

Corporate Purpose: A Management Concept and its Implications for Company Law

by

HOLGER FLEISCHER*

Many companies have recently been following the so-called corporate purpose concept that is recommended by leading management scholars. To this end, they identify a raison d'être for their enterprise that goes beyond mere profit making and they anchor it in the entire value chain. This paper puts the corporate purpose concept into perspective by linking it to the larger debate on corporate social responsibility and by outlining its theoretical foundations and practical application. It then goes on by explaining how this management concept fits into the company law framework, looking to France and the UK as well as to the US and Germany. Finally, this paper assesses various policy proposals made by leading purpose proponents, ranging from mandatory purpose clauses in the articles of association to say-on-purpose shareholder voting and dual-purpose business organisations.

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* Prof. Dr. Dr. h.c., LL.M. (Michigan), Director at the Max Planck Institute for Comparative and International Private Law, Hamburg and Affiliate Professor at Bucerius Law School.

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*I. Corporate Purpose: The Latest Management Fashion or a More Fundamental Change?*¹

A new buzzword has found its way into the boardrooms of larger companies: corporate purpose.² Business papers and management journals are heavily promoting the idea of a higher purpose conferring social legitimacy on companies.³ Politicians, church leaders and NGOs join in this chorus. Given this broad academic support and public acclaim, it is hardly surprising that nearly every board of a major company is now striving for such a higher purpose.⁴

At first glance, one might dismiss this endeavour as the latest management fashion. There is no lack of brochures from business practitioners,⁵ and one already finds specialised purpose consultants assisting companies in their search process. On closer inspection, however, this time a fundamental reorientation of the framework conditions for entrepreneurial activity could be in

- 1 For a slightly different German version of this paper, *Holger Fleischer*, “Corporate Purpose: Ein Management-Konzept und seine gesellschaftsrechtlichen Implikationen”, *Zeitschrift für Wirtschaftsrecht* 2021, 5.
- 2 See *Annette Bruce/Christoph Jeromin*, *Corporate Purpose – das Erfolgskonzept der Zukunft*, 2020.
- 3 See most recently *Robert G. Eccles/Mary Johnstone-Louis/Colin Mayer/Judith C. Strohle*, “The Board’s Role in Sustainability”, *Harvard Business Review*, September–October 2020, 48: “The concept of ‘corporate purpose’ provides the impetus that boards need to increase their focus on ESG concerns and manage their firms for long-time success.”; also *Thomas W. Malnight/Ivy Buchel/Charles Dhanaraj*, *Put Purpose at the Core of Your Strategy*, *Harvard Business Review*, September–October 2019, 70; *Robert E. Quinn/Anjan V. Thakor*, “Creating a Purpose-Driven Organization”, *Harvard Business Review*, July–August 2018, 78.
- 4 See *Georg Meck*, “Purpose”, *Frankfurter Allgemeine Sonntagszeitung*, 11 March 2019, p. 17: “Purpose, Purpose, Purpose: All corporate bosses are suddenly talking about the search for a higher purpose. Is there really a change of heart behind it – or rather a clever strategy?”; pointedly also *Bert Fröndhoff/Michael Scheppe*, “Die Frage nach dem Warum: Was unserer Arbeit Bedeutung verleiht”, *Handelsblatt* online, 18 April 2019: “Half the German corporate world seems to be on a self-discovery trip at the moment.”
- 5 See, for example, *Jo Aschenbrenner*, *For Purpose: Ein neues Betriebssystem für Unternehmen*, 2019; *Franziska Fink/Michael Moeller*, *Purpose Driven Organizations*, 2018; *Simon Sinek/David Mead/Peter Docker*, *Find Your Why: A Practical Guide for Discovering Purpose for You and Your Team*, 2017.

the offering:⁶ The increasingly common thesis is that modern companies need a *raison d'être* for their social legitimacy that goes beyond pure profit orientation.⁷ This thesis touches upon the foundations of both management research and company law and challenges both disciplines in a hitherto unimagined way.

As academic pioneers of the purpose concept in management studies, two British professors have emerged: Colin Mayer of the Saïd Business School in Oxford and Alex Edmans of the London Business School. Their recent book publications⁸ are not only bestsellers, but also deserve special attention because they combine sound economic analysis with legal policy proposals. Therefore, they have rightly met with resonance in legal circles, although some of the comments are rather critical.⁹

Taking these two books – Mayer's "Prosperity" and Edmans "Grow the Pie" – as a starting point, this paper will first put the purpose concept into perspective by linking it to the larger debate on Corporate Social Responsibility and by outlining its theoretical foundations and practical application (II.) It then goes on by explaining how this management concept fits into the company law framework, looking to France and the UK as well as to the US and Germany (III.) Finally, this paper assesses various policy proposals made by Colin Mayer and Alex Edmans, ranging from mandatory purpose clauses in the articles of association to say-on-purpose shareholder voting and dual-purpose corporate forms (IV.).

6 In this sense also *Edward Rock*, "For Whom is the Corporation Managed in 2020?: The Debate Over Corporate Purpose", *Business Lawyer* 76 (forthcoming Spring 2021), ssrn.com/abstract=3589951, 5: "From the perspective of corporate law, this current debate marks a dramatic change from the traditional understanding of corporate law's role and the division of labor between corporate law and other regulation."

7 *Barbara Weissenberger*, "'Purpose' heilt Friedmans Fehler", *Frankfurter Allgemeine Zeitung*, 6 April 2020, p. 18, under the subheading "Supplementing economic legitimacy with social legitimacy".

8 *Colin Mayer*, *Prosperity. Better Business Makes the Greater Good*, 2018, and *Alex Edmans*, *Grow the Pie. How Great Companies Deliver Both Purpose and Profit*, 2020.

9 See most recently *Guido Ferrarini*, "An Alternative View of Corporate Purpose: Colin Mayer on Prosperity", *Rivista delle società* 2020, 27; *Marco Ventoruzzo*, "Brief Remarks on 'Prosperity' by Colin Mayer and the often Misunderstood Notion of Corporate Purpose", *Rivista delle società* 2020, 43; and *Lucian A. Bebchuk/Roberto Tallarita*, "The Illusory Promise of Stakeholder Governance", *Cornell Law Review* 105 (forthcoming 2020), ssrn.com/abstract=3544978, with a reply by *Colin Mayer*, "Shareholderism versus Stakeholderism – A Misconceived Contradiction", *Cornell Law Review* 105 (forthcoming 2020), ssrn.com/abstract=36117847. See also *Columbia Law School Symposium*, "Corporate Governance 'Counter-Narratives': On Corporate Purpose and Shareholder Value(s)", 31 *Journal of Applied Corporate Finance* 3 (2019), 10–25; and *Columbia Law School Roundtable on the Future of Capitalism*, 32 *Journal of Applied Corporate Finance* 2 (2020), 42–63.

II. Corporate Purpose: A Management Concept and its Practical Application

For a deeper understanding, it is advisable to first place the corporate purpose concept in a larger economic, legal and social context. A suitable framework for this is provided by the debate on corporate social responsibility (CSR).

1. From Corporate Social Responsibility to Corporate Purpose

a) Early Examples of CSR: God's Account and Corporate Philanthropy

Nationally and internationally, the discussion about the social responsibility of large companies has gained enormous momentum in recent years.¹⁰ Its origins, however, go back much further. Charity already played a considerable role in the medieval trading companies of Northern Italy, for example with the Bardi and Peruzzi or the Tuscan merchant Francesco di Marco Datini.¹¹ In their partnership foundations, the Lord God became a silent partner; under the name "Messer Domeneddio", he received a current account to which profits were regularly credited, which then went to the church.¹² In the event of bankruptcy, God's account was paid out first.¹³ On public holidays, each partner received pocket money to distribute among the poor.¹⁴ Following these charitable traditions, the keeping of an "account of God" also became common in the Southern German trading companies during the golden age of the Fuggers.¹⁵ Such an account of God was found, for example, in the partnership agreement of the Welsers and probably also in those of the Great Ravensburg Company.¹⁶ A very similar practice had become established in German mining companies (*bergrechtliche Gewerkschaften*), which were the dominant form of business organisation in this sector until well into the 19th century: Two or more of their 128 shares (*Kuxe*) were commonly left as a gift to the church (*Freikuxe*).¹⁷

10 Taking stock of these developments, *Holger Fleischer*, Corporate Social Responsibility: Vermessung eines Forschungsfeldes aus rechtlicher Sicht, *Die Aktiengesellschaft* 2017, 509 et seq.

11 Fundamental *Armando Saponi*, La beneficenza delle compagnie mercantili del Trecento, *Archivio Storico Italiano* 1925, 251 et seq.

12 See *Iris Origo*, The Merchant of Prato: Francesco Di Marco Datini, 1963, p. 67.

13 See *Jaques Le Goff*, *Marchands et banquiers du Moyen Âge*, 2d ed. 2014, p. 90.

14 See *Le Goff* (fn. 13), p. 90.

15 More closely, *Elmar Lutz*, Die rechtliche Struktur süddeutscher Handelsgesellschaften in der Zeit der Fugger, 1976, Vol. I, p. 186.

