Chapter 13
Regulating companies as if the world matters: reflections from the ongoing 'Sustainable Companies' project

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1. Introduction: a moral imperative for action

The company is one of the most ingenious inventions of our time (Rajan and Zingales 2003: 59 and 160). With limited liability for its investors, enabling capital to be (in theory) put to its most efficient use, the company has become the backbone of our economies. But must this all-important component of our market economies be equated with environmental degradation to the extent that we risk dangerous loss of biodiversity and passing the tipping point of climate change? In my opinion it must not. We need to find out how to make the necessary changes. We have a moral imperative for action.[1]

Climate change is a case in point for the necessity of working toward a sustainable development; toward the achievement of economic development and social justice within the non-negotiable ecological limits of our planet. Sustainable development – the balancing of economic development, environmental protection, and social justice – has famously been defined as a development that 'meets the needs of the present without compromising the ability of the future generations to meet their own needs' (United Nations 1987: 27; analysed: Sjåfjell 2009a; Voigt 2009). According to even the most conservative estimates of the Intergovernmental Panel on Climate Change (IPCC), business as usual will

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1. See Porritt (2007). The title of this chapter is inspired by and intended as a tribute to Jonathon Porritt's book.

most probably lead to climate change of a magnitude to which we cannot adapt, or to which we can adapt only at extremely high costs (IPCC 2007; Bernstein *et al*. 2007; United Nations 1987). Contrary to popular phraseology, dealing with climate change is not about saving the planet. The planet will take care of itself. The issue is whether we should preserve the very basis of our existence, of our societies as we know them today. As the Stern Review put it, climate change is 'the greatest and widest-ranging market failure ever seen,' posing 'a unique challenge for economics' (to which we may add: and also for law) (Stern 2006). Runaway climate change involves a high risk of severe environmental, social, and economic consequences. According to Adger *et al*. (2007: 7-22), 'the resilience of many ecosystems is likely to be exceeded this century by an unprecedented combination of climate change, associated disturbances (e.g., flooding, drought, wildfire, insects, ocean acidification), and other global change drivers (e.g., land-use change, pollution, over-exploitation of resources)'. In that context, the challenge of climate change needs to be dealt with on all those levels, both in terms of mitigating as much as possible, and adapting to that which cannot be avoided.

Climate change is not the only crisis we face. There is a convergence of crises: the financial crises; the loss of biodiversity threatening the stability of our ecosystems (Sarukhán *et al*. 2005; Benjamin 2010); the peaking of fossil energy sources (Roberts 2010); and the harsh brutality of tens of thousands of people dying every day for poverty-related reasons. In the aftermath of one financial crisis and the furious effort to try to avoid a new full-blown crisis, the attention of world leaders is on stimulating growth and getting back to business as usual. Although there has been some talk of a 'Global Green New Deal', of turning the financial crisis into an opportunity for necessary transition to a green economy (United Nations Environmental Programme 2008; Barbier 2009; United Nations Environmental Programme website), generally speaking, environmental concerns have a tendency to be placed on the backburner, along with concerns for the underprivileged of this world, when jobs are lost, revenues disappear, stock markets quiver, and the financial basis of developed countries appears to be in danger. In that context, Barbier observes, 'fossil fuel subsidies and other market distortions, as well as the lack of effective environmental pricing policies and regulations, will diminish the impacts of G20 green stimulus investments on long-term investment and job creation in green sectors. Without correcting existing market and policy distortions that underprice the use of natural resources, contribute to environmental degradation and worsen carbon dependency, public investments to stimulate clean energy and other green sectors in the economy will be short lived. The failure to implement and coordinate green stimulus measures across all G20 economies also limits their effectiveness in 'greening' the global economy. Finally, the G20 has devoted less effort to assisting developing economies that have faced worsening poverty and environmental degradation as a result of the global recession.' (Barbier 2010). Consequently, getting back on track with economic growth and business as usual is a postponement of the necessary focus on dealing with climate change and other overriding environmental concerns – a postponement that may turn out to be highly detrimental to our chances of achieving a sustainable global society: financially, socially, and environmentally.[2]

It is the poor people of this world who are already suffering the most, who are hit first by financial crises (United Nations 2010), and who will continue to be affected the most, in the short term, as a consequence of climate change and the global energy situation (Braun 2007: 12; Bernstein *et al.* 2007). But ultimately these crises affect us all. There are many indications that business as usual is the right choice only if we desire a very uncertain future for our children and grandchildren (United Nations 2010). Unfortunately, by the time enough decision-makers realise that business as usual is not a viable alternative, it may very well be too late (Metz *et al.* 2007). That gives rise to the question: What do we do?

