ABSTRACTS - LECTURERS

PhD Seminar on Companies and Markets 2021

Day 1 - Monday

What PhD candidates in law can learn from other disciplines
– A conversation between **David Monciardini**, Dr. Senior Lecturer, University of Exeter Business School, Penryn and **Hanna Almlöf**, Senior Lecturer, Linköping University

David Monciardini

As the world becomes increasingly complex and we are facing 'wicked problems' that cannot be addressed by adopting a single perspective, interdisciplinary is more relevant than ever. It is required in international research projects to be funded. It is often evoked in the calls for papers of top-tier international publications. However, work across disciplines can be twice as hard, due for instance to different terminology making communication more difficult. Often methodological differences emerge. Also, in terms of future career, academic journals are based on disciplinary boundaries and academic tribes that are very protective of their limited 'territory'. Based on rea experiences of interdisciplinary collaborations, in this presentation we will discuss the plus and cons of going beyond legal disciplinary boundaries to gain theoretical and methodological insights from other disciplines such as Sociology, Political Sciences, Business Studies, Natural Sciences.

Why should PhD candidates in company law care about legal history?
– A conversation between **Katja Tikka**, Researcher, University of Helsinki and **Jørn Øyrehagen Sunde**, Professor, University of Oslo

Katja Tikka

Katja Tikka Ph.D. (2020) is a researcher from University of Helsinki. Her dissertation "Shipping Legal Norms – Swedish Trading Companies in the Seventeenth Century" studied the earliest commercial organizations in the Nordic Countries. These organizations had the simple characteristics of the modern limited company, such as anonymous shares, profit sharing, or the chance to invest in shares despite of social position or gender.

During the discussion with Jørn Øyrehagen Sunde, Tikka intends to bring out how today's commercial habits can be seen in historical frames. Knowing the background of the company law can provide a toolbox of answers even for modern day research topics. For instance, the Nordic countries had been seen over the centuries as some kind of a peripheral area. Fact is that the great inventions were discovered somewhere else, but the Nordic countries offered opportunities to experiment and test these novel models. Nordic countries provided the flexibility to be able to adopt reforms whereas countries with age-old strong traditions might have had too rigid structures.

Day 2 - Tuesday

Our European Company Law: Recent developments and remaining challenges

Beate Sjåfjell, Professor, University of Oslo

In this presentation, a brief overview will be given of the status and relevance of EU company law for national company laws of the EU Member States, and the three EFTA states Norway, Iceland and Lichtenstein, who through the European Economic Area Agreement are bound by most of the EU law relevant in our context. The main emphasis of the presentation will be on recent developments.

Of great importance amongst recent developments are those informed by the EU's increasing recognition of the need for regulatory initiatives to promote the integration of sustainability into European business. This resonates with the EU's high-level commitment to sustainability and with roots in the paradigm shift of the Commission's definition of Corporate Social Responsibility in 2011. With the launch of the Commission's Sustainable Corporate Governance Initiative in 2020, the Commission's proposal for a Corporate Sustainability Reporting Directive in 2021 and the EU Parliament's call for environmental and social rights due diligence, also in 2021, company law and corporate governance has become the topic of a heated political debate. The presentation will present an overview of these developments, for further discussion.

Our European Company Law cont'd

Karsten Engsig Sørensen, Professor, Aarhus University

Case law continues to be a driving force in creating free movement of companies, and this presentation will illustrate how the ECJ (and in one case also the EFTA Court) has developed the fundamental freedoms. In many cases, free movement has been expanded (e.g. Polbud), but there are also cases where the opposite seems to have happened (Kornhaas). At the same time, the ECJ has expanded the principle of abuse of EU law, which is likely to affect free movement of companies, but also how the harmonised company law works in the Member States. The final part of the presentation focusses on how free movement of companies may be conducted between the EU and third countries according to the trade agreements agreed upon. The focus will be on the GATS and the new EU-UK agreement.

