Review Article
UDC: 005:658:316.663:502(4)(100)
DOI: https://doi.org/10.22598/iele.2022.9.2.9

CORPORATE GOVERNANCE CHALLENGES IN RELATION TO THE ESG REPORTING

Dušan Jovanovič *
Nikola Jovanović **

ABSTRACT

Over the last decade, there has been an increasing emphasis on corporate social responsibility in business. The idea has evolved from CSR (Corporate Social Responsibility) to ESG Reporting (Environment, Social, Governance), with the latest trends developing towards a green transition. This genesis of development has been followed by corporate practice and legislation at European and national levels. Consequently, ESG and Green Transition guidelines have been incorporated into the liabilities and duties of the management and supervisory bodies of the company, resulting in a new view of the performance of these functions and their accountability. In this paper, the authors outline the basic postulates and roles of corporate governance bodies and their respective responsibilities for the implementation of ESG and the Green Transition. Sustainability as a value is highlighted in the EU and companies are committed to respecting human rights and reducing their impact on the planet. However, progress by companies (corporates) in integrating sustainability into their governance processes, in particular human rights and environmental due diligence, is still slow, and progress is visible with the drafting of the Corporate Sustainability Due Diligence Directive (CSDD) as a follow-up to the Directive 2014/95/EU (NFRD). The new rules are intended to provide companies with legal certainty and a level playing field. It should provide greater transparency for consumers and investors and should accelerate the green transition and protect human rights in Europe and beyond. These tasks are directly linked to the responsibilities of the authorities in society, who will have to respect these rules and be held accountable for failing to enforce them or for failing to achieve a transfer of capital to the green transition.

* Dušan Jovanovič, Faculty of Economics and Business, University of Maribor, Maribor, Slovenia; dusan.jovanovic@um.si
** Nikola Jovanović, Faculty of Economics and Business, University of Maribor, Maribor, Slovenia; balisticas95@gmail.com

KEYWORDS: *CSR (corporate social responsibility), ESG (environment, social, governance) Reporting, Green Transition, liabilities and duties, management, supervisory board, Corporate Sustainability Due Diligence Directive (CSDD)*

1. INTRODUCTION

Preserving and protecting the environment is one of the biggest challenges that "modern generations" will and are already facing.[1] Climate change, natural disasters, the unpredictability and extremity of weather events, and the COVID-19 pandemic have once again exposed society to a whole set of challenges that will require them to rethink their existing economic, business, and lifestyle habits.[2]

One of the key changes in the goal of preserving the ecosystem and the planet as a whole is highlighted as the transition of the existing economy towards more sustainable business through the so-called "green transition". There are many definitions of sustainable development in the world. The most common ones define it as an effort to meet the needs of the present without compromising the needs of future generations, as the World Commission on Environment and Development[3] stated in its report as early as 1987. If the economy is to move towards this transition, it will therefore need to define clear and precise operational objectives, the mechanisms by which it will achieve them, and, ultimately, the responsibilities and sanctions for non-compliance.

The transition towards sustainable business will also require a change in the fundamental paradigms on which the traditional economy is based. Such changes will undoubtedly pose a particular challenge and will undoubtedly seek the support of society as a whole, irrespective of national, regional, and local differences.[4]

[1] European Union: European Commission, *Communication from the commission to the european parliament, the european council, the council, the european economic and social committee and the committee of the regions, The European Green Deal,* 11. December 2019, COM(2019) 640 final available at:[https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0640&from=EN], accessed 30.10.2022].

[2] According to a study by the United Nations [available at: https://www.un.org/development/desa/es/news/population/2018-world-urbanization-prospects.html], accessed: 17.8.2022, cities today consume more than 75% of natural resources, emit between 60% and 80% of greenhouse gases and produce more than 50% of the world's waste. By 2050, two thirds of the world's population is expected to live in cities, 20 percent more than today.

[3] WCED Report of the World Commission on Environment and Development, available at: [https://www.are.admin.ch/are/en/home/media/publications/sustainable-development/brundtland-report.html], accessed 17 August 2022.

[4] European Union: European Commission, Communication from the commission to the European Parliament, the European Council, the Council, the European Economic and So-

The central path to a sustainable economy emphasizes a change in the fundamental concept of economic development to date, namely its linearity. Namely, in a linear economy, raw materials are collected and transformed into products which, after use, are discarded as waste without any possibility of reuse. On the other hand, a sustainable economy is characterized by circularity, in which we close the cycles of raw materials, changing the way we create and preserve value towards more sustainable production and more appropriate business models.[5]

Along with the concept of linear development, we will also have to consider the concept of infinite growth. The challenges mentioned above have undoubtedly raised the question of the purpose and role of the economy in society in general and, consequently, the purpose and role of corporations.

In the context of these changes, the paper will focus on how the economy's orientation towards sustainable development and the creation of a green transition in the economy are linked to issues of corporate non-financial reporting (Environmental Social Governance reporting) and what are the possible models of accountability of the management and supervisory bodies as the main decision-makers in the company.[6] In fact, the usual practice of incorporating "new-age" corporate institutes and determining their direction has generally evolved from full autonomy to the relative cogency of corporate reporting, and therefore the latter corporate institutes and their implementation are likely to follow this path as well.