16 Individual references in *Lutz* (fn. 15), p. 184 et seq.

17 See *Helmut Pasdika*, Wandlungen in Wesen und Bedeutung der bergrechtlichen Gewerkschaften, 1960, p. 19.

This participation of the needy in the company's profits, fed by a strong religious belief, continued in the following centuries in various forms of corporate donations. The idea of corporate philanthropy also manifested itself in the ideal of the honourable merchant who felt committed to the urban common good.¹⁸ Similar expectations were later placed on the large companies that emerged in the 19th and early 20th centuries: They were to contribute to the community as "good corporate citizens".

b) Theoretical Reflections on CSR in Management Studies

The academic study of CSR in management began in 1953 with Howard Bowen's book "Social Responsibilities of the Businessman".¹⁹ Keith Davies contributed further key publications, also on the "Business Case for CSR".²⁰ He developed the so-called Iron Law of Responsibility, according to which the social responsibility of companies must correspond to their social power if there is to be no erosion of social power in the long term.²¹

The next phase of CSR began in 1970 with Milton Friedman's clarion call for the exclusive profit orientation of companies²², a work celebrating its 50th anniversary recently.²³ According to the Friedman doctrine, the only responsibility of managers in a free-market system is to comply with the wishes of shareholders and increase corporate profits – admittedly only within the framework of the law and the basic ethical rules of society.²⁴ In a shortened version that cannot be

18 In this regard, *Holger Fleischer*, *Ehrbarer Kaufmann – Grundsätze der Geschäftsmoral – Reputationsmanagement: Zur Moralisierung des Vorstandsrechts und ihren Grenzen*, Der Betrieb 2017, 2015 et seq. with further references; monographically, most recently *Jennifer Milinovic*, *Der ehrbare Kaufmann im deutschen Recht*, 2019.

19 *Howard Bowen*, *Social Responsibilities of the Businessman*, 1953; the new edition from 2013 offers an insightful introduction by *Jean-Pascal Gond* and a foreword by Bowen's eldest son *Peter Geoffrey Bowen*.

20 See, for example, *Keith Davis*, *Can Business Afford to Ignore Social Responsibility?*, *California Management Review* 11 (1960), 70.

21 See *Keith Davis*, *The Case for and Against Business Assumption of Social Responsibility*, *Academy of Management Journal* 1 (1973), 312.

22 *Milton Friedman*, *The Social Responsibility of Business is to Increase its Profits*, *The New York Times Magazine*, 13 September 1970.

23 See, for example, *Karthik Ramanna*, *Friedman at 50: Is it Still the Social Responsibility of Business to Increase Profits?*, *California Management Review* 62 (2020), issue 3, 28.

24 *Friedman* (fn. 22): "In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible, while conforming to the basic rules of the society, both those embodied in law and those in ethical custom."

proven beyond doubt: “The business of business is business”. In the 1980s, in opposition to the Friedman doctrine, leading representatives of management theory set about refining the CSR idea and placing it on a stable conceptual basis. Edward Freeman’s book “Strategic Management: A Stakeholder Approach”, published in 1984, laid the foundation for a new type of strategic corporate management centred on the management of stakeholder relations.²⁵

c) Corporate Purpose as a Separate and Overarching Management Concept

Recently, the supporters of the corporate purpose concept have sharply distanced themselves from the previous understanding of CSR – perhaps more sharply than is necessary in view of some overlaps. They emphasise that they are not concerned with corporate charity, but with a fundamental reorientation towards responsible companies that simultaneously generate profit and social benefit. In that sense, corporate purpose is understood as an overarching management philosophy, a steering instrument for all the activities of a company: “Purpose drives everything.”²⁶

aa) Modern Approach (Colin Mayer, Alex Edmans)

What exactly do the prominent purpose protagonists have in mind? As Alex Edmans explains, his approach, called “pieconomics”, is based on the idea that companies make their profit solely by creating value for society as a whole.²⁷ He sees this as a fundamental difference from traditional CSR activities, which are managed by a separate CSR department and primarily aim to prevent damage to various stakeholders.²⁸ However, the better approach, he argues, is not to divide up the existing cake differently but to increase it through innovation and excellence in the corporate core business.²⁹

25 *Edward Freeman*, *Strategic Management: A Stakeholder Approach*, 1984.

26 Thus the subheading in *Bruce/Jeromin* (fn. 2), p. 59.

27 See *Edmans* (fn. 8), p. 27: “Pieconomics is an approach to business that seeks to create profits only through creating value for society.”

28 See *Edmans* (fn. 8), p. 27: “[Pieconomics] views differ from the traditional term Corporate Social Responsibility (CSR) in two fundamental ways. First, CSR typically refers to activities that are siloed in a CSR department, often to offset the harm created by a company’s core business, such as charitable contributions. [...] Second, a common dictum of CSR is ‘do not harm’ – not to take from other stakeholders. But Pieconomics stresses that it’s even more important for a company to positively do good by creating value.”; similarly *Bruce/Jeromin* (fn. 2), p. 2 et seq.

29 *Edmans* (fn. 8), p. 28: “Being a responsible business isn’t so much about sacrificing profits to reduce carbon emissions (splitting the pie differently), but innovating and being excellent at its core business (growing the pie)”; similarly *Bruce/Jeromin* (fn. 2), p. 28:

In a very similar vein, Colin Mayer advocates not leaving it at meritorious philanthropy in the conventional CSR sense,³⁰ striving instead for economic success through activities that benefit society as a whole: “Doing Well by Doing Good”.³¹ In sharp contrast to the Friedman doctrine and shareholder value thinking, he emphasises that the primary purpose of a corporation is not to generate profits but to create solutions to problems for the general public and the environment.³² Mayer calls on legislators to oblige companies to anchor their corporate purpose in their articles of association and to account for the ways in which they bring this purpose to life.³³ With reference to the US benefit corporation, he also encourages national legislators to make available a broader range of corporate forms with different purposes.³⁴

bb) Historical Predecessors

Just like CSR in its original sense, the idea of social utility of companies also has early predecessors. In Germany, the historical search for traces leads back to the time of the concession system, when the founding of joint-stock companies still required state approval.³⁵ According to the Prussian General Land Law of 1794, those companies that wanted to attain the status of “Corporations and Commoners”, i.e. acquire legal capacity, through a sovereign privilege had to have a social purpose (*gemeinnütziger Zweck*).³⁶ Building on this, later under the Prussian Stock Corporation Act of 1843, a ministerial decree of 22 April 1845 stipulated: “The application for approval of the establishment of a joint-stock company is only suitable for consideration at all if the purpose of

“This approach results in the pie to be distributed becoming larger rather than the pie being distributed differently in its current form.”

30 See Mayer (fn. 8), p. 117: “This is not corporate social responsibility (CSR) as meritorious philanthropy; it is poverty alleviation and environmental protection as core corporate activities.”

31 Thus the section heading in Mayer (fn. 8), p. 116.

32 Mayer (fn. 8), p. 109: “The purpose of companies is to produce solutions to problems of people and planet and in the process to produce profits, but profits are not per se the purpose of companies.”

33 Summing up Mayer (fn. 8), p. 232: “Corporate law should require companies and financial institutions to articulate their purposes, incorporate them in their articles of association, and demonstrate how their corporate structures and conduct promote their purposes.”

34 See Mayer (fn. 8), p. 201: “Policy should therefore seek to promote companies of varied legal structures. This is key to the successful development of purposeful companies and financial institutions because supportive legal structures are critical to their formation.”

35 More closely, Richard Passow, *Die Aktiengesellschaft*, 2nd ed. 1922, p. 63 et seq.

36 § 25 II 6 Prussian General Land Law; on this, for example, Otto v. Gierke, *Die Genossenschaftstheorie und die deutsche Rechtsprechung*, 1887, p. 90–91, 98–99.

the company in itself appears useful and worthy of promotion from a general point of view.”³⁷ The statutes of the joint-stock companies therefore specifically emphasised their public benefit.³⁸ Over the course of time, however, this was understood more and more generously by the licensing authorities: In the beginning, they equated it with the public interest in the narrower sense, but later functions such as the strengthening of the domestic economy or the increase in tax revenue were also sufficient.³⁹

In other legal systems, too, the notion of public benefit was emphasised early on in the formation of companies. This is well documented for the early period of US corporate law. In the late 18th century, the business corporation was seen as a vehicle through which the state could raise private capital for public purposes such as the construction of canals, bridges or roads.⁴⁰ This is referred to as the “Public Service Origins of the American Business Corporation”.⁴¹ Private profit and social benefit went hand in hand.⁴² The public ties of the business corporation were taken very seriously: In the absence of a public purpose, the state refused to grant the required corporate charter, and in the case of insufficient fulfilment of social responsibility, it revoked it.⁴³ Over the course

37 Ministerialblatt für die gesamte innere Verwaltung in den Königlich Preußischen Staaten, 1845, p. 121; on this, for example, *Kurt Bösselmann*, *Die Entwicklung des Aktienwesens im 19. Jahrhundert*, 1939, p. 73.

38 *Martin Bullinger*, *Staatsaufsicht in Verwaltung und Wirtschaft, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 22 (1965), 264, 279 with fn. 75, referring to the statutes of the Berliner Kassenverein: “The purpose of the bank is to support and stimulate trade and commerce, to promote the circulation of money and to make capital usable.”