2. The role of companies

What then is the role of companies in this bigger picture? Surely it is not companies, but policymakers and lawmakers, our parliaments and governments, who should do what is necessary to lead us into sustainable development. The responsibility of the state is incontestable (Sjåfjell 2010a). However, a part of that responsibility is considering the role that companies must play (Sjåfjell 2009a). The great significance of the function of companies within the global economy and the vast impact that the operations of companies today have, on an aggregated level, on society in general and on the biosphere and the atmosphere, means that a critical analysis of the purpose of companies and the regulatory frame-

2. Whether the current global uprising against the financial system can transmute into a call for sustainability in all three dimensions remains to be seen (see Stothard et al. 2011; Bond 2011).

work within which they operate is crucial to a deeper understanding of the correlation between society and sustainable development (ibid.). We cannot hope to achieve overarching societal goals without companies contributing to them. Companies are all-important components of our economies, with an enormous unrealised potential for mitigating climate change. As the IPCC has stated, there is potential to reduce greenhouse gas emissions with existing technology, but a number of barriers prevent this potential from being realised (Bernstein *et al.* 2007; Metz *et al.* 2007).

The supposed primacy of shareholders and of profit maximisation for shareholders is arguably one such barrier, and indeed prime among them (Sjåfjell 2009a: 82-91). Business acceptance of the nonprimacy of shareholder interests seems to be a necessary prerequisite for business to become sustainable, also in the environmental sense. As long as profit (maximisation) for shareholders is the overarching goal, any attempt at prioritising environmental concerns and prioritising climate change mitigation will quickly hit a ceiling (Sjåfjell 2011a). Certainly, profit in itself is good and necessary for the survival of our businesses providing workplaces, revenue, and in short, welfare. The search for profit is legitimate and necessary.[3] The problem arises when profit becomes the overarching objective to the detriment of other legitimate interests and societal goals. We need to find out how to change the framework within which profit is pursued, so that profit is pursued within the goal of sustainable development instead of the pursuit of profit being the main goal, with some good being done (or appearing to be done) in the name of corporate social responsibility.

3. The role of law

3.1 Beyond CSR and mainstream corporate governance: integration of environmental concerns

There are two dominant debates concerning companies: the corporate social responsibility (CSR) debate and the corporate governance debate (Sjåfjell 2009b: 981). CSR in a sustainable development perspective could be seen as dealing with and bringing together two interrelated is-

3. From the perspective of US law, see Dodge v Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

sues:[4] first, legal compliance and, second, the company's responsibility for going beyond such compliance, with the legal rules forming the floor and the voluntary part of CSR constituting a striving beyond that, in other words, a race to the top (Sjåfjell 2011a: 56-64). In that sense, CSR would encompass and form a bridge between hard law, soft law, and ethical obligations. But CSR does not do this. Business lobbyists have captured the CSR concept and ensured that the definition legislators subscribe to is that of CSR as a voluntary activity (Commission 2002: 5; Sjåfjell 2009c; for indication of a possible change see Commission 2011a). The business message may be said to be: 'Do not legislate us, and we are willing to talk about how we behave'. This is not meant to ignore that good is done in the name of CSR. And certainly the CSR movement has led to or been a part of a process where no self-respecting business leader will claim that her company disregards CSR. However, as I have argued elsewhere, defining CSR through delimitation against legal obligations is deceptive and detrimental to the development of a sustainably and socially responsible business and has contributed to giving CSR a bad name (Sjåfjell 2011).

