

The World Is Changing

Citation for published version (APA):

Kemp, B., & Olaerts, M. (2023). The World Is Changing. *European Company Law*, 20(1), 4-5.
<https://doi.org/10.54648/eucl2023004>

Document status and date:

Published: 01/01/2023

DOI:

[10.54648/eucl2023004](https://doi.org/10.54648/eucl2023004)

Document Version:

Publisher's PDF, also known as Version of record

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

www.umlib.nl/taverne-license

Take down policy

If you believe that this document breaches copyright please contact us at:

repository@maastrichtuniversity.nl

providing details and we will investigate your claim.

The World Is Changing

B. KEMP: PROFESSOR OF CORPORATE GOVERNANCE AND CORPORATE REGULATION AT MAASTRICHT UNIVERSITY AND PARTNER AT LOYENS & LOEFF*

M. OLAERTS: PROFESSOR OF COMPARATIVE AND NATIONAL COMPANY LAW AND APPOINTED TO THE ELVERDING CHAIR ON SUSTAINABLE BUSINESS, CULTURE AND REGULATION (CHAIR FINANCED BY BROADVIEW, DSM, DNB, ING EN QPARK) AT MAASTRICHT UNIVERSITY AND OF COUNSEL AT DVDW. B. KEMP AND M. OLAERTS ARE THE MAIN EDITORS OF THIS JOURNAL**

'*We all want to go to heaven but nobody wants to die*', was the title of the first editorial in this journal in the year 2004.¹ In the editorial Jaap Winter used the saying to describe the process leading up to the thirteenth company law directive on takeover bids. He explained that getting to heaven is generally a difficult and painful process. The process and outcome of adopting the thirteenth directive similarly reflects in his opinion the general struggle of redefining national interests in a single EU market. Back in 2004, one of the questions was whether or not the compromise nature of the takeover directive with its opt in and opt out arrangements would lead to harmonization through market mechanisms, given the assumption that most Member States would not impose rules that facilitate takeovers upon their companies. We can now safely conclude that the takeover directive did not have such a harmonizing effect and that most national rules on takeovers still vary significantly across Member States.²

Today, nineteen years after the publication of the first European Company Law issue, we see that the world has changed, company law is changing and our expectations of the role of the European legislator and company law regulation in general are different. Over the past years we have lost a Member State, lived through the financial crisis, a pandemic, and have been faced with several other crisis. The climate crisis and social challenges we are facing require – in our view – a renewed perspective on the role of companies in society which inevitably has an influence on company law and EU harmonization.

The EU company harmonization program and the directives in which this has resulted mainly focused on traditional company law issues such as for example minimum capital requirements, (cross border) mergers and divisions, single member companies, takeovers etc. At the time, harmonizing traditional governance issues such as the division of powers between corporate bodies or the responsibility of the board of directors seemed unattainable. Proposed directives addressing these issues, such as the fifth directive on the management structure of companies and the ninth directive on

links between undertakings and in particular company groups, were both withdrawn. Rather than harmonizing specific traditional company law issues, the driving force for harmonization nowadays seems to come from elsewhere, outside of traditional company law. Nevertheless, the saying '*we all want to go to heaven but nobody wants to die*' still applies. The European Green Deal³ for example ambitiously aims for the sky. The general sentiment in society is that action is needed sooner rather than later. One can only hope that in the negotiations the joint pressing need will incentivize Member States to more readily agree on a common approach than was the case for the takeover directive. The European Green deal has led to several legislative proposals such as the Corporate Sustainability Reporting Directive and the Corporate Sustainability Due Diligence Directive (CSDDD). Even though these proposals do not directly address traditional corporate governance concepts such as the division of powers between corporate bodies or the role of directors, they will undoubtedly have an influence on these concepts. An exception to the fact that these initiatives do not address traditional corporate governance issues is Article 25 of the proposed CSDDD. Within the proposed CSDDD provisions Article 25 is the odd one out as it does not specifically relate to due diligence requirements but more in general to the role of the board of directors. Article 25 requires directors to take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environment.⁴ As with previous attempts to regulate divisions of power and directors duties, also Article 25 of the CSDDD proposal does not seem uncontroversial given the fact that the provision was removed in the position taken by the Counsel on the proposed directive.⁵ There (for now) seems to be only a limited appetite to enforce (more) sustainable behaviour by companies through traditional corporate governance strategies, such as fiduciary duties, etc., leaving these developments up to the individual Member States. It remains to be seen what will remain of this proposed duty of care and whether or not the joint European challenge can be used as a driving force for harmonization in this area.

* Email: bastiaan.kemp@maastrichtuniversity.nl.

** Email: m.olaerts@maastrichtuniversity.nl.

1 J. Winter, *We All Want to Go to Heaven but Nobody Wants to Die*, 1(1) ECL 4 (2004).

2 See the takeover bids directive assessment report, which can be accessed at, <https://op.europa.eu/en/publication-detail/-/publication/67501b75-7583-4b0d-a551-33051d8e27c1>.

3 Communication from the Commission, The European Green Deal, Brussels, 11 Dec. 2019 COM (2019) 640 final.

4 Article 25 of the proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

5 Council of European Union, Permanent Representatives Committee, Proposal for a Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach, 30 Nov. 2022.

The changing expectations regarding the role of companies in society also beg the question whether the underlying assumptions in – for instance – the takeover directive and (recasted) shareholder rights directive hold true. Both directives operate on the basis of allocating powers to shareholders, in order to enable them to monitor the company and its board.⁶ It remains to be seen how effective monitoring by shareholders will be when pursuing the sustainability agenda. In that respect, the question can also be raised to what extent a distinction could (and should) be made between different types of shareholders. Our expectation is that sustainable corporate governance and these types of questions will receive (and require) even more attention over the next years.

We look forward to addressing these and other challenges of European company law in the journal in the upcoming years. nineteen years ago, Steef Bartman took the great initiative to initiate a journal with concise articles enabling academics and practitioners to stay up to date on comparative and EU-company law developments. We are delighted that he has provided us the opportunity to continue this journey for future generations, to follow and highlight the interesting developments and challenges as mentioned above, and to provide a platform to discuss current and future company law initiatives for years to come.

⁶ This has for instance led to criticism that the directive is too much focused on shareholder primacy: see B. Sjaafjell, *Towards a Sustainable European Company Law* (Alphen aan den Rijn: Kluwer Law International 2009).