Company law developments and discussions in Germany, France and the Netherlands

- Brief presentations by **Anne-Christin Mittwoch**, Professor, Martin Luther University Halle Wittenberg, **Christophe Clerc**, Lawyer, Descartes Legal and **Anne Lafarre**, Assistant professor, Tilburg University

Anne-Christin Mittwoch

German Company Law 2021: Beyond Covid-19, the Wirecard Scandal and traditional ownership structures

The presentation gives a short overview on a selection of company law changes in Germany either recently introduced or in the pipeline for the near future. In all, company law seems to be increasingly at the forefront of addressing economic upheaval or unprecedented social change. This is partly the result of the Covid-19 pandemic, but also of other recent developments like the

discussion about gender quotas and the fostering of sustainable corporate behavior. Moreover, the German financial markets have been shaken by the recent Wirecard scandal. Consequently, some interesting legislative changes have been enacted in the year 2021 and some remarkable discussions are currently lead in German company law:

1. The temporary Covid-19-related legislation of March 2020 that allows for virtual-only shareholders' meetings of stock corporations has been extended until the end of 2021 by means of an executive order of the German Ministry of Justice and Consumer Protection. This is helpful, but also leads to a cluster of questions.

2. In the aftermath of the spectacular collapse of German payment solutions provider Wirecard last year, the Act for the Strengthening of the Integrity of the Financial Markets (Gesetz zur Stärkung der Finanzmarktintegrität, FISG) came into force in July 2021. The FISG addresses a multitude of subjects regarding financial reporting and corporate governance and thus goes well beyond the questions that the Wirecard scandal raised.

3. In August 2021, Germany amended the regulations for the equal participation of women in leadership positions and enacted the so-called Second Leadership Positions Act (Zweites Führungspositionengesetz, FüPoG II). Under FüPoG II, listed companies, that are subject to the 50% employee co-determination under the Co-Determination Act and whose management board consists of more than three members, must appoint at least one female management board member whenever a position becomes vacant.

4. The German Act to Modernise the Law on Partnerships (MoPeG) changes some of the current regulations for partnerships that date partly back to the 19th century. This is particularly the case for civil law partnerships (GbR), general partnerships (OHG) and limited partnerships (KG). Many of the amendments do correspond to the state of the art in case law or usual contractual practice, which deviates from the previous legal model.

5. Since June 2020, a discussion about a new form of the GmbH has gained momentum. A proposal for a limited company characterized by the principle of "responsible ownership" has been published in June 2020 by a group of German legal scholars. According to this principle, the company's profits and assets are kept for the company's development as far as possible - they serve the company's purpose, are reinvested, used to cover the cost of capital or donated. The proposal has been discussed very controversially and will possibly lead to an amendment of the legal status quo in the next legislative term.

The presentation will discuss these issues and their core questions for German company law.

Anne Lafarre
Company Law Developments and Discussions in the Netherlands

Dutch company law can be described as a stakeholder model that increasingly emphasizes sustainability (as defined in the AkzoNobel decision, see also the Dutch corporate governance code 2016). Although the Netherlands is ahead of other jurisdictions such as the United States in this area, many believe that company law can be further used for sustainability.

In the spring of 2020, 25 professors in the Netherlands made various proposals to further promote sustainability in Dutch company law: these proposals include, in addition to further reporting obligations, the introduction of a corporate purpose (following the French 'raison d'être') and the

inclusion of a duty of care for directors and supervisory directors to participate responsibly in society (which has many similarities with the European proposal for sustainable corporate governance). This proposal has (like in Europe) led to a lot of discussion about the role of company law in the current time with the large sustainability challenges we face.

In addition to these proposals, a development has also been initiated in the field of human rights due diligence (HRDD): just like in many other countries (including France), there is a(n) (intended) shift in the Netherlands from soft law to hard law concerning HRDD obligations. In the Netherlands, *Initiatiefwetsvoorstel Verantwoord en Duurzaam Internationaal Ondernemen* (initiative for a Responsible and Sustainable International Business Act) was submitted at the beginning of 2021, which entails far-reaching due diligence obligations and links civil, administrative and criminal enforcement to this. Following the Shell/Nigeria case in which the Court of Appeal in The Hague ruled under Nigerian (English common) law at the beginning of 2021, there is also a discussion in the Netherlands as to whether piercing the corporate veil for environmental damage could take place. Since Dutch case law mainly deals with the situation of an insolvent subsidiary that cannot meet its payment obligations, it is questionable whether a duty of care for the parent company could also be assumed under Dutch law here. If not, the *Initiatiefwetsvoorstel Verantwoord en Duurzaam Internationaal Ondernemen* may provide a solution.

