REPORT FROM THE SCIENTIFIC LIFE: *ECCL SYMPOSIUM CSDD, SUSTAINABILITY AND CORPORATE LAW*

The first issue of the English-language journal *ECCL – European Company Case Law*, which offers readers a comprehensive overview of company law and legislations in the EU, was published in 2023. The journal is published quarterly. The individuals around the journal and its editorial board, headed by Prof. Dr. Andrea Vicari of the Università degli Studi di Milano and Prof. Dr. Alexander Schall of the Leuphana Universität Lüneburg, organize a conference twice a year on a company law topic with a European dimension. The first conference was held on 19 May 2023 in Ljubljana on the topic of Corporate Governance and Information. The second conference took place on 3 November 2023 in Lisbon on the topic Dual Class Shares / Multiple Voting Rights in Light of the EU Listing Act.

The **third conference on CSDD, Sustainability and Corporate Law** took place on 31 May 2024 at Ghent University Law School.

Prof. Hans de Wulf from Ghent University opened the event and gave a very detailed presentation on the legal development of sustainability. He was followed by **Prof. Joti Roest** from the University of Amsterdam who gave a brief presentation on the development of the Corporate Sustainability Due Diligence Directive (CSDDD or CS3D). The Directive was approved by the Council on 24 May 2024 and will come into force on 25 April 2025.

Roest stressed that the compromise reached under the Belgian Presidency has resulted in a huge disappointment, as personal agrandissement has been considerably reduced. According to the original intention, the directive was to apply to companies with 500 employees and a turnover of EUR 150 million. According to the approved text, the directive will apply to companies with 1,000 employees and a turnover of EUR 450 million. Article 22 governing the civil liability of companies has been affected by a significant change. The originally proposed Article 25 governing directors duties was deleted. Prof. Roest concluded her presentation by stating that the CS3D is a major challenge for academics as it will not only become the subject of their research but also because the academics will have to figure out how to teach about sustainability in company law.

The morning session was opened by **Prof. Christopher M. Bruner** of the University of Georgia School of Law with a presentation on *Developments and debates on Corporate Sustainability in the US*.

He opened the issue by looking at the state corporate law approach. This fundamentally favours the interests of shareholders, which are reflected in the duty of directors to maximise the value of the firm. Only in the case of pension regulation, securities regulation, California regulation, foreign regulation are there regulatory forces impacts

to director's discretion related to ESG or sustainability. In relation to pension regulation, Prof. Bruner mentioned ERISA fiduciary rules (29 CFR s 2550.404a-1), which require directors to consider the impacts of climate change and other environmental, social or governance factors on the particular investments. This rule is being challenged by courts in Republican-led states. As for securities regulation, it is built on transparency of climate risks and impacts (Reales Nos 33-11275;34-99678). It is expected that if Trump wins this year's election, he will propose to repeal this so-called final SEC rule.

California sustainability initiatives in corporate regulation stand on supply chain transparency (SB 657, 2010), board diversity qoutas (SB 826, 2018; AB 979; 2020), climate-relative disclosure (SB 253 & SB 261, 2023), and venture capital diversity (SB 54, 2023). The second and third pieces of legislation have been challenged in court. The last is expected to be challenged.

In the area of human rights protection, Prof. Bruner mentioned the Tariff Act of 1930 s 307, under which the importation of goods into any foreign country by convict labour is prohibited. This law is followed by the Uyghur Forced Labor Prevention Act (UFLPA).

The final part of Bruner's contribution focused on future developments. Depending on political developments, we can expect to see a strengthening of the left in the area of trade law and a stronger emphasis on clean energy in the area of infrastructure regulation. In contrast, if the right is strengthened, trade law will emphasize protectionism in regulation protecting US business and infrastructure regulation will emphasize energy security, growth and jobs.

The second morning speaker was **Prof. Karsten Engsig Sørensen** of Aarhus University. The topic of his presentation was *The role of stakeholders in sustainability due diligence processes*. His paper focused on two main questions, namely why it is important for stakeholders to be involved in sustainability due diligence and what the difference between duties to consult and engage is. On the first question, he focused in particular on the interpretation of Article 13 in conjunction with Article 3(1)(n) CS3D. Article 3(1)(n) CS3D defines the scope of stakeholders and Article 13 CS3D the scope of their rights. The paper concludes with a discussion of what are the tools to enforce the duties to consult and engage. In his view, in view of the deletion of Article 25 CS3D, it cannot be concluded that this would be a ground for invalidating the decisions of the elected bodies of the company. On the other hand, he considers that the new rules will have an impact on directors' duties and liabilities.

