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Greening corporations via corporate law: implementation of article 22 CSDDD via a *Climate Quota*

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Marc-Philippe Weller[1] ✉, Theresa Hößl[1] & Camilla Seemann[2]

The European Union must be climate neutral by 2050. However, recent studies show that meeting this target will require many more measures than currently established to combat climate change. On behalf of article 22 Corporate Sustainability Due Diligence Directive of the European Union and given the biennial conference of the Association of German Jurists that took place in autumn 2024, the following article analyses how a "climate quota" for large businesses could be one further step in "Greening Corporate Law".

Climate change is, to say the least, one of the key challenges of the twenty-first century. Tackling it is a human duty and task (*United Nations Development Programme*, Climate Change is a matter of justice, http://climatepromise.undp.org/news-and-stories/climate-change-matter-justice-heres-why). Like in all other areas of life, the *law* has to play its role in achieving this task (*Sjåfjell*, Why Law Matters: Corporate Social Irresponsibility and the Futility of Voluntary Climate Change Mitigation, University of Oslo Faculty of Law Legal Studies Research Paper Series, No. 2011-17, pp. 12 et seqq.). Many states have already committed to specific climate protection targets via law (see e.g. the German Climate Protection Act in which Germany formulates the goal of reaching greenhouse gas neutrality by 2045; similarly the European Climate Law, which writes into law the goal of the green deal; from a comparative view Merner et al., Comparative analysis of legal mechanisms to net-zero: Lessons from Germany, the United States, Brazil, and China, Carbon Management 2024, Vol. 15 No. 1, pp. 1 seqq.) or at least via declarations of intention (Japan for example aims to be climate neutral by 2050, https://www.weforum.org/agenda/2023/01/davos23-japan-accelerate-efforts-carbon-neutral-society/, China by 2060 https://english.mee.gov.cn/Resources/Reports/reports/202211/P020221110605466439270.pdf). Furthermore, they are obliged to climate protection by constitutional (The German Climate Ruling (BVerfG judgment of 24.03.2021 – 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20), decided that Art. 20a of the German Constitution contains the duty of the state to protect the climate, including to achieve a state of climate neutrality as soon as possible; similarly Urgenda Climate Case, Rechtsbank Den Haag, search number: C/09/456689 / HA ZA 13-1396, https://elaw.org/wp-content/uploads/archive/urgenda_0.pdf, however not regarding domestic constitutional law, but rather the European Convention on Human Rights; on the significance of the German Climate Ruling: *Jahn*, Domestic courts as a guarantee of international climate cooperation: Insights from the German Constitutional Court's climate decision, International Journal of Constitutional Law 2023, pp. 859-883; *Winter*, The Intergenerational Effect of Fundamental Rights: A Contribution of the German Constitutional Court to Climate Protection, Journal of Environmental Law 2022 (34), pp. 209-221) and international law (The well known obligation under the Paris Agreement of 12 December 2015 to keep global warming significantly below 2 °C; furthermore there are pending advisory opinions in front of the International Court of Justice (ICJ) and the International Tribunal of the Law of the Sea (ITLOS) which aim to clarify the duties of states concerning climate change with regards to international law; additionally, climate change litigation has already lead to clarification regarding the duty for climate protection enshrined in human right, notably the cases Urgenda against the Netherlands and "The Peoples' Climate Case", in which the Dutch Supreme Court and the European General Court saw a breach of the European Convention on Human Rights). The biggest contributors to climate change, however, are companies. Only 100 companies—the *carbon majors*—are responsible for over 60% of all global greenhouse gases (*Griffin*, CDP Carbon Majors Report 2017 p. 8, https://cdn.cdp.net/cdp-production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf). A total of 90% of these companies are privately owned (*Griffin*, CDP Carbon Majors Report 2017 p. 8, https://cdn.cdp.net/cdp-production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf). This has led to an international trend in recent years towards regulatory activities in the form of climate-related product standards and corporate climate disclosure requirements, which are intended to nudge businesses to transform to "net zero" (Hale et al., Turning a groundswell of climate action into ground rules for net zero, Nature Climate Change 2024, Vol. 14, pp. 306, 307).

