CORONA VERSUS CSR

Does the Virus also stop Sustainability?

In our German newsletter "Outlook Corporate Social Responsibility 2020" ("NL CSR 2/2020") at the beginning of February 2020, we presented our forecast that the new decade would be in the spotlight of sustainability. Two months later, our world has been transformed abruptly. The coronavirus is omnipresent, and the measures required to contain it are having a serious impact on society in general and on the economy in particular. At present, here and now, many people and companies feel that there are more important things to do than deal with sustainability issues. But does this mean that the issue of sustainable management is permanently off the table, the spotlight off?

Our assessment: Not at all! A diligent and forward-looking CEO will do well to keep the issue of sustainability in focus during and especially after the coronavirus crisis. Maybe now is exactly the time for a mind shift. Only recently, German national football coach Joachim Löw, one of the most important representatives of German professional football which is otherwise not necessarily known for its profundity, warned, "*The pace we set could no longer be beaten. […] Power, greed, profit, even better results, records were in the centre*", while environmental disasters and diseases were pushed to the margins of perception.

In the following, we provide an overview of the current developments on the topic of sustainability in corona times and the resulting arguments for the unbroken relevance of sustainable management. The most important aspects in brief:

1. **Preliminary considerations:** The coronavirus crisis and the efforts to achieve greater sustainability in the economy are not irreconcilable. On the contrary, it reveals clearly how important it is to avoid or mitigate, where possible, future crises that could be triggered or favoured by insufficiently sustainable economic activity, or at least to be as well prepared as possible for them. Keywords are: Cost efficiency of climate protection measures, resilience to the effects of climate change, transparency in the supply chain, interdependence of economy and society. It is one of the most important material contractual obligations of every manager to secure the long-term existence of the company. Especially when it comes to strategy and investment decisions, it is essential to make these decisions on the basis of adequate information. Sustainability aspects cannot simply be ignored.

2. **European Green Deal, EU Climate Act and new Marshall Plan:** The EU Commission has already made it quite clear that, even in view of the coronavirus crisis, it wants to continue to adhere to the European Green Deal and the goal of climate neutrality by 2050. To this end, the EU presented, among other things, the draft of an EU Climate Act at the beginning of March. In addition, European Commission President Ursula von der Leyen announced that the funds mobilised to fight the coronavirus crisis would have to be invested "*wisely and sustainably*". The aim is to "*build a more modern, sustainable and resilient Europe.*"

3. **Dealing with sustainability risks:** It is not apparent that existing and future sustainability risks will change or be reduced fundamentally as a result of the coronavirus crisis. In accordance with applicable legal regulations, the managements of financial companies and companies in the real economy must (also) deal appropriately with sustainability risks, and of course with the opportunities as well. The German banking supervisory authority BaFin's guidance notice on dealing with sustainability risks is thus still valid.

4. **Special climate change litigation:** In addition to the actual risks associated with advancing climate change, companies are also exposed to liability risks resulting from an increasing number of climate-related lawsuits worldwide (so-called climate change litigation). Judgements in pending lawsuits as well as potential future plaintiffs will not be stopped by the coronavirus crisis. Hence, the risks related thereto will continue to exist.

5. **Institutional investors:** It is not to be expected that investors – and here especially large institutional investors – will

pay less attention to sustainability aspects in the future. Larry Fink‘s recent statement that BlackRock will stick to its sustainability-oriented investment approach, and even that long-term thinking has never been more critical than it is today, is a prominent example. Companies and investors with a strong sense of purpose and a long-term approach would be better able to navigate this crisis and its aftermath.

6. **Stakeholder capitalism:** Klaus Schwab, founder of the World Economic Forum, shares Larry Fink‘s view. Following the discussion on new Stakeholder Capitalism at this year‘s World Economic Forum, Klaus Schwab calls for support for stakeholder companies in particular in the current crisis, as they represent the economic model "*that will make us survive today, but thrive again tomorrow*".

7. **Rights and duties of the management:** The legal situation that the management must also take sustainability aspects into account appropriately when making decisions (see above) remains unchanged. The discussion on sustainable corporate governance which is already in full swing, also and especially at EU level, is unlikely to be interrupted.

