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Towards a Sustainable European Company Law

A Normative Analysis of the Objectives of EU Law,
with the Takeover Directive as a Test Case

Beate Sjøfjell



Wolters Kluwer
Law & Business

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To

Aleksandra, Vilde and Katarina

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If then, there is some end of the things we do, which we desire for its own sake [. . .], clearly that must be the good and the chief good. Will not the knowledge of it, then, have a great influence on life? Shall we not, like archers who have a mark to aim at, be more likely to hit upon what is right?

Aristotle¹

1. Nicomachean ethics, Book I, Chapter 2 (translated by W.D. Ross)

Foreword by Jaap Winter

Beate Sjøfjell's timing with her book *Towards a Sustainable European Company Law* is both immaculate and courageous. Immaculate, as there could not be a better time to publish this book. We have a series of crises on our hands, from energy crisis to climate crisis to food crisis and finally to a massive financial markets crisis. All of these challenge us to reconsider our models and behaviours and Beate Sjøfjell is certainly doing that. She is also courageous because she has started writing her book when much of these crises were still under the water and markets and financial incentives were still hot.

Robert Reich in his latest book has called our times the times of Supercapitalism, in which companies are under pressure of stock markets to show continuous financial performance and of markets for goods and services to provide the highest quality against the lowest possible prices. Both reduce the scope for companies to promote other values and invest in long term sustainable activities as this may lead to more costly products and a reduction in profitability. Companies suffer from a collective action problem: if other companies are not doing it, why should we do it? To be frank, we all suffer from the same problem. As investors, directly with our savings, or indirectly with our pensions, we urge companies to yield instant and continuous results and as consumers we will not forego cheap and high quality products. This leaves us powerless as concerned citizens.

Reich does not believe in the ability of companies to change this, because of these collective action problems. Governments as the classic actors that can overcome collective action problems should set the rules that determine what companies can, cannot and should do. Beate Sjøfjell takes a different and more challenging route. The shareholder primacy model for the company's direction should be replaced by a dual guideline of acting in the company's interest and in that of a sustainable development, which includes taking into account the interests of other stakeholders and values intrinsic to the good society. Beate Sjøfjell argues

that there are grounds for such a change in company law in the overarching objectives of EU law, which should apply to all sectors. To see whether this is followed through in practice, she takes as a test case the EU Takeover Bids Directive which was adopted in 2004 after years of political struggle. In a sense this is an easy target as everybody, regardless of one's conviction on markets and society, agrees this Directive is an ugly compromise and probably ineffective. In my view however, the Directive did not attempt a compromise between outright market thinking by creating a market for corporate control on the one hand and a more holistic scope and concern for values of a good society on the other hand. It was the outcome of a political power game on whether a true internal EU market should be created without artificial barriers or that Member States would be able to continue to shield their industries from such market. This does not make the book's questions and challenges on the Directive less relevant, they are often to the point and well articulated.

The key question that remains, also after having read this book, is whether company law is the right vehicle to address the concerns for our society that we all have as citizens. There is a general tendency of using company law to achieve all sorts of public interest objectives. As the High Level Group of Company Law Experts we warned against this tendency in our report on a Modern Regulatory Framework for Company Law in Europe. The great thing about Beate Sjøfjell's book is that it vigorously and passionately forces us to rethink that question again.

Jaap Winter
October 2008

Foreword by Takis Tridimas

Traditional wisdom suggests that corporate activity is about maximizing shareholder wealth. The function of corporate law is to provide a regulatory framework within which companies can thrive and achieve profit maximization whilst providing a balance between managerial and shareholder interests and essential safeguards for creditors. This traditional private law model of corporate regulation has in recent years come under attack by scholars who, mindful of the great and pervasive impact of corporate power in economic, social and political life, promote a wider, stakeholder-based, paradigm of corporate regulation. This important book falls into this category. It seeks to reassess the underlying values and objectives of corporate and capital markets law. It questions the traditional pre-occupation with shareholder primacy and seeks to integrate societal and environmental concerns into the corporate law discourse.

The analysis focuses on EC law, in particular, the Thirteenth Directive on take-overs. As the author points out, corporate law cannot be seen in a vacuum. It is part of a system of rules which promote values, balance interests, and express political choices. This thesis provides a normative analysis of corporate law fundamentals and takes us skillfully on a journey through the wider objectives of the European Union and the ambitious harmonisation programme on company and securities law. What are the underlying values of the harmonization programme? How do these values fit in with the wider objectives of the Community? How can the Community model of corporate regulation be reconciled with the objective of ensuring sustainable development, which the Heads of the EU governments declared to be one of the overriding objectives of the Community? Should it serve that objective?