The European legislator has also recognised the need to specifically address companies in combatting climate change and is increasingly incentivising and recently even obliging companies to more climate action and protection (see development described under B). In light of the

[1]Institute for Comparative Law, Conflict of Laws and International Business Law at Heidelberg University, Heidelberg, Germany. [2]Higher Regional Court Munich, Munich, Germany. ✉e-mail: marc.weller@ipr.uni-heidelberg.de

adoption of the Corporate Sustainability Due Diligence Directive (CSDDD) (DIRECTIVE (EU) 2024/1760 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859. Possible changes to the CSDDD as a result of the draft Omnibus Regulation (Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, COM(2025) 81 final of 26 February 2025) are not taken into account; for article 22 CSDDD, the draft Omnibus Regulation only provides for minor changes.) in June 2024, the following reflections are intended to provide initial food for thought for the discussion on how to implement its article 22 in the respective national laws of the EU Member States. The article will therefore concentrate on the European perspective—hoping, of course, that also readers of the bigger international community will be able to derive interesting insights from it. While the rest of the directive aims to provide for due diligence along the supply chain, predominantly focusing on the protection of human rights, insofar similar to the German *Lieferkettensorgfaltspflichtengesetz (2021)* and the French *Loi de vigilance (2017)*, article 22 CSDDD is a real novelty and the only article within the directive dedicated to "Combating Climate Change" (Article 22(1) CSDDD 'Combating Climate Change' reads as follows: "Member States shall ensure that companies referred to in article 2(1), points (a), (b) and (c), and article 2(2), points (a), (b) and (c), adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its intermediate and 2050 climate neutrality targets, and where relevant, the exposure of the company to coal-, oil- and gas-related activities. […]").

In order to identify what exactly a corporate climate enforcement could look like, the first step will be to outline where climate protection is already taken into account *de lege lata* in broader European company law. Any further measures in the area of company law should contribute to the aim of reaching *climate neutrality* in accordance to European climate law. Deriving from these analyses, we propose a definition for climate neutral companie s and recommend a so-called *climate quota* to be introduced in national laws in order to implement article 22 CSDDD and to achieve climate neutrality by 2050.

Climate protection via companies *de lege lata*

European company law (By European company law we mean the areas of national company law within the member states of the European Union, that are at least partly predetermined by European regulations and directives) as it stands already contains instruments of corporate climate regulation and enforcement (*Weller/Benz*, Klimaschutz und Corporate Governance, ZGR 2022, pp. 563, 570 et seq.; *Ilmonen*, EBLR 32 (2021), 817, 819). However, the instruments all follow a very indirect effect: they concern climate reporting obligations at the level of non-financial accountin g, incentives for the management bodies via climate remuneration and climate transparency obligations for the capital markets. Nevertheless, the first signs of climate due diligence obligations for the board of directors are crystallising.

Climate reporting obligations (Corporate Sustainability Reporting Directive)

Climate protection is currently mainly attempted through climate reporting, which is to be significantly expanded in future and is developing from solely having a nudging character (*Zetzsche/Anker-Sørensen*, Regulation Sustainable Finance in the Dark, European Business Organization Law Review 2022, pp. 47, 57; *Enriques/Gilotta*, Disclosure and Financial Market Regulation, in: Moloney/Ferran/Payne (eds) The Oxford handbook of financial regulation, Oxford University Press, pp. 511, who classify mandatory disclosure as a "soft-form substitute of more substantive regulations"; *Nietsch*, Von der nichtfinanziellen Berichterstattung zur Nachhaltigkeitsberichterstattung—Eine Momentaufnahme zum Vorschlag der Corporate Sustainability Reporting Directive, ZIP 2022, pp. 449, 450: "Nudging approach"; previously already *Fleischer*, Corporate Social Responsibility, AG 2017, pp. 509, 521f.; *Hennrichs*, Die Grundkonzeption der CSR-Berichterstattung und ausgewählte Problemfelder, ZGR 2018, pp. 206, 209) to genuine obligations (see *Hummel/Jobst*, An Overview of Corporate Sustainability Reporting Legislation in the European Union (February 1, 2024). Accounting in Europe, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3978478, pgs. 1 and 2 for an outline of the development in depth and requirements since the Non Financial Reporting Directive (NFRD); *Nietsch*, ZIP 2022, pp. 449, 451 et seq.; *Fleischer*, Klimaschutz im Gesellschafts-, Bilanz- und Kapitalmarktrecht, DB 2022, pp. 37, 39 et seq.): The legal basis for climate reporting was initially the Non-Financial Reporting Directive (2014) (Also called "Corporate Social Responsibility Directive" (2014)), which in turn amended the Accounting Directive (2013). According to this Directive, environmental issues, such as greenhouse gas emissions, must be addressed as part of the non-financial statement. However, companies have so far been able to abstain from developing and publishing a climate protection concept, provided they explain the reason for doing so (*comply or explain model)*.

