 2020, https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-eu-sustainable-corporate; Marco Corradi, "EC Corporate Governance Initiative Series: Corporate Opportunities Rules, Long-termism and Sustainability," *Oxford Business Law Blog*, posted October 29, 2020, https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-corporate-opportunities; Alex Edmans, "EC Corporate Governance Initiative Series: Diagnosis Before Treatment: the Use and Misuse of Evidence in Policymaking," *Oxford Business Law Blog*, posted October 30, 2020, https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-diagnosis-treatment-use-and; Florian Möslein, Karsten Engsig Sørensen, "Sustainable Corporate Governance. A Way Forward," *Law Working Paper*, no. 583 (2021): 1–13; Jesper Lau Hansen, "Zombies v. Subsidiarity – Opening on 8 December 2021," *Oxford Business Law Blog*, posted October 28, 2021, https://www.law.ox.ac.uk/business-law-blog/blog/2021/10/zombies-v-subsidiarity-opening-8-december-2021.

[19] Critically see: Jesper Lau Hansen, "Unsustainable Sustainability," *Oxford Business Law Blog*, posted March 8, 2022, https://www.law.ox.ac.uk/business-law-blog/blog/2022/03/unsustainable-sustainability; moderately critical see: Alperen A. Gözlügöl, Wolf-Georg Ringe, "The EU Sustainable Corporate Governance Initiative: Where are We and Where are We Headed?," *Harvard Law School Forum on Corporate Governance*, posted March 18, 2022, https://

board members' duties in view of fostering sustainability-driven corporate governance tunes in with the broader discussion on the functions of private law and its europeanization[20]. In particular, the examined issue relates to the question of the assignment of authority to 'make' corporate law amongst the EU and its Member States[21], including dilemmas on social justice in European private law[22]. Consequently, it is also relevant for broader queries on European integration and economic governance in the EU[23], particularly regarding the integration of the 'new' Member States[24].

2.2. Content of the proposed measure

According to Art. 25 sec. 1 of the CSDDD Proposal, Member States were supposed to ensure that, when fulfilling their duty to act in the best interest

corpgov.law.harvard.edu/2022/03/18/the-eu-sustainable-corporate-governance-initiative-where-are-we-and-where-are-we-headed/?utm_content=buffer07f0c&utm_medium=social&utm_source=linkedin.com&utm_campaign=buffer; approvingly see: Beate Sjåfjell, Jukka Mähönen, "Corporate Purpose and the EU Corporate Sustainability Due Diligence Proposal," *Oxford Business Law Blog*, posted February 25, 2022, https://www.law.ox.ac.uk/business-law-blog/blog/2022/02/corporate-purpose-and-eu-corporate-sustainability-due-diligence; Stéphane Brabant, Claire Bright, Noah Neitzel, Daniel Schönfelder, "Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence (Part 1)," *Verfassungsblog*, posted March 15, 2022, https://verfassungsblog.de/due-diligence-around-the-world/; Daniel Bertram, "Green(wash)ing Global Commodity Chains: Light and Shadow in the EU Commission's Due Diligence Proposal," Verfassungsblog, posted 24.02.2022, https://verfassungsblog.de/greenwashing-global-commodity-chains/.

20 See: Stefan Grundmann, Hans-W. Micklitz, Moritz Renner, *New Private Law Theory* (Cambridge: Cambridge University Press, 2021); Hans-Wolfgang Micklitz, "The Transformative Politics of European Private Law," in *The Law of Political Economy Transformation in the Function of Law*, ed. Poul F. Kjaer (Cambridge: Cambridge University Press, 2020), 205–227.

21 John Armour, "Who Should Make Corporate Law? EC Legislation versus Regulatory Competition," *Current Legal Problems*, no. 58(1) (2005): 369–413.

22 Hans-W. Micklitz, *The Many Concepts of Social Justice in European Private Law* (Cheltenham: Edward Elgar Publishing, 2011).

23 Dariusz Adamski, *Redefining European Economic Integration* (Cambridge: Cambridge University Press, 2018)]; Herwig C.H. Hofmann, Katerina Pantazatou, Giovanni Zaccaroni, *The Metamorphosis of the European Economic Constitution* (Cheltenham: Edward Elgar Publishing, 2019).