Much of what companies claim as credit on their CSR accounts is involvement with issues unrelated to their businesses, for example the company operating the Norwegian Airport Express organising computer classes for former drug addicts or the utility company Norsk Hydro funding the Oslo Philharmonic Orchestra. Funding the orchestra gives no indication at all of how Norsk Hydro is run as a business, how it contributes to or works against the mitigation of climate change, how its employees are treated, or whether it cares about the workers hired by its subcontractors (Norsk Hydro website). Organising computer classes for the underprivileged or funding cultural activities is not CSR in the true sense, rather, it is corporate charity work.[5]

The mainstream corporate governance debate concentrates on a small segment of the reality in which companies operate (Sjåfjell 2009a: 37-

4. This could involve, for example, the inclusion in CSR debates of the three dimensions of sustainable development: environmental protection, social justice, and economic development, otherwise known simply as 'planet, people and profit' (Lambooy 2010: 10).
5. It could be argued, of course, that corporate charity work (CCW) is a part of an extended concept of CSR, but we should distinguish between CSR in the wide sense, including CCW, and the core of true CSR; for further explanation, see Sjåfjell (2011a). For different definitions of CSR, see generally Carroll and Shabana (2010).

44). This debate focuses on investors, first and foremost shareholders, and their relationship with the board of the company and, by extension, its management. The corporate governance debate has spawned a number of corporate governance codes (European Corporate Governance Institute website; Thomsen 2006) and legislative measures, such as the EU Directive on shareholder rights.[6] Heavily influenced by the dominant legal-economic theory of agency, the focus is on how to find the right incentives to make the board act as agents for the shareholders as principals with profit maximisation as the overarching goal (Sjåfjell 2009a: 82-91; 2010b; Greenfield 1997).[7]

Together with the capture of CSR as a voluntary affair for business, the narrow focus typical of the mainstream corporate governance debate promotes the shareholder primacy drive and the misconception that the company is and should be a vehicle for profit maximisation for shareholders only and that it is sufficient for companies to contribute to overarching societal goals (Berle 1931). A true integration of environmental concerns is required. The law, therefore, is necessary to ensure the contribution of companies, to level the playing field for companies that wish to actively contribute to the mitigation of climate change and of threats to biodiversity, and to ensure that their contributions are not limited by the competitive advantage that today's system tends to give irresponsible and short-sighted companies.

3.2 The limited effectiveness of environmental law

Having established that the law is necessary, this poses the question: What area of law? Environmental law and other forms of external regulation[8] are important, but the limits of external regulation are well documented and consist of a number of interlinked issues, briefly sketched here.

6. Directive 2007/36/EC of the European Parliament and of the Council on the exercise of certain rights of shareholders in listed companies, OJ L 184, 14.7.2007, p. 17.
7. However, indications on EU level may now be found that these alleged truths are questioned and that the problems with a too short-term perspective that the shareholder primacy drive entails are acknowledged (Commission 2011b).
8. As opposed to the internal regulation of the competence, duties, and decision making in companies through company law.

First, external regulation is limited by the extraterritoriality issue or the issue of home state and host state. For example, while European companies may be under relatively strict environmental regulation in their home state, the jurisdictional scope of home state regulation does not typically cover the company's business in other countries (Anderson 2002: 409). The host state may have lax regulation or lacking enforcement. Developing countries, needing jobs and revenue, may be fearful of making demands on companies from developed countries (Dine 2005). Second, there is a regulatory lacuna at an international level. The stalled proposal for UN norms governing transnational companies (United Nations 2003) is indicative of that gap (Deva 2004; Hillemans 2003). Third, the legislatures cannot keep up with everything companies do or plan to do and the environmental consequences of their actions.[9] Fourth, there is the danger of loopholes, boilerplate formulas or other measures through which companies comply or seem to comply with the law at as low a cost as possible. This is the problem with reporting (Sjåfjell 2011a).

Finally, and perhaps most importantly, sustainable development is about going further than the antipollution approach that often characterises environmental law and other external regulation. Sustainable development is a way of thinking. To get decision-makers in companies to think in a certain manner an internal company perspective is required. In my opinion, this involves a company law perspective, not as an exclusive perspective, but as a necessary contribution.