In this way, the authors highlight the key mechanisms and challenges that arise in connection with the development and implementation of future European and Slovenian legislation in this area (draft CSDD Directive). Finally, through examples of positive practices, they highlight possible trends and the direction that should be followed.

2. THE GREEN TRANSITION

Before addressing the issue of corporate sustainability reporting in-depth, it is necessary to at least briefly explain the concept of the so-called "Green Transition" and its basic premises.

cial Committee and the Committee of the Regions, The European Green Deal, 11. December 2019, COM(2019) 640 final available at:[https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0640&from=EN], [accessed 30.10.2022].

[5] See more at [https://kenniskaarten.hetgroenebrein.nl/en/knowledge-map-circular-economy/how-is-a-circular-economy-different-from-a-linear-economy/], accessed 17.8.2022.

[6] Grove, H. & Clouse, M.: *Focusing on sustainability to strengthen corporate governance*, Corporate Governance and Sustainability Review 2, 2018.

The Green Transition refers to a strategy for social change that will enable the world's current environmentally unsustainable situation to be transformed into a new sustainable paradigm "that promotes development and peace and seeks to improve the livelihoods of all", according to the manifesto published by UN-Habitat in its 2020-2023 Strategic Plan.[7] Namely, with the current concept of the economy and life in general, society consumes more resources every year than nature can regenerate, which means that the rest of the resources are actually taken from future generations. In this context, we highlight the so-called "Earth Overshoot Day"[8] i.e. the date when humanity's demand for ecological resources and services in a given year exceeds what Earth can regenerate in that year, which is getting shorter - year by year.[9]

The foundations of what we now call the Green Transition were already set up in the Paris Agreement.[10] The priorities of the Climate Action Plan include:

- promoting decarbonization and favoring green energy over fossil fuels,
- commitment to green transport,
- increasing investment in energy efficiency,
- supporting business and scientific innovation,
- creating competitive electricity markets
- preparing action plans and national strategies for the circular economy,
- increasing green public investment, etc.

The Paris Agreement and the United Nations Agenda: "Transforming our world: the 2030 Agenda for Sustainable Development"[11] , have set the path for the European Union, which has based itself on them, published a Communication[12] presenting the European Green Deal as an integral part of the European Union's strategy to integrate the Agreement and the Agenda.

---

7 See [https://unhabitat.org/], accessed 17.8.2022.

8 Earth Overshoot Day is hosted and calculated by Global Footprint Network, an international research organization that provides decision-makers with a menu of tools to help the human economy operate within Earth's ecological limits, for more information on Earth Overshoot Day, see [https://www.overshootday.org/about-earth-overshoot-day/], accessed 30.10.2022.

9 In 2022, the date was 28 July; in 2012, 4 August; in 2002, 21 September; and in 1992, 15 October.

10 For more details on the 2015 Paris Agreement, see [https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement], accessed 17.8.2022].

11 UN General Assembly, Transforming our world : the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, available at: [https://www.refworld.org/docid/57b6e3e44.html], accessed 30 October 2022.

12 European Union: European Commission, Communication from the commission to the european parliament, the european council, the council, the european economic and so-

Among other things, the target is to reduce greenhouse gases by 55% by 2030 and to make Europe a "negative" emitter from 2050, with a greater capacity to offset emissions than it produces.[13]

The Agreement and the Communication commit each country to promote the green transition on its territory, thus ensuring a new, sustainable reality for our planet. Slovenia is no exception to this and can follow the examples of European countries, and there is also an individual race *to the top* for companies wishing to follow ESG and green transition trends and good practices, for example by awarding scholarships to promote green transition (Santander Bank[14]), rewarding management according to the achievement of green transition targets (Mastercard[15], Apple,[16] Deutsche Bank[17]), etc.

There are many definitions of sustainable development around the world. The most common ones define it as the effort to meet the needs of the present without compromising the needs of future generations, as the World Commission on Environment and Development[18] put it in its report as early as 1987.

3. SUSTAINABILITY (CORPORATE) REPORTING - *QUO VADIS*?

Sustainability reporting means reporting to external stakeholders, whereby companies report on economic, environmental, and social impacts in addition to financial information. Non-financial information is also becoming important.[19] These concepts and definitions have recently been followed by a legislative approach, which is still evolving. [20]

cial committee and the committee of the regions, The European Green Deal, 11. December 2019, COM(2019) 640 final available at:[https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0640&from=EN], [accessed 30.10.2022].

13 See [https://www.becas-santander.com/en/blog/green-transition.html], accessed 17.8.2022.

14 *Ibid*.

15 See [https://fortune.com/2022/04/27/bonuses-linked-esg-goals-mastercard/] accessed: 17.8.2022.

16 See [https://www.esgtoday.com/apple-introduces-esg-modifier-to-executive-compensation/], accessed 17.8.2022.

17 See,[https://www.db.com/news/detail/20201207-deutsche-bank-plans-to-link-compensation-to-sustainability-criteria?language_id=1], accessed 17.8.2022.

18 WCED Report of the World Commission on Environment and Development, available at: [https://www.are.admin.ch/are/en/home/media/publications/sustainable-development/brundtland-report.html] accessed 17.8.2022.

19 S. Fink Babič, R. Biloslavo, *Sustainability Reporting by Companies - Opportunities and Challenges,* Organization p. A 14-A 26, No. 1, 2012.