24 Marek Safjan, Aneta Wiewiórska-Domagalska, "Political Foundations of European Private Law: Rethinking the East-West Division Lines," in *The Foundations of European Private Law*, ed. Roger Brownsword, Hans-W. Micklitz, Leone Niglia, Stephen Weatherill (Oxford and Portland: Hart Publishing, 2011), 265.

of the company, board members[25] act in the best interest of the company while taking "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. Further, Art. 25 sec. 2 of the CSDDD Proposal stipulated that Member States must ensure that their laws, regulations and administrative provisions providing for a breach of directors' duties are also applicable to the scope of duties referred to in Art. 25 sec. 1 of the CSDDD Proposal.

The Commission has embraced a noticeably concise wording of the board members' duty of care related to sustainability considerations. First, the material scope and content of the sustainability-related topics that ought to be addressed by the board members have only been vaguely indicated. The expression "sustainability matters" is nebulously circumscribed by a narrow catalog of examples, i.e., human rights, climate change and environmental consequences. There is no direct definition or referral to a definition of these "matters" to be found in the CSDDD Proposal.

Second, and most importantly, the CSDDD Proposal indistinctly stated that the board members' duty of care involved "taking into account" sustainability matters. Neither the CSDDD Proposal nor the Explanatory Memorandum provides guidance on how "taking into account" was supposed to be interpreted. It remained entirely unclear at what level of priority sustainability matters should be considered by the board members. In other words, the proposed wording of Art. 25 sec. 1 of the CSDDD Proposal did not allow for an unequivocal conclusion on whether sustainability matters (i) must be prioritized over other considerations, e.g., shareholder interests (strong interpretation option), (ii) must be considered at the same level of priority as other issues (medium interpretation option) or (iii) should be assigned a lower level of priority than other motives within the decision-making process (weak interpretation option).

While a contextual interpretation performed against the backdrop of the aggregate climate policy background which frames the CSDDD Proposal would support either the strong or medium interpretation

[25] The literal wording of the CSDDD Proposal uses the term „directors". This term is informed by the Anglo-American Corporate Governance discussion and does not perfectly grasp the situation in Continental Europe, where companies have boards rather than directors.

option, a literal interpretation allowed arguing for the weak option of interpretation. The emerging scholarship[26] and academic discussion clearly demonstrated that all of the interpretation options are being considered, confirming the vagueness of the provision's wording.

Unfortunately, the Commission's commentary on the content of Art. 25 of its CSDDD Proposal delivered in its Explanatory Memorandum only added to the confusion resulting from the provision's ambiguous wording. The Commission explained that a board member's general duty of care for the company "is present in the company law of all Member States" and is only "being clarified" by the proposed provision[27].

If one assumes the strong or the medium interpretation option to be applicable, the Commission's view of Art. 25 sec. 1 of the CSDDD Proposal as a mere clarification of the existing legal frameworks across Member States, would imply the assumption that the board members' duty of care to act in the interest of the company in all Member States already allows for sustainability matters to take priority over considerations on value delivered to shareholders. As we explain below, based on the example of Poland, either of these assumptions would be mistaken.

3. The reality: comparative observations on the current legal state of play

3.1. The relationship between a company's interest and board member's duties

The intersection of company law and sustainability is primarily being discussed in the literature with regard to the company's interest (Pol. *interes spółki*, Germ. *Unternehmensinteresse*, Fr. *intérêt social*). This is understandable, as the understanding of the company's interest permeates the entirety of company law institutions and therefore bears fundamental systemic importance[28]. In particular, the way in which the company's interest is defined delineates the duties of a company's board members[29]. Generally, a board member's fundamental duty of care consists of the obligation to act in the company's interest. The specific scope of a board member's

26 See fn. 25.

27 Explanatory Memorandum, 22.

28 Stefanicki, "Interest of the Company – the Discussion on Axiological Choices," *Review of European and Comparative Law*, 202, vol. 51, no. 4 (2022), 31.

29 Opalski, *Prawo zgrupowań spółek*, 145.

responsibilities is, therefore, *ad casum* dependent upon the interpretation of the company's interest and varies across Member States. In particular, in those jurisdictions whose company laws do not contain explicit provisions on the duties of board members, the understanding of the company's interest serves as a crucial interpretative tool. Consequently, the assessment of the legal state of play regarding the duties of board members must draw from the legal framework, the jurisprudence of the courts and the legal scholarship regarding the notion of the company's interest.