3.3 The role of core company law

This chapter makes the argument that company law is a necessary tool for achieving sustainable companies, both to make the external regulation of companies more effective and to realise the potential within each company to make its own independent, creative, and active contribution to the mitigation of climate change. Let us take the mainstream corporate governance debate as a starting point. If the focus of the board, and by extension, the management, is to be primarily ensuring profit

9. Goyder (1987: 36) gives the example of the countryside of Northamptonshire, England, being dug up in search of iron ore. 'It was some years before the government passed legislation imposing on companies the legal duty of reinstating fields and woods devastated by open-cast mining, and by then it was too late to recover much of the amenity value lost.'

for shareholders and keeping the share price high, and the whole system encourages shareholders to focus on their profits, who then is to be responsible for the company's action beyond its narrow obligation to comply with the law? In my opinion, this should be the responsibility of the board. But the board is under pressure from the shareholder primacy drive to focus on the short term rather than the long term and to disregard externalities that the company is not required by law to internalise (or which it can get away with ignoring).

In many jurisdictions, company law is seen as regulating the purpose of the company through its regulation of the relationship between the shareholders, the board, and management. Company law is thereby seen as supporting the shareholder primacy drive, although that view arguably is more a social norm than a legal one.[10] Combating the negative effects of the shareholder primacy drive therefore, in my opinion, entails redefining the purpose of the company and the role and the purpose of the board.[11] I believe redefining should be done in a principle-based manner, but it should be done in law, through the use of legal standards, instead of attempting to do this (only) through more or less voluntary codes and so on. The law needs to create a floor beneath which no company can go, thereby promoting a race to the top with each company contributing in its own individual, creative way.

4. The research project 'Sustainable Companies'

4.1 Internalising environmental externalities

The international team of the Oslo-based research project 'Sustainable Companies'[12] is dedicated to finding out how to move from the idea of internalising externalities (Sjåfjell 2009b: 1003-4) to a research-based proposal. Our vision is to contribute to the tools that make companies become part of the solution. The hypothesis underlying the project is that environmental sustainability in the operation of companies cannot

10. See below section 4.3.
11. See below section 4.4.
12. For more information about this project, which is financed by the Research Council of Norway and has a dedicated team of thirty-five scholars from many regions of the world, see 'Sustainable Companies' (http://www.jus.uio.no/ifp/english/research/projects/sustainable-companies/).

be effectively achieved unless the objective is properly integrated into company law and thereby into the internal workings of the company. To test this hypothesis and to prepare the ground for well-founded proposals for reform at the end of the project period, an important first stage in the 'Sustainable Companies' project has been to map the barriers to and possibilities for the promotion of sustainable business in the hitherto often ignored area of company law (Richardson 2011). Team members in our project, from a wide range of jurisdictions including countries in Europe, the Americas, Africa, and Asia, have written country reports concerning the same set of questions with the main focus on core company law issues but also covering accounting/reporting and auditing/assurance, as well as the – in practice very important but in company law not adequately addressed – area of groups.[13] These country reports have formed the basis for the ongoing work with three cross-jurisdictional papers identifying the barriers to and possibilities for sustainable companies in the same three important areas: first, core company law; second, accounting/auditing rules; and third, the regulation of company groups.[14] In this chapter, a first tentative suggestion of the results of this mapping and what it entails for possible reforms is given.[15] For reasons that will be made clear below, the focus is on core company law.

4.2 Tentative results: possibilities and critique

On the face of it, we see tentative glimmers of hope and possibilities for the promotion of companies in the increasing focus on CSR and the ethical obligations of a company to consider the environmental and societal impacts of its business (illustrated by the emphasis placed on these issues by those selling sustainability services to business (PwC website)). An analysis of the results of the mapping indicates that the two debates

13. The tentative analysis below is based on draft mapping papers. Direct references to the draft mapping papers are generally not made in this chapter. The final versions will be made available in 2012/2013 on the 'Sustainable Companies' publications page. The jurisdiction-specific papers published in the 'Sustainable Companies' project referred to below are initial discussions of some of the issues that are analysed over a broader scale in the mapping papers.
14. All three draft papers were presented at the international conference *Towards Sustainable Companies: Identifying New Avenues in Oslo* on 29-30 August 2011.
15. Again, the tentative summary of the results and what they entail for possible future reform is my own personal view, not necessarily representative of the view of the whole project team or of my co-authors for the cross-jurisdictional paper in core company law.