The third speaker was **Prof. Deirdre Ahern** of Trinity College Dublin with a presentation on *The Corporate Sustainability Reporting Directive: Excavating Direct Impacts on Regulated Actors and Indirect Impacts on Value Chain Actors*. The CSRD impacts large companies excluding SMEs and publicly traded companies excluding micro-enterprises. It does not matter whether the parent companies are EU or non-EU. The contribution discussed in detail what factors are subject to environmental, social and governance reporting. It dealt in great detail with the interpretation of the new Article 19a CSRD, specifically both paragraph 1 containing the so-called dual materiality (impact on sustainability matters and impact these matters on undertaking) and

paragraph 2 defining the value chain. The paper concluded with a discussion of the tension between sustainability and competitiveness.

The last speaker of the morning was **Prof. Alain Pietrancosta** of University of Paris I Panthéon-Sorbonne. He gave a very detailed presentation on *Sustainability due diligence: insights and experiences from France ("Loi de vigilance")*. The French legislation was the forerunner of CS3D. The legislation in force for seven years obliges large companies (the legislation affects about 250 French companies) to identify and prevent adverse human rights and environmental impacts resulting from 1) their activities, 2) activities of their subsidiaries and 3) activities of their subcontractors and suppliers established business relationship. The law applies to joint-stock companies registered in France (SA, SCA, SE), but not to SARLs, of a certain size. Size is determined by the number of employees for two accounting periods. The size condition is met if the company employs more than 5,000 employees in France or 10,000 employees worldwide for two accounting periods. Exemption for companies controlled by a company already covered.

The basic obligation of companies is to develop, publish and implement vigilance plans. Plans must be developed in coordination with stakeholders. Anyone can sue that these obligations have not been met. Anyone can petition a court to order the company to comply and be in compliance (Prior Formal Notice) within 3 months. The exclusive jurisdiction of the Paris Civil Court is given. So far, 22 infringement proceedings have been initiated in relation to vigilance plans against 18 companies.

The special Civil penalties provisions, which the law originally contained, were removed by Constitutional Council on 23 March 2017.

Prof. Pietrancosta gave a very detailed account of the La Poste case. The unions blamed La Poste for unfavourable working conditions. The court concluded that the vigilance plan made it noncompliant in all areas but denied the plaintiff's request for an order requiring it to take the specific actions specified in the complaint. The court stated that it was not the court's role to decide the specific form of action to take in the company's place.

In conclusion, Prof. Pietrancosta mentioned that only two civil liability lawsuits have been filed so far under general civil law.

The first speaker of the afternoon session was **Prof. Eva-Maria Kieninger** of the Julius Maximilians Universität Würzburg. She gave a very detailed and engaging presentation on *Private enforcement of Human Rights Due Diligence from a German and PIL point of view*. Like the French Loi de Vigilance, the German legislation was a precursor to the CS3D. The German Supply Chain Due Diligence Act (*"Lieferkettensorgfaltspflichtengesetz"*; "LkSG") has come into force on 1 January 2023. Although, part of the doctrine suggests that the basis for civil liability can be found in this Act (special litigation status in § 11 LkSG), generally, this regulation does not directly regulate civil liability for breach of due diligence in the supply chain (see § 3/3 LkSG). Therefore, the general rules of civil (tort) liability must be followed (§ 823 of the German Civil Code). Prof. Kieninger stressed that the new specific liability rules in the Directive will thus place an additional burden on German companies.

The substantive provision establishing civil liability of the companies and the right to full compensation are contained in Article 29 CS3D. The speaker paid particular attention to the seventh paragraph of this Article. She expressed concern that the need to assess both the application of the rules transposed from the Directive and the national regulation of third countries (the overriding mandatory rules) would create an undesirable mix of European and third country tort law. At the same time there may be a conflict with Article 7 of the Rome II Regulation governing the choice of law.