The Accounting Directive has now undergone fundamental changes as a result of the Corporate Sustainability Reporting Directive (CSRD) adopted in 2022 (Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, Official Journal of the European Union, L 322/15 of 16 December 2022). According to the amended article 19a(2) (a) (iii) Accounting Directive (Amended Accounting Directive stands for the Accounting Directive in the version amended by the CSRD), climate reporting will now become increasingly binding, as the previously applicable *comply or explain principle* is no longer in force (Recital 36 CSRD). In addition, it will cover a significantly larger number of companies (instead of 500, 15,000 are to be included in the scope of the aforementioned reporting duties in future) (Specifically, the scope of application of climate reporting will be extended to all large companies (irrespective of their previous capital market orientation) and all listed companies, article 19a (1) of the Accounting Directive as amended—large companies and capital market-oriented small and medium sized companies underly specific reporting obligations. Article 3 Directive 2013/34/EU defines which companies fall within which categories). Furthermore, the submitted reports will mandatorily be made subject of the end of year audit (Previously, an external audit of the content of the non-financial statement was voluntary. Article 34 of the amended Accounting Directive now stipulates that the auditor must also check whether the sustainability reporting fulfils the requirements of the CSRD and the Taxonomy Regulation; *Renner*, Menschenrechts- und umweltbezogene Unternehmensverantwortung zwischen Kapitalmarkt und Lieferkette, ZEuP 2022, pp. 782, 294, who compares the CSRD approach with the discussion on "company-related accounting" in the 1970s and sees this as a departure from the corporate governance paradigm).

The most significant innovation, however, is certainly the increased content requirements. In future, companies will have to report in great detail not only on their emissions in accordance with the very technical European Sustainability Reporting Standards (ESRS) (Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards, Official Journal of the European Union of 22 Dezember 2023) issued in order to complement the CSRD, but also on a climate transformation plan with which they intend to achieve climate neutrality by 2050 (ESRS E1 Climate Change Disclosure Requirement E1-1—Transition plan for climate change mitigation). The former non-financial statement is hence upgraded to an independent sustainability report (In future, the sustainability report will be a separate section of the management report, article 19a(1) subpara. 2 Accounting Directive as amended).

Climate remuneration parameters (Shareholder Rights Directive II)

Executive board remuneration with *variable remuneration parameters* that, amongst others, promote climate protection is another key instrument of corporate climate enforcement: According to article 9a Shareholder Rights Directive II, the remuneration structure of the members of the management board in listed companies must be directed towards supporting a sustainable *and* long-term development of the company. To describe the effects of the Shareholder Rights Directive II, it is worth taking a look at its implementation, for example in Germany: Section 87(1) clause 2 of the German Stock Corporation Act lays down the ground principles of the renumeration system in German stock corporations. It initially only mentioned the "sustainable" development of the company, but was extended explicitly onto "long-term and sustainable matters" in the course of the implementation of the Shareholder Rights Directive II into German law. By inserting "long-term" development into the wording of the law, the legislator clarified that "sustainable" is not solely to be understood in the long-lasting sense, but rather means an orientation towards social and ecological factors in the context of executive board remuneration (*Ausschuss für Recht und Verbraucherschutz*, Beschlussempfehlung und Bericht zu dem Gesetzesentwurf der Bundesregierung zur Umsetzung des ARUG II, BT-Drucks. 19/15153, p. 55, 62; see also the corresponding differentiation in recital 29 of the Shareholder Rights Directive II (Directive (EU) 2017/828): "the remuneration policy should contribute to the business strategy, long-term interests and sustainability of the company" and especially the following sentence of clarification: "Directors' performance should be assessed using both financial and non-financial performance criteria, including, where appropriate, environmental, social and governance factors"). In the financial year 2021, 28 of the 40 companies listed on the DAX already chose the reduction of CO_2 emissions as *the* sustainable parameter for determining executive board remuneration; in general, remuneration systems are now increasingly based on environmental factors ("The largest oil & gas companies—BP, Shell, and Total in Europe and Chevron and ExxonMobil in the United States—all incorporate climate metrics into CEO pay.", *Ritz*, Linking Executive Compensation to Climate Performance, California Management Review 2022, Vol. 64(3) pp. 124, 125/126).