8. **NAP-Monitoring and Supply Chain Law:** The already lively discussion about a possible supply chain law which was further fuelled by the unsatisfactory results of the first round of monitoring, will certainly not ease up under the impression of the economic consequences of the coronavirus crisis. Gerd Müller, German Minister of Economic Cooperation and Development, recently declared that he nevertheless remains committed to the goal of sustainable global supply chains. There are also strong intentions at EU level for regulations in this respect.

In detail:

1. INTRODUCTORY CONSIDERATIONS

Already now there are numerous indications that sustainable economic activity will not disappear in the new decade despite or precisely because of the current corona crisis. The problems and challenges humanity is facing are too great. In fact, connections between the corona crisis and sustainability are already becoming apparent which clearly relativise the apparent contradiction between the two aspects:

- The corona crisis will cost national economies enormous incredible amounts of money. Money that may not be available for the likewise extraordinarily expensive transition to a sustainable economy. At the same time, the words of German Chancellor Angela Merkel in her government declaration in September 2019 will be remembered: Climate protection is a challenge for mankind. To press ahead with it costs money. Ignoring it costs even more money. Looking at it this way, it would be a fatal vicious circle if efforts to avoid an otherwise threatening climate crisis were to be scaled back as a result of the current corona crisis. For future climate damage indirectly caused by the corona crisis would further deepen the damage already caused by the corona crisis. Such indirect consequential damage would in turn have to be shouldered by the economy and the general public. The fight against climate change represents only one, albeit essential, aspect of sustainability.

- Many companies will be dependent on state aid as a result of the corona crisis. This state aid is undoubtedly essential and is in the public interest in order to avoid an otherwise threatening large-scale collapse of the economy. This clearly illustrates that economy and society are dependent on each other, and that this relationship is reciprocal, or even more so, that economy and society are not to be understood as opposites but as a community. For it is precisely now that it is becoming particularly clear that companies and entrepreneurs are an important part of society. At the moment, the state, and thus the general public, is assuming responsibility for companies and entrepreneurs. And vice versa, it is up to companies and entrepreneurs to (also) assume responsibility for society. This is precisely the heart of the emerging stakeholder concept and, more broadly, of corporate social responsibility in its role as a major player in society (see also paragraph 2 of the Preamble to the revised German Corporate Governance Code, which came into force on 20 March 2020 German Corporate Governance Code).

- Greater resistance to crises (resilience) and more transparency in the supply chain are two further, partly overlapping aspects mentioned in connection with the corona crisis as well as with the efforts to achieve sustainable economic management. On the one hand, there is a growing awareness of how resilient companies are to crises and how this resilience can be increased. In general, companies that have built up reserves are in a better position in times of crisis than companies that have focused on dividend payments. The current demand by ECB, EIOPA and BaFin that banks and insurance companies should, in view of the corona crisis, generally waive dividend payments for the financial years 2019 and 2020 and also refrain from share buy-backs (see most recently German Press Release of BaFin dated 2 April 2020), is a manifestation of this truism. On the other hand, crisis-related failures in the supply chain can be better anticipated and compensated for if there is more transparency in the supply chain. A risk management system that also extends to the supply chain makes it easier to identify and minimise any latent risks to the company in the supply chain. This also applies without distinction to risks resulting from human rights violations or environmental violations in the supply chain.

- Like every crisis, the corona crisis will lead to permanent changes. There is a growing number of voices that the corona crisis could also change the way we deal with other challenges. This could be especially true for climate change which represents another exponential challenge for the community that is still ahead. The current report "Covid-19: Quarantined Economics", compiled by Allianz Research of 23 March 2020, soberly states that climate change is a major challenge: *"The urgency of action is commensurate, not the resources."*

- Recently, German Environment Minister Svenja Schulze – together with renowned scientists – pointed out that with increasing destruction of nature the risk of disease outbreaks and even pandemics increases. Therefore, in many regions of the world, committed nature conservation is an important key to preventing new infectious diseases (see Press Release No. 53/20 of the German Environment Ministry "*Global nature conservation can reduce risk of future epidemics*" of 2 April 2020). We are unable to assess the extent to which this thesis is correct and this certainly needs further examination.