20 Corporate governance first started to develop at the level of autonomous regulation in companies and later through the enshrinement of best practices in corporate governance codes un-

ESG investing is growing exponentially also, as more investors and issuers utilize ESG and climate data and tools to support their investment decision-making. The practice of ESG investing began in the 1960s as socially responsible investing, with investors excluding stocks or entire industries from their portfolios based on business activities such as tobacco production or involvement in the South African apartheid regime[21].

The importance and rapid development of non-financial reporting are best illustrated by Ken MacKenzie, Chairman of BHP, quote:

«Every non-executive director would also attest, as would every CEO who goes out and engages with shareholders, that the change in the tone in the marketplace around ESG has been remarkable. Go back 15 years ago, I›m not even sure we would have known what the ESG acronym meant«.[22]

The main objective is to promote sustainable and responsible corporate behavior in all global value chains. And it is companies (businesses) that have a key role to play in creating a sustainable economy and society.

To organize and render consistent the diversity of non-financial information potentially available, several sustainability accounting frameworks have evolved over the last quarter-century.[23]

Therefore, we argue that companies must be asked to provide data that are more timely, relevant, credible, and comparable and that demonstrate improved ESG performance. With this information, financial analysts and investors can redirect and accelerate capital flows towards corporate investments that help

---

der the *comply or explain* principle (Cadbury Code 1992), and only later on through legislation to make corporate governance reporting mandatory for so-called public limited companies. Similarly, a reporting system on non-financial data is now being introduced at the level of sustainability reporting through EU legislation and embedded in national systems. The placement of reporting for public interest entities thus transfers the obligation to comply with certain standards that improve and commit to socially responsible corporate behaviour. In addition, the Code of Corporate Governance for Publicly Listed Companies [Code 2021, available at: https://ljse.si/UserDocsImages/datoteke/Pravila,%20Navodila,%20Priro%C4%8Dniki/Slovenski%20kodeks%20upravljanja.pdf?vel=795437], for example, also introduces respect for human rights in business (due to the adoption of the National Action Plan for Respect for Human Rights in Business in 2018), as well as sustainable business and the existence of a sustainable business policy, which is supposed to incorporate the social, environmental and governance aspects of a company‘s business.

21 See: [https://www.msci.com/esg-101-what-is-esg/evolution-of-esg-investing], accessed: 30.10.2022.

22 Ken MacKenzie, Chairman of BHP, The Australian Financial Review Business Summit, 10 March 2020.

23 Bose, S. Evolution of ESG Reporting Frameworks, In: Esty, D.C., Cort, T. (eds) Values at Work. Palgrave Macmillan, Cham, 2020.

tackle important problems related to climate crises and the reaching of sustainable development.[24]

Considering the critical role corporate ESG information will play in assessing a company's long-term performance, companies must ensure that not only do they provide more information but also that the information is relevant and of high quality. [25]

In addition to the efforts of companies, it is also necessary to develop and follow legislative trends in the field of ESG, which can be more or less binding.

3.1 EU LEGISLATION ON NON-FINANCIAL AND SUSTAINABILITY REPORTING

Normative activity on social responsibility - formerly CSR, now ESG - has been going on for a considerable time, as already mentioned, also in the European Union. The basic idea of the EU Commission's Green Paper on the promotion of a European framework for CSR[26] was to go beyond mere legal norms. In this manner, CSR was to make a significant contribution to the Lisbon Strategy's objective of building a dynamic, competitive, and cohesive knowledge-based economy. This was followed by a White Paper,[27] which contained an EU strategy to promote social responsibility. Consequently, the EU has further defined social responsibility as the accountability of companies for their impact on society in its renewed acts (the so-called Renewed EU Strategy).[28] More recent regulatory efforts in the field of CSR include the adoption of several European Parliament Resolutions, European Commission Communications, and various Strategies.[29] The use and implementation of these legal acts are voluntary.[30]

[24] Arvidsson, S., & Dumay, J., Corporate ESG reporting quantity, quality and performance: Where to now for environmental policy and practice? Business Strategy and the Environment, 31(3), p. 1091, 2022.

[25] *Ibid*, p. 1093.

[26] Green paper on Promoting a European framework for Corporate Social Responsibility, COM(2001) 366 final, 18.7.2001.

[27] Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development, COM(2002) 347 final, 2.7.2002.

[28] Communication from the Commission to the European Parliment, The Council, The European Economic and Social Committee and the Committee of the Regions. A renewed EU Strategy 2011-2014 for Corporate Social Responsibiliti. Brussels, COM(2011) 681 final, 25.10.2011.

[29] Čertanec, A., *Ensuring respect for human rights in the activities of economic operators by concluding a contract*, Podjetje in delo, No. 1., p. 46-71., 2015.

[30] Also, Gale, M. *Legal aspects and pitfalls of corporate social responsibility.* Company and Labour, vol. 3-4. p. 450 ff., 2019.