of CSR and mainstream corporate governance are reflected. On the one hand, there is more shareholder focus, also in continental European and Nordic countries originally having a wider perspective (for Norway see Sjåfjell 2011b). On the other hand, there is more focus on the wider corporate responsibility also in shareholder primacy strongholds such as the United Kingdom, with its enlightened shareholder value (Villiers 2011). Exceptionally, the consideration of the environment is directly included in legal requirements of the duties of the board, as in the UK Companies Act 2006, while in jurisdictions like Germany we even see an increased emphasis in company law on a pluralistic view of the interests of the company (Deipenbrock 2011). In countries that have had to rebuild their societies after communism, or as in South Africa after apartheid, we see tendencies to new approaches based on a broader understanding of the societal significance of companies (Croucher and Miles 2010). Certainly company law in many jurisdictions allows the inclusion of environmental concerns and also the prioritisation of environmental protection over short-term profit, and we find legal sources that substantiate that from a legislative perspective. Companies are expected to contribute toward societal goals wider than that of shareholder profit maximisation (Sjåfjell 2011b).

These two partly conflicting trends seem to lead to reporting being seen as the solution, as a compromise satisfying both groups, especially in the form it takes in most countries, where the extent to which companies internalise environmental (and other) externalities is voluntary, while the reporting itself is not, an approach that may be seen as underpinned through theories of reflexive law (Buhmann 2011a). We see this in EU law and it is taken further in Norway (Sjåfjell 2011a) and Denmark (Buhmann 2011b). We see the same tendency in some corporate governance codes, notably in the Netherlands (Lambooy 2010: 107-46). There are some court cases that arguably indicate a new approach, inter alia, in cases concerning the piercing of the corporate veil (Sjåfjell 2010c).

There are also some business initiatives, in Germany and in Ireland for example, that seem to be working to contribute toward sustainable development (for Germany, see Deipenbrock 2011). There are some institutional investors, some pension funds, which are on their way toward what may become truly socially responsible investment (Halvorssen

16. The two debates are introduced above in section 3.1.

2011; Richardson 2008). And we see a very slowly growing tendency in public opinion to require more from companies (Ralph 2011).

However, the positive tendencies are not sufficient, neither in their current scope nor in their capacity to develop, it is too little and most likely going to be too late. Even more seriously, there is a two-pronged danger which results from preferring CSR talk and reporting as a (perceived) solution. The first danger concerns reporting. When the core duty is not in place, when the decision makers in companies are not required to integrate environmental concerns into the decisions on how the core business of the company is to be run, and when there is no hard law stating that companies must be run in a socially responsible manner, we risk that environmental reporting is neither relevant nor reliable (Berthelot *et al.* 2003). There are even studies that indicate 'a negative relation, i.e., the more a firm discloses, the worse its environmental performance' (ibid.: 20). The uglier the company, the more makeup it uses. Similar problems are reported concerning the disclosure of social issues (Laufer 2003: 255-7). The second danger is inherent in much of the CSR talk. Corporate charity work is often used instead of true CSR, leading to greenwashing and deflecting our attention from how the core business of the company is actually run (Sjåfjell 2011a). Further, all the CSR talk creates a danger of the wool being pulled over our eyes, making us believe that enough is being done. This is the danger with the company law reforms that are perceived by some as positive, notably the codification of 'enlightened' shareholder value in the UK Companies Act (Deva 2011). If this is seen as a step forward, it may serve to take the pressure off the legislature to undertake proper reform, due to the misconception that progress has been made in terms of internalising externalities in business decision making, when the truth seems to be that nothing has changed at all, at least not for the better. In the United Kingdom, as in most of the rest of the world, we are still seeing business as usual, or, more accurately, with the current financial unrest following the financial crisis of 2008, desperate attempts to keep business going as usual (Wolf 2011). But business as usual is not and cannot be an alternative for humanity desiring to ensure viable ecosystems for future generations.[17]

17. In his Opinion in Case C-176/03 Commission v Council [2005] ECR I-7879, Advocate General Ruiz-Jarabo Colomer cites in footnote 51 Demetrio Loperena Rota who states that 'an acceptable environment is not the product of social development, but a prerequisite for it to exist, and is a right bound up with human life, without which there is neither mankind nor society nor law' (Loperena Rota 1999).

