

Article

The Sustainable Corporate Objective: Rethinking Directors' Duties

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Received: 30 September 2019; Accepted: 11 November 2019; Published: 27 November 2019



Abstract: Traditionally, the purpose of directors' duties within company law is to ensure that the powers of management given to directors are properly exercised. For instance, instead of using their managerial powers to further their personal interests or for some collateral purpose, directors are under a duty to take decisions which they think will further the company's interests. In most EU jurisdictions, determining what acting in the company's interest means is not mandated by law, but is rather left to the subjective business judgement of directors. The discretion allowed by this duty has allowed for, influenced in part by a law and economics approach to company law, the shareholder value norm to become entrenched. This paper argues that the law of directors' duties should evolve to provide specific guidelines to directors on the question of the corporate objective. It supports existing arguments for a reform of EU company law to include a new duty requiring directors to ensure sustainable value creation. The paper argues that any such duty should be framed objectively and be enforced through public mechanisms rather than a reliance on private actors.

Keywords: corporate sustainability; planetary boundaries; shareholder primacy; directors' duties

1. Introduction

The traditional reason for the law's facilitation of the company is due to the economic benefits it provides. The company's status as a legal person makes it significantly easier to raise and efficiently manage capital, primarily by mitigating the risks associated with investment. In Posner's view, the company is an institutional response to people's inherent risk aversion which serves to encourage investment by lowering risk [1]. The risk reduction facilitated by the company occurs in two main ways. The first is that shareholders enjoy limited liability, which means that their potential losses are capped at the amount of capital voluntarily advanced by them to the company. The second is the delegation of management to a board of directors which allows shareholders to economise on the costs of decision making by limiting their involvement to the most fundamental of decisions [2]. Crucially, the delegation of management to a board allows investors to invest across multiple companies free from the burden of being involved in the company's everyday activities. This, in turn, facilitates investment across multiple companies in multiple jurisdictions, lowering the overall risk for investors and increasing overall investment in the economy.

However, the delegation of management creates the difficult problem of ensuring that the delegated powers are properly exercised. The legal response was to impose a series of duties upon directors. These duties, developed at common law by close analogy to the duties imposed on trustees, required directors to subordinate the pursuit of their own personal goals in favour of furthering the company's interests. Directors, as with all those who stand in a fiduciary position, have thus been required to avoid conflicts of interest, to abjure secret profits and to exercise their powers for a proper purpose. Those duties requiring loyalty were accompanied by a duty of care aimed at ensuring that the company could be compensated for damage suffered by it as a result of the negligence of its directors. An important duty, in both common and civil law jurisdictions, is the duty to act in the interests of the

company. This duty usually takes the form of a requirement that directors take decisions which they think will further the company's interests.

Given that the original purpose of directors' duties was to ensure delegated powers of management were not misused, it is unsurprising that once directors do not act negligently or for their own personal gain they are afforded a wide discretion by law in managing the company and deciding its objectives. Some jurisdictions do provide directors with specific guidance on the corporate objective. For example, the UK's "enlightened shareholder value" requires directors to "promote the success of the company for the benefit of the shareholders as a whole", while they must have regard to other, more pluralist interests, such as the local community, employees and the environment. However, in most European jurisdictions, directors are given no guidance on the corporate objective and deciding what it means to act in the company's interest is left entirely to the subjective business judgement of directors [3].

The wide discretion afforded by directors' duties has left a vacuum which for many years has been filled by a "social norm of shareholder primacy" [3]. Shareholder primacy is described as a norm because its basis lies in behaviour and corporate culture rather than in law and is distinct from a legal system that expressly prioritises shareholders (as is the case in the UK). In part, the shareholder primacy norm has become accepted due to a law and economics approach to company law. This approach has resulted in numerous scholars [4–7], taking the view that the best interests of the company equates with the best interests of shareholders. Given that the primary function of the company is to serve as a vehicle for encouraging investment, it is easy to see why people take the view that the company should also be a vehicle for promoting the interests of those investors. However, this interpretation is a misunderstanding of the basis for the law's facilitation of the company. The traditional justification for the company, and the numerous advantages conferred on it by law, lies in its ability to promote the interests of society as a whole, chiefly by promoting economic investment. The legal requirement that directors promote the interests of the company, rather than shareholders, firstly reflects the company's status as a legal person but is also the legal mechanism aimed at achieving this societal purpose of companies.