With all this, the famous insight of Alexander von Humboldt may come to mind: "*Everything is connected with everything*". This guiding principle is sometimes also helpful for the management to make decisions. Pursuant to the *Business Judgement Rule* codified in section 93 (1) sentence 2 of the German Stock Corporation Act (AktG), management board members and managing directors always act in a dutiful and indisputable manner if they can assume in their business decisions that they are acting in the best interests of the company on the basis of appropriate information. A recent judgement of the Higher Regional Court (OLG) of Cologne once again underlined the central importance of the aspect of the appropriateness of the information basis. Strategy and investment decisions in particular should be based on an information basis that corresponds to their considerable importance (see German blog article: "OLG Cologne on management board liability: Adequate information basis is essential!" of 18 February 2020). And it is precisely in such strategy and investment decisions that sustainability aspects often play an important role nowadays, given the opportunities and risks involved. The management acts in this respect for the benefit of society, at least when its decision serves to strengthen the **long-term earnings** and competitiveness of the company and its products or services. The *Business Judgement Rule* does not contain a commitment to the shareholder concept; rather, the prevailing opinion in German law is that the stakeholder concept has been in force for some time now (cf. below).

The corona crisis has obviously not eliminated the many opportunities and risks that companies are facing in connection with the issue of sustainability. On the contrary, the corona crisis has added an additional, undoubtedly major challenge, which the management also has to deal with (see blog post "Relevance of SARS- CoV-2 (coronavirus) for the functional specifications of the management" of 31 March 2020). Even if this may currently have priority depending on the urgency of the individual case, the Management must continue to take appropriate account of those opportunities and risks that arise from sustainability aspects. For nothing else applies to these opportunities and risks than to all other "traditional" opportunities and risks for the company – which have undoubtedly not become insignificant as a result of the corona crisis (see fundamentally Walden, NZG 2020, p. 50 et seq.).

Our forecast mentioned at the beginning of this article on the further increase in the importance of sustainability in the new decade therefore does not appear to have been distressed. Nevertheless, it makes sense to question this a little more closely. To this end, we will examine below the extent to which current developments in the area of sustainability have occurred in relation to the issues outlined in our February newsletter and beyond.

2. EUROPEAN GREEN DEAL, EUROPEAN CLIMATE ACT AND NEW MARSHALL PLAN

The European Green Deal of the EU Commission aims at transforming the EU economy for a sustainable future and is part of the Commission's strategy for implementing the Agenda 2030 and the Sustainable Development Goals (SDGs) defined therein. In this context, the EU Member States (with the exception of Poland) had committed themselves to climate neutrality by 2050 at the end of 2019 (see number 1 of our German NL CSR 2/2020).

As a result of the corona crisis, some politicians and individual Member States have called for absolute priority to be given to overcoming the corona crisis and for all measures to implement the European Green Deal to be postponed. The EU Commission, meanwhile, seems to be sticking to its plans in principle. Frans Timmermanns, Vice-President of the EU Commission, explained the corona-related cancellation of the 26th UN Climate Change Conference (COP26) in Glasgow in November 2020: The most important EU legislation to achieve the climate and energy goals for 2030 has already been introduced and work on a Climate Act to establish a legally binding target of climate neutrality by 2050 has already begun even under the current difficult circumstances (more on this in more detail in a moment). The EU Commission also intends to continue working with international partners on other key elements of the global climate agenda (e.g. sustainable finance, adaptation and resilience to the effects of climate change) (cf. Statement by Frans Timmermans on postponing the COP26 of 31 March 2020). Shortly afterwards, Commission President Ursula von der Leyen called for a new Marshall Plan which would help to build a "*more modern, sustainable and resilient Europe*" (see also the update at the end of the newsletter): The EU and the EU Member States had mobilised a total of EUR 2.8 trillion to tackle the corona crisis. This money would bind generations and would therefore have to be invested "*wisely and sustainably*". This strategic investment in the future includes, for instance, innovative research, the digital infrastructure, clean energy, an intelligent recycling economy and future-oriented transport systems (see editorial by Ursula von der Leyen "*How our Europe will regain its strength*"of 4 April 2020).

In particular, the opportunities that could result from this for companies, especially in the aforementioned areas, are obvious. Climate protection as a competitive advantage is a key issue that continues to be discussed in companies. At the same time, it can still be expected that traditional business models will have to be measured even more closely against new sustainability requirements in the future. After all, sustainability risks continue to exist unchanged, as will be illustrated below.