39 This is expressly stated by *Erik Kießling*, in *Walther Bayer/Mathias Habersack* (eds.), *Aktienrecht im Wandel*, 2007, vol. I, § 7 marg. no. 32.

40 See *Oscar Handlin/Mary F. Handlin*, *Origins of the American Business Corporation*, 5 *Journal of Economic History* 1, 22 (1945); *James Willard Hurst*, *The Legitimacy of the Business Corporation in the United States, 1780–1970*, 1970, p. 13 et seq.; *Lyman Johnson*, *Corporate Law and the History of Corporate Social Responsibility*, in *Harwell Wells/James L. Beasley* (eds.), *Research Handbook on the History of Corporate and Company Law*, 2018, p. 570 et seq.; summing up, *Stevens*, in *Citizens United v. FEC*, 130 S. Ct. 876, 949 (2010) (concurring in part, dissenting in part).

41 Thus the essay title by *Ronald E. Seavoy*, *Business History Review* 52 (1978), 30.

42 See *Edwin M. Epstein*, *Societal, Managerial, and Legal Perspectives on Corporate Social Responsibility – Product and Process*, 30 *Hastings Law Journal* 1287, 1308–1309 (1979): “Public service and profit seeking were compatible in early American corporations.”; slightly different *Larry D. Thompson*, *The Responsible Corporation: Its Historical Roots and Continuing Promise*, 29 *Notre Dame Journal of Law, Ethics & Public Policy* 199 (2015), 208–209: “Public service and private profit were not incompatible – indeed, the corporate form was available to pursue the latter only insofar as it contributed to the former.”

43 For more detail, see *Thompson* (fn. 42), 210 with further references.

of time, this original purpose of the corporation has been forgotten.⁴⁴ Bringing it back to mind also benefits leading purpose proponents like Colin Mayer, lending historical dignity to their cause and serving to castigate deviating conceptions like the Friedman doctrine as historically oblivious departures from the original corporate path.⁴⁵

2. Implementing the Corporate Purpose Concept

Leaving our discussion of the earlier public service and non-profit idea and returning to today's corporate purpose concept, according to professional purpose consultants, its successful introduction requires a firm anchoring its purpose in the company's value chain.⁴⁶ For this, a company-specific purpose situation analysis considering the benefit dimensions of "added value", "people" and "market" is recommended.⁴⁷ This should include the company's employees, but also customers and business partners.⁴⁸ The purpose to be developed in this way should specify the direction and the reason for the company's existence: "A purpose defines *who* the enterprise is for and *why* it exists."⁴⁹ It should not be limited to an attention-grabbing marketing statement, but should make a meaningful contribution to an unmet social need, be authentic, offer measurable added value for the company and be seriously implemented.⁵⁰ Finally, in order to fill the purpose with life, it must be communicated externally and embedded in the internal corporate culture.⁵¹

44 Along the same lines *Mayer* (fn. 8), p. 166: "[...] charters originally endowed corporations with public purposes. At that stage commitments were intrinsic to the corporation. With freedom of incorporation the intrinsic commitments were relinquished."

45 In this sense *Mayer* (fn. 8), p. 82–83: "The universal origin of the concept of business is therefore of promoting life through a collective endeavour. In marked contrast to the Friedman conception of the firm, not only were social and public considerations incorporated in corporate purpose from the outset, they were interwoven in a fusion of commercial and community in a single corporate form."

46 See *Bruce/Jeromin* (fn. 2), p. 13.

47 See *Bruce/Jeromin* (fn. 2), p. 54 et seq.

48 See *Bruce/Jeromin* (fn. 2), p. 65: "Purpose Quest".

49 *Edmans* (fn. 8), p. 223 (emphasis in original).

50 See *Bruce/Jeromin* (fn. 2), p. 14 et seq.

51 In greater detail, *Edmans* (fn. 8), p. 201 et seq., 208 et seq., summing up on p. 223: "A purpose is far more than a mission statement and must live in the enterprise. It must not only be *defined*, but also *communicated* externally and *embedded* internally." (emphasis in original).

3. Examples of Corporate Purpose Statements

As mentioned at the outset, corporate purpose is now an integral part of the management philosophy of many (large) companies. Take the case of Germany: According to surveys, all DAX30 companies see the recognisable purpose and inner drive of their company as crucial for their future economic success.⁵² The way it is implemented varies; the formulations used are becoming increasingly crisp and catchy. Here are a few examples: Adidas, Europe's largest sportswear manufacturer and one of the purpose pioneers in the DAX, writes "Through sport we can change lives"; at the German airline Lufthansa it is "We connect the countries of Europe with each other and Europe with the world"; at the real estate company Vonovia "We give people a home". The carmaker Mercedes Benz states "First Move the World"; the electric utilities company RWE "Our Energy for a Sustainable Life"; and the insurer Allianz "We Secure Your Life." So far, no DAX30 company has included its corporate purpose in its articles of association.

Companies tend to distinguish their vision from their purpose. The vision is oriented towards the future and describes what the company is aiming for in the next five to ten years.⁵³ The difference is best illustrated by a concrete example: At Bayer, a pharmaceutical company, the corporate purpose is "Science for a Better Life"; the vision is "Health for all, Hunger for none". The distinction from the corporate mission is not entirely clear. According to some authors, the purpose is much more than a mission statement⁵⁴ because it answers the question of *why*;⁵⁵ other commentators use the terms synonymously.⁵⁶

III. Managerial Corporate Purpose Meets Company Law: A Comparative View

After having learned more about the managerial corporate purpose concept, how do we locate it on the map of company law? Four aspects deserve further study. First: Which corporate organ has the competence to specify the corporate purpose? Is it the board or the general meeting? Second: Is it possible to

52 For more details, see *Fröndhoff/Scheppe* (fn. 4).

53 See *Bruce/Jeromin* (fn. 2), p. 25.

54 *Edmans* (fn. 8), p. 233, without further explanation.

55 With this delimitation, *Bruce/Jeromin* (fn. 2), p. 26.

56 In this sense, *Gary Johnson/Kevan Scholes/Richard Whittington*, *Exploring Corporate Strategy*, 8th ed. 2008, p. 164: "A mission statement aims to provide employees and stakeholders with clarity about the overall purpose and *raison d'être* of the organisation."

establish the corporate purpose in the articles of association? Third: How does the corporate purpose from management studies relate to basic concepts of company law, such as the object and the purpose of the company? Fourth: Do board members have sufficient leeway within the framework of their duties to implement a corporate purpose that is more in the public interest, or are they prevented from doing so by a shareholder primacy requirement? Some of these aspects have already been discussed more intensively in France or the United Kingdom, others in the United States or Germany.

1. France: Introducing the *Raison d'être* into Company Law (Loi PACTE 2019)

The French legislator has built a first bridge between management research and company law with its so-called Loi PACTE of 22 May 2019⁵⁷. One of the much-noticed innovations of this reform law is the introduction of a voluntary *raison d'être* in French company law.⁵⁸ Admittedly, the shareholders could already determine such a *raison d'être* in the articles of association, because these are in principle at their disposition.⁵⁹ However, the reformed art. 1835 Code civil (C. civ.) now explicitly draws attention to this possibility and requires the companies to provide funds for such a *raison d'être*.⁶⁰ This is intended to prevent mere lip service.⁶¹ In addition, art. L. 225-35 para. 1 sentence 2 and art. L. 225-64 para. 1 sentence 4 Cod de commerce (C. com.) oblige the board of directors or the management board of a French stock corporation (*société anonyme*) to take into account a *raison d'être* laid down in the articles of association.

57 Loi n° 2019-486 du 22 Mai 2019 relative à la croissance et la transformation des entreprises.

58 On what follows *Holger Fleischer/Yannick Chatard*, Zur Reform des französischen Gesellschaftsrechts durch die loi PACTE: Intérêt social – raison d'être – société à mission, in *Festschrift für Herbert Kronke zum 70. Geburtstag*, 2020, p. 1723, 1731 et seq.

59 See *Avis du Conseil d'État* sur un projet de loi relatif à la croissance et la transformation des entreprises, Séance du jeudi 14 Juin 2018, nos. 394.599 and 395.021, p. 39 marg. no. 105; *Primas*, Séance du 6 fév. 2019 = J.O. Sénat du 7 fév. 2019, p. 935; *Dominique Schmidt*, La loi Pacte et l'intérêt social, *Recueil Dalloz* 2019, 633; *Antoine Tadros*, Regard critique sur l'intérêt social et la raison d'être de la société dans le projet de la loi PACTE, *Recueil Dalloz* 2018, 1765, 1769; *Isabelle Urbain-Parleani*, *Revue des sociétés* 2018, 623, 625.

60 It states: "The articles of association may specify a *raison d'être*, consisting of the principles with which the company is endowed and for the observance of which it intends to allocate resources in the conduct of its business".