Historical developments, more recent findings, and different (economic, health) circumstances have led to a new approach to corporate social responsibility, which has flourished in the EU with Directive 2014/95/EU,[31] also known as the Non-Financial Reporting Directive (NFRD), and the subsequent proposal for a Corporate Sustainability Reporting Directive (CSRD).[32]

The NFRD lays down rules on the disclosure of non-financial and diversity information of certain large companies. This Directive also amends the Accounting Directive 2013/34/EU, all of which has already been taken into account in the amendments to the Slovenian Companies Act (ZGD-1I[33]) and the Companies Act (ZGD-1J,[34]), so that these provisions are now contained in the revised Article 70c of the Slovenian Companies Act (hereinafter: ZGD-1).[35]

However, the European Commission is even more aware of the need to pursue CSR principles in pursuit of economic objectives. Corporate social responsibility, also known as corporate consciousness, corporate citizenship, or responsible business conduct, is a form of self-regulation by a company that is integrated into its business model.[36] A CSR policy acts as a self-regulatory mechanism by which a company monitors and actively ensures compliance with the spirit of the law, ethical standards, and national or international norms. In this context, it is the non-financial report that is becoming an increasingly important "statement" of the company's performance, which not only looks at financial performance but also at the company's performance in protecting the environment and caring for employees and society. The European Commission proposes that the non-financial report should become key information on a company's commitment to sustainable development, its vision, and strategy, as well as its resilience and capacity to identify and respond to environmental and social risks. In this context, the European Commission has also adopted a

[31] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information on certain large undertakings and groups, OJ L 330, 15.11.2014.

[32] Proposal for a Directive of the European Parliament and of the Council of 21 April 2021 amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014 as regards corporate sustainability reporting, COM(2021) 189 final.

[33] Official Gazette of the Republic of Slovenia, No 55/15.

[34] Official Gazette of the Republic of Slovenia, No 15/17.

[35] Official Gazette of the Republic of Slovenia, No 65/09 - UPB et seq.

[36] ISO (The International Organization for Standardization) describes social responsibility as „a balanced approach for organisations to address economic, social and environmental issues in a way that aims to benefit people, communities and society". International Organization for Standardization strategic advisory group on corporate social responsibility, preliminary working definition of organisational social responsibility, ISO/TMB AGCSR N4, 2002.

CSRD proposal that would amend the current reporting requirements and will significantly complement the legal basis for quality sustainability reporting.

The proposed CSRD would further broaden the set of business entities that are obliged to publish non-financial information. Sustainability reporting would initially be mandatory for large companies[37] (expected in 2023), but also for SMEs from January 1, 2026.[38] As the Directive is also expected to specify reporting obligations, a single standard for sustainability reporting will be developed at the EU level.[39] The sustainability report will be an integral part of the management report and the management report will have to be published in a single electronic format and a machine-readable format.[40] The Directive is also expected to introduce new requirements for auditors to audit the sustainability information in the sustainability report and to provide assurance on sustainability reporting.[41]

3.1.1 PROPOSAL FOR A DIRECTIVE ON CORPORATE DUE DILIGENCE

A new proposal from the EU Commission, which further complements the CSRD proposal, is the proposal for a Corporate Sustainability Due Diligence Directive (CSDD) and amending Directive (EU) 2019/1937.[42] The proposal

[37] This is currently expected to cover around 11,000 companies - but the wish is to cover listed SMEs other than micro companies; see [https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_1806], accessed 17.8.2022.

[38] The consultations carried out by the Commission showed that many stakeholders are in favour of extending the reporting requirements to additional categories of companies. Therefore, the proposal includes an extension of the scope of the requirements to include all large companies, whether listed or not, and without the previous threshold of 500 employees. This change would mean that all large companies are publicly accountable for their impact on people and the environment, thereby responding to investors' requests for information on corporate sustainability. *Ibid*.

[39] The European Financial Reporting Advisory Group (EFRAG), a private association set up in 2001 at the Commission's instigation to serve the public interest, will be responsible for the development of the standards.

[40] Oryszczuk, S., Mertenskötter, P., Sijmons, R., Brand, M., *The EU's Green Capitalism Takes Shape: Taxonomy Screening Criteria and Corporate Sustaiability Reporting*., 2021, Available at: [https://www.covfinancialservices.com/2021/05/the-eus-green-capitalism-takes-shape-taxonomy-screening-criteria-and-corporate-sustainability-reporting/] Accessed:17. 8. 2022.

[41] Kunšek, M., Sustainability Reporting - soon to be a mandatory element of annual reporting. FinD-INFO, 2021. Available at:[https://www.findinfo.si/medijsko-sredisce/v-srediscu/290415] (accessed: 17.8.2022).

[42] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937 of 23.2.2022, COM(2022) 71 final.

aims to promote sustainable and responsible corporate behavior across global value chains. The implementation of the CSDD would be overseen by national supervisory authorities (Article 17), which would have the power to impose a combination of criminal and civil liability for failure to prevent (Article 7) or reduce and remedy (Article 8) impacts on human rights and the environment, through the imposition of fines. Victims of the breaches themselves would have the possibility to sue for damages, which could be avoided through proper due diligence measures. Article 25 of the CSDD proposal provides for a clear duty of care for directors, as they are expected to act in the best interests of the company in fulfilling their duty of *care*, taking into account the short-, medium-, and long-term implications of their decisions for sustainability considerations.

The proposed CSDD requires Member States to include these provisions in all existing laws and regulations relating to breach of directors' duties. In addition, Article 15 of the proposed CSDD makes variable remuneration of directors contingent on the achievement of business strategy and long-term interests and sustainability.[43]

3.2 EXISTING LEGAL BASIS FOR SUSTAINABILITY REPORTING AND THE GREEN TRANSITION IN THE REPUBLIC OF SLOVENIA

According to Article 54 of the ZGD-1, companies and entrepreneurs are required to keep books of account and to close them annually under the law and Slovenian accounting standards or international financial reporting standards. Based on the closed accounts, an annual report must be drawn up for each financial year within three months of the end of that financial year.