The European Climate Act already mentioned above is the heart of the European Green Deal. The EU Commission presented a draft for this on 4 March 2020 (Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and for amending Regulation (EU) 2018/1999 (European Climate Act)). The draft regulation contains the following key points (further information and FAQs can be found here in German language):

- Greenhouse gas neutrality by 2050 should be provided for as a legally binding objective (Art. 2 para. 1 of the Draft).

- Both the EU institutions and the EU Member States are to be obligated to take the necessary measures at EU and national level to achieve this objective (cf. Art. 2 para. 2 of the Draft) and to ensure continuous progress in improving adaptability, strengthening resilience and reducing vulnerability to climate change (Art. 4 para. 1 of the Draft). The EU Member States should moreover develop and implement adaptation strategies and plans to strengthen resilience and reduce vulnerability to the effects of climate change (Art. 4 para. 2 of the Draft).

- The current EU target of reducing greenhouse gas emissions by 40 per cent by 2030 compared with the base year 1990 will remain unaffected for the time being. However, the EU Commission intends to propose a new EU benchmark by September 2020 on the basis of a comprehensive impact assessment and to adapt the climate law accordingly. By June 2021, the EU Commission will then review all relevant policy instruments and, if necessary, propose a revision so that the additional emission reductions can be achieved by 2030.

- For the period from 2030 to 2050, the EU Commission wants to set an EU-wide target course for the reduction of greenhouse gas emissions so that progress can be measured and planning security for authorities, companies and citizens is given (Art. 3 of the Draft). By September 2023, and every five years thereafter, the EU Commission will then examine whether the measures taken by the EU and the EU Member States are consistent with the objective of climate neutrality and the target course 2030-2050 (Art. 5 and 6 of the Draft). The EU Commission is to be given the power to make recommendations if measures taken by an EU Member State are not consistent with the objective of climate neutrality. The respective Member States must follow these recommendations or justify why they do not comply (Art. 6 para. 2 and 3 of the Draft).

The effects of this EU Climate Act on the economy are obvious. However, at present it is certainly not to be expected that the EU Commission's Draft will pass the Council and the European Parliament without resistance. In particular, it remains to be seen how Germany will position itself in this regard in view of its EU Council Presidency starting in July.

3. HOW TO HANDLE SUSTAINABILITY RISKS, IN PARTICULAR THE CONSEQUENCES OF CLIMATE CHANGE

In December 2019, BaFin published a much-discussed guidance notice on dealing with sustainability risks (see number 2 of our German NL CSR 2/2020). It is directly addressed to all credit institutions, insurance companies, pension funds, capital management companies and financial services institutions supervised by BaFin. However, it is also of great importance for companies in the real economy, both with regard to the expected effects on their business relations with financial institutions and with regard to their own handling of sustainability risks. In this guidance notice, BaFin outlines principles and processes that are to be understood as sensible but non-binding procedures (good practice approaches). It is not intended to formulate specific examination orders. Nevertheless, on the basis of the applicable laws, BaFin expects the supervised companies to (also) address sustainability risks strategically.

In view of the corona crisis, the Bavarian State Government demands in a current position paper, among other things, "*to focus on crisis management and to avoid additional regulatory burdens (e.g. postponement of the development of sustainable finance strategies at national and European level and of the BaFin guidance notice on sustainability risks at least until the end of 2020)*" (cf. German Press Release of the Bavarian State Chancellery of 31 March 2020). The above-mentioned statements of the EU Commission give an idea of how much political dynamite is still lying dormant on the regulatory side with regard to the further development of the issue of sustainable finance. Detached from this legal policy discussion, however, it seems doubtful whether the financial markets would actually attach less importance to the aspect of sustainability in future, contrary to the current trend. At least so far, we believe that there is more argument in favour of continuing the current market trend in the area of sustainable finance. This is because sustainability risks – including their potentially serious financial and economic consequences – continue to exist in principle even in the light of the corona crisis (more details on this below). A mere "postponement" of the BaFin guidance notice would not change anything with regard to the handling of sustainability risks, as is mandatory by law and supervisory authorities. According to BaFin, binding legal or supervisory requirements with regard to sustainability risks are neither weakened nor extended by the Guidance Notice, i.e. the Guidance Notice only has an explanatory function. As a result, the only question that remains is whether there are justified reasons to temporarily exempt supervised companies from the mandatory legal or supervisory consideration of certain types of risk – such as sustainability risks in this case – as a result of the corona crisis. This would, however, entail the danger of a presumably undesired increase in risk in this area of growing importance.