61 See Amendment AN n° 2382 du 12 sept. 2018.

The legislature has refrained from defining the term *raison d'être*, hitherto unknown in French company law.⁶² For the time being, therefore, it remains a “mystery”⁶³ with a “sibylline character”⁶⁴ – a circumstance that the Council of State had expressly criticised.⁶⁵ Nevertheless, first guidelines can be identified: The *raison d'être* is supposed to help as a guidepost for the most important corporate decisions⁶⁶ or to serve as an expression of what is indispensable to realise the company’s purpose.⁶⁷ According to other authors, the *raison d'être* is the purpose and objective of the company⁶⁸ or the way in which the company should pursue its corporate purpose.⁶⁹ In any case, there is broad agreement that the new concept is part of the fight against the short-term orientation of certain investors:⁷⁰ Companies should no longer be guided solely by a *raison d'avoir* that obeys short-term financial interests, but also by a *raison d'être*.⁷¹ Contrary to the original legislative proposals, the concretisation of the *raison d'être* is not solely in the hands of the board of directors or the management board;⁷² rather, it is left to the shareholders in the articles of association.⁷³

62 *Projet de loi relatif à la croissance et la transformation des entreprises*, AN no. 1088, Enregistré à la Présidence de l’Assemblée nationale le 19 juin 2018, *Étude d’impact*, p. 543; *Avis du Conseil d’État* (fn. 59), p. 39 marg. no. 106; *Myriam Roussille*, *Projet de loi PACTE: quel impact?*, *Droit social* no. 8–9 2018, 8, 11.

63 In this sense, *Julia Heinich*, *Intérêt propre, intérêt supérieur, intérêt social*, *Revue des sociétés* 2018, 568, 571: “mysterious reason for being”; similarly *Tadros* (fn. 59), 1770: “esoteric formulas”.

64 Thus *Thibaut Massart*, *Réforme des articles 1833 et 1835 du Code civil*, *Gazette du Palais* 2018, 3070, 3073.

65 See *Avis du Conseil d’État* (fn. 59), p. 37 marg. no. 95.

66 *Rapport Notat/Senard*, *L’entreprise, objet d’intérêt collectif*, 2018, p. 4, 6–7, 49; *Projet de loi relatif à la croissance et la transformation des entreprises*, AN n° 1088, Enregistré à la Présidence de l’Assemblée nationale le 19 juin 2018, *Exposé des motifs*, p. 59.

67 *Rapport Notat/Senard* (fn. 66), p. 4, 6, 49; taken up by *Étude d’impact* (fn. 62), p. 59.

68 *Roussille* (fn. 62) 11 et seq.; similarly *Étude d’impact* (fn. 62), p. 545, 547; see also *Pierre-Henri Conac*, *The reform of articles 1833 on social interest and 1835 on the purpose of the company of the French Civil Code: recognition or revolution*, in *Festschrift für Karsten Schmidt zum 80. Geburtstag*, 2019, vol. I, p. 213, 217: “It can be considered as the general goal and the driver of the business, its animus. It is also comparable to a State Motto. The concept is also close to the German *Dasein*.”

69 *Hervé le Nabasque*, *Propos introductifs*, *Bulletin Joly Sociétés* 2019, 33, 38 with fn. 12.

70 See *Exposé des motifs* (fn. 66), p. 59; *Rapport Notat/Senard* (fn. 66), p. 3 et seq., 49; also *Jean-Jaques Daigre*, *Loi PACTE : ni excès d’honneur, ni excès d’indignité*, *Bulletin Joly Sociétés* 2018, 541; *Le Nabasque* (fn. 69), 39; *Urbain-Parleani* (fn. 59), 626.

71 See *Exposé des motifs* (fn. 66), p. 59; *Rapport Notat/Senard* (fn. 66), p. 49; commenting on this *Le Nabasque* (fn. 69), 39; see also *Patrick Cochetoux*, *L’objet social de l’entreprise: à étendre?*, *Petites affiches* 2018, no. 256, 7; *Urbain-Parleani* (fn. 59), 626.

72 *Rapport Notat/Senard* (fn. 66), p. 50.

73 *Avis du Conseil d’État* (fn. 59), p. 39 no. 106; *Étude d’impact* (fn. 62), p. 543.

If the shareholders decide in favour of a statutory *raison d'être*, this has legal consequences:⁷⁴ On the one hand, funds must be made available for its implementation.⁷⁵ On the other hand, directors can be dismissed in the event of serious violations of the *raison d'être*.⁷⁶ The effects on directors' liability, on the other hand, are difficult to predict according to the legislative impact assessment.⁷⁷ If a managing director violates the *raison d'être* laid down in the statutes by an act, this arguably constitutes a violation of statutory provisions, giving rise to civil liability under art. 1850 para. 1 C. civ., art. L. 225–251 para. 1 C. com.⁷⁸ Actual liability risks are likely to vary depending on the wording and the degree of concretisation.⁷⁹

A look at corporate practice shows that two-thirds of the companies listed in the leading French stock index CAC 40 have now given themselves a *raison d'être*.⁸⁰ At the tyre manufacturer Michelin, for example, it is “Offering a better way forward”; at the IT service provider ATOS it is “Contributing to the shaping of the information space”. Overall, however, only just under ten per cent have included their purpose of existence in their articles of association; the other companies fear possible liability risks or shy away from the bureaucratic effort.⁸¹

2. United Kingdom: Board's Task to Establish the Company's Purpose (UK Corporate Governance Code 2018)

A second approach to incorporating the purpose concept can be found in English company law. There, the UK Corporate Governance Code, revised in July 2018, has re-titled its opening section as “Board Leadership and Company Purpose”. Principle B of this section states: “The board should establish the company's purpose, values and strategy, and satisfy itself that these and its cul-

74 See *Conac* (fn. 68), p. 213, 217.

75 Amendement no. 2362 du 12 sept. 2018.

76 *Étude d'impact* (fn. 62), p. 548; commenting on this *Tadros* (fn. 59), 1770; *Urbain-Parleani* (fn. 59), 628: “real sanction”.

77 *Étude d'impact* (fn. 62), p. 548; by contrast, clearly highlighting the risks of sanctions, *Avis du Conseil d'État* (fn. 59), p. 39 no. 105; *Tadros* (fn. 59), 1770: “no doubt”; generally *Daigre* (fn. 70), 541.

78 *Étude d'impact* (fn. 62), p. 548; see also *Tadros* (fn. 59), 1770.

79 See *Massart* (fn. 64), 3074 et seq.; *Didier Poracchia*, De l'intérêt social à la *raison d'être* des sociétés, *Bulletin Joly Sociétés* 2019, 40, 50; *Tadros* (fn. 59), 1770.

80 See *Jean-Claude Bourbon*, De plus en plus d'entreprises se dotent d'une *raison d'être*, *LaCroix*, 13 May 2020.

81 *Bourbon* (fn. 80) under the subheading “Few companies have modified their articles of association”.

ture are aligned.” What is meant by company purpose is not further defined. The Financial Reporting Council’s accompanying Guidebook on Board Effectiveness explains: “A company’s purpose is the reason for which it exists.”⁸² The Guidebook goes on by explaining that the board is responsible for setting and reaffirming this purpose. A well-defined purpose helps companies to articulate their business model and makes it easier for them to forge closer links with employees, customers and the wider community.

This description causes difficulties because the Companies Act 2006 (CA 2006) also uses the term “purpose” with varying meanings.⁸³ In a recent synthesis of all purpose provisions, David Kershaw and Edmund-Philipp Schuster of the London School of Economics have come to the conclusion that the UK Corporate Governance Code does not use this term in the sense of an object of the company.⁸⁴ The relationship to the statutory purpose of the company for directors in s 172(1) CA 2006 appears more difficult to them. This section states: “A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to (a) the likely consequences of any decision in the long term, (b) the interests of the company’s employees, (c) the need to foster the company’s business relationships with suppliers, customers and others; (d) the impact of the company’s operations on the community and the environment; (e) the desirability of the company maintaining a reputation for high standards of business conduct [...]” From this provision, one generally assumes a primary orientation of directors’ duties towards shareholder interests (enlightened shareholder value).⁸⁵ Changing this provision, Kershaw and Schuster argue, would probably be a fundamental change to the company and would therefore require shareholder approval in the form of an amendment of the articles of association by a qualified majority.⁸⁶ Assuming that the UK Governance Code must not be contrary to the Companies Act, they see a strong case for understanding the “purpose” of the UK Governance Code as less far-reaching, namely in the sense of a mission purpose: “an animated version of what it does;

82 Financial Reporting Council, Guidebook on Board Effectiveness, July 2018, marg. no. 12.

83 See s 7(2) CA 2006: “A company may not be so formed for an unlawful purpose.” and s 172(2) CA 2006: “Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members [...]”

84 See *David Kershaw/Edmund-Philipp Schuster*, The Purposive Transformation of Company Law, 68 *American Journal of Comparative Law* (forthcoming) = LSE Law, Society and Economy Working Papers 4/2019, <http://ssrn.com/abstract=3363267>, p. 5 et seq.

85 See *Gower/Davies/Worthington*, *Principles of Modern Company Law*, 10th ed. 2016, marg. no. 16–38.

86 See *Kershaw/Schuster* (fn. 84), p. 7.

a corporate and societal mission which levitates out of what it prosaically does and around which the actions of its directors, managers and employees can coalesce.”⁸⁷ Even with this interpretation, however, Kershaw and Schuster have doubts as to whether English company law gives directors sufficient leeway to implement a mission purpose. These doubts stem from the fact that the CA 2006 focuses on shareholders’ rights and in principle approves of influence by shareholders.⁸⁸

In practice, the corporate governance statements for 2019 are now available in accordance with the new code recommendations, in which the large listed companies present and explain their purpose. At Vodafone it is “We connect for a better future”⁸⁹; at British Petroleum “Reimagine energy for people and our planet”⁹⁰.