This presentation will provide an explanation of these and other recent developments in Dutch company law. After a short introduction to the Dutch corporate law framework, the proposals of the 25 professors, the legislative HRDD initiative, and the impact of the Shell/Nigeria case are discussed. The role of shareholders (and especially institutional investors) and their associations (including FollowThis, Eumedion and VBDO) will also be discussed if time allows.

Company law developments and discussions in Spain, Italy and Greece

- Brief presentations by **Mónica Fuentes Naharro,** Professor, Universidad Complutense de Madrid, **Alessio Bartolacelli**, Associate Professor, University of Macerata and **Christina Livada**, Assistant Professor, National and Kapodistrian University of Athens

Mónica Fuentes Naharro

Law 5/2021, of April 13, has modified several provisions/articles of the Spanish Company Law to implement Directive 2017/828, as regards the encouragement of long-term shareholder engagement (known as "Second Shareholders Rights Directive, "the II SRD"). However, the implementation of the II SRD is just one of the goals of Law 5/2021, which has gone much further, incorporating new relevant reforms that either were not required by the II SRD or have gone beyond its basic requirements.

Regarding the former -novelties that are not caused by the II SRD-, two of them are worth to be highlighted:

(i) The recognition under Spanish company law (without prejudice of the transitory regulations incorporated because of the COVID pandemic) of the possibility to hold entire or pure telematic general meetings, applicable to all capital companies (new art. 182 bis LSC) if by-laws provide so.

(ii) The recognition under Spanish company law for the first time of the so-called loyalty shares for listed companies (articles 527 ter to 527 undecies LSC). These are shares that breach the one-share

one-vote principle (quite strict under Spanish Law until now) since they attribute a double vote to each share owned by the same shareholder for two consecutive years (cf. art. 527 septies LSC) if by-laws provide so.

Regarding the latter -developments that do bring their cause in the II SRD but go far beyond its basic mandatory rules- it is worth to highlight the new regime of related-party transactions ("RPT") and, particularly, that of the so-called "intra-group transactions" (art. 231 bis LSC) which incorporates some specialties for RPT within groups of companies.

Alessio Bartolacelli

The main legislative amendments occurring in the area of Italian business law over the last five years did not focus on company law, but in particular on insolvency law, due to the introduction of the new Italian bankruptcy code, approved in February 2019, but still not in force, for its most part. Its entrance into force was scheduled for August 2020. It has been postponed several times because of the Covid emergency until May 26, 2022.

Even if the code is not in force yet in its entirety, a few provisions with a meaningful impact on company and partnership law have nevertheless been already made applicable, by amending the Italian civil code.

In my intervention, I will describe such modification and their possible interaction with sustainability in company law, which is one of the main topics debated among Italian scholars.

Even if the latest legislative measures in the field date back to 2015/16 (benefit companies) and 2017 (social enterprises and third-sector organisations), the debate on the purpose of a company and, in particular, on directors' duties is vivid in Italy as it is currently all over the world. I will therefore link a specific profile of the former issue (the directors' obligation to equip the organisation with adequate administrative, management and reporting order) and the latter topic. I will also consider briefly some key features of Italian social enterprises reformed in 2017, and their new "low profit" asset. Again, I will briefly examine the sustainability-related issues in the recent Italian Corporate Governance Code for listed companies, issued in 2020.

Finally, I will focus on the current situation of private companies in Italy and the changes in their main features that occurred over the last ten years. They passed from being substantially closed companies to the possibility of being financed through crowdfunding. In particular, the minimum capital requirement for establishing such companies was almost zeroed; but this seems very unlikely to be consistent with the organisational obligations each company has according to the new rules.