3.2. Germany

In international discussion, the German corporate governance system is usually qualified as a prime example of an interest-pluralist or stakeholder-value system.[30] This is done mainly with reference to the right of co-determination but also with regard to the legal construct of the company's interest.[31] However, probably surprisingly to the international audience, the normative conditions for such classification are also disputed in German company law, and the principle of shareholder primacy has already been gaining increasing support for some years now.[32]

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30 See Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (London: Routledge, 2013), 42; Paddy Ireland, "Company Law and the Myth of Shareholder Ownership," *The Modern Law Review*, no. 62 (1999): 32; Jeswald W. Salacuse, "Corporate Governance, Culture and Convergence: Corporations American Style or with a European Touch," *Law and Business Review of the Americas*, no. 9 (2003): 33, 47; Shuangge Wen, "The Magnitude of Shareholder Value as the Overriding Objective in the UK – The Post-Crisis Perspective," *Journal of International Banking Law and Regulation*, no. 26 (2011): 325, 326.

31 With regard to the interest of the company Andreas Rühmkorf, "Shareholder Value versus Corporate Sustainability," in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, ed. Beate Sjåfjell, Christopher M. Bruner (Cambridge: Cambridge University Press, 2020), 232 ff.; with regard to codetermination Salacuse, "Corporate Governance, Culture and Convergence: Corporations American Style or with a European Touch," 33, 47; This usually overlooks the fact that the right of co-determination is visibly eroding, see Walter Bayer, "Die Erosion der deutschen Mitbestimmung," *Neue Juristische Wochenschrift*, no. 27 (2016): 1930.

32 Rühmkorf, "Shareholder Value versus Corporate Sustainability," 232 ff.; Max Birke, *Das Formalziel der Aktiengesellschaft* (Baden-Baden: Nomos, 2005), 155 ff., 199 ff.; Gregor von Bonin, *Die Leitung der Aktiengesellschaft zwischen Shareholder Value und Stakeholder-Interessen* (Baden-Baden: Nomos, 2004), 76 ff.; Peter O. Mülbert, "Shareholder Value aus rechtlicher Sicht," *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (1997): 129, 140 ff.

In fact, the German corporate governance discussion has historically been primarily based on the question of the relationship between the state (i.e. public or common good interests) and the market (i.e. private interests). This relationship is currently modelled in section 76 (1) of the German Stock Corporation Act (AktG), which, as interpreted by the judiciary and academia, obliges board members to act according to the interest of the company. Although the discussion on the company's interest reached its peak in the late 1970s and early 1980s, no concrete programme of action for corporate boards could ultimately be derived from this intensively conducted debate.

The German Corporate Governance Code takes up the discussion and, since 2009, has explicitly based its recommendations for good corporate governance on the pluralist approach. The foreword of the current version of the GCGC from 2022 states the following in this regard: "The Code highlights the obligation of Management Boards and Supervisory Boards – in line with the principles of the social market economy – to take into account the interests of the shareholders, the enterprise's workforce and the other groups related to the enterprise (stakeholders) to ensure the continued existence of the enterprise and its sustainable value creation (the enterprise's best interests)".[33] The significance of the GCGC is, however, fundamentally different from that of legal norms set by the state, especially with regard to legitimacy and binding force: The Code was drafted by a private commission appointed by the Federal Ministry of Justice, the regulations of the Code are thus merely non-binding recommendations for conduct. Therefore, they can, at best, reflect developments in discussions on company law but not anticipate their outcome *de lege ferenda*.

Nonetheless, the Commission's proposed wording of Art. 25 sec. 1 CS-DDD would not have introduced a substantial change to German company law. Establishing the relevance of the company's interest as a guiding principle for the board of directors would have, in fact, served as a mere

[33] "German Corporate Governance Code," Regierungskommission Deutscher Corporate Governance Kodex, current version of 2022, accessed October 19, 2022, https://www.dcgk.de/en/code.html.

clarification of the prevailing opinion in case law and literature.[34] An obligation of board members to take sustainability matters into account according to the strong or the medium interpretation option would by no means infringe German company law.

3.3. Poland

The existence of a board member's general duty of care follows from art. 337[1] Commercial Companies Code ("CCC")[35]. According to this provision, board members should perform their duties with due diligence resulting from the professional nature of their activity. The liability regime for a breach of the board member's duty of care is articulated in Art. 483 CCC. Since the board members' liability is construed as "towards the company", it should be inferred that the duty of care is owed to the company[36].