3. *United States: Ongoing Battle Over Shareholder Primacy (2020)*

On the other side of the Atlantic, a passionate and high-profile debate on corporate purpose is also currently taking place. The letter written by Larry Fink, CEO of the powerful asset manager Blackrock, to company leaders in January 2018 has attracted worldwide attention. Its key sentences are: “Society is demanding that corporations, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate.”⁹¹ This was followed in August 2019 by the equally sensational “Statement on the Purpose of a Corporation” by the Business Roundtable, an association of 181 CEOs of leading US companies. In contrast to an earlier statement from 1997,⁹² the new state-

87 *Kershaw/Schuster* (fn. 84), p. 8.

88 Thus *Kershaw/Schuster* (fn. 84), p. 11 et seq.

89 *Gerard Kleisterlee*, Chairman’s Governance Statement, adding to this: “Our purpose is at the core of our strategy which aims to drive shareholder returns through a focus on operational excellence and organic growth by deepening customer engagement, transforming our operating model; and improving asset utilisation.”

90 *Helge Lund*, Chairman’s Governance Statement, adding to this: “Our new purpose [...] is supported by a new ambition – for BP to get to net zero by 2050 or sooner, and to help the world get to net zero too. And we have appointed a new chief executive officer, Barnard Looney, who under the board’s oversight, will lead BP in achieving both its purpose and its ambition.”

91 *Larry Fink*, 2018 Letter to CEOs, A Sense of Purpose, January 2018.

92 The Business Roundtable, Statement on Corporate Governance, 1997: “The paramount duty of management and of boards of directors is to the corporation’s stockholders.”

ment moves away from the primacy of shareholder interests and emphasises the importance of all stakeholders.⁹³

The legal debate revolves around directors' duties and is currently in full swing. In the last few months alone, in-depth working papers have been published by Edward Rock,⁹⁴ Lucian Bebchuk and co-authors,⁹⁵ Jill Fisch and Steven David Solomon,⁹⁶ and, most recently, by Leo Strine.⁹⁷ Under Delaware corporate law, the leading jurisdiction for listed companies, the duty of directors has always been "to promote the value of the corporation for the benefit of its stockholders".⁹⁸ The 1984 Principles of Corporate Governance of the American Law Institute's (ALI) which are currently being revised formulate it in a similar way.⁹⁹ In contrast, 33 states have enacted so-called other constituency statutes since the 1980s, which explicitly allow directors to take stakeholder interests into account.¹⁰⁰

Against this legal background, Colin Mayer's proposals for a fundamental restructuring of the corporate governance system have met with rejection from leading corporate law professors. Edward Rock, the reporter responsible for the revision of the ALI Principles, complains that the current purpose debate mixes four different issues: (1) the legal debate on what is the best theory of the corpora-

93 The Business Roundtable, Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans', August 19, 2019.

94 *Rock* (Fn. 6).

95 *Bebchuk/Tallarita* (Fn. 9); *Lucian A. Bebchuk/Kobi Kastiel/Roberto Tallarita*, For Whom Corporate Leaders Bargain, 63 Southern California Law Review 2021 (forthcoming), ssrn.com/abstract=3677165.

96 *Jill E. Fisch/Steven Davidoff Solomon*, Should Corporations Have a Purpose?, August 2020, https://scholarship.law.upenn.edu/faculty_scholarship/2163, p. 137.

97 *Leo E. Strine*: Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy, 76 Business Lawyer (forthcoming Spring 2021), ssrn.com/abstract=3749654.

98 *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010); earlier already *Dodge v. Ford*, 204 Mich. 459, 507 (1919); summing up *Leo Strine*, 50 Wake Forest Law Review 761, 776 (2015): "Dodge v. Ford and ebay are hornbook law because they make clear that if a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty."

99 American Law Institute, Principles of Corporate Governance, vol. I, 1984, § 2.01(a): "A corporation [...] should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."

100 On this figure, *Christopher Geczy/Jessica S. Jeffers/David K. Musto/Anne M. Tucker*, Institutional Investing When Shareholders are not Supreme, 5 Harvard Business Law Review 73, 95 (2015); on the background and content of these corporate constituency statutes *Charles Hansen*, Other Constituency Statutes: A Search for Perspective, 46 Business Lawyer 1355 (1991).

tion, (2) the corporate finance debate about conceptualising the corporation in theoretical models and empirical research, (3) the management debate about successful management strategies for building valuable firms, and (4) the political debate about the social responsibility of large listed companies.¹⁰¹ Rock accuses Colin Mayer of being overly optimistic about (corporate) legal solutions¹⁰²: Tinkering with the corporate objective cannot be a substitute for laws on the climate, worker protection and health care. Using private law to solve social problems would destroy the value generating potential of private law while failing to solve the social problems, thus leaving everybody worse off.¹⁰³

Lucian Bebchuk and Roberto Tallarita are even more critical of the concepts of Mayer and Edmans and the latest announcement of the Business Roundtable, which they bundle under the collective term “stakeholderism”.¹⁰⁴ Stakeholder governance, they say, can be found in an instrumental version as enlightened shareholder value and in a pluralistic version that sees stakeholder welfare as the ultimate goal.¹⁰⁵ In both forms, it remains an empty promise because directors have no incentive to promote stakeholder interests if this does not also promote shareholder value.¹⁰⁶ According to them, stakeholderism leads to reduced management accountability to shareholders and consequently to economic losses.¹⁰⁷ In a reply, Mayer counters that conflicting goals cannot be avoided in any system and that Bebchuk and Tallarita only describe the current system without looking for better alternatives.¹⁰⁸ Furthermore, they overlook the fact that the concretisation of a corporate purpose increases the responsibility of management and makes it stand out almost like a laser.¹⁰⁹ Responding to this criticism, Bebchuk and Tallarita point out that most of the companies whose CEOs signed the Business Roundtable’s statement on stakeholder capitalism a year ago continue to pursue a shareholder primacy course, as evidenced by their governance guidelines.¹¹⁰ Another recent publication of theirs

101 *Rock* (fn. 6), p. 7 et seq., 16 et seq., 19 et seq., 22 et seq.

102 See *Rock* (fn. 6), p. 27: “Here, Mayer’s lack of legal background gives him an optimism for ‘legal’ solutions that few corporate lawyers would share.”

103 In this sense, *Rock* (fn. 6), p. 29.

104 See *Bebchuk/Tallarita* (fn. 9), p. 6 et seq.

105 *Bebchuk/Tallarita* (fn. 9), p. 10 et seq.

106 *Bebchuk/Tallarita* (fn. 9), p. 28 et seq.

107 *Bebchuk/Tallarita* (fn. 9), p. 53 et seq.

108 *Mayer* (fn. 9), p. 8: “Status Quo Illusion”.

109 *Mayer* (fn. 9), p. 10.

110 See *Lucian A. Bebchuk/Roberto Tallarita*, ‘Stakeholder’ Capitalism Seems Mostly for Show, *Wall Street Journal*, 6. August 2020: “The evidence is clear: Notwithstanding statements to the contrary, corporate leaders are generally still focused on shareholder value. They can be expected to protect other stakeholders only to the extent that doing so would not hurt shareholder value.”

finds that boards in states with other constituency statutes made little use of their power to consider non-shareholder interests in corporate sales to private equity investors between 2000 and 2019.¹¹¹

Regardless of all academic disputes, corporate purpose statements are an integral part of entrepreneurial self-presentation in current US management practice. As in Germany, however, their formulations remain rather vague.¹¹² At Google the purpose is “to organize the world’s information and make it universally accessible and useful”; at Amazon “We aim to be the Earth’s most customer centric company”; at Mastercard “Connecting Everyone to Priceless Possibilities”; and at Coca Cola “to refresh the world and make a difference”.

4. *Germany: Interest of the Enterprise, the Honourable Merchant and Directors’ License to Pursue Public Benefits (2017–2020)*

In Germany, little has been written on the relationship between the managerial corporate purpose concept and company law,¹¹³ with a bit more having been authored on CSR clauses.¹¹⁴ It is probably fair to say that the purpose from management studies has nothing to do with the object of the company (*Unternehmensgegenstand*) nor with its corporate purpose in the legal sense (*Gesellschaftszweck*), which differentiates between for-profit and non-profit-objects.¹¹⁵ In the absence of any provisions in the articles of association, the management board is empowered to specify the corporate purpose.¹¹⁶ However, shareholders are in principle allowed to step in and may enshrine a binding purpose clause in the articles.¹¹⁷ As far as one can see, there are not yet any examples of large listed companies that have done so.

Less controversial in Germany than in the United Kingdom or the United States is the question of whether the management board may consider stake-

111 See *Lucian A. Bebchuk/Kobi Kastiel/Roberto Tallarita*, For Whom Corporate Leaders Bargain, 63 Southern California Law Review 2021 (forthcoming), ssrn.com/abstract=3677165.

112 Summing up, *Fisch/Davidoff Solomon* (fn. 96), p. 137.

113 See *Holger Fleischer*, Gesellschaftszweck, Corporate Purpose, Raison d’être, Der Aufsichtsrat 2019, 137; *Fleischer* (fn. 1), 11 et seq.; *Mathias Habersack*, “Corporate Purpose”, in Festschrift für Christine Windbichler zum 70. Geburtstag, 2020, p. 707.

