



UiO : **Faculty of Law**
University of Oslo

The Role of Company Law in the Transition to Sustainability

Professor Beate Sjøfjell, 10 February 2022



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ssrn.com/author=375947

Overview of my presentation

- A research-based concept of sustainability
- Corporate sustainability – and the role of company law
- The multilayered regulatory framework
- Company law as a missing piece, still?
- Hope for coming EU initiatives
 - Through a sustainable company law reform
 - Through mandatory sustainability due diligence

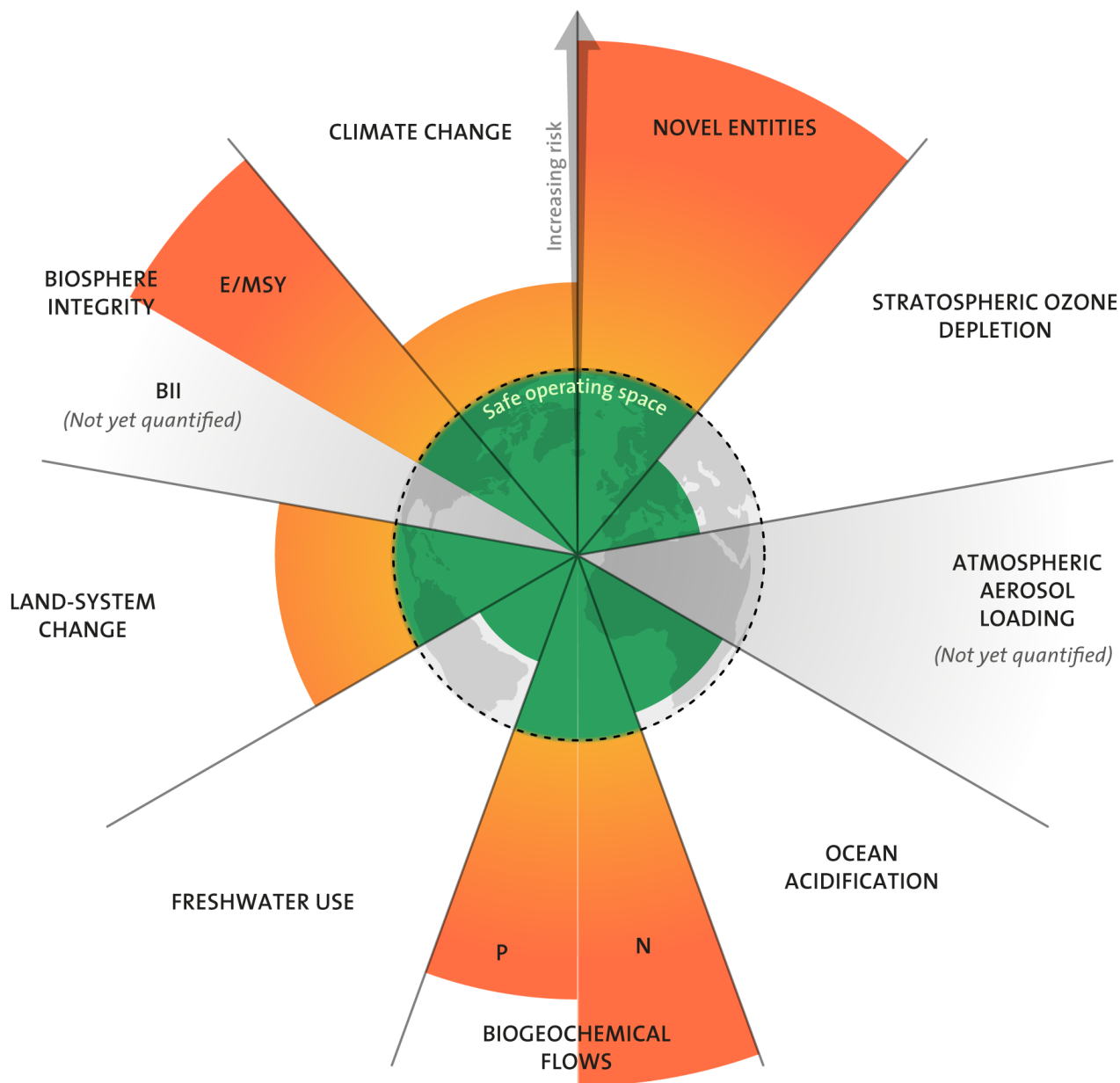


Photo: Michael Held

UN Sustainable Development Goals



Photo source: un.org:
About the Sustainable
Development Agenda

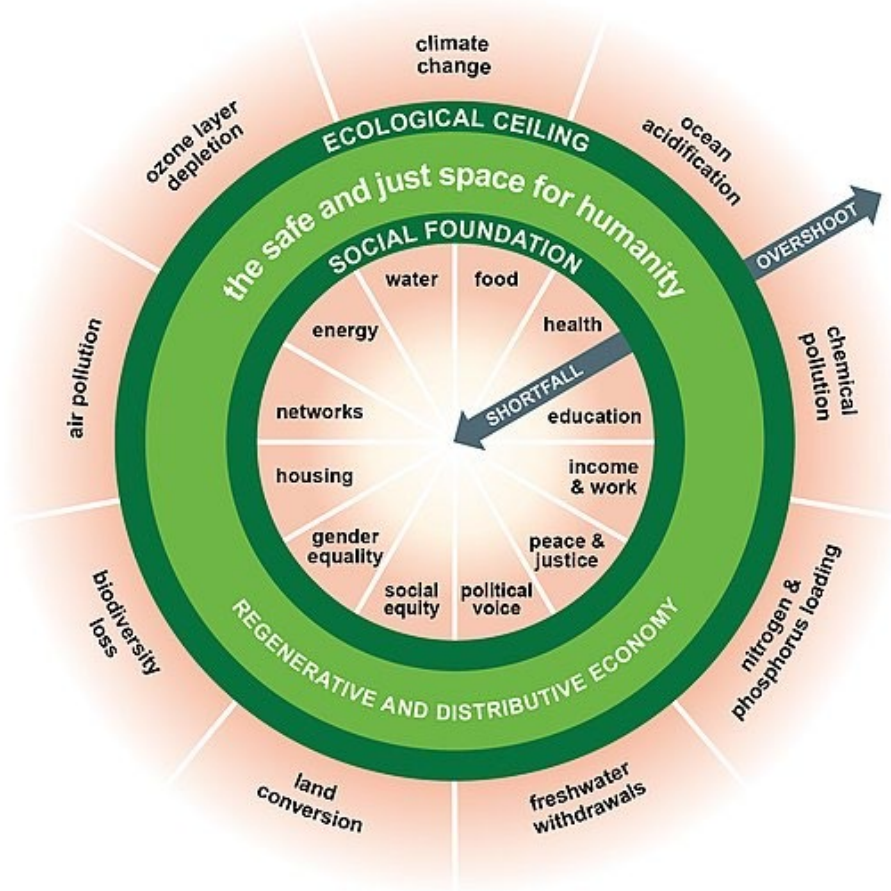


Credit: Azote and Stockholm Resilience Centre, based on analysis in [Persson et al. 2022](#) and Steffen et al. 2015