While the duty of care is embedded in Polish company law, no legal provision delivers guidance on the specific content of such duty. In other words, the elements of a board member's duty of care remain open to interpretation. In Polish scholarship and jurisprudence, it is generally accepted that such interpretation requires reference to the concept of the company's interest[37]. The fundamental substance of a board members' duty of care is to act according to the company's interest[38]. Consequently, board members' specific obligations within these ramifications should be understood as derivatives of the company's interest.

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34 Claudia Schubert, *Das Unternehmensinteresse – Maßstab für die Organwalter der Aktiengesellschaft* (Baden-Baden: Nomos, 2020), 210 ff., 220; somewhat more reserved Peter Hommelhoff, "Die OECD.Priciples on Corporate Governance – ihre Chancen und Risiken aus dem Blickwinkel der deutschen corporate governance-Bewegung," *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (2001): 238, 250.

35 The same provision also expresses the board member's duty of loyalty.

36 Katarzyna Chałaczkiewicz-Ładna, Tomasz Sójka, Jędrzej Jerzmanowski, "To whom Polish directors owe their duties – between shareholder primacy and political agenda," *European Business Law Review* (forthcoming) – working paper on file with Authors, 2.

37 Opalski, *Prawo zgrupowań spółek*, 145.

38 Krzysztof Oplustil and Arkadiusz Radwan, "Company law in Poland: Between Autonomous Development and Legal Transplants," in *Private Law in Eastern Europe: Autonomous Developments or Legal Transplants?*, ed. Christa Jessel-Holst et al., (Tübingen: Mohr Siebeck, 2011), 482–494.

Polish company law does not contain a legal definition of the company's interest[39]. Therefore, the understanding of that term needs to be deduced from the courts' jurisprudence and the relevant scholarship. The prevailing view of the latter is that the company's interest emanates from the shareholders' interests[40]. Since the Polish Supreme Court Judgement of 5 November 2009 (I CSK 158/09), the interest of the company is repeatedly described (in both jurisprudence and scholarship) as a "resultant of the interests of the shareholders"[41]. As explained by the court, particular shareholders' interests need to be weighed appropriately, as legitimate minority shareholders' interests are part of determining the "resultant". Nonetheless, it is rightly being stressed that due to concentrated shareholding structures[42], majority shareholders *de facto* determine the company's interest[43].

In Poland, questions regarding the use of corporate governance mechanisms in fostering sustainability largely has for a long time remained outside of the academic agenda. While some authors have explained foreign scholarship developments and juxtaposed these with the current understanding of the company's interest in Polish literature and jurisprudence[44] the inclusion of sustainability matters in the process of determining the content of the company's purpose is rarely advocated in Polish legal scholarship[45].

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39 Chałaczkiewicz-Ładna, Sójka, Jerzmanowski, "To whom Polish directors owe their duties – between shareholder primacy and political agenda," (forthcoming) – working paper on file with Authors, 9.

40 See: Krzysztof Oplustil, *Instrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej* (München: C.H. Beck, 2010), 175; Opalski, *Prawo zgrupowań spółek*, 167.

41 This expression was initially coined in legal scholarship, see: Adam Opalski, "O pojęciu interesu spółki handlowej," *Przegląd Prawa Handlowego*, no. 11 (2008): 16–23.

42 See further: Krzysztof Oplustil, Anne-Marie Weber, "Country Report Poland," in *Sustainable Finance in Poland*, ed. Jens Ekkenga, Martin Winner (Tübingen: Mohr Siebeck, 2023) (forthcoming) – working paper on file with Authors.

43 Chałaczkiewicz-Ładna, Sójka, Jerzmanowski, "To whom Polish directors owe their duties – between shareholder primacy and political agenda," (forthcoming) – working paper on file with Authors,11.

44 Mazur, "Nowy paradygmat ładu korporacyjnego. Globalne tendencje w dyskusji o interesie spółki i ich możliwy wpływ na prawo polskie," *Państwo I Prawo* (2022/7): 114–128.

