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978-1-107-04327-5 - Company Law and Sustainability: Legal Barriers and Opportunities

Edited by Beate Sjøfjell and Benjamin J. Richardson

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## COMPANY LAW AND SUSTAINABILITY

This investigation of the barriers to and opportunities for promoting environmental sustainability in company law provides an in-depth comparative analysis of company law regimes across the world. The social norm of shareholder primacy is the greatest barrier to progress, and this recognition also helps explain why voluntary action by companies and investors alone is insufficient. By deconstructing the myth that shareholder primacy has a legal basis and challenging the economic postulates on which the mainstream corporate governance debate is based, *Company Law and Sustainability* reveals the surprisingly large unexplored potential in current company law regimes for companies to reorient themselves towards sustainability. It also suggests possible methods of reforming the existing legal infrastructure for companies and makes an important contribution to the wider debate on how to achieve sustainability.

BEATE SJØFJELL heads the international network of scholars in the Sustainable Companies Project, on which much of the ground-breaking research in this book is based. Professor Sjøfjell is also the head of the University of Oslo's research group, Companies, Markets, Society and the Environment ([jus.uio.no/companies](http://jus.uio.no/companies)), as well as of its European Law Network.

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In memory of my deeply beloved daughter,  
Aleksandra (1997–2014)

Beate Sjøfjell

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BEATE SJØFJELL is Professor dr. juris at the University of Oslo, Faculty of Law, Department of Private Law, in Norway. Her fields of interest include company and securities law, corporate governance and corporate social responsibility, EU law, environmental law, and law and economics. She is the head of the Sustainable Companies Project and of the Faculty's Research Group, Companies, Markets, Society and the Environment ([jus.uio.no/companies](http://jus.uio.no/companies)), as well as of its European Law Network. In addition to her monograph, *Towards a Sustainable European Company Law* (Kluwer, 2009), and the edited volume, *The Greening of European Business Under EU Law* (Routledge, 2014, co-editor Anja Wiesbrock), Beate has published extensively on EU company law and the integration of sustainable development. Many of her papers are available at [ssrn.com/author=375947](http://ssrn.com/author=375947).

CHARLOTTE VILLIERS is Professor of Company Law at the University of Bristol, UK. She is a qualified solicitor, and she has also worked at the Universities of Sheffield, Glasgow, and Oviedo in Spain. Her teaching and research expertise cover the broad areas of company law, corporate governance, and labour and employment law. She is interested in corporate social responsibility and sustainability issues. She is the author of several books and articles, and currently she is writing on boardroom diversity, disclosure, executive pay, and workers' participation.

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## FOREWORD

Company law has typically been seen as a dry and technical subject principally of interest only to the community of lawyers. Traditionally, its aim has been to create legal certainty for companies themselves in their relations with each other in the marketplace, and to define and combat corrupt, fraudulent, or other criminal acts by individuals using company structures to shield their behaviour. This book takes a completely different perspective, analysing how company law is being and can be used as a vital tool to combat new collective threats in the world, including climate change, social disintegration, and conflict. It is partly a response to the successes, but also the limitations, of movements towards corporate social and environmental responsibility in the past 20 years that have largely been pursued through a range of voluntary, soft law, and other initiatives kept strictly separate from those of corporate governance.

A number of factors make this new approach timely and relevant to decision-makers:

The financial crisis of 2008 threw a new focus on issues of integrity and short-termism which have demanded responses that go far beyond simply narrow financial transparency for companies.

Delays and failures in global climate change and trade talks have highlighted the weakness of relying on inter-governmental processes alone, and placed new emphasis on what companies can and should do directly to meet global challenges.

Widespread business support for the UN Guiding Principles on Business and Human Rights also saw a subtle shift away from a simplistic anti-regulation, voluntary-only approach to corporate responsibility from business lobbyists, to an acceptance of the concept of a 'smart mix' that both regulatory as well as voluntary initiatives are needed in order to promote responsible corporate behaviour.

Meanwhile, many in the investment community, from pension funds to insurance companies, have come to the growing realisation that the

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risks due to climate change and other societal challenges pose a level of potential cost to their business activities, that represents not just a generic threat to the sustainability of the planet but also a very direct threat to the sustainability of the company itself.

Many of those who have worked on issues of corporate responsibility and accountability, including myself, have not come to these issues of company law with any great expertise or previous experience of the subject. What brought us to it was a new understanding of how company law was actually acting as a barrier to companies adopting more sustainable practices, as well as having the potential to create frameworks which can assist rather than hinder this process. The analysis in this book emanating from the Sustainable Companies Project provides a fresh perspective and challenges old assumptions in this respect.

Concepts of ‘shareholder primacy’ and ‘fiduciary duty’ which have acted as a straitjacket restricting responsible business are shown to be greatly over-stated, and largely based on societal rather than legal norms.

The authors in this volume demonstrate that current approaches, however worthy, are grossly inadequate to address the scale of change required to achieve the necessary transition to low-carbon growth.

There is a critique of the traditional ‘business case’ for corporate social responsibility, with its assumption that corporate behaviour will be modified simply by increased understanding of the cost and opportunities created by unsustainable business practices.