The annual report must be clear and transparent and give a true and fair view of the company's assets and liabilities, financial position, and profit or loss. In this respect, the ZGD-1 specifies the indications and explanations to be given in the financial report according to the size of the business entities, and Article 70 of the ZGD-1 also specifies the necessary elements of the financial report. The reporting in management report is based on a balanced and comprehensive analysis of the development and results of the Company's operations and its financial position, which includes key accounting, financial and other indicators, ratios, and other indicators, including information related to en-

[43] The European Independent Directors' Association ecoDa is highly critical of the CSDD's proposal on directors' liability and damages actions due to the vagueness and inconsistency of the statements. For more details see: [https://ecoda.eu/wp-content/uploads/2019/08/20220520-ecoDa-Position-Paper-on-CSDD-3.pdf] accessed: 17.8.2022.

vironmental and employee protection, the Company's expected development, the Company's financial risk management objectives and measures, and the Company's exposure to price, credit, liquidity, and cash flow risks. Companies subject to audit are required to include a *corporate* governance statement in their annual report.

Additional annual report requirements apply to public-interest entities[44] whose average number of employees during the financial year at the balance sheet cut-off date is greater than 500: they must comply with Article 70(1)(b) of the Financial Regulation of the European Parliament and the Council. Article 70c of the ZGD-1, they must also include in their annual report a statement of non-financial performance which, insofar as is necessary to understand the development, performance, and position of the company and the impact of its activities, shall include at least information on environmental, social and human resources matters, respect for human rights, and anti-corruption and anti-bribery matters, and, in so doing, on the main risks relating to those matters, related to the Company's activities, including its business relationships, products or services, where relevant and proportionate, that could cause serious adverse effects in these areas, and the ways in which the Company manages these risks and the key non-financial performance indicators relevant to each activity.[45]

Thus, for companies (for which the management report is an integral part of the annual report), the ZGD-1 already provides a loose legal basis for reporting and information on environmental impacts or environmental matters.

4. CHALLENGES AND MODELS OF LIABILITY OF THE COMPANY AND ITS BODIES CONCERNING ESG REPORTING

The two key challenges authors want to highlight and to identify solutions in comparative practices are:

- regulating and making accountable the governing bodies for non-implementation or lack of commitment to the Green Transition; and
- correlation of the lucrative purpose of companies vs. sustainable development (in particular the definition of an appropriate (acceptable) ratio and the consequent responsibility of the company's bodies and the role of legislative solutions).

[44] For more details see Bratina, B., Jovanovič, D. *Novelties and Connections of Institutes with the Amended Auditing Act and the Companies Act*. Company and Labour, No. 6-7. p. 1204 ff., 2019.

[45] Kunšek, M., Sustainability Reporting - soon to be a mandatory element of annual reporting. FinD-INFO, 2021. Available at:[https://www.findinfo.si/medijsko-sredisce/v-sre-discu/290415] (accessed: 17.8.2022).

The current legal status of the sustainability transition with reporting goes through the phases of defining sustainability, concern for reporting on the sustainability transition and the resulting accountability, which is in principle an ad hoc relationship without a systematic embedding of the achievement of measurable sustainability transition objectives.

Corporate social responsibility is the duty of every corporate body to protect the interests of society as a whole. Thus, the liability of the company itself as a legal person must be distinguished from the liability of its management and supervisory bodies for the company's business. Their work may, however, be subject to corporate and civil liability or liability for misdemeanors or even criminal offenses. Liability may be moral (public condemnation, disgrace, etc.) or legal (disciplinary, indemnification, or criminal).[46] In this paper, we limit ourselves to civil (indemnification) liability.

The legal status of the members of the management or supervisory bodies[47] is defined on the one hand by their powers and duties and on the other by their responsibility for the exercise of those powers and duties. The object of the obligations of members of management or supervisory bodies is, by its very nature, a service, that is to say, the performance of a specific act in order to achieve or attempt to achieve a purpose. The acts of the management or supervisory bodies are directly binding on the company (duty of endeavor), as are the tortious acts of the members of those bodies. The appointment of a person as a member of a management or supervisory body and the assumption of office creates a corporate law relationship between them, which is already regulated more or less in mandatory terms by law. The same applies to the question of the liability of members of management or supervisory bodies.

In performing their duties, members of the management and supervisory bodies must act in the best interests of the company with the care of a conscientious and honest businessman (*duty of care*)[48] and must protect the company's business secrets (Article 263(1) of the Companies Act-1).[49] They shall be joint-

[46] Bohinc, R., *Corporate Social Responsibility*, Ljubljana: Faculty of Social Sciences, p. 209, 2016.

[47] *Mutatis mutandis,* the concept of management and supervisory bodies applies to all companies.

[48] This provision provides a yardstick for assessing fault and, in the form of a general clause, also describes an objective duty to act. Podgorelec, P., *The role and powers of individual management or supervisory bodies in capital companies - the corporate aspect of the offence under Article 240 of KZ-1.* Odvetnik, No. 90, p. 47., 2019.