Company law developments and discussions in Lithuania, Sweden and Denmark

- Brief presentations by **Lina Mikalonienė**, Associate Professor, Vilnius University**, Hanna Almlöf**, Senior Lecturer, Linköping University and **Hanne Birkmose**, Professor, Syddansk University

Lina Mikalonienė

In, Lithuania, limited liability companies with a share capital (private company - *uždaroji akcinė bendrovė/UAB,* public company - *akcinė bendrovė/AB*) have been subject to numerous improvements, albeit without a conceptual and systematic approach. When addressing

company law developments, I would like to concentrate on the following three aspects: 1) better regulations for SMEs, 2) sustainable corporate governance and 3) digitalization.

As regards SMEs, a private limited liability company form (*UAB*), which follows a model of public stock company (*AB*), in principle, continues being regulated in a conservative and rigid way, and the legislation fails to tackle some problematic issues related to shareholders conflicts in private companies. The legislative initiatives aimed at solving some selected issue (e.g. modification of shareholder's right to information outside the general shareholders' meeting, introducing stock option legal framework). While the law still has to embody enabling approach and broader contractual freedom in internal corporate relations as well as a more liberal approach concerning concept of a legal capital. E.g. the law strictly limits permitted types of shares to be issued, the concept of legal capital rigidly applies (e.g. a minimum share capital is 2,500 euros, etc.).

The Law on Stock Companies fails to respond sufficiently to a sustainable corporate governance issues. The law contains a rule that a company's director should act both in the interest of the company and in the interest of company's shareholders. There are no legislative initiatives to promote a mandatory sustainable business standard by introducing a corporate duty to act in a sustainable way.

In context of a digital transformation, it should be mentioned that both private and public limited liability companies have an option to organize virtual shareholders' meetings, and the rule is the same both in emergency and normal situations. However, light legislative approach could have contributed to its limited use in practice. The Lithuanian lawmakers have presented an innovative legislation initiative to introduce a virtual corporate seat as an alternative to a traditional (physical) concept of a registered office. Use of a virtual corporate seat may reduce some administrative and financial costs for SMEs and, in particular, it can help SMEs engaging in digital business.

To note, Lithuania has followed the path of some jurisdictions that have developed a plurality of business entities approach for SMEs by introducing a new type of private limited liability company form for small and medium-sized businesses – a small partnership (*mažoji bendrija/MB*), which is an alternative to the existing traditional company form/UAB. A small partnership company form follows the *intuitu personae* principle and the small business philosophy. This legal form may potentially be attractive for start-ups. This legal entity form offers an owner a possibility to act simultaneously in multiple entrepreneurial roles (owner-manager-employee) guaranteeing an entrepreneur simplicity and great flexibility. The legislative developments concerning an owner's compensation in a small partnership is another example of best practices in improving a legal environment for SMEs.

Hanne S. Birkmose

The Danish Corporate Governance Code was updated in 2020. The updated code has several interesting innovative features, which will be one key focus of my presentation. Also in 2020 the SRD II was fully transposed in Danish law and at the same time the Danish Stewardship Code was abandoned. This transposition and shareholder engagement is another key focus.

It is not surprising that the updated Corporate Governance Code follows international trends and include themes such at sustainability and company purpose. Sustainability is connected to CSR, but

the definition of 'sustainability' which is given in the Code, is broader than the traditional CSR understanding. The recommendation on CSR is not new, but the inclusion of sustainability makes it interesting to take a closer look at this specific recommendation. Company purpose is an innovation in the updated Code. The understanding and the importance of company purpose has been debated widely in recent years, but the comments in the Code does not leave much guidance on the interpretation of the term.

Dialog and interaction between company stakeholders and the company is considered a fundamental prerequisite in the Corporate Governance Code. The recommendations in this respect are reflected in the expectations aimed the investors and their engagement with investee companies. In Denmark the investee side and the investor side have been divided in two codes; the Corporate Governance Code and the Stewardship Code. Since the transposition of the SRD II's provisions on shareholder engagement came into force the latter was abandoned. Till now shareholder engagement in Denmark has been rather low, but one way to increase engagement could be to encourage listed companies also to engage with investors after the AGM to understand their engagement behavior. In this respect the Corporate Governance Code can be an important catalyst.