4.3 Tentative results: the main barrier

The role of the board is central to the way companies are run and thereby to the contribution of companies to the mitigation of climate change and the mitigation of the destruction of biodiversity. Inspired by the ideas of agency theory, directors of the board are increasingly seen as agents for the shareholders as principals, with profit maximisation as the goal (Sjåfjell 2009a). The tentative results of our cross-jurisdictional analysis indicate that shareholder primacy and the perceived overarching goal of maximizing shareholder profit present the most important barriers to the contribution of companies to environmental sustainability. Indeed, all tentative possibilities, all glimmerings of hope, are negated through the dominance of shareholder primacy and the short-term shareholder profit maximisation drive.

This gives rise to the question: How can shareholder primacy be perceived as a main barrier in an analysis of company law, when shareholder primacy arguably is more of a social norm than a legal one? (Deakin 2005). There is a clear link, however, between this social norm and company law, because the social norm has developed within the framework of the law, as a result of what the law does and does not regulate (ibid.: 13-14). In my opinion, understanding this relationship may be a significant step towards understanding how we can achieve change, and it certainly is also indicative of the possibility that lies in company law as it is today.

How has company law allowed this myth of shareholder primacy and profit maximisation as a mandatory requirement to develop? To understand that, it may be useful to return to the starting point of this chapter, namely that the company is one of the most ingenious inventions of our time. We mostly take it for granted today, but the company with limited liability for its shareholders is a relatively recent innovation, and much younger than the enforceable contract, that perhaps was the most innovative contribution of Roman law (Watson 1984). Contracts and private property rights are necessary prerequisites for business as we know it and have much deeper historical roots as such (Mickelthwait and Wooldridge 2003: 4). The idea of the company with limited liability, where people can invest their money in a business venture and expect a cut of future profits if successful and not lose more than their investment if unsuccessful, is relatively speaking the newcomer in the world of business. From one perspective, this was arguably not new; banks lend money to business projects along the same principles (Lau Hansen 2003: 34-36). The major difference is, however, that banks are protected through contract, while shareholders are not (ibid.: 31-36). Nor can shareholders be described as owners, in any full, traditional sense of the word ownership (Sjåfjell 2009a: 32-33 and 80-81).

History saw the rise of this innovative way of financing companies, putting capital to its purportedly most efficient use, but for that to work on a grand scale, investors needed some kind of protection. Naturally, therefore, company legislation setting up rules for companies with limited liability for their shareholders emphasises regulation of the relationship between the shareholders, on the one hand, and the company, through its board and management, on the other. This is not to say that no other interests involved in or affected by companies are dealt with in company legislation, most of these statutes have some rules on creditor protection.[18] The rights of creditors are, however, mainly regulated through other areas of law, with historical roots far surpassing those of companies with limited liability.

The focus on shareholders in company legislation has in many jurisdictions led to company law being perceived as regulating the purpose of the company through its regulation of the relationship between shareholders and the company. For example, Nordic legislation typically states that companies that do not have profit for the benefit of shareholders as a purpose should regulate in their articles of association how the profit of the company is to be distributed.[19] This is misconstrued, in my opinion, as setting out the purpose of the company understood as the company's only or main purpose. Understood historically, company legislation sets out the typical purpose that shareholders have with their relationship with companies in which they have shares, and serves

18. Some, such as the Norwegian Companies Acts, also include rules on the involvement of employees in the decision making of companies, while the most central rules concerning the protection of employees are set out in a separate act, the Working Environment Act. Norway has two acts on limited liability companies: the Public Limited Liability Companies Act 13 June 1997 No 45 and the Private Limited Liability Companies Act 13 June 1997 No 46. For an English translation see Norwegian Institute of Public Accountants (2012). The Working Environment Act 17 June 2005 No 62 is freely available in an English translation at http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156.
19. See Norwegian Public Limited Liability Companies Act § 2-2(2): 'If the objective of the company's activities is not to generate a financial return for its shareholders, the articles of association must contain provisions on the allocation of profit and the distribution of assets upon dissolution of the company.' (author's translation).