In the past, it has been possible to build a plausible argument that the best way to promote this societal purpose of companies was to prioritise the interests of shareholders. By prioritising the interests of shareholders, directors had a relatively simple solution to the complex question of the corporate objective, allowing them to efficiently manage the company making financial success more likely thereby creating the potential to benefit other company constituents. However, even if shareholder primacy was the best way to promote economic interests, which is a doubtful claim, today, promoting the interests of society as a whole must include a consideration of factors other than the economic. While the economic benefits provided by the company should always remain a central concern, company law must adapt to the evolution that the company has undergone and reflect its role in modern society. Companies, particularly large public companies, wield significant political, social and economic power [8]. They are playing a central part in numerous crises faced by global society such as environmental emergencies, the recent financial crises and ongoing supply chain and human rights abuses. Company law can no longer be dominated by a narrow focus on law and economics and the law of directors' duties, as the primary set of laws governing company managers, should also expand to address these issues. This is not a new proposition, yet despite various attempts to move away from the shareholder primacy norm, competing norms such as corporate social responsibility appear unable to replace it.

When the shareholder primacy norm is deeply embedded as the foundation of managerial decision making, it can even serve to undermine laws with alternative priorities. For example, much of the analysis on the Non-Financial Reporting Directive has concluded that while the directive's goals and purposes are laudable, it can easily become an exercise in boiler-plate reporting or green washing without a change in norms or stricter mandatory reporting standards [9]. Another example is Volkswagen's apparently wilful disregard of German regulations on car emissions. Examples such as these have led Sjøfjell to describe the entrenchment of the shareholder primacy norm as the primary

roadblock for the prioritisation of sustainable value creation [10]. On this basis, it is worth examining the law of directors' duties and examine whether therein lies the potential to affect a movement away from shareholder primacy. What makes the law of directors' duties different from methods such as the Non-Financial Reporting Directive and specific environmental regulations is that it strikes at the foundation of managerial decision making.

This paper argues that the law of directors' duties should evolve to provide directors with guidance on the question of the corporate objective. This view is not original; in fact, the UK's statutory enactment of "enlightened shareholder value" was an attempt to provide directors with guidance on the corporate objective. However, this attempt has been widely criticised, primarily for its prioritisation of shareholder interests which is widely regarded to be a misrepresentation of the pre-existing English common law position [11]. This paper supports a recasting of directors' duties as advocated by Sjøfjell and Munoz-Torres, who call for a reform of EU company law to include a new duty requiring directors to ensure sustainable value creation [12]. While such a duty is unlikely to be introduced at the national level, there are numerous reasons to think that such a reform is possible at EU level. First, the EU has demonstrated an increased commitment to sustainability in the context of company law reform. The most obvious example is the Non-Financial Reporting Directive, the express purpose of which was to manage "change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection" [13]. Additionally, the EU's Sustainable Finance Initiative has opened a discussion, for the first time at the EU level, of the integration of sustainability into the duties of the corporate board [14]. Furthermore, the strongest opponent of any significant reform of company law on sustainability principles was likely to be the UK. In the past, efforts on reform of company law have failed in part due to strong resistance from the UK. For example, the UK strongly resisted the Fifth Directive on Company Law which attempted to harmonise management structures across the EU [14]. Brexit could make reforms on EU company law more likely.

The focus of this paper is on how a new duty focused on ensuring sustainable value creation could be framed and enforced. Ultimately, legal strategies are only relevant to the extent that they induce compliance [2]. In that context, this paper criticises the historical approach of measuring directors' decision making by completely subjective standards and argues that any new duty should be framed in objective terms. Secondly, the paper criticises the reliance on private actors in the enforcement of directors' duties generally and argues for a scheme of public corporate law enforcement. The aim is not to dramatically increase the number of actions against directors, which could induce a chilling effect and be detrimental to effective decision making damaging the economic benefits that the company provides. Rather, the aim of such reform is to reimagine directors' duties as a guide for directors to the corporate objective, with that objective being long term sustainable value creation. This can only be achieved if a new duty carries with an appropriate legal standard with at least some potential for enforcement. As Parkinson has noted, in order for duty-based controls to be effective there must be at least a realistic chance of enforcing those duties [15]. The paper argues that an objective standard, coupled with a mechanism of public enforcement, creates this realistic chance of enforcement, thereby making it more likely to alter the norms of managerial behaviour away from shareholder primacy toward sustainable value creation.