Green finance

The European legislator has furthermore introduced regulations that address sustainability and climate protection issues in particular within the area of corporate finance. These are essentially climate transparency obligations (in the form of categorisation, information and reporting obligations).

Climate classification obligations (Taxonomy Regulation). The centrepiece of green finance is the Taxonomy Regulation (2020) (Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088, OJ EU L 198/13 of 22 June 2020). According to its article 1, it establishes criteria for determining when an economic activity can be categorised as being environmentally sustainable. According to its article 3, the realisation of or contribution to one or more of the environmental objectives listed in article 9 of the Taxonomy Regulation is crucial for being categorised as being environmentally sustainable. Examples of such environmental objectives are climate protection (article 9 lit. a Taxonomy Regulation) and adaptation to climate change (article 9 lit. b Taxonomy Regulation). Both environmental objectives are further specified by the Climate Delegated Act (2021) (Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity is considered to contribute significantly to climate change mitigation or adaptation and for determining whether that economic activity avoids significant harm to any of the other environmental objectives, OJ EU L 442/1 of 09.12.2021); it contains a classification system whereby economic activities can be categorised into being environmentally sustainable with regard to the climate and thus as "taxonomy-eligible" (see in detail *Gortsos/Kyriazis*, The Taxonomy Regulation and its Implementation, European Banking Institute Working Paper Series 2023—no. 136).

Climate information obligations (Sustainable Finance Disclosure Regulation). Financial market participants such as insurance or fund management companies and financial advisors such as insurance brokers or investment advisors must provide certain information on the sustainability of their financial products in accordance with articles 3 et seqq. of the Sustainable Finance Disclosure Regulation (SFDR, 2019) (Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, OJ EU L 317/1 of 09.12.2019; detailed information on the individual information obligations: *Hummel/Jobst*, An Overview of Corporate Sustainability Reporting Legislation in the European Union (February 1, 2024). Accounting in Europe, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3978478, pp. 17 et seqq.; *Zemke/Troost*, in: Freiberg/Bruckner, Corporate Sustainability. Kompass für die Nachhaltigkeitsberichterstattung, 1st ed. 2022, Section 11 para. 4 et seqq). In the case of financial products that promote sustainable (environmental or social) characteristics among other (non-sustainable) characteristics and not as a main objective (so-called light-green products), financial market participants must provide extensive pre-contractual information in accordance with article 8 SFDR; the same applies for so-called dark green products, products that are intended to exclusively serve sustainable characteristics, according to article 9 SFDR (see in detail *Hummel/Jobst*, An Overview of Corporate Sustainability Reporting Legislation in the European Union (February 1, 2024). Accounting in Europe, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3978478, p. 19/20; *Kehrel*, Der Einfluss von Sustainable Finance auf die Nachhaltigkeitsziele deutscher Aktiengesellschaften, 2023, pp. 189 et seqq).

The obligations under the SFDR are partially modified and expanded by the Taxonomy Regulation (Recital 55 of the Taxonomy Regulation (Regulation (EU) 2020/852)): On the one hand, articles 5 and 6 Taxonomy Regulation specify the (pre-contractual) informatory obligations of articles 8 and 9 SFDR; this affects financial market participants and advisors, being the obliged parties. On the other hand, article 8 of the Taxonomy Regulation imposes an obligation on companies that are required to publish a non-financial (group) statement; must expand this statement to include information on how and to what extent their activities are linked to economic activities that are to be categorised as environmentally sustainable in line with the meaning of the Taxonomy Regulation (*Hummel/Jobst*, An Overview of Corporate Sustainability Reporting Legislation in the European Union (February 1, 2024). Accounting in Europe, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3978478, pp. 16 et seqq.; *Borcherding*, in: Freiberg/Bruckner, 1st ed. 2022, Section 12 margin no. 4 et seq).