45 Weber, Mazur, Szczęsna, "Zrównoważony ład korporacyjny (sustainable corporate governance) kierunek ewolucji polskiego prawa spółek?," 20–33; Anne-Marie Weber-Elżanowska, "Postulat zrównoważonego wzrostu gospodarczego jako wyzwanie dla polskiego prawa handlowego," in *Sto lat polskiego prawa handlowego. Księga jubileuszowa dedykowana Profesorowi*

Against the backdrop of the prevailing views, sustainability matters – if treated as distinct from shareholders' interests – could only be considered by board members, if they align with the company's interest (as determined by the shareholders' interests)[46]. If there is a collision between the company's interest and sustainability matters, the former prevails. This essentially corresponds to the concept of "enlightened shareholder value" as expressed in s. 172 of the UK Companies Act[47].

Despite a historically warranted closeness to German law[48], in light of the above, Poland is to be classified as a shareholder primacy jurisdiction[49]. Based on the dominating view of the company's interest, board members cannot consider sustainability matters at a higher level or the same level of priority as shareholders' interests.

As a consequence, both the strong and the medium options of interpreting Art. 25 sec. 1 of the CSDDD Proposal would have introduced a significant change to Polish company law. It follows that in the case of Poland, the Commission's assumption regarding an already existing, established board member's duty of care to take into account sustainability matters was thus erroneous.

Andrzejowi Kidybie. Tom I, ed. Małgorzata Dumkiewicz, Katarzyna Kopaczyńska-Pieczniak, Jerzy Szczotka (Warszawa: Wolters Kluwer, 2020), 218–229.

46 Oplustil, *Instrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej,* 175–177; Opalski, *Prawo zgrupowań spółek*, 165–174.

47 Chałaczkiewicz-Ładna, Sójka, Jerzmanowski, "To whom Polish directors owe their duties – between shareholder primacy and political agenda," (forthcoming) – working paper on file with Authors, 12.

48 See: Adam Opalski, "Poland. Introduction. Historical Development of the Polish Model of Company Law," in *Company Laws of the EU: A Handbook*, ed. Andrea Vicari, Alexander Schall (München: C.H. Beck, 2020), 661–664.

49 Dąbrowska, "Social Enterprises, Cooperatives or Benefit Corporations? On Reconciling Profit and the Common Good in Doing Business from a Polish Perspective," *Review of European and Comparative Law,* vol. 51, no. 4 (2022): 68; Pinior, "Duty of loyalty and due care of the board member under Polish law," *Review of European and Comparative Law,* vol. 51, no. 4 (2022): 15; Chałaczkiewicz-Ładna, Sójka, Jerzmanowski, "To whom Polish directors owe their duties – between shareholder primacy and political agenda," (forthcoming) – working paper on file with Authors, 2.

4. Dealing with harmonization challenges

As our comparative analysis has revealed, the strong or medium interpretation option of the Commission's proposed harmonization measure, which would constitute an assumption that the inclusion of sustainability matters already saturates board members' duty of care across the Member States, proves to be problematic. In Poland, the inclusion of sustainability matters in board members' decision-making processes in a manner that could collide with or hamper shareholders' interests would create liability risks for infringement of the company's interest. While such a conclusion might not explicitly follow from the wording of the relevant company laws and naturally can be subject to critique[50], the prevailing scholarship, courts' jurisprudence as well as market practice paint such a landscape. While Germany might serve as an example of a Member State in which the implementation of strong or medium interpretation of Art. 25 sec. 1 of the CSDDD Proposal would not alter the legal framework to any significant extent, Poland would need to profoundly reform its company laws in order to accomplish these interpretation options of the Commission's CSDDD proposal[51].

Since a strong or medium interpretation option of Art. 25 sec. 1 of the CSDDD Proposal cannot be by any means qualified as a mere "clarification" of the current legal *status quo* (at least in one (Poland), quite possibly in several Member States), and it remains entirely ambiguous whether any of these interpretation options should prevail, the methodological soundness of the Commission's legislative efforts must be critically scrutinized. Despite the limited scope of our research, which covered only two Member States, the example of Poland has exposed a methodological inconsistency in the Commission's work on the CSDDD Proposal.

The documentation of the legislative process does not reveal the source of the flawed assumption and wording of Art. 25 sec. 1 of the CSDDD Proposal, according to which it only constituted a "clarification" of board members' duties in the EU. We identify two possible reasons for the Commission's

[50] See: Weber, Mazur, Szczęsna, "Zrównoważony ład korporacyjny (sustainable corporate governance) kierunek ewolucji polskiego prawa spółek?," 20–33; Weber-Elżanowska, "Postulat zrównoważonego wzrostu gospodarczego jako wyzwanie dla polskiego prawa handlowego," 218–229.