2. The Case for a New Duty

Under shareholder value or shareholder primacy, the ultimate objective of the company is the maximisation of shareholder wealth; other interests are to be considered only to the extent that they assist in achieving this primary goal [16]. As stated above, most jurisdictions do not legally require this approach and there is support for the view that prior to the 2006 legislative reform, the English common law did not require this approach either [17]. As Deakin noted in 2005, "it is surprisingly difficult to find support within company law for the notion of shareholder primacy" [18]. However, despite this legal reality, academic support for a shareholder focused interpretation of company law was strong throughout the 1970s, 1980s and became particularly prevalent in the 1990s [4–7]. The view

culminated in 2001, with Hansmann and Kraakman concluding that there was “no longer any serious competitor to the view that company law should principally strive to increase long term shareholder value” [19]. However, their prophesied “end of history for corporate law” has not come to pass and alternate interpretations of the principal purpose of company law continue to be developed. It is worth briefly considering how, despite the discretionary scope given to directors by law, shareholder primacy became the accepted interpretation of company law.

The emergence of this line of thought can be traced to Berle in 1930, who was primarily concerned with the lack of accountability for directors. He asserted that because the power to manage the company had been delegated from shareholders to directors, those directors should be accountable to shareholders and prioritise their interests. He stated that all powers granted to the management of a company were “at all times exercisable only for the ratable benefit of all the shareholders” [20]. While it is true that ultimate authority to organise company affairs lies with the shareholders and that they delegate powers of management of the company to directors, the creation of a company involves the creation of a legal person with its own rights (for example, property rights and the right to litigate) liabilities and interests, separate and distinct from its shareholders. The legal requirement that directors must act in the interests of the company, rather than the shareholders, reflects this status of the company as a legal person. There is no legal basis for the proposition that the interests of that legal person always equate with the interests of the shareholders. To argue otherwise requires treating legal personality as fact when convenient for shareholders (e.g., limited liability) and denying this status in another context (directors’ duties). As Dodd stated in his rebuttal to Berle, the law treats the company “as an institution directed by persons who are primarily fiduciaries for the institution rather than for its members” [21]. The reason is because of the company’s status as a separate legal person and because acting the company’s interests is the law’s chosen way to express the societal function of the company.

Perhaps the most influential argument leading to the entrenchment of shareholder primacy is that it is the most economically beneficial way to operate a company [22]. By providing directors with a clear objective, shareholder primacy allows directors to act in a way which facilitates companies generating wealth which, while benefiting shareholders, can also meet several other social objectives. Financially successful companies can provide increased employment, more competitive markets, increased tax and providing desired goods and services. As O’ Sullivan argues, the most compelling argument in favour of prioritising the interests of shareholders is that it increases social wealth [23]. The argument is made more persuasive when alternatives such as stakeholder theory and corporate social responsibility (CSR) have traditionally had vague definitions which can result in a multitude of divergent agendas making practical decision making difficult. In Berle’s words, prioritising shareholders is the “only effective way of ordering business affairs” [24].

However, constantly prioritising shareholders has numerous drawbacks, both in terms of the economic contributions of companies and their impact on wider society. While proponents of shareholder primacy argue it simplifies the decision-making process by providing clear priorities, having a single goal in a role that is inherently complex often leads to a myopic focus with the potential to harm stakeholders, wider society and the company itself. A full critique of shareholder primacy is beyond the scope of this paper, but briefly, two of the main issues are short termism and excessive risk taking, both which arise out of the managers pursuit of immediate and demonstrable increases in shareholder wealth. Consistently prioritising shareholders in the decision-making process has long been criticised on the grounds that it leads to an excessive focus on short term profit over long term sustainable value creation [25]. If short term profit is prioritised by the internal governance structure of the company, directors will forego economically worthwhile investments with long term benefits in order to increase reported earnings for the current period [26]. This can negatively impact the company and the economy in the longer term. Furthermore, where the shareholder primacy norm is deeply embedded in a company, it can lead to a corporate culture of excessive risk taking from directors [27], which in the past has led to high-profile corporate collapses causing great economic harm [28]. As an example, numerous reports investigating the Irish banking crises identified excessive risk taking [29]

and a general “misjudgement of risk” [30] in Irish Banks as one of the primary causes of the “greatest financial failure and ultimate crash in the history of the State” [31].