Climate reporting obligations (Shareholder Rights Directive II). In addition, institutional investors and asset managers must report on the extent to which they monitor their portfolio companies, inter alia with regard to the social and environmental impact of their business activities in accordance with article 3 g(1) lit. a of the Shareholder Rights Directive (SRD) (Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184/17 of 14 July 2007.) in the version amended by the Shareholder Rights Directive II (SRD II) (Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the promotion of long-term shareholder engagement, OJ EU L 132/1 of 20 May 2017). In German law, these requirements were implemented by the so-called *ARUG II* in section 134b(1) No. 2 German Stock Corporation Act (Article 1 no. 18 ARUG II; although section 134b(1) no. 2 German Stock Corporation Act only refers to "important matters" of the portfolio companies, this should be seen in conjunction with the wording of Article 3g(1) lit. a of the amended Shareholder Rights Directive ("social and environmental impact"); *Koch*, AktG, 17th edition 2023, section 134b marginal no. 2; *Tröger*, Die Regelungen zu institutionellen Investoren, Vermögensverwaltern und Stimmrechtsberatern im Referentenentwurf eines Gesetzes zur Umsetzung der zweiten Aktionärsrechterichtlinie (ARUG II), ZGR 2019, pp. 126, 143).

Climate due diligence obligations of the board of directors?

The board of directors is obliged to implement *legally binding* climate-protection measures, such as climate reporting obligations by virtue of their duty of legality. Concerning further—*voluntary*—sustainability or climate-protection measures, the prevailing view in many European jurisdictions is that in line with the *enlightened shareholder value approach*, managers are *authorised, but not obliged* to combat climate change as part of their management discretion (For Germany: *Habersack*, Gemeinwohlbindung und Unternehmensrecht, AcP 220 (2020), pp. 594, 627 ff.; *Harbarth*, Die Aktiengesellschaft im Wandel der Zeit zwischen Wirtschaftlichkeit und Gemeinwohl, ZGR 2022, pp. 533, 547 ff.; *Vetter*, Geschäftsleiterpflichten zwischen Legalität und Legitimität, ZGR 2018, pp. 338, 341 ff., *Verse*, in: Nietsch, 2023, pp. 21, 36; *Weller/Fischer*, ESG-Geschäftsleitungspflichten, ZIP 2022, pp. 2253, 2258). However, implementing climate-friendly measures are increasingly expected due to an "investor revolution", where "shareholders are getting serious about sustainability" (*Eccles/Klimenko*, The Investor Revolution, Harvard Business Review, May-Junge 2019, pp. 106-116, https://hbr.org/2019/05/the-investor-revolution. In UK Company Law, the *enlightened shareholder value approach* is enshrined in article 172 UK Companies Act, see *Williams*, Enlightened Shareholder Value in UK Company Law, UNSW Law Journal Vol. 35(1), pp. 360 et seqq.; in the US, the debate is particularly lively: *Hart/Zingales*, The New Corporate Governance, 2022, pp. 14 et seqq.; *Lund/Pollman*, 121 Colum. L. Rev. (2021), 2563, 2567; *Lipton*, Will the real shareholder primacy please stand up? Book Review, 137 Harv. L. Rev. 1584 (2024) ont the *enlightened shareholder value approach* on p. 1594; *Business Roundtable*, Statement on the purpose of a corporation, accessible at: https://perma.cc/Q9SC-SGHY); consequently, *shareholder* and *stakeholder value* are increasingly overlapping (*Hart/Zingales*, The New Corporate Governance, 2022, pp. 14 et seqq.; *Lund/Pollman*, The Corporate Governance Machine, 121 Colum. L. Rev. (2021), 2563, 2567; against: *Bainbridge*, The Profit Motive: Defending Shareholder Value Maximization, 2023, there is no "business case" for socially responsible behaviour).

Only if specific climate protection measures are prescribed by law, the business management discretion of the board of directors becomes a strictly binding duty to promote climate protection due to their duty of legality (*Koch*, AG 2023, pp. 553, 562; on the effects of changing market expectations on entrepreneurial decisions *Harbarth*, FS Ebke, 2021, pp. 307, 315 et seq). *De lege lata*, these are likely to be in particular the human rights and environmental due diligence obligations pursuant to national Supply Chain Acts such as section 3 et seq. German Supply Chain Due Diligence Act or article L. 225-102-4 French Code de Commerce (see in detail *Burchardi*, Lieferkettensorgfaltspflichten: Risiken für die Unternehmensleitung, NZG 2022, pp. 1467 et seq.; *Nietsch*, Nachhaltigkeit als Aufgabe von Compliance? – Grundsatzüberlegungen zur organisatorischen Zuweisung in Unternehmen, CCZ 2023, pp. 61, 65 et seq).