Such arguments have already contributed to a political climate where it has been possible to reach agreement on new reporting requirements on the environmental, social, and human rights impacts of the company in the European Union – new legal requirements that I personally have long advocated and am proud to have helped deliver.

Reporting is perhaps the easiest aspect of corporate governance with which to address issues of corporate responsibility because it involves no specific new obligations on the company, except for that of transparency itself. It can be seen as an approach which is primarily of benefit as a management tool within the company, and one which externally utilises market-based rather than regulatory forces to foster changes in behaviour.

However, the EU law is only one example of a company law approach to corporate sustainability analysed in this volume and one which I would be the first to say was preceded by non-financial reporting requirements in individual European countries, including France, Belgium, and Denmark. Indeed, it can be argued that the leading global example was found, not in

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Europe, but from the King III Report on Corporate Governance in South Africa.

Nevertheless, the debate in Europe is now moving on to include questions such as whether corporate sustainability reports should be debated and voted at company Annual General Meetings, how far management remuneration could be linked to environmental, social, and governance issues, and whether directors' duties should be changed to embrace wider sustainability objectives.

Indeed, at the time of writing, company law responses in new or developing instruments of global governance are being debated, including a through revision of the OECD Corporate Governance Code and proposals to incorporate corporate sustainability reporting in a new Sustainable Development Goal as part of the UN post-2015 Development Agenda.

The analysis that follows in this volume represents a much-needed contribution to current public policy discourse and is truly global in character. It sounds trite to say that this debate affects the future of the planet as the enormity of the issues involved often makes this so difficult to comprehend.

However, the concept of 'climate justice' which has now entered the debate emphasises that the challenge of global warming can only be met by addressing issues of law and of rights. For the company lawyers who have been used to the more conventional debates of the past, this is a language which they will swiftly understand.

What we will all have to understand, including those who start off primarily from the social and environmental perspective, is that the challenges we identify can actually be met, not only by setting limits in megatonnes of carbon emissions, but also by addressing the sphere of corporate governance and coming to new definitions of what is the very purpose of the company.

I very much welcome this understanding in what follows.

*Richard Howitt, MEP*

European Parliament Rapporteur on Corporate Social Responsibility

Opinion Rapporteur, EU Non-Financial Reporting Directive

Cambridge, United Kingdom

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## PREFACE

This book originates from the Sustainable Companies Project (2010–2014),<sup>1</sup> an international scholarly network whose principal aim has been to deepen our understanding of how company law hinders or facilitates corporate environmental responsibility. In an innovative stance, this project has sought to shift the dominant focus beyond environmental law to the role of company law and related areas of business regulation in promoting sustainable development. Our vision has been to contribute to the conceptual framework and tools to realise the potential of some companies to make independent, creative, and significant contributions to mitigate climate change and other global environmental problems. Climate change provides a powerful example illustrating the broader challenges in promoting corporate environmental and social responsibility through company law reform.

The Sustainable Companies Project has received invaluable funding from the Research Council of Norway, under its programme ‘Norwegian Environmental Research towards 2015’. The Project’s broad international scope was made possible through the academic contributions of a team of scholars from all continents. While only a few team members were directly involved in the writing of this book, the analysis, especially in the chapters on comparative company law (Chapter 3, ‘Shareholder primacy: the main barrier to sustainable companies’ by Sjøfjell and others) and accounting law (Chapter 5, ‘Accounting, auditing, and reporting: supporting or obstructing the sustainable companies objective?’ by Villiers and Mähönen), draws on the original research of the Project’s many scholars. We thank them all for their fine contributions, constructive feedback, and unwavering enthusiasm for the project and this book.<sup>2</sup> For the book

<sup>1</sup> See [jus.uio.no/companies](http://jus.uio.no/companies) under Projects.

<sup>2</sup> A list of team members may be found on the Sustainable Companies Project’s website (see note 1). We also acknowledge the contribution of other scholars, including that of Dr Andreas Rühmkorf, Sheffield University, UK, for his help in explaining German company law.

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PREFACE

manuscript itself, we express our gratitude not only, of course, to the chapters' authors, but also to the University of Oslo research assistants, Linn Anker-Sørensen and Elisabeth Hvaal Lingaas, for their technical support.

The subject matter of this book is timely and significant. We need bold new approaches to curb environmentally unsustainable trends. Some 50 years of environmental legislation in the modern era hardly seem to have made a difference in the bigger picture of the biosphere's increasing degradation and decay. The time is right to discuss how to promote sustainable business by reforming corporate governance and the related legal rules for commerce. In other words, we need to consider how the imperative of sustainability can be embedded within the very core of business decision-making, so that economic enterprise, from the outset, is pursued within nature's parameters. Mere tinkering with 'business as usual', as is presently the case with most corporate social responsibility codes and practice, is not good enough. It is our hope that this book's analysis of the legal barriers to sustainability and the possibilities of changes within business law will help policy-makers move from incremental to fundamental reform.

*Beate Sjøfjell and Benjamin J. Richardson*

January 2015