Beyond the economics-based arguments against shareholder primacy lies the even more serious matter of long-term global sustainability. Several attempts have been made to dislodge the shareholder primacy norm, including CSR, stakeholder theory, non-financial reporting and models focused on the prioritising the maximisation and sustainability of the company as a separate entity [32,33]. However, they have had limited success, leading Sjøfjell and Munoz to argue that in order to achieve meaningful progress on shifting away from shareholder primacy towards a focus on sustainable value creation, the goal of sustainability itself must be integrated into the company law framework [13].

A reform of company law focusing on sustainability has been proposed based on the work of the Sustainable Companies Project [34]. This idea has been further developed by Sustainable Market Actors for Responsible Trade (SMART) project, which advocates for companies to adopt a Sustainable Governance Model. The central objective of the Sustainable Governance Model is to integrate sustainability at all levels and in all decision-making processes of the organisation. However, for this to be achieved, the above research projects have concluded that changes at the level of the board are required. One aspect of the proposed reform is introduction of a duty to ensure sustainable value creation within planetary boundaries [12]. The term planetary boundaries is a scientific term adopted to encapsulate the ecological limits within which humanity can continue to develop in the long term [35]. It is a consequence of research done by a group of environmental scientists who developed a framework for assessing the boundaries of our planet [36] and is a similar concept to the “the limits of our Planet” used by the European Union [37]. The planetary boundaries framework provides a science-based outline for sustainable development within non-negotiable boundaries where the room for trade-offs is limited [12]. To facilitate this framework being operational in practice, the SMART project developed the Sustainability Assessment Tool [38], which is a technology and research-based process towards identifying the business’ sustainability performance. The aim being to provide more specific guidance on practical decision making and an increased ability to objectively assess the performance of companies on sustainability goals.

The rest of this paper will examine how a new directors’ duty, as part of the above more comprehensive framework, could be framed and enforced. The claim of this paper is that the potential for a new duty to alter director behaviour and affect a shift away from shareholder primacy is significantly increased if it includes an objective standard of assessment coupled with a scheme of public enforcement. However, a focus on standards and enforcement is not a claim for a dramatic rise in actions taken against directors but is rather a claim that a plausible threat of enforcement will act as incentive for compliance with the new duty.

3. Subjective and Objective Standards in Directors’ Duties

Two of the main duties of directors—the duty of care and the duty to act in the company’s interest—have historically been assessed by subjective standards. In its early development at common law, the duty of care was assessed entirely on subjective grounds. The standard required was determined solely by the directors’ own subjective characteristics and views, meaning if the director had no business experience or acumen, the standard of care was set accordingly low. As an example, in the late 19th century in *Turquand v Marshall*, it was held that regardless of how “ridiculous and absurd” the directors’ decision making may have been, “it was the misfortune of the company that they chose such unwise directors” [39]. The intervening period has seen an evolution in the standard of care required, moving from this entirely subjective standard, to a hybrid standard combining subjective and objective elements, to a duty that is now set by an objective minimum standard that allows for increasing that standard based on subjective criteria [40]. The duty of care under English [41], Irish [42] and in most US States is now set by a base level of objectivity, based on what would be expected from a reasonable person in the same position.