[49] These are professional persons who provide their services on the market for a fee and are presumed to have the professional skills necessary to provide the services properly. These practices are therefore judged against the abstract criteria of the profession for the areas in

ly and severally liable to the company for damages resulting from a breach of their duties unless they prove that they have performed their duties honestly and conscientiously (Article 263(2) ZGD-1). However, they shall be exempt from liability for damages if the act is based on a lawful decision of the General Meeting. The management itself (the management board or the executive directors) is not exempted from liability, even if the supervisory board or the board of directors has approved or consented to their actions (Article 263(3) of the German Companies Act).

Liability for damages is established against the company, which also has the legal standing to bring an action against the responsible members of the management or supervisory bodies. This liability is subject to the general presumptions for the creation of a liability for damages under civil law (the occurrence of certain legal facts)[50], namely:

- harmful fact,
- cause unacceptable damage,
- the causal link between the harmful act and the impermissible harm; and
- liability for damages.[51]

Article 265 of the Companies Act-1 clearly stipulates that the board of directors shall manage the company's affairs independently and on its responsibility. The Supervisory Board supervises the management of the company's affairs (Article 281(1) ZGD-1), but the management of the company's affairs cannot be delegated to the Supervisory Board (Article 281(5) ZGD-1). Among its recommendations, the 2021 Code also assigns to the Supervisory Board the power to review and supervise the sustainability policy (recommendation 7), which, as an integral part of the annual report, is subject to review by the Supervisory Board.

As Article 263 of the ZGD-1 stipulates that members of the management or supervisory body must act in the best interests of the company with the care of a conscientious and honest businessman in the performance of their duties, this can be regarded as a legal standard of conduct, which is further supplemented

which the expertise is required to provide these services. This is in principle an objective criterion of professionalism, but the liability of members of the management or supervisory bodies is nevertheless culpable (subjective).

[50] Thus Bratina, B., *Aspects of the liability of the board of directors of a joint-stock company and recall relationships*, Podjetje in delo, No. 6-7. p. 640 ff., 1995.

[51] For more details, Bratina, B., Jovanovič, D. (ur.) et al., *Corporate Law and Commercial Contract Law*, Maribor: De Vesta. p. 723 ff., 2018.

by descriptions in other provisions (e.g. 70. [52] Breach of these provisions gives rise to the liability of the members of the management to the company they manage and, additionally, to the members of the Supervisory Board for failure to exercise due diligence in the supervision of the conduct of business. The above provision also gives rise to criminal liability for the offense of abuse of position or trust in the exercise of economic activity under Article 240 of the Slovenian Criminal Code (KZ-1).

Article 14 of the Slovenian Minor Offences Act (ZP-1)[53] also establishes the liability of a legal person for an offense. A legal person is liable for an offense committed during its business by an offender in its name or on its behalf or for its benefit or with its funds. The person responsible for a particular offense committed by a legal person may also be punished. Under Article 15 of the ZP-1, the responsible person is the person who is authorized to carry out work in the name of, on behalf of, for the benefit of, or with the funds of the legal person. A person who is authorized to exercise over a legal person a duty of supervision that is capable of preventing an offense is also liable. Pursuant to Article 15(3), the management body (in the case of a public limited liability company, the management board) shall be deemed to have the power to exercise the duty of supervision, and the supervisory body (in the case of a public limited liability company, the supervisory board) shall be deemed to have the power to exercise the duty of supervision over the management body. A person who is liable shall be held liable for an offence which he or she commits by his or her act (act or omission) while carrying on the business of a legal person.[54]

The members of the management and supervisory bodies are therefore required by explicit legal definition to draw up, verify and adopt the annual report. It also includes a management report with a management declaration (prepared by the management), which must give a true and fair view, a balanced and comprehensive analysis of the development and results of the company's business and its financial position, proper to the scale and comprehensiveness of its operations. To the extent necessary for an understanding of the development and results of the Company's business and its financial position, the analysis must include key accounting, financial and, if necessary, other indicators, ratios, and other indicators, including information relating to environmental protection

[52] The duties of *care primarily relate to* the legality of actions defined by law, statutes, rules of procedure, etc., but secondarily, the duties also arise from the general clause and depend on the specific case and other factors (economic rules, professional rules, sustainability policy rules, etc.).

[53] Official Gazette of the Republic of Slovenia, No 29/11 - UPB et seq.

[54] For more details see Bratina, B., *Offences of Management and Supervisory Bodies under ZGD-1*. Company and Labour, No. 6-7. 2022.

and employees (Article 70, paragraph 2, of the ZGD-1). The management report is reviewed by the Supervisory Board and falls within the scope of the supervision of the Company's management of its affairs. Specifically for public interest entities, it is stipulated (Article 70c of the ZGD-1 - more detail supra) that the bodies must also prepare a statement on non-financial performance in the business report, which should include at least information on environmental, social, and human resources matters, respect for human rights and on matters relating to the fight against corruption and bribery. In this way, the ZGD-1 has defined very clearly the obligations of management and supervisory bodies (in particular for public interest entities) which, if the conditions for claiming indemnification are met, give rise to the liability of management and supervisory bodies under Article 263 of the ZGD-1. If the management and supervisory bodies, while fulfilling the elements for the imposition of liability for damages, also fulfill the conditions for the imposition of the exculpatory cause of action for the free exercise of their entrepreneurial discretion, their liability for damages will not arise despite the fact that the other conditions for the imposition of liability for damages may have been fulfilled.[55]