The next presentation took us to another issue, namely the *Role of Institutional Investors in promoting ESG goals in Europe*. This topic was presented by **Prof. Giovanni Strampeli** of Bocconi University in Milan. Firstly, he pointed out that according to the European Commission, institutional investors and asset managers (whose shareholdings in large listed companies have been steadily increasing within the EU) should play a significant role in improving ESG performance in their target companies. To this end, they are subject to several obligations (particularly under the SHRD II) that strengthen their engagement in the performance (including non-financial, ESG performance) of target companies.

Prof. Strampeli highlighted that the institutional investors and asset managers will only be motivated to implement ESG engagement activities if they reasonably expect to enhance the economic value of the managed investments. Subsequently he calculated a number of economic disincentives, such as large diversification of stakes in their target companies (which limits the benefits of engagement) or low fees charged (which on the one hand increase the investor's competitiveness, but at the same time limit the amount of the costs associated with engagement activities). Nevertheless, he demonstrated that many institutional investors use and present their ESG engagement activities as a marketing tool to attract environmentally and socially sensitive clients (who are willing to voluntarily pay higher fees to cover such activities). Such engagement activities are usually general (no company-specific) and non-confrontational.

In conclusion, prof. Strampeli pointed out that the new obligations imposed on institutional investors by the SFDR, in particular exclusion from portfolios of companies with the worst ESG performance, may undermine the aim of above mentioned SHRD II regulation to promote portfolio companies' ESG performance.

The third speaker of the afternoon session was **Prof. Marleen van Uchelen** of University of Amsterdam with a presentation on *Social Enterprise and steward ownership*. She opened her speech with a basic definition of the purpose of social enterprise (in the spirit of the motto "do no harm, do good"). Although not typical, some social enterprises make use of stewardship structures. Such arrangements are purpose driven.

Within Europe, there is no harmonized definition or concept of a social enterprise. In some countries, the special legal form is established (the Community Interest Company in the UK) or the benefit status of the social enterprise is publicly recognized (such as "Société à Mission" in France or "Società Benefit" in Italy). Currently, special regulation is proposed in Germany and the Netherlands.

Prof. van Uchelen further described the current legislative steps in the Netherlands. Among other things, she explained how the certain statutory structure could facilitate steward ownership of the Dutch social enterprises. She explained so-called double

foundation model, where a purpose foundation holds the voting shares in a company and a charitable foundation holds the profit shares in the same company. In contrast, the single foundation model contains only one foundation who holds all shares in the company. And finally, the third model, so-called golden share model where a foundation holds shares with veto power (golden shares) and rest of the shares are distributed among small investors with limited economic rights. The Dutch legislator is thus now faced with the challenge of how to formulate effectively the regulation of the social enterprises and their structure, while at the same time not excluding variability in their organization.

The afternoon session, as well as the whole conference, ended with a passionate contribution by **Prof. Hans de Wulf** of the Ghent University on the topic of *Climate litigation against companies*. The main thrust of his presentation was criticism of the Hague court for its (first-instance) decision in the Shell case (Milieudefensie et al. v. Royal Dutch Shell plc.; now under appeal). This dispute was triggered by an NGO lawsuit based on the violence of the general Dutch tort law (particularly tort of negligence). However, the plaintiff did not pursue damages, but injunctions. Therefore, the court ordered Shell to reduce its emissions by 45% by 2030, relative to 2019, across all its activities. Prof. de Wulf argued that such a decision is not within the competence of the court, but of the executives (elected politicians), who are legitimized to take such political power decisions. Thus, the court's decision is contrary to the democratic separation of powers that divides roles between the legislative, executive and judicial power. Under the professor's opinion, the court created a new regulation (only for the defendant and not for all pollution contributors) and thus usurped a core political power in the effort to combat climate change.

The professor's second key argument against the Shell decision was that the general tort law (which was the basis for the lawsuit) generally contains no enforceable duty of care (e. g. to act carefully and vigilantly) without a fault. It is therefore questionable to what extent non-existent duty can be enforced through injunctions. The courts can only enforce the certain statutory obligation, so it is up to legislators to enact specific climate regulations. As he concluded, failure of politicians to act is no excuse to undermine constitutional democracy through the courts.

We believe that this ECCL conference was of great benefit to all participants and made a very significant contribution to deepening the current debate on sustainability issues.

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