Despite this shift in the duty of care, the duty to act in the company's interest, at common law and in civil law jurisdictions, has remained grounded in subjective language. While the duty is framed in slightly different terms across EU Member states, it can be generally summarised as requiring directors to take decisions which they think will further the company's interests [43]. The reason for the subjective framing is because the law defers to directors when it comes to making business decisions and recognises the reality that two directors may hold opposing views as to what decision is in the best interests of the company and both be honestly aiming to benefit the company. This general deference of law to the subjective decision making of directors is illustrated by the existence of the business judgement rule [44]. The business judgement rule comes in various forms, but in Europe, it encapsulates an idea that a court will not substitute its own views in the place of those of an individual director with the benefit of hindsight. The courts will never deem a director to have breached their duties simply because the court would have taken a different decision in the circumstances or because a decision did not work as intended or led to a financial loss. For example, in *Howard Smith v Ampol Petroleum* the Privy Council stated "there is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at" [45]. Several good rationales underlie the application of the rule. First, by law, it is a matter for directors, not the courts, to decide what is in the company's interest. Second, the courts often lack the information necessary to accurately substitute their view of a business decision in place of that of the directors. It would also be inhibiting for directors if their every decision was subject to review by the courts which could cause undue hesitation when making business decisions.

However, the subjective framing of the duty to act in the company's interest, the business judgement rule, and the sound rationale underlying both, does not mean that directors are entirely free from review based on reasonable standards. As Sealy has noted, in the common law context, "there has always been a bottom line, an objective threshold of reasonableness" below which a subjective belief of acting in the company's interest "will not itself be sufficient for a decision to stand" [46]. The consequences of a wholly subjective standard would mean that once a director claimed to be acting in the company's interest, their submission would be almost impossible to disprove, even if the decision taken was one which no reasonable director, who was acting in the company's interest, would take. The problem would be that decisions that obviously did not promote the company's interest, could still be deemed, in law, as decisions taken in the company's interest. This would be the case even if it was abundantly clear that such an act was not in the company's interest and that belief was not one which any reasonable director would hold.

The precise nature of this base objective threshold varies across EU jurisdictions. In the common law jurisdictions of the UK and Ireland, as well as Poland and Slovenia, it is set by a requirement of good faith. Good faith is essentially a requirement that directors are acting honestly [47,48]. The widely held perception is that good faith is again, assessed by subjective standard [45] which is relatively easy for directors to satisfy. For example, Davies has stated that disproving a director's assertion that they have acted in good faith is almost impossible except in the most obvious of cases [16]. While it is true that good faith relates to the directors' subjective judgement, the view that good faith is assessed entirely subjectively does not survive an analysis of the relevant law, at least at common law. Instead, good faith is often used as the means through which to set the base threshold of what is reasonable. Several cases have shown directors to have breached the duty because their actions were not in line with reasonable standards (*Item Software Ltd (UK) Ltd v Fassih* [2004] EWCA Civ 1244; *Re Coroin Ltd* [2012] EWHC 2343 (Ch); *Breitenfeld UK Ltd v Harrison* [2015] EWHC 399 (Ch); *Re Genosyis Technology* [2006] EWHC 989 (Ch)), while other cases have given clear pronouncements that to comply with the duty, directors must meet a base level of reasonableness (*Wallach v Secretary of State for Trade and Industry* [2006] EWHC 989; *Citico Banking Corp NV v Pussers Ltd* [2007] 2 BCLC 638, *Howard Smith v Ampol Petroleum Limited* [1974] AC 821; *Bloxham (in Liquidation) v The Irish Stock Exchange Ltd* [2014] IEHC 93; *Heron International v Lord Grade* [1983] BCLC 638.). A review of good faith does not examine

whether the impugned decision did or did not benefit the company but rather is an examination about the reasonableness of the claim that the director was acting honestly in the company's interest. While there is a strong presumption of good faith, that presumption can be rebutted where it can be shown that no reasonable director would believe that the decision was in the interests of the company, for example, when the decision was completely irrational and obviously not in the company's interest. Other European jurisdictions are more obvious in setting objective standards in the context of the duty to act in the company's interest. In the Netherlands, directors can be liable for a breach of duty where there is a breach of "elementary principles of responsible entrepreneurship" [49]. In Germany, the management board will only comply with their duties only if it could "reasonably believe, based on appropriate information, that they were acting in the best interest of the company" [50]. The relevant point is that when it comes to the duty to act in the company's interest, there is a history of base standard for directorial decision-making set on objective grounds.