4.1. EXAMPLES OF POSITIVE PRACTICES RELATED TO THE IMPLEMENTATION OF THE GREEN TRANSITION

4.1.1. INDIA

Examples of good (innovative) approaches to sustainable development include the case of India, where the Companies Act (last amended in 2021) introduced a mandatory obligation for a company that meets the size, number of employees, and turnover criteria[56] to create a special fund and to establish a policy for the distribution of the fund's assets in the next financial year. At least 2% of the average net profit of the last three financial years must be allocated annually to the fund, and a special committee of board directors must be appointed (three members, one of whom must be independent). They draw up the CSR policy and submit it to the Board of Directors for adoption, after which they monitor its implementation. Reports are to be drawn up on the implementation of CSR and the consequent liability for failure to carry out these works and tasks.

[55] In more detail Jovanovič, D. *et al.*, Corporate and Takeover Law. Maribor, Založba WD, p. 209, 2020.

[56] Jovanovič, D., Bratina, B., *The importance of public interest entities for increasing social responsibilities,* The welfare state and poverty - monograph, UM, Univerzitetna založba, 2022.

4.1.2. SWITZERLAND

In Switzerland, in addition to the changes for public interest entities and whistleblowing through compliance with EU Directive 2014/95/EU, a specific amendment to the criminal law was adopted in 2022, focusing on sustainability reporting and the value chain of companies, namely those based in Switzerland that deals in so-called toxic minerals (importers of certain conflict minerals) or offer products or services that are reasonably suspected of having been produced or provided using child labor. Such companies are required to carry out specific due diligence and report on these situations if these "toxic" entities appear in their value (supply) chains, to be audited and reported to the Boards of Directors for approval and to be made public. If there is any misstatement, non-publication, or false information in the reports on non-financial matters, the person responsible shall be liable to a fine (Article 325 of the Criminal Code).

4.1.3. USA

With new climate-related disclosure rules in the making, the Securities and Exchange Commission has signaled greater enforcement ahead of environmental, social, and governance disclosures.[57]

The SEC has proposed new climate-related disclosure requirements for public companies. In March 2022, with the "issuer rule," the SEC proposed rule amendments that would require public companies to provide certain climate-related financial data, and greenhouse gas emissions insights, in public disclosure filings. As part of the issuer rule, companies would have to disclose emissions they are directly responsible for, as well as emissions from their supply chains and products.[58]

According to Farient's ESG Tracker, 240 of 416, or 58 percent, of S&P 500 companies releasing proxies in 2022 have used ESG measures.[59]

In addition, they have linked sustainable development and the remuneration of management and supervisory bodies in such a way that on average 46% of companies reward their executives with variable rewards (5-15% of total salary) depending on their compliance with ESG standards.[60]

---

[57] Read more: [https://pro.bloomberglaw.com/brief/proposed-sec-climate-disclosure-rule/], accessed 31.10.2022.

[58] *Ibid.*

[59] Read more: [https://tax.thomsonreuters.com/news/more-executives-could-see-their-compensation-tied-to-esg-goals-if-sec-finalizes-climate-disclosure-rules/], accessed 31.10.2022.

[60] *Ibid.*

6. CONCLUSION

Sustainability reporting and reporting of non-financial data have been implemented in the EU and individual Member States (including non-member countries - Switzerland) as a standard that forces companies to operate more responsibly by making their business moves more transparent. Thus, the implementation of the NFRD in Slovenia has also brought about a significant shift.

As the perception that "going green is expensive" is still entrenched, companies rarely report on the green transition without "coercion". Therefore, national legislation should be further amended to make it compulsory (at least for public interest entities) to have investment plans (policies) for the green transition, which would also have accountable managers ("green companies require green management"). These would be obliged to report on non-financial performance on an ongoing basis through the company, and to produce a report which should at least include information on environmental, social, human resources, respect for human rights, and anti-corruption and anti-bribery issues. In addition, the State could also ensure that appropriate legal changes are made to the taxation of corporations and individuals to make the green transition and reporting policy attractive to other companies, while at the same time making socially responsible business a *race* to the top between individual companies, competing not only in profitability but also in the transformation from a linear to a circular economic system.

On the other hand, legislation should also ensure that the relationship between profitability and investment in sustainable development is defined in a way that does not interfere with the doctrinaire concept of responsibility and the principal-agent relationship. It is essential to enable the management and supervisory bodies of the company to take proper business decisions that are sustainable while at the same time not directly affecting the profitability of the companies and stakeholders. This can be done with the help of the legislator, who must, through proper subsidies, tax incentives, and exemptions, reliefs, more accessible resources, enable companies to "spread" the costs of sustainable development between stakeholders and the State while keeping decisions on this in the corporate decision-making sense and the consequent reliefs of responsibility.

