



The Utopia of Digital and Sustainable Companies: Is There a Role for European Law?

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Digital and sustainable companies?

What's sustainable?

No legal definition of sustainability

Very few legal tips

Traditional notion (Brundtland report, 1987):

meeting the needs of the present without compromising the ability of future generations to meet their own needs.



Sustainability today

More on ESG topics

And more recently:

“securing **social foundations** within **planetary boundaries**” (Sjåfjell & Bruner, 2020)

Legally speaking: no definition, but pieces of evidence

- Taxonomy Regulation
 - Corporate Sustainability Reporting Directive
 - [Proposal Corporate Directors Due Diligence Directive – DISRUPTIVE]
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Taxonomy regulation (EU) 2020/852

Just environmental, for now

Criteria: the sustainable economic activity

- (a) **contributes substantially to one or more of the environmental objectives** set out by the regulation;
- (b) **does not significantly harm** any of the environmental objectives set out in Article 9;
- (c) is **carried out in compliance with the minimum safeguards** laid down in Article 18;
- (d) complies with **technical screening criteria** that have been established by the Commission

N.B.: all the four criteria must be met **jointly**...



The environmental objectives being...

The objectives (to be achieved by means of economic activities):

- (a) **climate change mitigation**;
 - (b) **climate change adaptation**;
 - (c) the sustainable **use and protection of water** and marine resources;
 - (d) the transition to a **circular economy**;
 - (e) **pollution prevention** and control;
 - (f) the protection and restoration of **biodiversity** and **ecosystems**.
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The Corporate Sustainability Reporting

“sustainability matters” means environmental, social and human rights, and governance factors, including sustainability factors defined in point (24) of Article 2 of Regulation (EU) 2019/2088, i.e.

‘sustainability factors’ mean environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters.

It deals with the *disclosure* of sustainable activities carried out by the major companies

But *really* major



The Corporate Directors' Due Diligence

Just a proposal

Value chain and “parent” company directors’ liability for sustainability issues along the chain

Primarily held just major companies...

...but cascade effect on the entire chain, including SMEs (possible adverse impact)



In this situation: what's the role for digitalisation?

What's digitalisation for a company?

- Fake approach
 - E.g.: Directive 1151/2019: only deals with online establishment of companies
 - Real approach
 - The real life: how digital tools might help companies in their day-by-day business
 - E.g.: SHRD2 (2017): just larger companies, digital profiles considered to help shareholders to exercise their rights (shareholders forum, agenda proposals and so...)
 - Current proposals on transparent AI (EP statement June 2023): but deals more with entrepreneurial issues (workers and workplaces), than with governance ones
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And, above all... what's the role for the EU?

Debatable: shared competence in the field of company law

- Limited to establishment and improvement of the internal market
 - So, any kind of intervention should be grounded on:
 - Transnational issues, and
 - Removal of internal market barriers (or improvement of guarantees for creditors, or similar...)
 - That's why currently it is limited to establishment and SHRD2 issues...
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In the meanwhile, the world goes on...

Pandemics time: online meetings for all the corporate bodies all over the world

And today application of blockchain and AI technologies to companies

Blockchain: registers

- Internal: e.g. list of shareholders
 - External: e.g. Trade Registers
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In the meanwhile, the world goes on...

Artificial Intelligence

- General principle of exclusive management of the company by the directors, but...
- ...the AI cannot be a director (even if in Delaware...)

AI serves as a support for the directors, but the liability is just on the directors



Any role for digitalisation in sustainability?

For sure!

Blockchains:

- For instance, certifying the value chains' information required by the CDDDD, if passed

AI

- Multiple possibilities: help in risk identification and in considering sustainability issues (CSRD)
 - But in any case, final word on the directors
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Is there room for the EU in all of this?

The real question is: does digitalisation (and sustainability) impact on the internal market?

For larger companies, with transnational shareholdings, yes (albeit indirectly). But the scope of intervention looks rather limited

For smaller companies: a disaster so far!

- And perhaps better this way: regulatory competition



The SMEs problem

Completely unaddressed, but the 90%+ of the EU enterprises

Cascade effect of CDDDD not enough...

...and even adverse impact, as the “parent” company should pay for the SMEs in the chain... why should they keep on with SMEs?

Huge costs for SMEs for a real digitalisation



A possible solution?

1. SMEs consortia to promote sectoral digitalisation
2. Mandatory sustainability contribution by the enterprises to be conveyed into a specific fund
 1. SMEs might access the fund to boost their sustainability...
 2. ...also by means of digital tools!

The teaching of cooperative funds...



**Thank you very much for your
attention!
Any questions?**

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