

Anne-Marie Weber*

BOOK REVIEW: ANNE-CHRISTIN MITTWOCH, NACHHALTIGKEIT UND UNTERNEHMENSRECHT, SCHRIFTEN ZUM UNTERNEHMENS- UND KAPITALMARKTRECHT 107, TÜBINGEN (MOHR SIEBECK) 2022

Keywords

sustainability; company law; ESG; shareholder primacy; company's interest; due diligence duty

The increasing acknowledgment that economic development is constrained by planetary boundaries, coupled with heightened societal awareness of climate change, places the transition to a sustainable economy at the forefront of today's global political agendas. International climate policy commitments such as the Paris Climate Agreement¹ and the UN 2030 Agenda for Sustainable Development² are shaping the global trajectory of sustainability policy. In the European Union (EU), alongside treaty-based obligations (Art. 3 TEU), the Euro-

* Dr Anne-Marie Weber, University of Warsaw, ORCID: 0000-0001-7164-7571; e-mail: a.weber@wpia.uw.edu.pl

¹ Paris Agreement, United Nations Framework Convention on Climate Change, Paris, France, 12.12.2015.

² United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development. Resolution adopted by the General Assembly, 25.09.2015.

pean Green Deal,³ with its climate neutrality commitment, is laying the groundwork for this transformative change. Recognizing that a sustainable reorientation of the economy necessitates a shift in economic behavior, there is an increasing understanding that companies must play a central role in pursuing sustainability objectives. While public law instruments, such as direct regulatory controls on emissions, have a longstanding tradition of regulating commercial activity, the emerging discourse increasingly emphasizes the role of private law in fostering sustainable business conduct. The monograph “Nachhaltigkeit und Unternehmensrecht” (Sustainability and Company Law), authored by Anne-Christin Mittwoch, substantially contributes to this discussion by exploring to what extent company law is capable of facilitating sustainability objectives (p. 5).

The monograph discusses the concept of corporate sustainability from the perspective of German and EU law. As a leading thesis of the book, the author contends that company law is particularly well-suited to both incentivizing and compelling companies toward sustainable business practices, as it directly engages with companies as key market actors. However, she argues that realizing this potential requires explicit legislative action, as the current legal status quo is unlikely to yield the desired results.

The author’s argument unfolds in three parts. The first part of the monograph investigates sustainability as an “interdisciplinary principle of an international character” (pp. 15-39), elucidates the understanding of sustainability as an economic principle (pp. 40-53), and identifies sustainability as a legal principle that transcends the multi-level structures of international law, EU law, and national law (pp. 57-104). The monograph’s second part examines the intersection of company law and the sustainability concept (pp. 113-12) and also delineates how company law may act as an impediment to sustainability goals (pp. 121-148). In particular, the shareholder value model and alternative approaches to the question of the company’s objectives as an organizational form are assessed. Further, the author scrutinizes various regulatory attempts to use company law and its neighbouring regula-

³ Communication from the European Commission, The European Green Deal, Brussels, 11.12.2019, COM(2019) 640 final.

tory fields as catalysts for sustainability (pp. 149-272). The third part of the monograph analyses German company law concepts through the lens of sustainability objectives (pp. 285-373). In particular, the notion of the company's interest (*Unternehmensinteresse*) is examined as a potential gateway for implementing sustainability objectives into business practices.

The reviewed monograph provides an immensely timely contribution to the most pressing research challenges in the field of company law. Primarily, it addresses the central theme of corporate sustainability research, questioning whose interests the company as a business vehicle should consider and which goals should determine the actions of board members. While identifying the shareholder primacy paradigm as a fundamental obstacle to mainstreaming sustainable business practices, the monograph rejects a simplistic substitution with the stakeholder value approach. The author argues that aligning business conduct with stakeholder interest fails to encompass the company's relationship with society as a whole and thus fails to embrace the principle of sustainability fully. Building on this premise, the monograph explores current legislative attempts to promote sustainable business conduct through the regulation of business organizations. The author concludes that these efforts align with the notion of "weak sustainability", attempting to harmonize sustainability objectives with competing profit-maximization goals. Consequently, the monograph advocates a "strong sustainability" approach to company law that rejects an unconditional prioritization of profit maximization.

Given the monograph's in-depth exploration of the German legal system, it naturally holds significance for a German academic audience. However, the monograph will also likely prove to be very valuable for future comparative research in the field. Particularly noteworthy is the examination of historical concepts associated with German company law. The elaboration on the ties between the notion of public benefit (*Gemeinwohl*) and the legal form of a German joint-stock company (*Aktiengesellschaft*) is of interest to the international legal discourse as it illustrates that an obligation of board members to consider sustainability objectives in their decision-making processes would not be an entirely novel concept to the company law realm. Additionally, although the notion of the "enterprise itself" (*das Unternehmen an sich*) is

sporadically mentioned in the international debate on corporate sustainability, the scrutiny presented within the reviewed monograph offers considerably profound insights into this concept.

Significantly, the author's examination of the notion of the "company's interest" (*Unternehmensinteresse*) and its connection to board members' duties as outlined in Art. 76 of the Act on the Joint-Stock Company (*Aktiengesetz*) holds relevance for comparative research. While the law's wording allows for a sustainability-driven interpretation, the author suggests that legislative intervention is desirable to explicitly define the company's interest in order to capture sustainability objectives. The author proposes defining the interest of the company, *i.e.* the goal of business activity (*Ziel unternehmerischen Wirkens*) as the "sustainable value creation within planetary boundaries" (*nachhaltige Wertschöpfung innerhalb der planetaren Grenzen*) (p. 381). How this overarching goal is to be attained would, however, remain within the discretion of the company's bodies. To empower the appropriate competencies, the author advocates the introduction of a general sustainability-aligned due diligence duty. Importantly, in the author's opinion, such a sustainability due diligence duty should expand beyond the current narrow understanding, which is limited to environmental and human rights considerations in multinational corporations' value chains (p. 381).

The role of company law in promoting sustainability policy is gaining prominence not only in scholarship, but also in public discourse across the EU and globally, attracting increasing interest from policymakers and politicians. Therefore, the comprehensive analysis of a specific legal system delivered in this monograph will likely be also of high significance outside scholarly discourse. This trajectory of influence appears particularly relevant when considering the recent unsuccessful attempt by the EU Commission to mandate board members to consider sustainability objectives in their decision-making processes.⁴ It may be hypothesized that the lack of success in harmonizing this issue at the EU level redirects political and societal pressure to address sustainable business conduct to the national legislative level. Conse-

⁴ See Art. 25, Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23.2.2022, COM(2022) 71 final.

quently, the monograph's analysis of German company law may hold significance for future attempts in other EU member states. Given the language-driven limitations of the monograph, the publication of an English version is hoped for to enhance its accessibility and broaden its impact.