[51] Weber, Mazur, Szczęsna, "Zrównoważony ład korporacyjny (sustainable corporate governance) kierunek ewolucji polskiego prawa spółek?," 32.

approach. First, the explanation could lie in an analytical error or deficiency of scope relating to the substantive research leading up to the CSDDD Proposal. In such a scenario, we would assume that the Commission unwillingly presented Art. 25 sec. 1 of the CSDDD Proposal as a clarifying provision, despite the fact that a medium or strong interpretation was intended. Second, the reason for mislabeling a deep harmonization measure could be the Commission's hope to "disguise" or "hide" a medium or strong interpretation option, i.e., a truly contentious issue, behind safe, invulnerable reasoning. This scenario would imply that the Commission intentionally presented Art. 25 sec. 1 of the CSDDD Proposal as a clarifying provision, although being aware it actually was not. Third, the Commission could have intended to propose a provision that should be understood according to the weak interpretation option.

If the first potential explanation was accurate, it would indicate that the Commission's overall research methodology was flawed. While it is impossible to pinpoint the exact moment of failure, the Commission is responsible for the whole research process that leads to their legislative proposal. Regardless of whether the error occurred in the scope of internal research activities or within the tasks performed by an outside expert, the responsibility to organize the research rests with the Commission. In particular, the Commission must actively engage with hired experts, including the verification of their proposed research methodologies.

If the second potential explanation was accurate, it would indicate a fundamental misconception regarding the prerequisites of enacting effective harmonization measures. Foremost, the achievement of a harmonization goal does not materialize in the simple adoption of the proposed legislative measure. The success of "pushing" a harmonization measure through the political bottleneck leading to adoption on the EU level is only of a technical nature. The true goal of harmonizing laws within the EU must be measured against the way these laws are implemented and consequently applied in the Member States. In the analyzed case, adopting the CSDDD Proposal regarding board members' duties would be futile if the Member States decided not to adjust their national company law regimes actively. "Disguising" a deep harmonization measure that actually seeks to remodel the company laws of some Member States as a minor clarification of the current legal *status quo* results in the Member States' reluctance

to change anything in their national legal regimes. Why would they, since the Commission admits it is only clarifying existing obligations? It follows that the methodological flaws in harmonizing board members' duties could likely frustrate the adoption of effective implementing laws in those Member States, whose current legal frameworks diverge from the Commission's envisaged concept.

If the third explanation was true, the Commission's declaration regarding a mere "clarification effect" would actually be correct. However, in such a scenario, a glaring incoherence with the richly motivated climate policy agenda of the CSDDD proposal would emerge.

Regardless of what reasons led to the puzzling reasoning regarding Art. 25 sec. 1 of the CSDDD Proposal, it needs to be stressed that the extent to which Member States' national legal regimes are being transformed is of fundamental importance for reaching harmonization objectives. In other words, the depth of interference with the national laws matters. The harmonization measures' profoundness must be mirrored in the evaluation criteria explored within the Impact Assessment. In addition, the Explanatory Memorandum should plainly depict that the regulation will actually alter existing legal regimes. In the case of the CSDDD Proposal regarding board members' duties, neither of these prerequisites was met. Even a significant collision between the harmonization measure and the Member States' "old" regulation is not a problem in itself. It only develops into a problematic issue, if an effective implementation is not accomplished.

In light of the above, one should not be surprised that the Regulatory Scrutiny Board was unsatisfied with the Commission's reasoning regarding the proposed measures on board members' duties. As has rightly been pointed out, the Commission should have assessed "how the proposed EU corporate sustainability governance rules would fit with the different national corporate governance models existing in the EU, given the national focus of company law"[52]. Moreover, one must agree with the Regulatory Scrutiny Board's opinion that the Commission was not clear about "why it is necessary to regulate directors' duties on top of due diligence

[52] See: "Regulatory Scrutiny Board Opinion, 26.11.2021, SEC (2022) 95," European Commission, accessed October 18, 2022, https://ec.europa.eu/transparency/documents-register/api/files/SEC(2022)95?ersIds=090166e5e99ec8f8, p. 4.

requirements"[53]. Since the Commission itself identified the provision tackling board members' duties as a mere clarification, it is indeed hard to extract and understand the value-added of this measure. If the harmonization of board members' duties is treated as a simple clarification, any conclusions as to the impact of this measure are *ab initio* distorted.