De lege ferenda, article 22 CSDDD provides for climate-specific due diligence obligations for certain companies, which the management will then also be bound to comply with by virtue of their duty of legality (*Hübner/Habrich/Weller*, Corporate Sustainability Due Diligence—Der EU-Richtlinienentwurf für eine Lieferkettenregulierung, NZG 2022, pp. 644, 647; *Mares*, Directors' Duties During the Green Transition under EU Law, Nordic Journal of European Law 6 (2023), pp. 75 et seqq.; *Verse/Tassius*, in: Hommelhoff/Hopt/Leyens, 2024, Section 7 para. 13 f).

Climate neutrality as a legal target

For future *corporate climate regulation*, "climate neutrality" should in our view be the new guiding concept (see also *Harbarth*, ZGR 2022, 533, 554: "Goal of climate neutrality" and p. 556: "Transformation to a climate-neutral economy" as well as *Weller/Hößl/Seemann*, Klimaneutralität als Zielvorgabe für Unternehmen, ZIP 2024, pp. 209 et seqq). Following up on the obligations under the Paris Climate Agreement (2015), European law has set the reaching of climate neutrality as a goal for the European Union and all its Member States (Both in the recitals to the EU Climate Law (Recitals 1, 29, 30), but in particular in its article 1(2) ("This Regulation sets out the binding objective of achieving climate neutrality in the Union by 2050 in order to realise the long-term temperature objective set out in Article 2(1) lit. a of the Paris Agreement [...]") and in section 1(3) German Climate Protection Act ("The basis is the obligation under the Paris Agreement based on the United Nations Framework Convention on Climate Change to limit the increase in the global average temperature to well below 2 degrees Celsius and, if possible, to 1.5 degrees Celsius above pre-industrial levels [...]") make it clear that the Paris commitments are a reason for European and national framework legislation and objectives). This goal is now being transferred onto companies as well with article 22 CSDDD obligating companies to report on their compatibility with the goal of climate neutrality by 2050.

Climate neutrality as a target of the EU Climate Law

"Climate neutrality" is enshrined in article 2 of Regulation (EU) 2021/1119, which was adopted in 2021 and officially bears the title "European Climate Law" (Article 2 EU Climate Law: "Climate neutrality objective: Union-wide greenhouse gas emissions and removals regulated by Union law shall be balanced in the Union by 2050 at the latest, so that emissions are reduced to net zero by that date, and the Union shall aim for negative emissions thereafter"). According to this, the European Union and its Member States must achieve climate neutrality by 2050 at the latest. The goals of the European Green Deal (Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640 final of 11.12.2019, available at https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0021.02/DOC_1&format=PDF) of 2019 are hereby made legally binding (*Calliess*, The Future of the European Green Deal, Article in Verfassungsblog from 12 September 2024, "The core of the European green Deal is the European Climate Law of June 2021, which prescribes the reduction of net greenhouse gas emissions to zero by 2050 as a legally binding target for the EU and its member states."; *Fellenberg/Guckelberger*, in: Fellenberg/Guckelberger, Kommentar zum KSG, TEHG, BEHG, 2022, introductory marginal no. 14; *Schlacke*, Klimaschutz im Mehrebenensystem, NVwZ 2022, pp. 905, 907; *Stäsche*, Entwicklungen des Klimaschutzrechts und der Klimaschutzpolitik, EnWZ 2021, pp. 151, 159). The re-elected President of the European Commission, *Ursula von der Leyen*, made clear before the European Parliament on 18 July 2024 that the European Union will stick to the Green Deal goals during the forthcoming parliamentary period (2024–2029) and the herefore announced *Clean Industrial Deal*.

Climate neutrality in European company law

While current German company law has so far only faintly incentivised companies and their management bodies to protect the climate, the European legislator wants to oblige companies above a certain size to align their business model with the goal of climate neutrality.