Following the corresponding recommendations of the EU regulatory and supervisory bodies and international standard setters, BaFin has announced that it will adapt its supervisory practice and its measures in the corona crisis. Felix Hufeld, President of BaFin, explained: "*The existing regulatory framework allows for a high degree of supervisory flexibility which we make full use of. We are relieving the burden on banks where this is possible without compromising financial stability*". (cf. Press Release of BaFin of 24 March 2020). However, as far as can be seen, it is not yet apparent from the other announcements of the BaFin that this could limit the expectations of the BaFin in dealing with sustainability risks.

We also consider this unlikely for the reasons already described. This is underlined, for instance, by the "*Ten Theses on the Necessity of Extending the Finance Function to include the ESG [Environment Social Governance] Dimension*", which was recently published by the "Integrated Reporting" working group of Schmalenbach Society (KoR 2020, p. 153 et seq.). With these ten theses, the working group, which is made up of well-known experts, believes that it provides important arguments for why ESG issues are relevant to the value of companies. In accordance with the BaFin guidance notice, he points out that "*ESG challenges, such as climate change, represent significant risks for companies, which must be recorded in strategic and operational risk and opportunity management [...]*". This suggests that financial companies supervised by BaFin cannot ignore these aspects in their respective business activities.

This is further confirmed by the latest report Global Risk Dialogue published by Allianz Global Corporate & Specialty (AGCS) on 12 March 2020. In this report, AGCS highlights five ESG issues that need to be monitored in 2020 – also in view of the corona crisis: first and foremost, climate change. According to Climate Transparency, extreme weather events are already taking some 16,000 lives every year – in the G20 countries alone. The expected costs are estimated at USD 142 billion per year. The consequences of climate change could threaten plants and corporate assets and cause disturbances in the supply chain. The cost to companies of coping with climate change could be up to USD 2.5 trillion in the next decade alone. Many of the aspects covered by AGCS's description of the possible consequences of climate change do not appear at all dissimilar to the consequences of the current corona crisis. And it is quite obvious that the current corona crisis alone will not stop long-term climate change but will only have a positive effect on greenhouse gas emissions in the short term, since emissions will rise again after the end of the lockdown (see Federal Environment Agency in German language, "*The impact of the corona crisis on the environment*" of 3 April 2020). "The results of the study by McKinsey & Company on "*Climate risk and response: Physical hazards and socioeconomic impact*" which we quoted in our German Newsletter February will probably continue to stand unchanged.

The same also applies to the four other ESG issues identified by the AGCS: water management, biodiversity, human exploitation and, last but not least, good corporate governance, which is the so-called *licence to operate*.

4. IN PARTICULAR: CLIMATE CHANGE LITIGATION

In addition to the actual risks associated with the advancing climate change, there are also liability risks. In its current Global Risk Dialogue on climate change, AGCS also rightly refers to environment-related lawsuits against large climate-intensive companies that are already pending in more than 30 countries, the majority of which (so far) are in the USA.

The lawsuit currently pending before the Higher Regional Court of Hamm by a Peruvian farmer against RWE also belongs to this category of *Climate Change Litigation*. The outcome of this lawsuit is still open. This also applies to the risks that may arise for climate-intensive companies in this context. It is not to be expected that the question of the civil liability of climate-intensive companies for the consequences of climate change and related legal proceedings as a result of the corona crisis will resolve itself.

The same is also true for the other categories of *climate change litigation* that are observed internationally: These include, on the one hand, actions by investors against companies for allegedly inadequate consideration of the risks posed by climate change to the company's facilities, supply chain and business models, and, on the other hand, public law actions against the state. With regard to the latter category, special reference should be made to the proceedings in *Urgenda versus the Netherlands*: In the third and final instance, the Dutch Supreme Court, the High Council, sentenced the Dutch government on 20 December 2019 to reduce the Netherlands' greenhouse gas emissions by 25 per cent by the end of 2020 compared to the base year 1990. Prior to this, the Dutch government had sought a 20 per cent reduction. It has announced that it will implement the judgement.