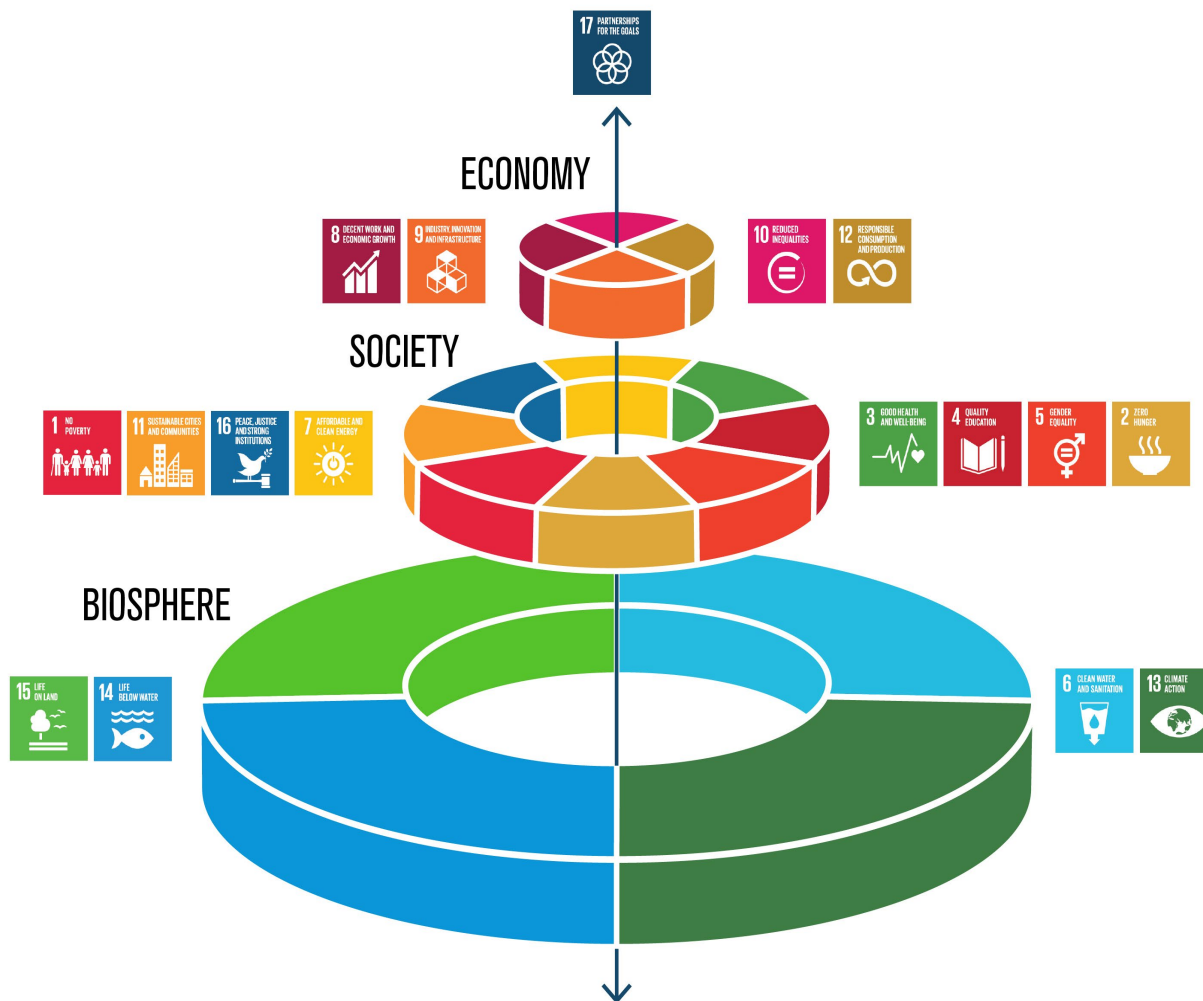
News story in the [Guardian](#), January 2022



Source: [Sjåfjell, Häyhä & Cornell, 2020](#),
Figure Credit: Sarah Cornell



Source: Raworth 2017;
Leach, Raworth &
Rockström 2013



Graphics by Jerker Lokrantz/Azote

Credit: Azote for Stockholm Resilience Centre, Stockholm University (CC BY 4.0)

Increasing recognition of a research-based concept of sustainability

- The history of the SDGs
- International mention of planetary boundaries
 - E.g. [UN press release during the pandemic \(2020\)](#)
- Planetary boundaries in the EU
 - E.g. [7th Environmental Framework Programme](#) & [political consensus](#) now on [8th Framework Programme](#)
 - [Häyhä et al Operationalizing the concept of a safe operating space at the EU level \(2018\)](#)
 - [A new Circular Economy Action Plan 2020](#)
- Planetary boundaries employed by nation states
 - [Sweden 2013](#); [Switzerland 2015](#); [The Netherlands 2018](#); [New Zealand/Aotearoa 2020](#); [Germany 2021](#)
- The ‘doughnut’ of social foundations with planetary boundaries increasingly employed by cities, eg. [Amsterdam 2020](#)

Corporate sustainability

- Corporate sustainability is about business creating sustainable value within planetary boundaries, contributing to society's overarching goal of sustainability
- More specifically: business that creates value that is:
 - (a) environmentally sustainable, in that it ensures the long-term stability and resilience of the ecosystems that support human life;
 - (b) socially sustainable, in that it facilitates the achievement of human rights and other basic social rights, as well as good governance;
 - and (c) economically sustainable, in that it satisfies the economic needs necessary for stable and resilient societies

Source: Sjøfjell & Bruner, [Corporations and Sustainability](#) (2019)