as a protection of that purpose in the sense that if companies do not intend to distribute dividends to shareholders at all, then potential investors should be forewarned in the articles of association. What the Nordic company legislation does not mention, and nor does company legislation, generally speaking, expressly regulate this point, is what the purpose of the company on an aggregate level is, and what the guidelines are according to which the company is to be run. The interlinked concepts of the purpose of the company and the interests of the company are therefore topics for debate in academic contributions, while in more pragmatic, practitioner-oriented literature the inference is simply drawn that shareholder focus in company legislation translates into a prioritisation of shareholder interest by the legislature. The historically explicable fact of the focus on the relationship between the shareholders and the company organs in company legislation, and the lack of express regulation of the purpose of the company and the interests of the company, has therefore led to the development within this vacuum of an idea of shareholder primacy.[20] This is not to say that shareholder primacy cannot be shown to have legal support in any jurisdiction. However, the dominance of the Anglo-American law-and-economics[21] inspired shareholder primacy[22] does seem to go far beyond anything that can be substantiated in a comparative analysis of company law.[23] Certainly the narrow, short-term perspective that the shareholder primacy drive has led to is contrary to company legislation anywhere, and detrimental to the societal goals to which the regulation of companies is meant to contribute (Sjåfjell 2009a: 90-91).

The vacuum in the company legislation of many jurisdictions and the resulting development of the shareholder primacy drive, with its detrimental effects, has led to the extraordinary state of affairs of the Reflection Group on the Future of EU Company Law suggesting that

20. The development and rise of shareholder primacy has other explanations as well, but in a legal analysis this is a main point. For a broader discussion, see Keay (2011).
21. The positive contributions of law and economics to our understanding of company law and the consequences of various forms of regulation are, in my opinion, indisputable. However, so are the negative effects of the abuse of legal-economic theories meant to be descriptive as normative, and of the abundance of postulates based on concepts and ideas removed from the theories in which they originated and disconnected from the assumptions on which they are based (Sjåfell 2011a).
22. To the extent that the end of history at one point was declared, see generally Hansmann and Kraakman (2000).
23. This holds true even in jurisdictions, such as the UK, where the prioritisation of shareholders over other interests may be said to have a legal basis (Deakin 2005: 11).

companies should be allowed to include in their articles of association that boards are allowed to promote the interests of the company and to employ a long-term perspective (Reflection Group 2011: 37-8). The Reflection Group thereby proposes to codify an acceptance of what, from any proper, in-depth company law analysis seems to be the state of law today, namely that shareholder profit maximisation and shareholder primacy are not the only, nor should they be the dominant, guidelines in the narrow, short-term sense that we see today and which may be seen as contributing to the convergence of crises that we face. The perverse effect of that well-intended proposal may unfortunately be that it is used as an argument to say that narrow, short-term shareholder primacy is the norm under European company law. Why, otherwise, would the Reflection Group suggest that the opposite should be expressly allowed?

4.4 The way forward: tentative reflections

We see that what is perhaps the main barrier to sustainable companies has been allowed to flourish because of what the law regulates and what it does not. This also indicates a way forward. If a key problem is the lack of regulation of what the purpose of companies and the interests of companies are, then a clarifying regulation of those issues will not simply be an additional layer of detailed regulation that entails only more expenses and aggravation for companies, but will set a key issue straight in a principle-based manner that could be the start of a shift in a sustainable direction (Sjåfjell 2011b). However, as we are so far off track from sustainable development, with a dramatic shift needed to achieve the presumed safe harbour of no more than two degrees Celsius warming, in itself a prospect with many negative effects, we probably need to go beyond stipulating long-term, inclusive concepts of the purpose of the company and the interests of the company. In my opinion, what urgently needs to be done is to clarify that the company, on an aggregate level, may and should have profit as a core of its purpose (Sjåfjell 2009a: 103-110) – business cannot survive in the long run without making profit – but this should be sought within the overarching societal purpose of sustainable development. This would turn inside out the purpose of the company that shareholder primacy drive today promotes, where profit is the overarching purpose and perhaps some good may be done in the name of CSR.