However, the covid pandemic may have paved the way for increased shareholder engagement unintendedly. During the pandemic, an executive order was issued which allowed companies to hold their annual general meeting as a fully electronically meeting even when such an option had not been established according to the Company Act's provision. Although such a fully electronically meeting has been an option for more than a decade hardly any companies had made use of it. Now a large majority of the largest listed companies have passed an amendment to their Articles of Association, making it a permanent possibility. In the last part of my presentation, I'll discuss how it may affect shareholder engagement.

Day 3 - Wednesday

Comparative law – theories and practical advice

Jaakko Husa, Professor, University of Helsinki

Comparative study of law today is not a monolithic field, but it consists of several schools of thought and different approaches. This plural state of affairs may sometimes mean that those who are not dedicated comparatists but are interested in using comparative method only as a part of their research, have difficulties finding their way through the legion of books and articles on the subject.

In essence, comparative study of law is about studying differences, and similarities between legal systems (broadly understood). Moreover, modern comparative study of law is about finding explanations to both differences and similarities. Up-to-date comparative study of law is based on substantive and methodological pluralism and the past idea according to which there would be a one-size-fits-all has been all but abandoned. Comparative law, such as it was crafted by Zweigert and Kötz, has become more diverse and open to multidisciplinarity.

The question of how to study law comparatively is, however, not a simple one as there are different reasons and motivations to study law comparatively. This presentation is built on two basic parts. First part explains what the modern comparative law is and how it differs from the past paradigm. Second part discusses the practical issues related to comparative study of law. These issues concern,

among other things, significance of the research question, finding sources and understanding them. It will also be explained what is the most natural and arguably the best way to construct comparative study of law in a situation where the researcher is not and indeed aims not to become a full-blown comparatist.

Doing multijurisdictional comparative analysis in a research project: experience from the Sustainable Companies Project and from the SMART Project

Beate Sjåfjell, Professor, University of Oslo

Comparative legal research is often perceived as fraught with dangers and may seem insurmountably challenging, especially if the comparative analysis is intended to be undertaken of more than two jurisdictions. Yet it is also very rewarding and inspiring – and, I would posit, necessary to undertake. After Professor Jaakko Husa's lecture, you will all know more about different theories of comparative analysis and also received practical advice on how to undertake comparative research in 'a situation where the researcher is not and indeed aims not to become a full-blown comparatist'.

In my presentation, I will share my experience of having coordinated multijurisdictional comparative analysis in the Sustainable Companies Project (2010-2014) and in the SMART Project (2016-2020). In the Sustainable Companies Project, we undertook a comparative analysis of company law and accounting law across numerous jurisdictions, with the specific research question of identifying barriers and possibilities within these fields of law for better integration of environmental concerns into company decision-making.

In the project Sustainable Market Actors for Responsible Trade (SMART), we undertake a broader and more interdisciplinary analysis, drawing on fields of international law, EU law and laws of selected jurisdictions. The comparative analysis across jurisdictions was therefore more limited in number of countries but much more ambitious in the research questions.

In parallel with and partly based on the SMART Project, I worked together with my co-editor Professor Christopher M. Bruner on editing the Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability, which was published by Cambridge University Press towards the end of 2019. I will also speak to the comparative elements of our work with this volume.

Comparative analysis of selected Asian jurisdictions

- a conversation between **Ernest Lim,** Professor and **Luh Luh Lan,** Associate Professor, National University of Singapore

We will discuss the law and practice of derivative actions in Asia by focusing on four jurisdictions – China, Taiwan, Hong Kong and Singapore. The first two are civil law jurisdictions and the last two are common law. An effective derivative action mechanism needs to strike an optimal balance between three sets of rules: firstly, screening rules that preclude frivolous and vexatious lawsuits, second, standing rules that allow the claimant to bring the action easily, and finally, cost rules that do not impose onerous burden on the claimant. We examine whether, and if so, how the four jurisdictions have struck the right balance. On standing rules, we inquire whether shareholders and non-corporate constituents are permitted to bring derivative actions, and if so, the circumstances under which they

can do so. On cost rules, we examine who is responsible for bearing the cost of the lawsuit and who gets the damages. On screening rules, we examine how the different jurisdictions have sought to rule out unmeritorious claims. Understanding the derivative action in these four jurisdictions is not only a matter of doctrinal analysis, but also an issue of political economy: how the political and economic contexts in each of these jurisdictions have shaped the development and implementation of the rules.