Corporate Sustainability Reporting Directive (CSRD). As aforementioned, large companies (According to article 3(4) Directive 2013/34/EU, large companies are those that exceed at least two of the following three size criteria on the balance sheet date: (a) balance sheet total: EUR 20 million; (b) net sales: EUR 40 million; (c) average number of employees during the financial year: 250) and capital market-orientated small

(According to article 3(2) Directive 2013/34/EU, small companies are those that do not exceed the limits of at least two of the following three size criteria on the balance sheet date: (a) balance sheet total: EUR 4 million; (b) net turnover: EUR 8 million; (c) average number of employees during the financial year: 50) and medium-sized (According to article 3(3) Directive 2013/34/EU, medium-sized enterprises are those that are not micro or small enterprises and that do not exceed the limits of at least two of the following three size criteria on the balance sheet date: (a) balance sheet total: EUR 20 million; (b) net turnover: EUR 40 million; (c) average number of employees during the financial year: 250) companies underly specific reporting obligations: according to article 19a(2) lit. a no. iii of the Accounting Directive as amended by the CSRD, they are to report on how they ensure that their business model and strategy are compatible with the goal of climate neutrality by 2050 in their management report. In addition, the obliged companies are to disclose information on their greenhouse gas emissions with the help of standards—the *European Sustainability Reporting Standards* (ESRS)—which the European Commission issues as delegated acts supplementing the CSRD (Article 290(1) TFEU in conjunction with article 49(2), 29b Accounting Directive as amended; for more details see *Hummel/Jobst*, An Overview of Corporate Sustainability Reporting Legislation in the European Union, pp. 32 et seqq). In future, companies will have to comply with the *ESRS E1 Climate Change* with regard to the impact of their business activities on the climate (Delegated Regulation 2023/2772 supplementing Directive 2013/34/EU with regard to sustainability reporting standards of 31 July 2023, C(2023) 5303 final, with Annex 1, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202302772; ESRS E1 Climate Change can be found on pp. 66-104). As the reporting obligations can only be fulfilled using these standards (Article 29b para. 1 sentence 2 Accounting Directive (new version); see also recital 37 CSRD), they are of central importance (*Hummel/Jobst*, An Overview of Corporate Sustainability Reporting Legislation in the European Union, pp. 2, 30, 32 et seqq.; *Hommehoff/Allgeier/Jelonek*, Ausstrahlung der CSRD-Berichtsvorgaben auf die Unternehmensorganisation, NZG 2023, pp. 911, 916). For example, they require companies to report on the transformation of their business model and emission reduction efforts (Companies' emission reduction targets must be based on gross figures; this refers to genuine reduction efforts and not deductions through offsetting, see Disclosure Requirement E1-4 No. 34 lit. b Delegated Regulation 2023/2772/EU supplementing Directive 2013/34/EU with regard to sustainability reporting standards of 31 July 2023, C(2023) 5303 final, with Annex 1, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202302772). In addition, they should report on green house gas emission reduction targets for the year 2030 and, if possible, in 5-year periods up to the year 2050 (Disclosure Requirement E1-4 No. 34 lit. d Delegated Regulation 2023/2772/EU supplementing Directive 2013/34/EU with regard to sustainability reporting standards of 31 July 2023, C(2023) 5303 final, with Annex 1, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202302772).

Corporate Sustainability Due Diligence Directive (CSDDD). Building upon the reporting obligations of the previous Accounting Directives and the CSRD, the CSDDD introduces additional behavioural obligations for companies and their management not only in the area of respecting human rights in global supply chains, but also in the area of climate protection. Article 22(1) CSDDD stipulates that companies above a certain size (Companies referred to in Article 2 (1), points (a), (b) and (c), and Article 2 (2), points (a), (b), and (c) CSDDD. Article 2 (1) refers to companies that are formed in accordance with the legislation of a member state and Article 2 (2) refers to companies that are formed in accordance with the legislation of a third country) must draw up and implement a transition plan to ensure that their business model is compatible with the goal of climate neutrality by 2050 (There is one exception: According to article 22(2), companies that report a transition plan in accordance with article 19a(2) lit. a no. iii of the Accounting Directive as amended by the CSRD shall be deemed to have complied with the obligation to adopt a transition plan for climate change mitigation under article 22(1) CSDDD). Overall, both the CSRD and the CSDDD therefore provide for companies aligning their business models with the concept of climate neutrality.