Possibilities for and barriers to corporate sustainability

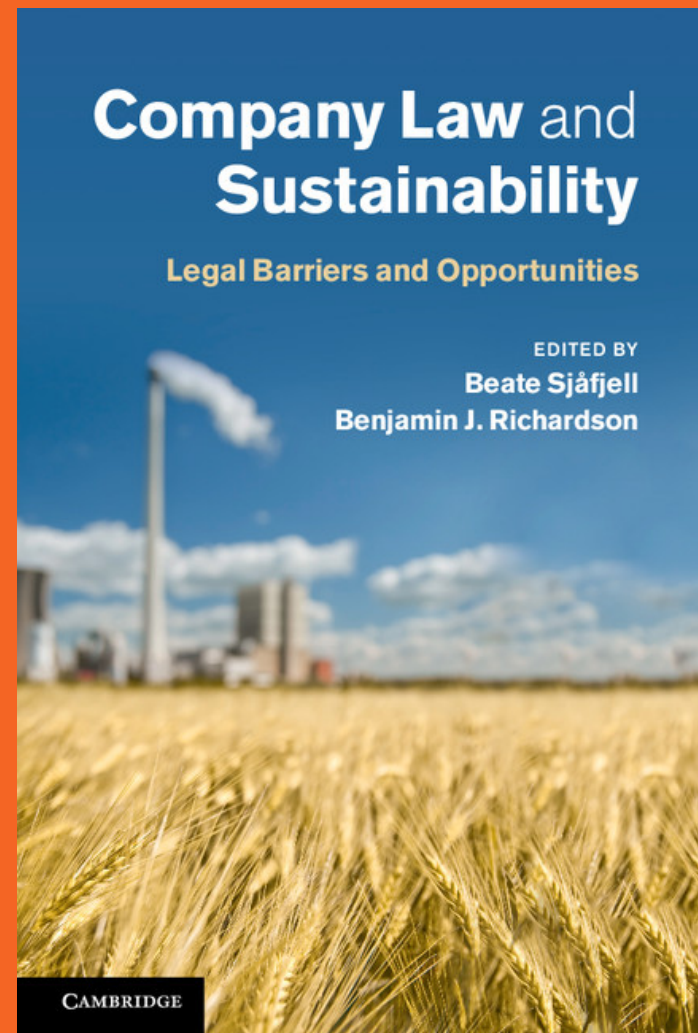
Multijurisdictional comparative analyses through:

- [The Sustainable Companies Project](#) (2010-2014)
- [Sustainable Market Actors for Responsible Trade](#) (SMART, 2016-2020)
- [The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability](#) (2017-2019)

Shareholder Primacy: The Main Barrier to Sustainable Companies

Sjåfjell, Johnston,
Anker-Sørensen & Millon
2015

Chapter downloadable at SSRN:
ssrn.com/abstract=2664544



The Sustainable Companies Project: analyses and results

- Company law and the social norm of shareholder primacy
- Limited effects of various forms of sustainability reporting
- Exarbatation of shareholder primacy through corporate groups and global value chains

Sustainable Companies website:

<https://www.jus.uio.no/ifp/english/research/projects/sustainable-companies/>

Obstacles to Global Sustainable Business

Sjåfjell, Mähönen, Johnston & Cullen
2019 Report downloadable at SSRN:
ssrn.com/abstract=3354401