In the context of proposing a new objectively framed directors' duty focused on sustainable value creation, it is not a radical claim to suggest that such a duty should include a base level of objectivity. Yet it remains true that directors must be afforded scope to manage the company, that the business judgement rule must be complied with; courts cannot become, in effect, supervisory boards reviewing the substance of every management decision. A solution must be found to allow directors sufficient scope for business decision making which complies with the business judgement rule, while still setting an objective standard based on what is reasonable. There are differing degrees of objectivity that could be set in a new duty promoting sustainable value creation. An objective standard could mean that the courts determine what was, in their opinion, reasonably promoted sustainable value creation and evaluate if the directors acted accordingly with that determination. Such a standard is objective but contravenes the business judgement rule and courts do not have the resources, information or business experience to act as a supervisory board substantively reviewing directorial decision making in line with sustainability principles. The criterion of reasonableness cannot be applied to assess whether a director's decision actually promoted sustainable wealth creation. However, an objective standard could be introduced by reference to a hypothetical reasonable director. For example, would a reasonable director have honestly believed the decision was taken to promote sustainable wealth creation. A less demanding standard would be: was the decision taken one that no reasonable director could believe it was taken to promote sustainable wealth creation. Langford and Ramsey, in proposing a similar standard in a different context, claim that introducing that level of objectivity would promote accountability, and crucially, would not interfere with the business judgement principle [51]. In assessing whether a hypothetical reasonable director would honestly believe the decision was taken to promote sustainable wealth creation, the concept of planetary boundaries and the Sustainability Assessment Tool, briefly described above, could be used as a benchmark for dictating what a hypothetical director would reasonably believe. The inclusion of such a standard into the new duty could allow for an objective assessment of directorial decision making, but crucially, would make it clear to directors that there are reasonable limits placed on their subjective decision making.

The introduction of a duty requiring directors to act for sustainable value creation could cause a change in the behaviour of some directors purely because many directors wish to comply with their legal duties. A clear statement of the importance of sustainability within the legal framework, by itself, could cause managers to reconsider the shareholder primacy norm. In addition, establishing an objective standard within that duty could amplify this declaratory effect as directors become aware of the reasonable limits placed on their discretionary decision-making. However, relying on declaratory effects is unlikely to be sufficient to provide a widespread disruption of the shareholder primacy norm given that it is so entrenched in corporate culture. It is therefore necessary to consider the role of enforcement within proposals for reforms of company law.

There is no reason why, given the importance of the area of law, directors' duties should not be enforced when the relevant standards are breached. However, the law of directors' duties

has longstanding difficulties with enforcement [52]. This is because directors' duties are owed to the company and therefore only the company can enforce them. As directors usually control whether the company takes an action, it is unlikely that a board of directors will initiate proceedings against themselves or will sue one of their colleagues, except for the most unusual of circumstances. This structural feature of company law limits the potential enforcement of directors' duties to where there is a change in the management of company affairs, as occurs on liquidation or if the company is subject to a takeover. An alternative avenue for enforcement is the derivative action. A derivative action occurs where a shareholder applies to the court for leave to sue a director on behalf of the company for a wrong committed against the company. At common law, the courts take a very narrow interpretation of the derivative action [53], and they are only allowed in the most obvious cases of abuse against minority shareholders by those in control of the company. A significant disincentive for taking derivative actions is because they are taken in the company's name, any financial benefit accruing from the case will be due to the company and not the shareholders who initiated proceedings. The costs involved in taking these actions, which can often be complicated pieces of litigations, also acts as a barrier.

The consequence is that while a company is solvent, directors' duties are rarely enforced, and empirical studies have shown that private enforcement is unlikely to provide regular and effective enforcement of directors' duties [54]. Because of the structural issues, which act as a barrier to enforcing directors' duties, public mechanisms of enforcement provide a potential solution. Instead of relying on private actors, a public scheme of enforcement would provide a more rigorous oversight of a duty promoting sustainable value creation, and crucially, because of an actual possibility of enforcement, could make it more likely that directors will comply with the duty and thus act in a more sustainable way. In other words, a system of public enforcement will act as an incentive to comply with the duty, prioritising sustainability, in the first instance. Again, this is not a novel proposition. Keay has argued that the existence of a potential action being brought by a public authority could lead to more compliant director behaviour [55] and that public enforcement of directors' duties has the potential to enhance corporate governance generally [56]. As outlined above, the costs and the lack of direct economic gain act as significant barriers to derivative actions ever becoming a regular means through which to enforce directors' duties. Beyond the derivative action, liquidators or new boards are unlikely to take actions against previous boards of directors, even when there have been serious breaches, if there is no economic gain likely to accrue to the company. This means that private enforcement of directors' duties is extremely reliant on economic incentives to enforce standards. Public enforcement authorities can enforce standards in the absence of potential economic gain which allows them to consider concerns other than the economic, such as sustainability. As Parkinson has noted "deterrence, and the creation and refinement of standards of conduct and performance, have the quality of 'public goods' which private enforcers, pursuing only private gain are liable to under produce" [15].

