



# Policy Coherence and Sustainability in the EU – A few remarks

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# A great chapter!

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Policy Coherence for Corporate  
Sustainability in the EU:  
Can We Achieve Sustainable  
Corporate Governance  
Without Sustainable Finance?

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ALEXANDRA ANDHOV AND LELA MÉLON

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# For sure I agree!

The key idea: **more coherence** is needed at EU level when it comes to sustainability

Coherence implies that the **corporate system is to be considered as a whole**, linking together the financial and the corporate governance issues

I could not agree more: **no sustainability without a sustainable governance**, which requires an holistic approach. And this means the financing factor, too

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# Just a few observations

There are a few issues that deserve to be taken into consideration

1. Policy coherence and EU competences
  2. The notion and the content of sustainability
  3. The promotional role of the law: how to achieve the goal
  4. Current proposals in the field
  5. A compass and a roadmap?
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# 1. Policy coherence and EU competences

Who is in charge of these initiatives?

Different institutions (Parliament, Council, Commission), different Directorates (Internal Market, Justice...), different offices

The problem of **intra-organic dialogue**

But above all, the problem of the **EU competence** in the area of sustainability

The goal to be achieved is clear, but does the EU the competence for it? Does it relate to the development and well-functioning of the internal market?

In addition: the European problem with the corporate governance, from the draft fifth Directive on...

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## 2. Sustainability

Perhaps an abused word...

... **without a clear definition!**

In the chapter it's very clear the environmental dimension, but what about the **social** and the **governance** one (ESG)?

The problem of the missing pieces in the EU rules. Why?

The issue of **measurability**: much easier for the environment, but for social issues we face problems:

Socio-cultural

Economic

As for **governance**: no clear scope of application

At EU level usually just gender balance (proposal approved on October 17, 2022); of course, it is not just that

Not to talk about “**economic sustainability**” (some welcome references in the Due Diligence Proposal)

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## 2. Sustainability

The problem is how sustainability is to be defined, and to be intended

Definition: many are possible, but the most recent (Sjåfjell-Brumer) seems good: **“Securing social foundations within planetary boundaries”**

In philosophical terms, **is it ὅλος (a whole) or πᾶν (a sum)?**

It makes a world of difference. If it is a whole, the compliance just under one profile does not fulfil sustainability

This leads to a further problem: **multi-stakeholder approach** and the need to **balance different (potentially conflicting) stakeholders' interests**

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# 3. The promotional role of the law

I.e.: how to achieve the goal?

Many possibilities:

- No intervention: the market reigns
- Soft law (best practice collections, CG codes, guidelines...)
- **Hard law**

IMHO, the point is: **do we really want to take sustainability seriously?**

If so: **just hard law matters**

This means that it's up to public institutions to define borders

e.g.: protecting the environment as we protect, for instance, creditors, or minority shareholders; no one of use would dare to protect them via soft law...

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## 3. The promotional role of the law

Are other options useless? Perhaps no, but they are

- Not enforceable
- Not completely reliable
- On a voluntary basis
  - And we should also discuss the comply or explain policies
- More useful for **educational purposes** than for a real achievement of the intended goals

As of today, the law looks more like Achilles chasing the turtle...

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## 4. Current proposals in the field

**Sustainability reporting:** see the chapter

But disclosure cannot replace activity. No activity, no reporting (more engaging interpretations are possible, but they would make no sense with the CSDD Proposal)

Specific reporting duties for financial institutions: Regulation (EU) 2019/2088

**Gender policy:** recently approved directive

But it is already outdated; the majority of the Member States has already its internal policy, often more effective than the EU goals

**Proposal for a Directive on corporate sustainability due diligence (CSDD Proposal - February 2022)**

Impossible to discuss here in detail. Just a few tips

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# CSDD Proposal – what is it for?

Whereas 14:

This Directive aims to **ensure that companies active in the internal market contribute to sustainable development and the sustainability transition of economies** and societies through the identification, prevention and mitigation, bringing to an end and minimisation of potential or actual adverse human rights and environmental impacts **connected with companies' own operations, subsidiaries and value chains.**

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# CSDD Proposal – how and who?

By **acting and monitoring actively** the activities not just of the company itself, but also of its entire value chain (whereas 18)

Directly: for sure the **largest European Companies** (net turnover over 150M€ + 500 employees), but also smaller ones (net turnover over 40M€ + 250 employees), if they are active in certain sectors (textiles, agriculture, extraction...)

... but also non-EU companies, with high turnover in the EU

Specific view to the **financial institutions** when it comes to the loans or other credit services [Art. 3(a)(iv)]

Shorter value chain: **no** natural persons or **SMEs** (senseless!)

Evaluation at the beginning (granting loan time) only

**No stop if “this can be reasonably expected to cause substantial prejudice to the entity to whom that service is being provided” (Art. 7.6)**

**Indirectly: all the companies in their value chain (contractual cascading)**

But value chain is not necessarily a contractual concept...

... and the scope of application might be far beyond the EU alone

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# CSDD Proposal – what?

Company's directors should (Art. 4):

- Integrate due diligence into company's policies
- Identify actual or potential adverse impacts
- Prevent and mitigate potential adverse impacts and terminate/minimise actual adverse impacts
- Establish and maintain complaints procedures
- Monitor the effectiveness of the policy
- Publicly communicate on due diligence

**According to a list of international treaties and conventions (not directly applicable to private organisations...)**

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# CSDD Proposal – what if not?

If there is a negative impact, the company (**company's directors**) are **liable if they do not comply and an adverse impact occurred and led to damage** (Art. 22)

Additional liability: subsidiaries and other companies in the chain are liable as well

Safeguard clause: non reasonability of the adverse impact, and measures theoretically adequate (but burden of proof is left to each MS)

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# CSDD Proposal – duty of care (Art. 25)

1. 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.
  2. Member States shall ensure that their laws, regulations and administrative provisions providing for a breach of directors' duties apply also to the provisions of this Article.
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# CSDD Proposal – due diligence (Art. 26)

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.
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# A couple of remarks

- **SMEs** are very poorly addressed, and just with some sort of (expensive) tutoring by the large companies  
Adverse selection?
  - **Definitions** are **not** always **clear**
  - It might be **extremely expensive**  
Insurance cost?
  - Mainly: **external regulatory competition** and race to the bottom
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## 5. A compass and a roadmap

First of all, a few questions:

- Need to find a **reliable legal definition for Sustainability**
  - **Should we be afraid of the additional costs?**
  - Should be a sustainability policy required for **all the companies**, or just some of them? (segmentation per dimension or type)
  - Is **disclosure** enough?
    - And are investors always the good ones?
  - Is **long-termism** always good?
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## 5. A compass and a roadmap

Once addressed these questions, we can try to set up a **roadmap**

- We already have the instruments to evaluate environmental issues
  - But we need to address also S & G
  - In any case: are we sure that this all belongs to the European Union's competencies?
  - Milestones to be defined at a global level
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# Thank you very much for your attention!

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