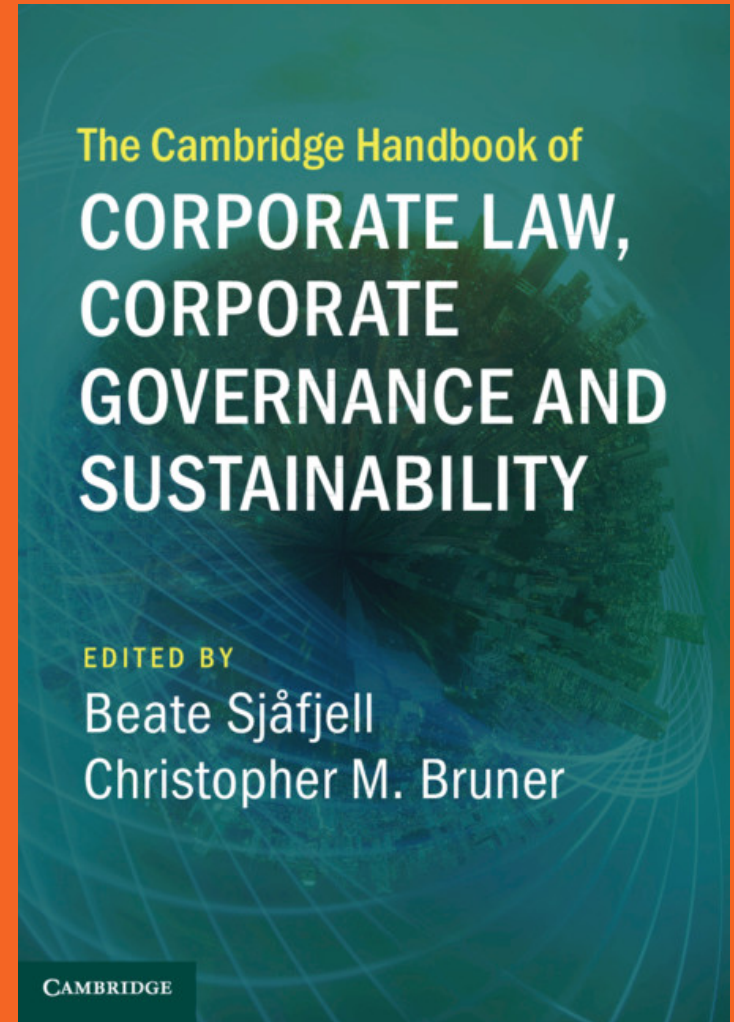
SMART analysis & results

- Sustainability increasingly recognised – changing social norms
- Silo-thinking, lack of policy coherence, emphasis on economic growth
- Financial markets – possibilities but also barriers
- Company law and shareholder primacy, still
- Social enterprises, the U.S. private B Lab and benefit corporations

SMART project website: smart.uio.no/

Cambridge Handbook of Corporate Law, Corporate Governance & Sustainability

Sjåfjell & Bruner (eds).
Our introductory chapter is
downloadable from SSRN:
ssrn.com/abstract=3383384



Cambridge Handbook analysis & results

- Increasing recognition of the need to shift towards sustainability
- Continued shift from corporate governance to contractual governance and other non-equity modes of control
- Shareholder primacy's constraining effects on company law & corporate governance reform

Cambridge Handbook website

<https://www.jus.uio.no/english/research/areas/companies/publications/books/sjafjell-bruner-2019..html>

Multilayered regulatory framework

- A brief overview:
 - International laws and policies
 - EU laws and policies
 - Nation states' laws and policies
 - 'Self-regulation' of market actors
- A complex & messy regulatory framework:
 - Fragment & interconnected
 - Rigid & flexible
 - Backward-looking & progressive



Source:
www.theguardian.com/law/from-the-archive-blog/2018/nov/28/un-adopts-universal-declaration-human-rights-paris-1948
Photograph: STF/AFP/Getty Images.



We are all equal in dignity and rights



#standup4humanrights



Source: standup4humanrights.org/en/index.html



Source Paris picture:
Lawrence & Schäfer, 2019,
science.sciencemag.org/content/364/6443/829



Source both Glasgow pictures:
www.reuters.com/business/cop/un-climate-negotiators-go-into-overtime-save-15-celsius-goal-2021-11-13/

THREE PILLARS of the UN GUIDING PRINCIPLES

HUMAN RIGHTS

PROTECT

STATE
duty to protect

RESPECT

CORPORATE
responsibility to respect

REMEDY

VICTIMS
access to effective remedy



Sources: shiftproject.org/resources/ungps101/;
oecd.org/investment/mne/roundtable-40-years-of-the-guidelines.htm;
UN.org (About the Sustainable Development Agenda)



History. Establishment of the European Union.
Photo: European Parliament.



Signing of the Treaty of Lisbon in 2007.
Photo: European Parliament

Sustainability in EU Treaty Law after Lisbon

- Sustainability an overarching Treaty objective for the European Union internally in Europe and as a global actor:
 - [The EU] shall contribute to peace, security, *the sustainable development of the Earth*, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter (Article 3(5) of the Treaty of the European Union)
- Horizontal integration rules in the EU Treaties:
 - Environmental protection requirements *must be integrated* into the definition and implementation of the Union policies and activities, in particular with a view to promoting *sustainable development* (Article 11 of the Treaty of the Functioning of the European Union)

Sustainability on the EU agenda

A European Green Deal

Striving to be the first climate-neutral continent

FINANCING A
SUSTAINABLE
EUROPEAN ECONOMY



Buying green!