The book uses the Thirteenth Company Law Directive on take-overs as a test case. This is a good choice for many reasons. Acquisitions in the form of take-overs are one of the main ways in which corporations grow in size. Cross-border

take-overs are encouraged by, and promote, integration and globalization. Given that the economic and political power of large corporations exceeds that of small nations, it is clear that the regulation of take-overs and the set of political preferences that it expresses, has repercussions for governments, shareholders, creditors, employees, consumers and citizens.

The Thirteenth Directive has the unenviable distinction of being one of the directives with a very long period of gestation, possibly the longest. The Commission first began working on take-overs in the early 1970s but it was not before 2004 that a directive could finally be agreed upon. More importantly, it is a measure which is at odds with the federalizing tendencies of contemporary EU capital markets law. Whilst the Financial Services Action Plan and the Lamfalussy process have spearheaded a high degree of harmonization in the broader field of capital markets law, the regulation of take-overs has escaped this consensus. Bred in conflicting national corporate cultures, the Directive is full of compromises, opt-outs, and elective provisions so much so that the Commission has publicly expressed its disappointment with the end result. The author considers that the focus of the directive on promoting a market for corporate control is problematic and questions whether the directive will be able to achieve its ultimate objective, namely to foster economic development in the EU.

In Beate Sjøfjell's analysis, the examination of the Directive serves to promote an alternative corporate law paradigm. The author views company law as a tool which can make an important contribution to the achievement of wider societal objectives and advances two normative guidelines in lieu of the one-dimensional paradigm of shareholder primacy: the company interest guideline, where the corporation functions as a balancing point for a broad range of interests (employees, shareholders, customers etc), and the sustainable development guideline.

This is a fresh, stimulating and valuable discussion on a topical subject which will make an important contribution to European corporate law discourse.

Takis Tridimas
November 2008

Preface

The topic of this book has never been more important, and I wish with all my heart this were not so. Nevertheless, the latest reports from the Intergovernmental Panel on Climate Change give us only a few years in which to peak carbon emissions to avoid the very worst consequences of global warming. At the time of writing, financial unrest, rising oil prices and an escalating food crisis further serve to accentuate this book's underlying theme: What is the role of the law that regulates our large companies?

The global challenges we face environmentally, socially and financially necessitate a new approach: a new and more comprehensive way of legal thinking. This book represents a contribution to such a new approach. It is my sincere hope that this book will spark a debate that will lead us to the tentative answers of how we can use company law as the societal tool it is, to ensure that our companies contribute to a sustainable future for us all.

It may come as a surprise that this book does not argue in favour of changing EU law. Rather it contributes to developing an understanding of the role of EU law as it is today. EU law contains many of the right ingredients, but something has gone very wrong in the implementation of its Treaty law. As the analysis of the test case, the Takeover Directive, shows, the consequence is secondary legislation that neither promotes economic development nor furthers the integration of economic, social and environmental interests that the principle of sustainable development requires.

The journey from the beginning of what was originally intended to be a run-of-the-mill doctoral thesis to this finished product, which has become something quite different, has been the most stimulating, demanding and rewarding trip of my life. On this journey I have experienced the thrill of going deep into the realms of company and securities law, law and economics, general EU law, environmental law, labour law, human rights law, and the issue of sustainable development. I only

wish I could have stayed longer and explored many of these exciting topics in greater depth. Without the help of a number of excellent colleagues, I would most probably have got lost along the way. It would be impossible to mention all the kind people I have encountered, who have enriched my research with their questions, comments, suggestions and inspiring discussions. I will do my best here to honour those who deserve it the very most, after first giving collective thanks to everyone I must leave out: thank you all so much.

The Centre for European Law at the Faculty of Law in Oslo has served as my home base during the four years of my research fellowship, and it has been a wonderful place to be. Together with the friendly crowd at the neighbouring Nordic Institute of Maritime Law, my colleagues at the Centre managed to give all the right advice, support and encouragement that a new research fellow needs (in good times as well as not-so-great ones): Erik Røsæg, Anne Robberstad, Anne-Karin Nesdam and Henrik Bull, my special thanks to you.