Because shareholder primacy in the narrow, short-term sense has been allowed to develop for so long, we will also need to consider incentives to support a shift towards sustainable development, and removing disincentives for sustainability that encourage the myth of shareholders as owners and shareholder profit maximisation as the dominant guideline. The concept of the interests of the company as a guideline should be developed accordingly, and as I have suggested elsewhere, be teamed together with a concept of sustainable development as an overarching guideline (Sjåfjell 2009a: 103-110; 2009b: 987 and 1003-6).

A tentative conclusion from my point of view is that legal reform seems to be necessary not only to support the possibilities that company law today actually gives sustainable business, but to codify these possibilities expressly, preferably as mandatory guidelines, so that the competitive advantage is given to companies that wish to contribute to sustainable development and taken away from those that do not. Legal reform seems to be necessary to start the difficult process of removing the barriers created mainly through social norms that have been allowed to develop in the vacuum caused by the lack of definition of the purpose of companies and of the interests of the company in company law.

Only once these issues are clarified as a matter of company law do we have a good basis for discussing incentives and sanctions, such as liability, and necessary supportive measures such as accounting and reporting, taken seriously, and not as marketing and greenwashing and wool-over-the-eyes pulling as we have today.

Reforming core company law seems in short to present itself as a necessary prerequisite to achieving sustainable companies, both to make the external regulation of companies more effective and to realise the potential within each company to make its own independent, creative, and active contribution to the mitigation of climate change.

5. The proposals of the 'Sustainable Companies' project

The 'Sustainable Companies' project seeks in the final phase of the project during 2013 to identify necessary measures to dismantle the barriers preventing business from becoming sustainable and legal mechanisms and incentives to propose which will promote truly responsible business.

For the European part of the project,[24] EU law, the common framework for thirty European countries, contains the legal basis for making necessary changes to achieve sustainable business (and sustainable development in general) (Sjåfjell 2009a: 2012). However, the necessary steps have not been taken (Dhondt 2003: 482). This lack of movement may be seen as indicative of a general problem. We may presume, in general, that legislators have sufficient knowledge – and at the EU level they have not only knowledge and a sufficient legal basis to move forward, but also legal obligations – to take action to achieve the goal of sustainable development (Sjåfjell 2012). Legislators nevertheless often seem to be powerless to move beyond path-dependent ways of dealing with the pervasive issues of our time. Legislative work tends to be reactive rather than proactive, based on postulates and superficial discussions, with a striking lack of time and energy devoted to in-depth analysis of the underlying issues and the consequences of existing and proposed new legislation (Sjåfjell 2009a: 293-463). The 'Sustainable Companies' project therefore aims to conclude its work with research-based concrete proposals for any necessary change on the EU level, as well as jurisdiction-specific proposals for a number of the countries represented in the project team. These may take the form of proposals for legal reform within and beyond company law as well as proposals for guidelines for companies wishing to become true contributors to sustainable development.

6. Conclusion: global challenges call for global debate

The challenges we face are global by nature. Global challenges ideally require a global approach and an unprecedented holistic and forward-looking approach (Stern 2006). The international climate negotiations in Copenhagen, Cancun and Durban have shown that we cannot depend on governments agreeing to the necessary measures to mitigate climate change as far as still possible. And even if the international community against all odds were to reach an agreement on a sufficient reduction in greenhouse gas emissions (the IPCC recommends these should peak in 2015), regulators around the world would be in dire need for effective proposals how to achieve those goals. And to reiterate: climate change is but one case in point for the necessity of a shift toward sustainable development (for others see Sarukhán *et al.* 2005: 2; Benjamin 2010).

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24. Europe was the starting point for the project, but the project happily has developed into an international research endeavour.

The ‘Sustainable Companies’ research project, with its international team of scholars, hopes to contribute one of the many necessary jigsaw puzzle pieces of sustainability. The work done by the ETUI represents another. Let us hope that there will be enough pieces in time to make the picture complete.

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