A handbook on green public procurement
3rd Edition



Circular Economy Action Plan

For a cleaner and
more competitive
Europe

Sustainable corporate governance

European Commission conference
24 January 2019
Brussels



‘Paradigm shift’ of corporate social responsibility

- [Corporate Social Responsibility: A business contribution to Sustainable Development](#) (2002):
 - ‘CSR is a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.’
- Global financial crisis and the end of ‘the end of history of corporate law’
- ‘Paradigm shift’ in the [Commission Communication: A renewed EU strategy 2011-14 for Corporate Social Responsibility](#) (2011)

The reflexive theory belief in reporting

- [Directive on 'non-financial' reporting \(2014\)](#)
- [Proposal for directive on corporate sustainability reporting, April 2021](#)

Seeking to influence shareholders

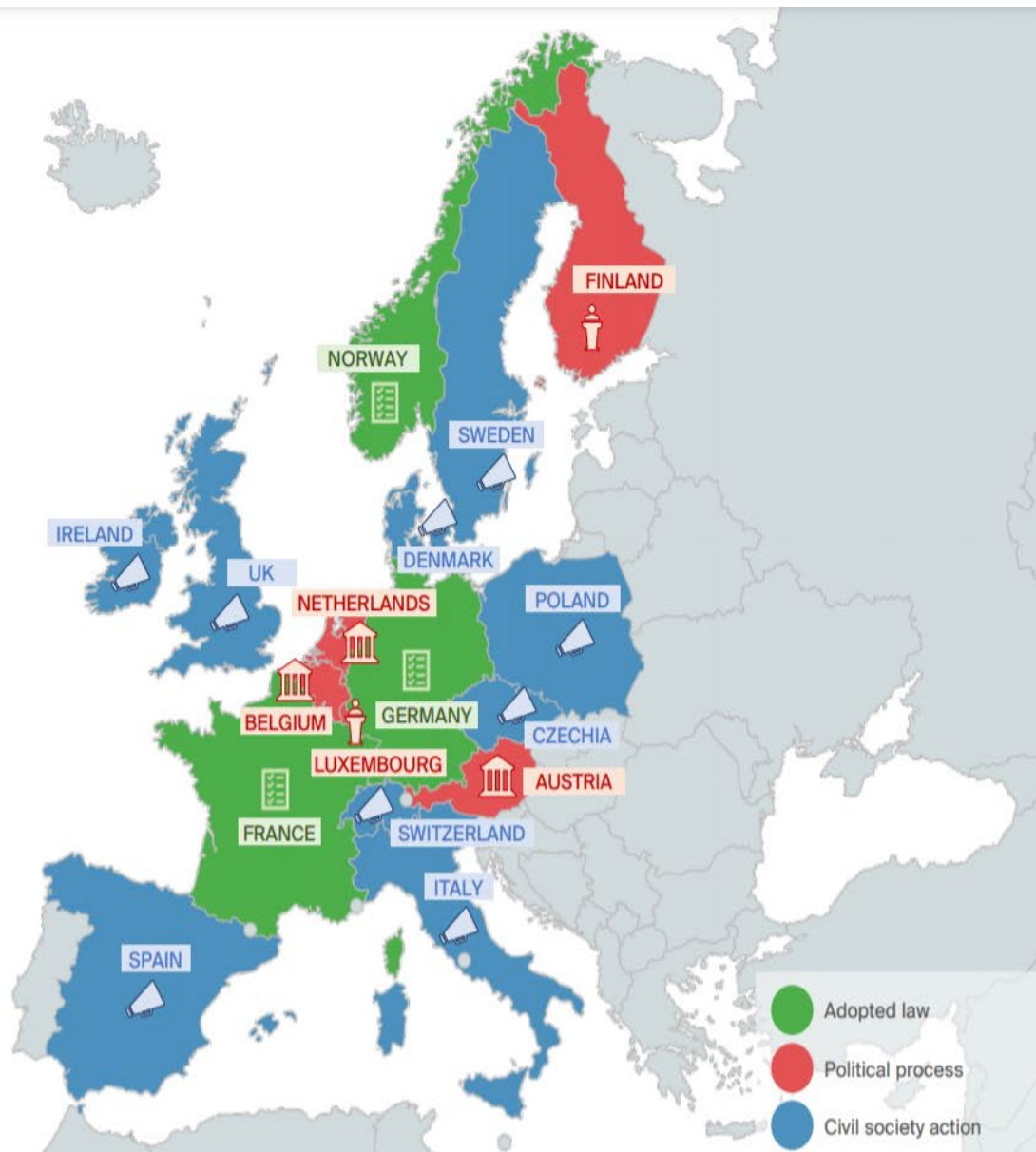
- [Shareholder Rights Directive II \(2017\)](#)
 - Stronger shareholders' rights and facilitation of cross-border voting
 - Long-term engagement of institutional investors and asset managers
 - More transparency of proxy advisors
 - Shareholders will have a "say on pay"
 - Related party transactions