Day 4 - Thursday

The creeping codification of UN Guiding Principles of Business and Human Rights

Claire Bright, Assistant Professor, Nova School of Law

The UN Guiding Principles on Business and Human Rights (UNGPs) were unanimously endorsed by the Human Rights Council in 2011 and constitute the global authoritative standard on business and human rights. The UNGPs are a non-binding instrument that can be characterized as an example of soft law deliberately grounding the corporate responsibility to respect human rights in non-legal norms (i.e. social expectations which form part of the companies' "social license to operate"). Nonetheless, since their adoption, the UNGPs have been extremely influential and a growing number of jurisdictions have started to implement them through National Action Plans and through legislation seeking to encourage or require companies to respect human rights in their activities and throughout their global value chains. As a result, the corporate *responsibility* is progressively turning into a legal *duty* as the human rights expectations are gradually being codified into domestic and regional laws. This is part of a wider momentum pointing at the progressive 'hardening' of the UNGPs. In this session, we will explore this momentum and the progressive crystallisation of human rights due diligence expectations that has taken place in the past 10 years. In particular, we will analyse key examples of legislation that have sought implement the UNGPs such as the French Duty of Vigilance Law, the Dutch Child Labour Due Diligence Act, the Norwegian Human Rights and Decent Work Due Diligence Law and the German Supply Chain Due Diligence Act. We will also discuss the European Parliament Resolution of 10 March 2021 on corporate due diligence and Corporate Accountability and the upcoming legislative developments at the EU level.

Sustainability due diligence as an emerging legal norm

Charlotte Villiers, Professor, University of Bristol

In this seminar we will explore the fast-developing phenomenon of due diligence and its potential benefits for the sustainability agenda in company law. As large companies often operate with highly complex organisational arrangements and through global supply chains it can be difficult to identify the source of problems that arise. From the perspective of vulnerable stakeholders who may become victims of human rights violations or who may see their environment damaged by corporate activity, it is important to be able to have the right information to challenge those companies and it is also important for companies to be able to show that they have taken the right steps to avoid harm or mitigate the impacts of their activities. Reporting and transparency have for a long time been the predominant means to seek to hold corporations to account for their impacts but often such

reporting is inadequate and does little to prevent or reduce harmful impacts. Due diligence offers a more proactive approach and requires corporate actors to demonstrate that they have full knowledge and can influence positively what goes on across their organisations and in their supply chains. We have witnessed a strong shift towards due diligence, especially within Europe, and this is encouraged as part of the European Sustainable Finance Agenda. In this seminar we will look at some examples of due diligence law and we will consider what this approach means for corporate practice. We will consider if due diligence will make a positive difference as well as the question of what the risks of inaction might be for business.

Key themes will include: why due diligence? what is wrong with reporting?; origins of due diligence; some areas where law and practice has developed (eg Human Rights) – strengths and weaknesses; supply chains; European developments; what if we don't establish due diligence?

Shifting norms in legal research: on feminism and intersectionality in company law

Carol Liao, Associate Professor, The University of British Columbia

Gender plays a critical role in the construction of corporate institutions and the regulatory infrastructure that governs them. The lack of women in executive positions and corporate boardrooms is a direct consequence of a male-dominated history, and so are the laws and norms guiding the institutions that hold positions of power. This article tackles difficult questions related to business and power through the lens of feminist legal theory, and provide an unapologetic and ambitious call to redesign existing power structures, and internal power dynamics, that are leading our world into environmental crises. It begins with a short primer on the social construction of gender, and how society continuously reinforces different behaviour from men and women. The article then examines how gendered predispositions are imbued in the entrenched norms that dominate corporate law, and through implicit biases that prevent or slow the rise of women in the corporate world. These invisible power imbalances need to be widely recognized as they subvert the ability of women to attain meaningful positions of power that instigate change. A critical partnership must be forged between feminist legal theory and corporate sustainability to overcome the formidable challenges in attaining a greener future.