The lack of regulation at the EU level (CSRD and CSDD) should not stop the Slovenian legislator from autonomously trying to transpose good practice at the ESG level into Slovenian corporate law. As an alternative, another form of regulation is proposed, i.e., autonomous regulation in codes and soft *law* acts at the company level, which would then be translated into corporate law through the legislative process over time. Certainly, the Republic of Slovenia could at least summarise good practice for a part of public interest entities (companies whose shares are owned by the State or local authorities), which it would oblige through the Slovenian Sovereign Holding, either in a mandatory instruction or in the Code of Corporate Governance of State Invested Enterprises in the form of a summarized good practice. The liability of the management and supervisory bodies for the green transition is currently justified both by the regulation of the breach of the ground rules and by the general due diligence clause, but further pragmatic consideration of the change will be needed due to the requirement under the CSDD proposal.

LITERATURE

1. Amao, Olufemi (2011), Corporate Social Responsibility, Human Rights and the Law. London in New York: Routledge.
   – DOI: https://doi.org/10.4324/9780203815557
2. Arvidsson, Susanne, & Dumay, John, (2022), Corporate ESG reporting quantity, quality and performance: Where to now for environmental policy and practice? Business Strategy and the Environment, 31(3), p. 1091.
   – DOI: https://doi.org/10.1002/bse.2937
3. Bohinc, Rado (2016). Družbena odgovornost. Ljubljana: Fakulteta za družbene vede.
4. Brandšteter, Maja (2020). Odnos računovodij do razkrivanja okoljskih informacij (magistrsko delo). Maribor: Ekonomsko-poslovna fakulteta.
5. Bratina, Borut (1995). Vidiki odgovornosti uprave delniške družbe in razmerja pri odpoklicu. Podjetje in delo, št. 6-7.
6. Bratina, Borut (2022). Prekrški organov vodenja in nadzora po ZGD-1. Podjetje in delo, št. 6-7.
7. Bratina, Borut, Jovanovič, Dušan (2019). Novosti in povezanost institutov z noveliranim Zakonom o revidiranju in Zakonom o gospodarskih družbah. Podjetje in delo, št. 6-7.
8. Bratina, Borut, Jovanovič, Dušan (ur.) *et al*. (2018). Pravo družb in gospodarsko pogodbeno pravo. Maribor: De Vesta.
9. Bose, Satyajit, (2020), Evolution of ESG Reporting Frameworks, In: Esty, D.C., Cort, T. (eds) Values at Work. Palgrave Macmillan, Cham.
   – DOI: https://doi.org/10.1007/978-3-030-55613-6_2
10. Čertanec, Ana (2015). Zagotavljanje spoštovanja človekovih pravic pri delovanju gospodarskih subjektov s sklenitvijo pogodbe. Podjetje in delo, št. 1.
11. Fink Babič, Sonja, Biloslavo, Roberto (2012). Trajnostno poročanje podjetij – priložnosti in izzivi. Organizacija, št. 1.

12. Gale, Maksimiljan (2019), Pravni vidiki in pasti družbeno odgovornega poslovanja podjetij. Podjetje in delo, št. 3-4.
13. Jovanovič, Dušan, (2020), *et al*., Gospodarsko statusno pravo in prevzemno pravo. Maribor, Založba WD.
14. Jovanovič, Dušan, Bratina, Borut. (2022), Pomen subjektov javnega interesa za povečanje družbene odgovornosti. Socialna država in revščina - monografija. Univerza v Mariboru, Univerzitetna založba.
– DOI: https://doi.org/10.18690/um.1.2022.12
15. Kunšek, Mojca (2021). Trajnostno poročanje – kmalu obvezni element letnega poročanja. FinD-INFO, 29. 12. 2021. Dostopno na: https://www.findinfo.si/medijsko-sredisce/v-srediscu/290415 (17. 8. 2022).
16. Oryszczuk, Sinéad, Mertenskötter, Paul, Sijmons, Roemer, Brand, Marco (2021). The EU's Green Capitalism Takes Shape: Taxonomy Screening Criteria and Corporate Sustaiability Reporting. Dostopno na: https://www.covfinancialservices.com/2021/05/the-eus-green-capitalism-takes-shape-taxonomy-screening-criteria-and-corporate-sustainability-reporting/ (17. 8. 2022).
17. Podgorelec, Peter (2019). Vloga in pristojnosti posameznih organov vodenja ali nadzora v kapitalskih družbah – korporacijski vidik kaznivega dejanja iz 240. člena KZ-1. Odvetnik, št. 90.
18. Rao, Samheeta (2021). New amendments to the CSR Act: All you need to know. Philanthropy & CSR, 9. 2. 2021. Dostopno na: https://idronline.org/new-csr-act-amendments-updates-and-all-you-need-to-know/ (17. 8. 2022).
19. European Union: European Commission, Communication from the commission to the european parliament, the european council, the council, the european economic and social committee and the committee of the regions, The European Green Deal, (2019), COM(2019) 640 final available at:[https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0640&from=EN], [accessed 30.10.2022]
20. WCED Report of the World Commission on Environment and Development,(1987), dostopno na: [https://www.are.admin.ch/are/en/home/media/publications/sustainable-development/brundtland-report.html], dostopano: 17. 8. 2022.
21. [https://www.overshootday.org/about-earth-overshoot-day/], dostopano 30.10.2022.
22. UN General Assembly, Transforming our world : the 2030 Agenda for Sustainable Development, (2015), A/RES/70/1, available at: [https://www.refworld.org/docid/57b6e3e44.html], accessed 30 October 2022
23. https://pro.bloomberglaw.com/brief/proposed-sec-climate-disclosure-rule/], dostopano: 31.10.2022.