The due diligence movement

- [The UN Guiding Principles for Business and Human Rights](#) (2011)
- Integrated into [OECD Guidelines for Multinational Enterprises](#) in 2011; [OECD Guidance for Due Diligence](#) (2018)
- EU [Action Plan on sustainable finance](#), Action 10 (2018)
- EU Parliament call for [mandatory due diligence for supply chains](#) (2020) – [legislative initiative report](#) (2021)
- Various Member States' initiatives, including [France](#), [Germany](#) & (the half-member) [Norway](#)



FRANCE	Law on the duty of vigilance of parent and outsourcing companies
GERMANY	Law on the corporate duty of care in supply chains
NORWAY	Law on business transparency and human rights and decent working conditions
AUSTRIA	Parliamentary proposal for a supply chain law
BELGIUM	Parliamentary proposal on the corporate duty of vigilance and care in value chains
FINLAND	Government commitment to due diligence legislation
LUXEMBOURG	Government commitment to due diligence legislation
NETHERLANDS	Government commitment to due diligence legislation Parliamentary proposal on responsible and sustainable international business conduct



Towards sustainable corporate governance

EU Commission [Sustainable Corporate Governance](#) (2020)



More than 100 companies and investors call for effective EU corporate accountability legislation, news piece about the letter from business 8 Feb 2022

Company law the missing piece – is that about to change?



EU company law

– for corporate governance fit for future

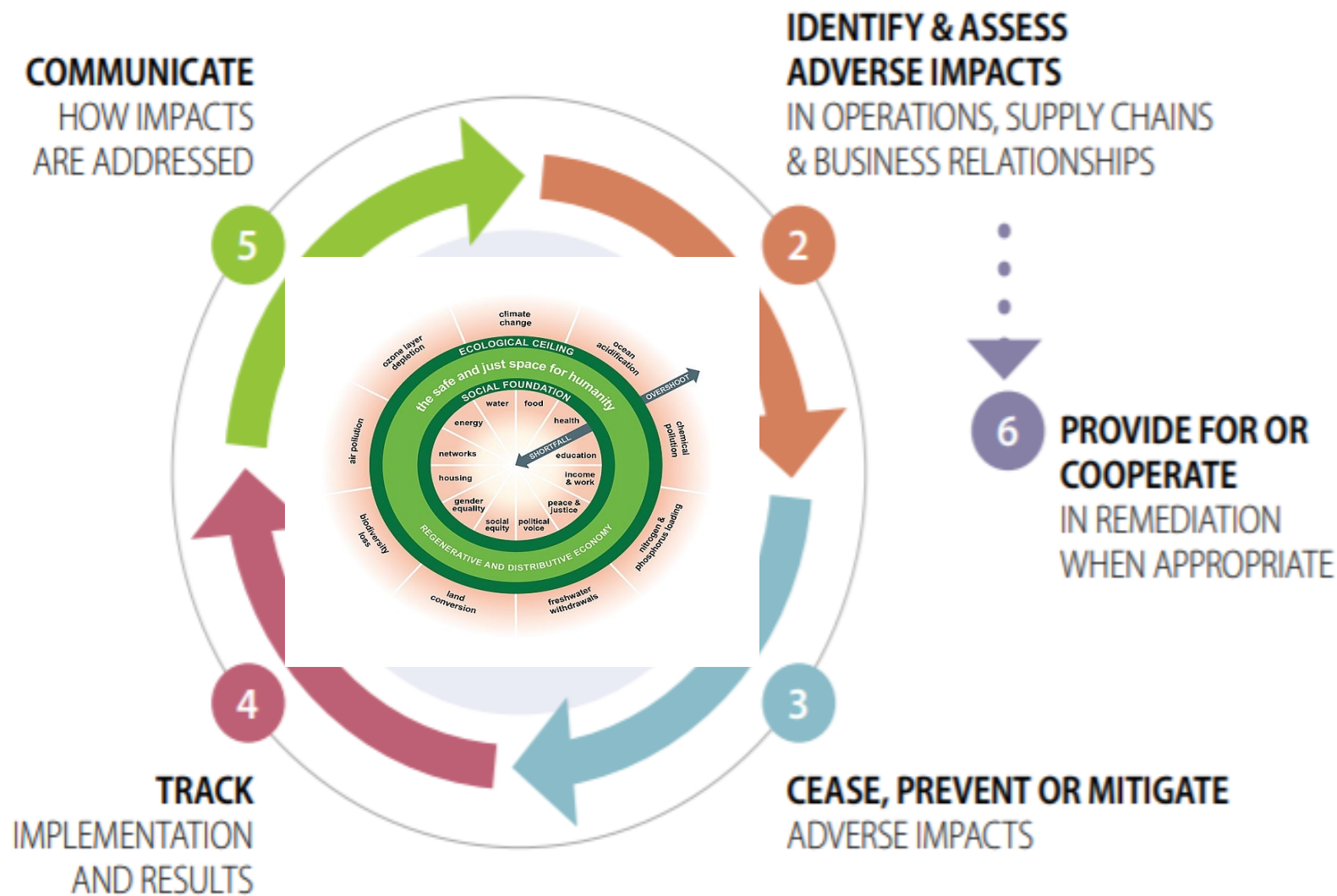
- Embedding sustainable value creation into the law
- Enabling the board to fulfil its role
 - Strategy-setting
 - Supervision
 - Risk management
 - Sustainability due diligence
- A level playing field for business
- Legal certainty for all involved
- Coherence between company law and sustainability initiatives
- Source: Sjøfjell, [Reforming EU Company Law to Secure the Future of European Business](#) (2021)