114 See *Fleischer* (fn. 10), p. 514; *Peter Müllert*, Soziale Verantwortung von Unternehmen im Gesellschaftsrecht, Die Aktiengesellschaft 2009, 766, 772; *Gerald Spindler*, Corporate Social Responsibility in der AG – Mythos oder Realität?, in Festschrift für Peter Hommelhoff zum 70. Geburtstag, 2012, p. 1133, 1140.

115 See *Fleischer* (fn. 1), p. 11.

116 See *Fleischer* (fn. 1), p. 11; *Habersack* (fn. 113), p. 714.

117 See *Fleischer* (fn. 1), p. 11 et seq.; *Habersack* (fn. 113), p. 716.

holder interests in its decision-making. The clear answer is yes.¹¹⁸ In 1937, Germany witnessed a major law reform notorious for introducing a public welfare clause in sec. 70 para. 1 of the Stock Corporation Act. This provision stipulated that “the management board has to manage the company under its own responsibility, as the good of the enterprise and its retinue and the common weal of folk and realm demand.” A careful reader will notice that this multiple-constituencies-clause does not mention one important group at all: the shareholders.¹¹⁹ Some 30 years later, the task of redrafting the old sec. 70 Stock Corporation Act 1937 stirred much discussion throughout the legislative process.¹²⁰ Eventually, the new – and still valid – sec. 76 para. 1 Stock Corporation Act 1965 merely reiterated the board’s independence, without postulating any explicit goal: “The management board is to manage the affairs of the company on its own responsibility.” What one can infer from this legislative abstention, was roundly debated: Some authors said it is self-evident that directors have to take capital, employees and public interest into account;¹²¹ they also referred to the new constitutional framework after World War II, especially to Art. 14 para. 2 of German Basic Law: “Property carries responsibility” (*Eigentum verpflichtet*).¹²² Others disagreed, suggesting that no multiple-purpose- or public-welfare-clause exists.¹²³ Today, it is well-settled that the management board may take public welfare concerns into account.¹²⁴ They are part of the “interest of the enterprise” (*Unternehmensinteresse*), the polestar of German stock corporation law developed in case law and doctrinal writing.¹²⁵

118 For a more detailed account, *Holger Fleischer*, Comparing Unternehmensinteresse and Intérêt Social: A Guided Tour Through Last Century’s Corporate Law History in Germany and France, *Revue trimestrielle de droit financier* 2018, (4), 2 et seq.

119 See *Holger Fleischer*, Gesetzliche Unternehmenszielbestimmungen im Aktienrecht – Eine vergleichende Bestandsaufnahme, *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 2017, 411, 413, adding that the *travaux préparatoires* addressed shareholders at least in passing; also *Detlev Vagts*, Reforming the ‘Modern’ Corporation: Perspectives from the German, 80 *Harvard Law Review* 23, 40 (1966): “One omission in section 70 is noteworthy – nothing was said about the shareholders!”

120 For a detailed account of the legislative process with its many proposals and counter-proposals, *Holger Fleischer*, in *Gerald Spindler/Eberhard Stilz* (eds.), *Aktiengesetz*, 4th ed. 2019, § 76 marg. no. 23 et seq.

121 See *Peter Raisch*, Zum Begriff und zur Bedeutung des Unternehmensinteresses als Verhaltensmaxime von Vorstands- und Aufsichtsratsmitgliedern, in *Festschrift für Wolfgang Hefermehl zum 70. Geburtstag*, 1976, p. 347, 352 et seq.

122 See *Fritz Rittner*, Zur Verantwortung des Vorstands nach § 76 Abs. 1 AktG, in *Festschrift für Ernst Geßler zum 70. Geburtstag*, 1971, p. 139, 145 et seq.

123 See *Michael Jürgenmeyer*, Das Unternehmensinteresse, 1983, p. 172 et seq.

124 See BGHZ 219, 193 marg. no. 54: “Consideration of public welfare concerns in business decisions”; *Fleischer* (fn. 120), § 76 AktG marg no. 43 et seq.

125 See *Fleischer* (fn. 120), § 76 AktG marg. no. 24 et seq. with further references.

What this means exactly for the board's duties is spelled out in the German Corporate Governance Code. Its foreword states: "The Code highlights the obligation of Management Boards and Supervisory Boards – in line with the principles of the social market economy – to take into account the interests of the shareholders, the enterprise's workforce and the other groups related to the enterprise (stakeholders) to ensure the continued existence of the enterprise and its sustainable value creation (the enterprise's best interests)." In 2017, in an act of moralising company law, the Code introduced the "honourable merchant concept" (*Leitbild des Ehrbaren Kaufmanns*), admonishing the corporate organs to behave ethically sound and responsibly.¹²⁶ In 2020, the Code added that "the companies and its governing bodies must be aware of the enterprise's role in the community and its responsibility vis-à-vis society". The quoted passages accurately reflect the prevailing interpretation of sec. 76 para. 1 Stock Corporation Act.

5. *Interim Findings*

The corporate purpose concept, understood as an overarching management philosophy, is now firmly established in the boardrooms of French, English, US and German companies. Its implementation follows the same basic pattern everywhere; most of the published purposes are similar in their vague, open-ended formulations.

It is more difficult to classify the corporate purpose concept in the categories of national company laws because it is not a genuine legal concept. This has been aptly expressed by a French deputy when the National Assembly passed the loi PACTE, introducing the concept of *raison d'être*: "un concept non pas juridique, mais managérial – très franchement, on ne sait absolument pas que cela veut dire."¹²⁷

As for the specification of the corporate purpose, it has so far almost always been set by the respective management body (board of directors, management board). The UK Corporate Governance Code even explicitly assigns this task to the board; in Germany this follows from the management board's responsibility for the strategic orientation of the company.¹²⁸ An obligatory right of the shareholders to have a say or to make the final decision has not yet been pro-

126 Commenting on this *Fleischer* (fn. 18), 2105 et seq.

127 *Daniel Fasquelle*, Séance du 4 October 2018 = J.O. A.N. of 5. Oct. 2018, p. 9636.

128 See Principle 2 of the German Code of Corporate Governance: "The Management Board develops the enterprise strategy, coordinates it with the Supervisory Board and ensures its implementation."

vided anywhere. However, in France, after the introduction of the loi PACTE, shareholders are at least entitled to take over the competence to specify the *raison d'être* in the articles of association. In Germany, too, purpose clauses in the articles of association are likely to be permissible in principle.¹²⁹ In Delaware, on the other hand, this is predominantly considered impermissible under the prevalent shareholder primacy approach, but there are also dissenting voices.¹³⁰

Concerning the discretion of board members to implement a corporate purpose which is more in the public interest, this is permissible under German and French company law. Both continental European legal systems follow, with different doctrinal terminology (*Unternehmensinteresse*, *intérêt social*), a pluralistic governance model;¹³¹ in political economy it is known as Rhenish capitalism, characterised by a balance of power between shareholders and management, a close social partnership between trade unions and employees, and more stringent state regulation of economic activity.¹³² By contrast, in the United Kingdom and the United States, a more stakeholder-oriented corporate purpose concept is subject to narrower limits within the enlightened shareholder value or shareholder primacy framework. The exact demarcation there still awaits final clarification.

The lowest common denominator in all four jurisdictions is that corporate philanthropy in the sense of the early CSR approaches described above¹³³ is permitted everywhere, provided it does not exceed certain limits and there are no conflicts of interest (“pet charities”¹³⁴).¹³⁵ This kind of philanthropy can also be rationalised from the point of view of shareholder value because it is suitable

129 See *Fleischer* (fn. 1), 11 et seq.; *Habersack* (Fn. 113), 716.

130 See most recently *Fisch/Davidoff Solomon* (fn. 96), p. 135: “We believe (contrary to the view of some scholars), that current law allows corporations to commit in their charters to prioritize stakeholder or societal interests, and that such commitments would be legally enforceable, but we have found no examples of corporations that have done so [...]”

131 In-depth, *Holger Fleischer*, *Unternehmensinteresse und intérêt social: Schlüsselfiguren aktienrechtlichen Denkens in Deutschland und Frankreich*, *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 2018, 703.

132 See *Michel Albert*, *Kapitalismus contra Kapitalismus*, 1992, p. 103 et seq. and 128 et seq.; modified and deepened in the specialist debate on “varieties of capitalism”, which distinguishes between coordinated market economies and liberal market economies; fundamentally, *Peter Hall/David Soskice*, *Varieties of Capitalism*, 2001.

133 See II 1 a) above.

134 *A.P. Smith Manufacturing Co. v. Barlow*, 98 A.2d 581, 590 (1953); adopted by BGHSt 47, 187, 195.

135 For a comparative overview, *Holger Fleischer*, *Unternehmensspenden und Leitungsermessens des Vorstands im Aktienrecht*, *Die Aktiengesellschaft* 2001, 171 et seq.

for improving the social acceptance of the company and thus its economic progress.¹³⁶

IV. Policy Proposals Relating to Corporate Purpose

The leading purpose advocates do not stop at appealing to companies and business leaders, instead addressing their proposals to legislators as well.