Day 5 - Friday

European company law towards 2030

Christoph Teichmann, Professor Dr. - University of Wuerzburg (Germany)

In 2019, the European Union has passed two directives of fundamental importance for company law (cf. *Teichmann*, ECFR 2019, p. 3-14): (1) The directive on digital tools which ensures that electronic incorporation of companies will soon be available in every Member State; (2) the mobility directive which introduces a set of rules for cross-border restructurings (merger, division, transfer of the registered office).

The efficiency of the new instruments may suffer from different levels of protective rules that Member States are allowed to introduce (e.g. identification requirements for electronic incorporations, rejection of cross-border restructurings in cases of abuse). In many cases, these

protective rules are related to the undesired behaviour of letter-box companies. The European Commission has announced that it will carefully observe the behaviour of letter-box companies and probably take some action in order to combat abuse of the corporate form.

With regard to digital tools, however, the above-mentioned directive may not be last word. Some experts argue that the European Union should offer a framework for "virtual companies". This raises the question as to what connecting factor should be applied in order to define the nationality of such a virtual company (cf. *Kurcz/Paizis*, ECFR 2019, p. 434-456). The nationality in the traditional sense is a requirement for applying the freedom of establishment and it is hard to see how a company could exist or claim any rights under EU law without having any connection to the territory of a particular Member State.

Finally, the corporate governance of groups of companies remains an outstanding issue of European company law (cf. *Teichmann*, ECFR 2015, p. 202-229). From a traditional company law perspective, the group of companies does not exist as such. The group consists of several companies with a legal personality on their own; each company has its own corporate governance system attributed to the particular company (shareholder meeting, directors etc.).

This picture, however, does not really reflect the reality within a group where a parent company to a certain extent develops and enforces a centralised management strategy. As a consequence, there is a tendency to hold the whole group liable whenever one of the companies belonging to the group has committed a wrongful act. This approach is typical for European competition law (the "economic entity" approach). But it can also be observed in the debate on supply chain liability or sustainability duties. It is worthwhile to discuss whether the group shall still be accepted as a decentralised form of organisation or whether the legal separation shall simply be ignored based on the argument that the centralised strategy leads to joint liability of all group members.

Futuring sustainable Nordic business models – Nordic reform proposals

Beate Sjåfjell, Professor and **Jukka Mähönen**, Professor, University of Oslo

The Nordic countries share common history and common roots for their legal systems. Well before the European harmonisation, the Nordics started in the beginning of the twentieth century a harmonization process of their private law, including contract law and sale of goods law. In the 1960s, an attempt was made also to harmonize company law. Albeit this attempt did not fully succeed, Nordic company law and corporate governance share common characteristics. Strong protection of minority investor interest and prohibition of abuse of control powers are leading principles of company law. Typically, a Nordic business has a control holder, would it be a private person, a family, a foundation, or a state. Independent boards balance control holdings. Employees' rights have been recognised early on, albeit there is a diversity in how they are put into practice in businesses on either company level or work place level.

Due to the control structures, investors' economic rights have been overemphasised although this has also contributed to creating long-term value for the business itself. However, during the last years, more concern has been given to the impact of Nordic businesses on society and the environment, and demands for more stringent regulation for corporate sustainability have grown stronger, especially concerning the role of Nordic businesses in global value chains. The problem has

been one of silo thinking: company law proper has seen a field solely dedicated to shareholder and member value, manifesting in the recent Nordic resistance against European attempts to harmonise sustainable corporate governance.

We challenge the shareholder centred Nordic corporate governance model, emphasising the importance of the board and board duties toward the business. The interest of the business can be interpreted as sustainable value creation and regulation strengthening this interpretation follows a long tradition of Nordic business law and Nordic business models. Positioning our paper within a research-based concept of sustainability, understood as securing social foundations for humanity now and for the future within planetary boundaries, we propose reforms that can strengthen Nordic businesses' value creation in their transition to sustainability.