Public enforcement has long been a part of company law at the national level. Most obviously, companies and directors are subject to the criminal law which is publicly enforced. In England, the Secretary of State has certain powers to take actions against directors (UK Company Directors Disqualification Act 1986 s 7(1) and s 8(1)). In Ireland, the establishment of the Director for Corporate Enforcement has seen a dramatic improvement in corporate compliance as a new practice of active enforcement has evolved in Ireland [57]. In that context, Ahern has stated that the public enforcement of directors' duties has become a key driver in relation to standard setting for directors [58]. The public element of enforcement in Ireland and England is usually based not on criminal sanctions or personal liability for the company's debts but rather a restriction on a director's ability to manage a company or complete disqualification from the office of director. Disqualification from the office of director could provide a sufficiently serious penalty for directors to comply with the new duty on sustainable value creation. Improved compliance with a duty focused on sustainable value creation by enforcing and setting standards could dislodge the shareholder primacy norm in favour of a focus on sustainable

development. The concept of planetary boundaries and the Sustainability Assessment Tool could be used as a basis for informing whether a public authority should take a case for breaching the duty.

The proposal for the inclusion of the new duty is at the EU level, and thus, the public enforcement of the duty would also have to be overseen at the EU level but implemented by national agencies or bodies such as the Secretary of State in England or the Director for Corporate Enforcement in Ireland. This system of oversight at the EU level would have the benefit of transcending the limits of national enforcement. The proposal for the new duty focused on sustainability is based on a scientific understanding of sustainability developed by the SMART project and their Sustainability Assessment Tool. To achieve a harmonised application of that research, it would be necessary for EU oversight of the national enforcement agencies. Furthermore, as many companies have establishments and impact across the EU, EU oversight would be necessary to monitor the cross jurisdictional impact on sustainability of a company's decision making. One of the key weaknesses of general enforcement regimes focused on sustainability is the lack of a supranational aspect. For example, as is now well accepted, climate change and environmental damage cannot be adequately addressed at a national level and there is a need for legal mechanisms that mirror the structure of multinational enterprises.

4. Conclusions

The power, wealth and influence that companies have in modern society means that the laws under which the managers of these companies operate must come under increased analysis. While traditionally, the law of directors' duties has been assessed in subjective terms, the ability to review directors based on reasonable standards has always been an essential feature of this area of law. The evolution of company law has seen the common law duty of care move from an entirely subjective standard to a primarily objective standard. However, the duty to act in the company's interest is a more complicated area, and while a base level of objectivity has always been present, it has remained in the background. This is because of the business judgement rule and the necessary discretion given to directors to manage the company. A new duty at EU level requiring directors to promote sustainable value creation is bound by similar considerations and the law cannot mandate what is reasonable in every context. However, it is essential that any new duty is not entirely subjective, or it would be possible for a director to claim be acting for sustainable value creation, their submission would be almost impossible to disprove, even if the decision taken was one which no reasonable director, who was acting in the company's interest, would take. This paper claims that reference to the honest beliefs of a hypothetical reasonable director could square this circle, allowing sufficient scope for subjective discretion and not contravene the business judgement rule, while still providing a means of assessing director decision making by reference to a standard of reasonableness. This objective framing, coupled with a scheme of public enforcement, has the potential to dislodge the shareholder primacy norm and move toward the prioritisation of sustainable value creation within companies.

Funding: This research received no external funding.

Conflicts of Interest: The authors declare no conflict of interest.

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