At the same time, the concerns voiced twice by the Regulatory Scrutiny Board suggest that it adopted a strong or medium interpretation of the proposed harmonisation measure: It was clearly assumed that Art. 25 of the CSRDDD Proposal would actually alter Member States' current company law regimes.

5. Conclusions

The Commission's political mandate to implement climate policy goals through company law is challenging. The question of whom companies should serve remains a perpetual subject of dispute in company law scholarship. This naturally stems from the fact that the company, as a conventional creation of the law "without a soul"[54], requires an external assignment of interest. Despite a bulging body of literature advocating a sustainability-driven remodeling of basic company law concepts[55], a substantial pushback

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53 See: "Regulatory Scrutiny Board Opinion, 26.11.2021, SEC (2022) 95," European Commission, accessed October 18, 2022, https://ec.europa.eu/transparency/documents-register/api/files/SEC(2022)95?ersIds=090166e5e99ec8f8, p. 2.

54 As famously declared by Edward, First Baron Thurlow: "*Did you ever expect a Corporation to have conscience, when it has no soul to be damned, and no body to be kicked?*", cited and further explored by, John C. Coffee Jr., "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment," *Michigan Law Review*, no. 79(3) (1981): 386–459.

55 See in particular: Colin Mayer, *Prosperity: Better business makes the greater good* (Oxford: Oxford University Press, 2018); Barnali Choudhury, Martin Petrin, *Corporate Duties to the Public* (Oxford: Oxford University Press, 2019); Andrew Johnston, "Reforming English Company Law to Promote Sustainable Companies," *European Company Law,* no. 11(2) (2014): 63–66; Melon, *Shareholder Primacy and Global Business. Re-clothing the EU Corporate Law*; Nien-hê Hsieh, Marco Meyer, David Rodin, Jens van 't Klooster, "The social purpose of corporations," *Journal of the British Academy*, no. 6(1) (2018): 49–73; Beate Sjåfjell, "Sustainable Value Creation Within Planetary Boundaries–Reforming Corporate Purpose and Duties of the Corporate Board," *Sustainability*, no. 12, 6245 (2020): 1–15; Beate Sjåfjell, "Regulating for Corporate sustainability: Why the public–private divide misses the point," in *Understanding the company,* ed. Barnali Choudhury, Martin Petrin (Cambridge:

supporting the *status quo* of prevailing shareholder primacy approaches persists[56]. This is clearly displayed in the context of the intended harmonization of board members' duties, which are interpreted mainly through the lens of the company's interest.

As we have explained through our comparative analysis why the Commission's stance on a clarifying role of Art. 25 sec. 1 CSDDD is flawed and misleading. Whereas Germany might serve as an example of a Member State in which the strong or medium interpretation of Art. 25 sec. 1 of the CSDDD Proposal would not have substantially modified the national company laws, Poland would have been obliged to fundamentally amend its legal framework to accomplish the strong and medium interpretation options of the discussed proposal. Consequently, based on the actual implications of the envisaged harmonization measure regarding board members' duties, we claim that when jostling such a contentious and deep harmonization measure, the Commission should have played its legislative A-game to have a shot at approval from the Council and subsequent effective implementation by the Member States.

Cambridge University Press, 2017), 145–165; Dana Brakman Reiser, "Progress is Possible. Sustainability in US Corporate Law and Corporate Governance," in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, ed. Beate Sjåfjell, Christopher M. Bruner (Cambridge: Cambridge University Press, 2020), 131–145.

56 Lucian A. Bebchuk, Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, Working Draft, accessed October 18, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544978; Jill E. Fisch, Steven Davidoff Solomon, "Should Corporations have a Purpose?," *Texas Law Review*, no. 99 (2021): 1309, accessed February 3, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561164; Lucian A. Bebchuk, Kobi Kastiel, Roberto Tallarita, *For whom corporate leaders bargain*, Working Draft, accessed February 3, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3677155; Pierre-Henri Cognac, "The reform of articles 1833 on social interest and 1835 on the purpose of the company in the French Civil Code: Recognition or Revolution," in *Festschrift für Karsten Schmidt zum 80. Geburtstag,* ed. Katharina Boele-Woelki et al. (München: C.H. Beck, 2019), 213–221; Oliver Hart, Luigi Zingales, "Companies Should Maximize Shareholder Welfare Not Market Value," *ECGI Finance Working Paper,* no. 521 (2017).

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