1. Mandatory Statutory Purpose Clauses

Colin Mayer calls for companies to be required to include a corporate purpose in their articles of association.¹³⁷ In this way, he wants to make directors more accountable and encourage institutional investors to also commit to the corporate purpose.¹³⁸ Indeed, the anchoring of a corporate purpose in the articles of association may have a certain signalling effect for potential investors and stakeholders of the company.¹³⁹ However, the signalling effect would presumably be even stronger if companies were not obliged to include a purpose clause but were free to decide on this, as is the case in France under art. 1835 C. civ. The requirement there to provide corresponding funds for a declared *raison d'être* fits into a theoretically coherent signalling concept because it prevents “cheap talk” that does not lead to binding consequences.

Irrespective of this, there are serious doubts about Mayer's basic assumption that statutory purpose clauses are suitable for noticeably improving the monitoring and control of management bodies.¹⁴⁰ As the cited examples from cor-

136 See *Fleischer* (fn. 120), § 76 AktG marg. no. 52.

137 In this sense *Mayer* (fn. 8), p. 23, 201, summing up p. 232: “Corporate law should require companies and financial institutions to articulate their purposes, incorporate them in their articles of association, and demonstrate how their corporate structures and conduct promote their purpose.”

138 See *Mayer* (fn. 8), p. 202: “It would shift the onus of director fiduciary duties to where they should be on corporate purposes. They would require not only directors and management of companies to demonstrate commitment to purpose but also all external parties related to the firm to do likewise. For example, it would encourage institutional investors to demonstrate a commitment to promoting the purposes of the companies in which they invest as well as to their investors.”

139 Likewise, although without reference to *Mayer's* claim, *Fisch/Davidoff Solomon* (fn. 96), p. 143: “First, corporate purpose serves a signaling function. It allows individuals to identify a corporation's objectives in order to determine the degree of fit between the corporation's operational goals and their individual goals.”

140 Also rejecting this, *Ferrarini* (fn. 9), 37; *Ventoruzzo* (fn. 9), 46 et seq.

porate practice show, their content often remains vague and open to interpretation.¹⁴¹ They have therefore been aptly compared to good intentions for the new year, which are expressed hopefully but later quickly abandoned.¹⁴² Even if they contain a halfway tangible core, as in the case of RWE “Our energy for a sustainable life”, it will not be difficult for board members to eloquently justify almost every decision they prefer.¹⁴³ If one also takes into account that business decisions enjoy in any event broad managerial discretion under some type of business judgment rule, the circumscribing potential of a purpose clause shrinks even further.¹⁴⁴

In addition, there are serious enforcement weaknesses if the board of directors disregards public benefit objectives in contravention of the articles of association. In the absence of direct pecuniary damage, shareholders willing to sue are unlikely to be found in such a case. For their part, the concretely affected stakeholders have no right of action of their own. Granting them a direct or derivative right of action could lead to other dysfunctionalities, such that so far neither the German nor the English or US legal systems have dared to open this Pandora’s box.¹⁴⁵

In order to mitigate the likely enforcement deficits, one could think about more precise legal requirements with regard to corporate purpose. The price for this would be high, however, because it would entail the danger of legal paternalism and a further politicisation of the purpose debate.¹⁴⁶ This should give pause to all

141 Similarly *Ferrarini* (fn. 9), 37: “[...] the wording of corporate purpose will often be generic”; *Fisch/Davidoff Solomon* (fn. 96), p. 137: “[...] many of these statements are aspirational and vague, providing neither ascertainable standards by which stakeholders can determine whether the corporation is meeting its identified goals nor a mechanism for holding corporate officials accountable.”; *Ventoruzzo* (fn. 9), 46: “too generic”.

142 Vividly, *Fisch/Davidoff Solomon* (fn. 96), p. 138: “something akin to a New Year’s resolution – the corporation’s identification of an area, in which, according to some baseline set of normative principles, it hopes to do better and an expression of its desire to do so.”

143 In the same vein *Ventoruzzo* (fn. 9), 49 et seq.: “It will be very easy to justify [...] virtually any choice that might balance in different ways the different interests that directors may pursue, with the only exclusion, probably, of truly extreme decisions that consistently and for an extended period systematically discount or ignore certain stakeholders.”

144 This is also pointed out by *Habersack* (fn. 113), 712 et seq.; from a US perspective, also *Jeff Gordon*, 32 *Journal of Applied Corporate Finance* 2 (2020), 19; further *Ferrarini* (Fn. 9), 30.

145 For more details, see *Fleischer* (fn. 119), 423 et seq. with numerous comparative law references.

146 Counseling against this from a UK perspective, also *Kershaw/Schuster* (fn. 84), p. 8 et seq: “Indeed, any attempt to precisely define it will politically position purpose and

those who glorify the public service and public benefit concept as encountered in the early phase of company law: The old licence system thrived on the monarch's right to unilaterally determine just what "salus publica" was.¹⁴⁷ Today, should a state stock office or sustainability office decide on the social licence to operate?¹⁴⁸ This is indeed advocated for the United States by Elizabeth Warren in her Accountable Capitalism Act,¹⁴⁹ but it is hardly convincing.

These and other objections to purpose clauses do not deny that the voluntary development and implementation of a purpose concept can be highly useful. Indeed, it seems plausible that a structured purpose search brings previously undiscovered value creation potential to light and contributes to the sharpening of the business model. It is also intuitively obvious that agreement on a higher purpose strengthens the commitment of all those involved in the company, provided that they have been involved in the purpose search.¹⁵⁰ Similar to the development of a family constitution or a mission statement in family-run companies, the creation process is often at least as important as the result¹⁵¹

2. Say-on-Purpose Voting

A second proposal, penned by Alex Edmans, aims to give investors an advisory say-on-purpose vote.¹⁵² This would ensure that investors approve the cor-

will retire the idea to the quagmire of politicised conflict about the corporate purposes we do and do not approve of."

147 Thus expressly, *Bullinger* (fn. 38), 280.

148 Sharply rejecting this, *Christine Bortenlänger/Cordula Heldt*, Paradigmenwechsel im Gesellschaftsrecht? Vom ‚Aktienamt‘ zum ‚Nachhaltigkeitsamt‘, vom Konzessionssystem zur ‚Social Licence to Operate‘ – Der Aktionsplan Finanzierung nachhaltigen Wachstums der EU-Kommission, in *Festschrift für Ulrich Seibert*, 2019, p. 147, 156 et seq., 163: "Such a 'sustainability office' would in any case have to be resolutely opposed."

149 See 115th Congress (2017–2018), p. 3348, sec. 3(a): "There is within the Department of Commerce the office of the United States Corporations."

150 Similarly *Kershaw/Schuster* (fn. 84), p. 10: "Within the firm, company purpose also provides for stakeholder bonding. Purpose provides a fulcrum around which the corporation can build intra-firm cultural norms supportive of the mission purpose, in a way that a prosaic understanding of business purpose cannot.;" *Ventoruzzo* (fn. 9), 46.

151 With a view to family constitutions, *Holger Fleischer*, Familiengesellschaften und Familienverfassungen: Eine historisch-vergleichende Standortbestimmung, *Neue Zeitschrift für Gesellschaftsrecht* 2017, 1201, 1206 et seq.: "In this context, the self-creation process according to the self-assessment of the family members and the observations of their advisors is at least as important as the result."

152 See *Edmans* (fn. 8), p. 206 et seq.: "One idea to improve two-way communication is to give them an advisory 'say-on-purpose' vote. Similar to 'say-on-pay' in the EU, this

porate purpose and agree to any conflicting objectives in its pursuit.¹⁵³ Linguistically and factually, this proposal is based on the say-on-pay votes that have been prescribed throughout the EU since the reformed Shareholder Rights Directive. There is now a wealth of research on the implementation and effectiveness of such shareholder votes.¹⁵⁴

One will readily concede to Edmans that corporate purpose is more important than remuneration policy.¹⁵⁵ However, this does not demonstrate that it is equally suitable for a shareholder vote. While the remuneration system is described in great detail by its pre-structured minimum content according to Art. 9a and 9b of the amended Shareholder Rights Directive, the same cannot be said of the murky purpose clauses in corporate practice to date.¹⁵⁶ To enable shareholders to make an informed decision, at least a more meaningful purpose report would be needed. Uncoordinated reporting on fundamentally related issues should be avoided as far as possible. If at all, it would therefore make sense to integrate mandatory purpose reporting into the already existing CSR reporting pursuant to the CSR Directive and its national implementing laws. The catalogue in Art. 19a (“non-financial statement”) of this directive already contains reporting elements that explain the company’s business model in terms of environmental, employee and social concerns. However, every company should be free to declare that it does not pursue a corporate purpose in Mayer’s sense.

3. Dual-Purpose Company Forms

Finally, Mayer suggests that legislators should provide a sufficient range of organisational forms and governance mechanisms under company law.¹⁵⁷ He cites

could be split into two – a forward-looking ‘policy vote’ on the enterprise’s purpose statement, and a backward-looking ‘implementation vote’ on whether it’s put into practice.”

153 Thus Edmans (fn. 8), p. 207.

154 See most recently, Betty H.T. Wu/Ian MacNeill/Katarzyna Chalaczkiewicz-Ladna, “Say-on-pay”-Regulations and Director Remuneration: Evidence from the UK in the Past Two Decades, *Journal of Corporate Law Studies* 20 (2020), 541, with further references.