Research-based reform proposal for sustainable company law for corporate sustainability

- Redefined purpose of the undertaking
 - Sustainable value creation within planetary boundaries
- Redefined duties of the board
 - Integrating sustainability in business models and strategies
 - Sustainability due diligence across global value chains
 - Ambitious plan for continuous improvement
- Assurance, auditing and enforcement
 - Assurance of process by external experts
 - Auditing of sustainability reporting
 - Public and private enforcement
- Source: [SMART reform proposals, business](#) (2020)

The potential of sustainability due diligence for corporate governance fit for future

- A crucial tool for the company & its board
 - To identify and mitigate financial & business risks of unsustainability (forward-looking risk management)
 - To begin the transition towards sustainable business (strategy; business model choice; decision-making)
 - As a basis for meaningful reporting (facilitating sustainable finance, sustainable public procurement, etc)
- A crucial step towards a sustainable future



Adapted from Figure 1, OECD DD Guidance, 2018

How could due diligence be mandated to affect change towards sustainable corporate governance?

- A duty for the company and for the board
- Encompass the *business* of the company
- An integrated sustainability approach
- A mandatory (company law) instrument
 - Verification
 - Enforcement
 - Liability
- No safe harbour, no box ticking...
- Possible defence – crucial for legal certainty
- Source: Sjøfjell & Mähönen, [Mandatory sustainability due diligence is key to a sustainable future](#) (blog post with further references, 2021)

Possible further reading

- B. Sjøfjell, T. Häyhä, & S. Cornell, [A Research-Based Approach to the UN Sustainable Development Goals. A Prerequisite to Sustainable Business](#), 2020/2021
- B. Sjøfjell, [Reforming EU Company Law to Secure the Future of European Business](#), 2021
- D. Monciardini, J. Mähönen & G. Tsagas, [Rethinking Non-Financial Reporting: A Blueprint for Structural Regulatory Changes](#), 2020.
- L. Smit & C. Bright, [The concept of a ‘safe harbor’ and mandatory human rights due diligence](#), 2020
- M.B. Taylor, [Litigating Sustainability – Towards a Taxonomy of Counter-Corporate Litigation](#), 2020
- B. Sjøfjell, *Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law, with the Takeover Directive as a Test Case* (Kluwer Law International, 2009). The whole monograph now available at SSRN: <https://ssrn.com/abstract=4011934>

Sustainability is possible, with legislative reform to support the transition

Research Group **Companies, Markets & Sustainability**
(the Company Law Group): jus.uio.no/companies

[Blogging for Sustainability](#)

 @BeateSjafjell

 @CompanyLawGroup #SMARTlegacy #FuturingNordics
#BloggingforSustainability

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