Henrik Bull also served as my first supervisor (until he was called to the EFTA Court), and I thank him for his kind encouragement and carefully considered advice, and for his continued interest in my research project after moving to Luxembourg. Hans Petter Graver was kind enough to take over. In addition to his good advice, I am grateful to Hans Petter for starting the EU law discussion group and to him and the other members of the group – especially Benedikte Moltumyr Høgberg, Christoffer Eriksen, Henrik Bjørnebye, Tarjei Bekkedal and Jørgen Stubberud – for our many stimulating discussions. I would also like to thank Ole Kristian Fauchald and his research group in international law, especially the subgroup on transnational corporations.

At the Faculty in Oslo we are lucky enough to be allowed a second supervisor, and my second supervisor, Jan Andersson, deserves special thanks for his help with the structure and logic of my argumentation, for his insightful advice concerning company law and for his support. My trusted colleague Ola Mestad has also contributed substantially to my writing with his x-ray vision, especially in the first and last chapters of this book: thank you so much for this and for caring. Dag Michalsen, mentor and colleague, thank you for many wonderful lunch meetings. Finn Arnesen, with his open-door policy and insight into EU law, has also been a valuable discussion partner, especially during the tough final months.

As regards law and economics, I thank Endre Stavang for his help in getting me started, Mads Krohn for inspiring discussions and Erling Eide for patiently reading an early draft of my entire thesis. Christina Voigt and Hans Christian Bugge provided invaluable help in relation to environmental law and the law of sustainable development. Marius Emberland did the same in the area of human rights law, as did Stein Evju in the area of labour law.

Aud Slettemoen, legal advisor at the Ministry of Justice in Norway, deserves special thanks for reading drafts of most chapters and providing enthusiastic, inspiring and constructive comments. An even bigger and very warm thank you goes to Jukka Mähönen, my dear colleague at the Faculty of Law in Turku, Finland, who read everything and gave very useful and often provocative comments about everything from law and economics and company law, to the style of writing.

In addition, Jukka allowed himself to be engaged in a vigorous (and on-going) e-mail debate on vital issues in company law, which I can only hope is as inspiring – and fun – for him as it is for me.

I am grateful to the Eckbo legacy fund for financing a three-month research visit to the Centre for Commercial Law Studies, Queen Mary College, University of London, in 2006. During my stay, I especially appreciated the stimulating discussions I had with Janet Dine and Takis Tridimas at CCLS, and Simon Deakin at Cambridge. I am also very grateful to Mette Neville and the other company law researchers in the Nordic network who organized a seminar for Nordic research fellows in 2004 and inspired us to start our own network, which has since evolved into a permanent network for researchers and research fellows alike. For helpful suggestions and inspiring feedback, I owe a number of Nordic colleagues thanks, especially Mette Neville, Stinne Taiger Ivø, Carl Svernlöv and Mads T. Andenæs. Of my other European colleagues, I would especially like to acknowledge Steef Bartman and Cornelis de Groot (the Netherlands), Luca Enriques (Italy) and Liane Bednarz (Germany). Zsafia Kerecsen at the Internal Market DG of the European Commission helpfully answered my questions about the implementation of the Takeover Directive; thank you, Zsafi!

When turning the thesis into this book, I was greatly inspired and encouraged by comments and advice from all three members of the evaluation committee: Janet Dine, Jesper Lau Hansen and Erling Hjelmeng. Thank you all!

At the Faculty in Oslo, the service-minded support team consisting of office manager Ole Bjerknes, librarians Inger Hamre and Bård Tuseth, computer whizzes Ingeborg Vedal and André Nilsen, and our external, supreme proof-reader Caroline Glicksman deserve – and have – my gratitude. The academic writings of many have inspired and contributed to my research, as is evident from the footnotes and bibliography to this book. I am also grateful to Oxford University Press for granting permission to quote from ‘The Anatomy of Corporate Law’ by Kraakman et al.

To series editor Steef Bartman, and Simon Bellamy at Kluwer Law International: thank you both for your encouraging interest in my research project from an early stage. I am honoured and delighted to see *Towards a Sustainable European Company Law* become a part of the CECL series.

The gratitude I feel to all those I have thanked above is exceeded only by the gratitude I feel to my husband, Steinar Høiback, for his unstinting enthusiasm and belief in this project and for a love and support that knows no boundaries, and to our three daughters, to whom I dedicate this book.

Beate Sjøfjell
July 2008

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