155 See Edmans (fn. 8), p. 207, adding to this: “While a bad pay policy can make a company bad, a great pay policy can’t make it great. But purpose can.”

156 Similarly Fisch/Davidoff Solomon (fn. 96), p. 144: “[W]e question the value of corporate purpose statements that are vague, aspirational or cannot be evaluated by reference to publicly available metrics.”

157 See Mayer (fn. 8), p. 225: “Beyond requiring companies to prioritize their purposes, corporate law should enable companies to adopt diverse forms of ownership and gov-

the benefit corporation of US origin as a welcome example.¹⁵⁸ This is a corporate form first introduced in Maryland in 2010 and is now available in 33 states and the District of Columbia.¹⁵⁹ It enables the companies concerned to pursue a dual purpose, combining profit and public welfare orientation: “Pursuing Profit with Purpose”.¹⁶⁰ According to the model legislation (MBCL), a benefit corporation must pursue the purpose of providing a general public benefit.¹⁶¹ The purpose is secured by corresponding duties of conduct for directors, reporting obligations (benefit report) and rights of action for a shareholder minority of at least 2% (benefit enforcement proceedings).

In the meantime, variants of the benefit corporation have also gained a foothold elsewhere. In Italy, it has been possible since 2016 to establish a company with a dual objective: profit distribution (*scopo di dividerne gli utili*) and public benefit orientation (*finalità di beneficio comune*).¹⁶² Conceptually, the *società benefit* is not an independent legal form, but is open to all existing forms of company as a variant. Through the loi PACTE,¹⁶³ France has introduced the *société à mission*, which is also modelled on the US benefit corporation.¹⁶⁴ In order to be able to act as a *société à mission*, art. L. 210-10 C. com. requires that already existing companies must, among other things, include a *raison d’être* in the articles of association and set out at least one social or environmental objective in the articles. In England, there is the community interest company, which, however, has a somewhat different profile.¹⁶⁵ In Germany, a private initiative has recently proposed the introduction of a limited liability company in responsible ownership (“GmbH in Verantwortungseigentum”) having a different thrust.¹⁶⁶

ernance that empower different parties to the firm and give them the means to enforce their rights.”

158 See Mayer (fn. 8), p. 42, 157, 201.

159 Discussed monographically most recently by Frederick H. Alexander, *Benefit Corporation Law & Governance: Pursuing Profit with Purpose*, 2018; for a comparative overview Holger Fleischer, *Benefit Corporations zwischen Gewinn- und Gemeinwohlorientierung: Eine rechtsvergleichende Skizze*, in *Festschrift für Ulrich Seibert*, 2019, p. 219, 220 et seq.

160 Coining this term, Kyle Westaway, *Profit & Purpose: How Social Innovation is Transforming Business for Good*, 2014.

161 § 201(a) MBCL.

162 See, for example, the contributions regarding the *società benefit* collected in *Orizzonti del diritto commerciale* 2017, issue 2.

163 For more details, see Fleischer/Chatard (fn. 58), p. 1733.

164 See *Rapport Notat/Senard* (fn. 66), et seq. 65f., 70; *Poracchia* (fn. 79), 50: “*sorte de Benefit corporation à la française*”.

165 See Gower/Davies/Worthington (fn. 85), marg. no. 1–12.

166 Available at <http://www.gesellschaft-in-verantwortungseigentum.de/der-gesetzes-entwurf/>; on this see the explanation by Anne Sanders, *Eine Gesellschaft in Verant-*

Mayer's plea for more diversity has a lot going for it from an evolutionary theoretical perspective,¹⁶⁷ and it stimulates the discovery competition for new types of society. Admittedly, it is formulated against the background of English law, which traditionally gets by with very few types of business organisation. In Germany, the range of organisational forms available and actually used is much wider.¹⁶⁸ However, this does not exclude the possibility that a further, this time purpose-driven, expansion of the repertoire of legal forms could also make sense in one or another jurisdiction. The argument that a benefit corporation can already be modelled within the existing legal framework of a stock corporation or a limited liability company is not a convincing counter-argument.¹⁶⁹ In doing so, the signal function of a "speaking" legal form designation for investors and the business community would be lost from sight, thus obscuring the valuable branding comparable to that of the the non-profit limited liability company in Germany (*gemeinnützige GmbH, gGmbH*) or the European Company (SE).¹⁷⁰ Furthermore, within an independent regulatory framework, it is easier to introduce precisely tailored disclosure obligations and enforcement mechanisms as well as protective regulations against "green-washing". In addition, the general gain in distinction and legitimacy acquired by dual-purpose companies through special legal regulation should not be underestimated.

Finally, a plea for more diversity should also include the continued existence of a traditional type of business organisation not having a corporate purpose as conceived by Mayer and Edmans: "We should in some sense let 1,000 flowers bloom [...]. If a company wants to be a ruthless, profit-maximizing company,

wortungseigentum im GmbHG, *Zeitschrift für Rechtspolitik* 2020, 140; approvingly, *Marvin Reiff*, Entwurf eines Gesetzes für die GmbH in Verantwortungseigentum (VE-GmbHG) vorgelegt, *Zeitschrift für Wirtschaftsrecht* 2020, 1750; critically, *Arnd Arnold/Ulrich Burgard/Gregor Roth/Birgit Weitemeyer*, Die GmbH in Verantwortungseigentum – eine Kritik, *Neue Zeitschrift für Gesellschaftsrecht* 2020, 1321; *Mathias Habersack*, "Gesellschaft mit beschränkter Haftung in Verantwortungseigentum" – ein Fremdkörper im Recht der Körperschaften, *GmbH-Rundschau* 2020, 992.

167 On this, also *C. Mayer* (fn. 8), p. 15: "Just as human genetics spawns a plethora of individual types, so too corporations reproduce in varying ways. But it is not simply that it is possible. It is also desirable. Human evolution has benefited from a combination of randomness and natural selection. So too has corporate evolution. There is no single best corporate form, and corporations like humans need to adapt to their environment and social context. The study of corporate evolution is as fascinating and important as its anthropological equivalent."

168 On this point, *Holger Fleischer*, Ein kleiner Fremdenführer durch das deutsche Gesellschaftsrecht: Charakteristika – Besonderheiten – Eigenarten, in *Festschrift für Wulf-Henning Roth zum 70. Geburtstag*, 2012, p. 125, 128 et seq.

169 *Habersack* (fn. 113), p. 714; *Fleischer* (fn. 166), p. 232; *Mayer* (fn. 8), p. 201.

170 See *Fleischer* (fn. 159), p. 232.

they should be able to do so; but they should then have to compete in the market for customers, investors, and employees, many of whom won't want to do business with that company.”¹⁷¹

V. Key Findings

1. Many large companies have recently resorted to the so-called corporate purpose concept by identifying a *raison d'être* for their activities that goes beyond pure profit-making. In doing so, they are adopting a new corporate philosophy essentially shaped and popularised by leading English management scholars (Colin Mayer, Alex Edmans). The purpose clauses proclaimed by them follow the same basic pattern everywhere and are similar in their vague, open-ended formulations.

2. The corporate purpose concept belongs to the larger context of CSR thinking, whose practical origins go back further than is commonly assumed. As early as the High Middle Ages, the partnership agreements of the large upper Italian and southern German trading firms provided for the establishment of an “account of God”. A theoretical reflection on CSR only began in the second half of the 20th century. The shareholder value-oriented Friedman doctrine on the one hand and the Freeman stakeholder approach, on the other, are considered antipodes.

3. The modern purpose protagonists sharply distance themselves from shareholder value thinking and also want to leave behind the traditional understanding of CSR, which is perceived as silo-like. Instead of corporate philanthropy, they focus on economic success through activities that benefit society as a whole (“Doing Well by Doing Good”) and increase the distributable profit (“Grow the Pie”). They see historical antecedents in the public service concept of early US corporate law, which used to find a parallel in Germany in the public-purpose-requirement of Prussian concession practice for joint-stock companies.

4. French legislative reform built a bridge between management research and company law in 2019 by opening up the possibility for all companies to voluntarily include a *raison d'être* in their articles of association. In a slightly different form, the UK Corporate Governance Code has since 2018 been recommending that the board define the company's purpose. In the United States, under the heading of corporate purpose, there is currently a high-profile debate in the corporate law literature as to whether the shareholder primacy concept should be corrected.

171 *Steve Pearlstein*, 32 *Journal of Applied Corporate Finance* 2 (2020), 54, 55.

5. In Germany, the corporate purpose of management theory deviates from both the object and the purpose of a company in a legal sense. According to the statutory allocation of powers, the management board is responsible for specifying the managerial corporate purpose. In doing so, it may take public welfare concerns into account. However, purpose clauses in the articles of association would be generally permissible and binding for the board. So far, there are no practical examples of this among larger listed companies.

6. It is not only to companies and corporate leaders that prominent purpose protagonists make their appeal; they also address their proposals to legislators. Their demand that companies be legally obliged to anchor a corporate purpose in the articles of association deserves no support. A periodic say-on-purpose vote would at best be debatable if a more meaningful purpose report were prescribed, which should then be integrated into CSR reporting. The call for dual-purpose corporate forms deserves serious consideration in those jurisdictions which do not yet have some kind of benefit corporation.