The judgement of the High Council, which was brought about by the non-governmental organization Urgenda on the grounds of a violation of Articles 2 and 8 of the European Convention on Human Rights, is considered a model for similar proceedings in other countries. In Germany, however, such proceedings have not yet been successful.

Further litigation risks for companies in connection with climate change are conceivable, for example from a competition law perspective in the case of so-called *Greenwashing*.

5. LARRY FINK, CEO OF BLACKROCK, ON CORONA CRISIS, CLIMATE CHANGE AND SUSTAINABILITY

Larry Fink had announced in his CEO letter at the beginning of 2020 that Blackrock would place sustainability at the centre of its investment approach. Climate change had become a determining factor for the long-term prospects of companies. Moreover, a company cannot achieve long-term profits without recognising and pursuing its purpose and taking into account the needs of a broad spectrum of stakeholders (cf. number 4 of our German NL CSR 2/2020).

In his current letter "To our shareholders" of 29 March 2020, Larry Fink naturally addresses the serious consequences of the coronavirus pandemic. Among other things, he points out that the corona crisis has triggered a reassessment of many assumptions about the global economy, such as the dependence on just-in-time supply chains or international air travel. More profoundly, he said, people around the world are fundamentally rethinking the way they work, shop, travel and meet. The world will be a different place after the crisis. Incidentally, Allianz Research draws similar conclusions in its latest report "*Covid-19: Quarantined Economics*" of 26 March 2020 (including localisation instead of globalisation, changed behaviour etc.). Despite all the challenges, Larry Fink remains optimistic. Nevertheless, he reminds us of our common humanity in the fight against the coronavirus: In order to defeat this crisis, a response is needed that transcends party and national boundaries.

This assessment is also not unsimilar to the fight against climate change and its consequences. Not surprisingly, Larry Fink subsequently emphasises that he has always been convinced of the advantages of long-term thinking and that long-term thinking has never been as important as it is today: "*Companies and investors with a strong sense of purpose and a long-term approach will be better able to navigate this crisis and its aftermath.*" A view that is also shared by Klaus Schwab (see below).

Larry Fink finally makes it expressly clear that Blackrock will stick to its above mentioned investment approach. His reasoning: "*The money we manage belongs to our clients, and we can only serve them if we address how global changes will impact their outcomes. We can only serve our shareholders if we focus on the long term and constantly evolve our business, driving industry dynamics instead of reacting to them. And we can only serve our full set of stakeholders – from our employees to the communities where we operate – if we continue to make a positive contribution to society. Through these times, we remain firmly committed to our stakeholders by focusing on leading the evolution of asset management.*"

Larry Fink is thus taking up where the US Business Round Table left off in the summer of 2019, turning away from the strict shareholder value approach and emphasizing the fundamental obligation to all stakeholders in its "*Statement to the Purpose of a Corporation*" (see our German blog post "*Update Corporate Social Responsibility: US companies are abandoning the strict shareholder value approach*" of 23 August 2019).

6. WORLD ECONOMIC FORUM: STAKEHOLDER CAPITALISM

The subject of this year's World Economic Forum in Davos was sustainability. Following the repositioning of the US Business Round Table, one of the topics discussed was the path from shareholder capitalism to stakeholder capitalism and the associated effects on Corporate Governance (cf. number 6 of our German NL CSR 2/2020).

Klaus Schwab, founder and CEO of the World Economic Forum, recently spoke on this topic in the wake of the corona crisis. The stakeholder model is concerned with the long-term preservation and resilience of the company and the embedding of companies in society. The corona crisis shows which companies really embody the stakeholder model and which have only paid lip service to it while at the same time maintaining a short-term profit orientation. Both in the current crisis and afterwards, stakeholder companies must be supported as they represent the economic model "*with which we can survive today and flourish again tomorrow*" (see guest article in the German newspaper Welt by Klaus Schwab "*Covid-19 is a Litmus Test for the Stakeholder Model*" of 30 March 2020).

7. SIGNIFICANCE OF SUSTAINABILITY FOR THE RIGHTS AND DUTIES OF MANAGEMENT

In number 7 of our German NL CSR 2/2020 we had pointed out that the executive board and supervisory board must already address appropriately the opportunities and risks that arise for the company from sustainability aspects under current law. In addition, section 87 (1) sentence 1 German Stock Corporation Act (AktG) now stipulates that the supervisory board must in future orient the remuneration structure towards the "*sustainable and long-term development of the company*", section 87 I 2 AktG (cf. in detail Walden, NZG 2020, p. 50 et seq.).

The corona crisis has not changed our assessment of the current legal situation in this regard. On the contrary: The aforementioned judgement of the Higher Regional Court of Cologne once again confirms how important it is to make strategic and investment decisions based on appropriate information. In view of the correlations described above, it seems questionable at the outset whether sustainability aspects can in principle be ignored in such decisions.

The increasing importance of sustainable corporate governance has already become evident. The intention repeatedly expressed by the EU Commission to address this topic is therefore likely to remain in the spotlight. In the course of the Green Deal the EU Commission has announced a new Sustainable Finance Strategy, which focuses on redirecting private capital flows into green investments (recently the EU Commission launched the consultation on this Renewed Sustainable Finance Strategy (see update at the end of the newsletter)). The EU Commission considers it equally important to establish a culture of sustainable corporate governance in companies (in summary Commission Work Programme 2020 of 29 January 2020, p. 3, for further details cf. number 1 of our German NL CSR 2/2020).

Among other things, the EU Commission has commissioned Ernst & Young to conduct a study on the duties of management and sustainable corporate governance. The study's objective is to (i) gather evidence of a possible trend towards maximising shareholder value in the short term, (ii) explore the main factors contributing to this trend, and (iii) analyse how a possible reform of company law and corporate governance duties could contribute to greater accountability for sustainable value creation and the implementation of the Paris Convention on Climate Change and SDGs. In this context, the "*10 Ideas to make corporate governance a driver of a sustainable economy*" by Accountancy Europe from July 2019 will also be discussed, as well as the results of the SMART initiative "*Supporting the Transition to Sustainability*".

8. HUMAN RIGHTS IN THE SUPPLY CHAIN: NAP MONITORING AND SUPPLY CHAIN LAW

In view of the unsatisfactory results of the first round of monitoring for the implementation of the National Action Plan on Economic and Human Rights (NAP), it had become apparent that German Minister of Economic Cooperation and Development Gerd Müller and German Minister of Labour and Social Affairs Hubertus Heil would present a draft or key elements for a Supply Chain Act in February or March 2020 (cf. number 8 of our German NL CSR 2/2020). However, this did not happen. There was speculation in the press as to whether German Chancellor Angela Merkel and German Minister for Economic Affairs and Energy Peter Altmaier had "*called off*" German Ministers Müller and Heil in March. The fact is that the legislative proposal is (also) controversial in the federal government, and not just since the corona crisis. Business associations had also been voicing concerns for some time. In an interview with Deutsche Welle (DW), German Minister of Economic Cooperation and Development Gerd Müller now said that he was sticking to the goal of sustainable global supply chains. The current global crisis was also a moment to reflect on how globalisation should be shaped in future. One must not fall back into the old kind of globalisation which was based on the short-sighted exploitation of people and nature. However, according to DW, the German Ministry of Economic Cooperation and Development does not have any information about a precise current timetable for the Supply Chain Act (cf. DW German article "*Corona-Pandemie: Supply chain – shoulda, coulda, woulda*" of 28 March 2020). At any rate, before the start of the corona crisis it was said that Ministers Müller and Heil also wanted to use the German EU Council Presidency, which begins in July 2020, to enforce a corresponding regulation throughout Europe. Further political developments remain to be seen in this regard.

In any case, the results of the first round of the German NAP monitoring, which have now been published (cf. here). Only 17 to 19 percent of German companies are considered to be "performers" to date. The second round of monitoring started on 2 March 2020. The feedback period ends on 24 April 2020. It remains to be seen whether there will be an extension as a result of the corona crisis. According to current planning, the final report should in any case be available by mid-August 2020.

The results of a study on due diligence in the supply chain commissioned by the EU Commission at the end of 2018 as part of its Sustainable Finance Action Plan have also become available (see Daily News 24/02/2020 of the EU Commission with the meaningful title "*Commission study shows the need for EU-level legislation on due diligence throughout the supply chain on human rights and environmental impacts*" and further links). This study shows similar results to the first round of the German NAP monitoring: According to the study, only one in three companies carries out EU-wide reviews of human rights and environmental impacts. Didier Reynders, the EU Commissioner for Justice, is quoted in this context with the following words, which also speak clearly in favour of the intention of a Europe-wide regulation of due diligence duties in the supply chain: "*Companies told us they believe that EU rules would here provide legal certainty and a harmonised standard for businesses' duty to respect people and the planet. As working towards climate neutrality is among the top priorities of this Commission, I will make sure the results of this important study are taken into account for future work.*"

Irrespective of these regulatory intentions, new risks for companies – as mirrored in the Climate Change Litigation – arise from the increasing number of complaints of human rights violations worldwide (see our German article "*Human-Rights-Litigation – Future Trend or Individual Cases with High Publicity?*"). Moreover, the brochure of the BMJV cited in number 9 of our German NL CSR 2/2020 on "*Access to Justice and Courts for Affected Persons in Germany*", should be mentioned in this context. Also, the risk of such human rights litigation will not decrease as a result of the corona crisis.

9. CONCLUSION

Corona versus CSR: As we currently see it, the coronavirus crisis will not stop sustainability, on the contrary, it may even promote it. It is already predictable that the corona crisis will lead to a change in behaviour in many respects. Similarly, a reassessment of many assumptions about the global economy does indeed seem appropriate. The corona crisis shows the vulnerability of a globalised world at its most sensitive spots. This may raise awareness of the fact that other future crises above all those resulting from progressive climate change could have very similar consequences and that it is therefore important to prevent or mitigate them wherever possible. It also highlights the importance of strengthening the resilience of companies. This also includes creating more transparency, especially at the critical points in the supply chain, and diversifying risks.

The corona crisis also makes it evident how closely economy and society are linked nationally and globally. Ultimately, global challenges can only be tackled efficiently if all players work together. States, business and society would be well advised to make their respective contributions to this end in order to achieve sustainable growth for all in line with the United Nations' 2030 Agenda and prevent the dangers that would otherwise threaten. This, however, requires, among other things, precisely the economic transformation that the EU Commission is pursuing in its European Green Deal.

+++ UPDATE AFTER EDITORIAL DEADLINE +++

On 13 April 2020, the German National Academy of Sciences Leopoldina published its third ad hoc opinion on the COVID-19 pandemic. In the paper entitled "*Coronavirus pandemic – Sustainable Ways to Overcome the Crisis*", the scientists emphasize, among other things, that already existing global challenges such as climate and species protection in particular will not disappear with the corona crisis. All political measures that do not directly serve to save companies must be oriented towards the principle of sustainability; the objective must remain a strong European Green Deal (see pp. 2 and 17 of the paper under "*Setting the scene for sustainability*"). According to the scientists, there can be no simple restoration of the previous status because of the "*climate and biodiversity crisis which is at least as threatening [...]*". The general increase in population, urbanisation and global mobility, the destruction and decrease in the resilience of ecosystems through land use changes and climate change would contribute significantly to the outbreak of epidemics and pandemics. If government measures did not focus on sustainability criteria, "*due to the size of the current economic programmes, a more drastic change in direction at a later stage would be extremely difficult*". What is needed is "*a transparent cost discussion that also takes into account the massive external costs of climate, environmental and, not least, health damage resulting from these factors*".

Shortly before that, on 8 April 2020, the EU Commission had already launched the consultation on the Renewed Sustainable Finance Strategy which had been announced in the European Green Deal. In the Consultation document, the EU Commission reaffirmed its intention to adhere to the European Green Deal and the Sustainable Finance Project, especially in view of the corona crisis. The considerations are similar to those of Leopoldina: "*The ongoing COVID-19 outbreak in particular shows the critical need to strengthen the sustainability and resilience of our societies and the ways in which our economies function. This is necessary to, above all, minimise the risk of similar health emergencies in the future, which are more likely to occur as climate and environmental impacts escalate. In parallel, it will be paramount to ensure the resilience and capacity of our societies and economies to resist and recover from such emergencies. The COVID-19 outbreak underscores some of the subtle links and risks associated with human activity and biodiversity loss.*" The EU Commission's consultation on the Renewed Sustainable Finance Strategy is addressed to all citizens, member states and organisations and is open until 15 July 2020.

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NOTES

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