Explicit mentioning of *Climate Neutral Businesses* in German law

In Germany, the term "climate neutral businesses" has recently even been incorporated into law. With section 18 of the German Energy Efficiency Act 2023, the German legislator has now for the first time explicitly extended the term "climate neutrality", which it had previously used for the Federal Republic of Germany as a whole and for public administration (section 15 German Climate Protection Act), to the private sector and addresses "climate-neutral businesses" for energy issues. However, the German Energy Efficiency Act 2023 so far does not define under which conditions companies can be qualified as "climate-neutral".

Definition of climate neutrality with regard to companies

Although climate neutrality has been set as a target by the European legislator, it does not provide a definition of climate neutrality with regard to companies (Rather, the legislator itself states that "currently [...] there is still no legal definition for climate-neutral companies", BT-Drucks. 20/6872 of 17 May 2023, p. 66). Our own definitory approach shall therefore be outlined below and submitted for critical discussion. However, the conceptual outline of climate neutrality will, of course, have to be based on already existing international and European parameters, which we roughly describe in the following (More detailed *Weller/Hößl/Seemann*, Klimaneutrale Unternehmen—Ein Definitionsversuch, ZIP 2024, pp. 330 et seqq).

Subject of the term "Climate neutrality"

Various physical "Climate factors". In environmental physics, it is undisputed that in addition to greenhouse gases, other—partly man-made—environmental factors such as aerosols, land use or cosmic radiation also influence the climate system (*IPCC*, Climate Change 2021: The Physical Science Basis. Working Group I Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 2021, pp. 944 et seqq., available at https://report.ipcc.ch/ar6/wg1/IPCC_AR6_WGI_FullReport.pdf). However, the *normative* concept of climate neutrality does not extend to these other physical factors. Rather, the *legal concept* of climate neutrality is used in a standardised way and equated with greenhouse gas neutrality by the European and also the German legislator (see article 2(2) EU Climate Protection Act, section 15(1) sentence 1 German Climate Protection Act, section 18 German Energy Efficiency Act, Article 19a(2) lit. a no. iii Accounting Directive as amended and article 22(1) CSDDD; for more details see *Weller/Hößl/Seemann* ZIP 2024, pp. 330, 332 et seqq). In addition to carbon dioxide (CO_2), greenhouse gases include six other greenhouse gases defined in the Kyoto Protocol (1997) (The Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997, UN Treaty Collection Vol. II Ch. 27, 7a (Kyoto Protocol) entered into force on 16 February 2005. Annex A of the Kyoto Protocol defines the six greenhouse gases to be taken into account: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (laughing gas) (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulfur hexafluoride (SF_6). Nitrogen trifluoride (NF_3) has also been included since 2015, *German Federal Environmental Agency*, Die Treibhausgase, article dated 14 November 2022, available at https://www.umweltbundesamt.de/themen/klima-energie/klimaschutz-energiepolitik-in-deutschland/treibhausgas-emissionen/die-treibhausgase; see section 2 No. 1 German Climate Protection Act and Annex V Part 2 of Regulation (EU) 2018/1999 of 11 December 2018 (Governance Regulation)), which are converted into CO_2 equivalents to calculate greenhouse gas or climate neutrality (At least according to the calculations of the *IPCC*, the German *Advisory Council on the Environment* and the *German government's Expert*

Council on Climate Change; see also the *UN Emissions Gap Reports*, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/43922/EGR2023.pdf?sequence=3&isAllowed=y).

Criticism of the concept of climate neutrality. The influence of the physical factors mentioned above on the climate is small compared to that of greenhouse gas emissions and difficult to quantify (*IPCC*, Climate Change 2021: The Physical Science Basis. Working Group I Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 2021, p. 960; *Steuer*, "Klimaneutrale" Produkte im Lauterkeitsrecht, GRUR 2022, pp. 1408, 1409). Nevertheless, it might be scientifically misleading if the concept of climate neutrality is reduced to greenhouse gas neutrality (see also *Steuer*, GRUR 2022, pp. 1408, 1409. For more details, see *Weller/Hößl/Seemann*, ZIP 2024, pp. 330 et seqq). The *Intergovernmental Panel on Climate Change (IPCC)* also considers the concept of "climate neutrality" to be too imprecise in scientific terms (*IPCC*, Climate Change 2022: Mitigation of Climate Change. Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 2022, Cross-Chapter Box 3, p. 329, available at https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf) and instead uses the terms "Greenhouse Gas (GHG) Neutrality", "Carbon Neutrality", "Net Zero CO_2 Emissions" and "Net Zero GHG Emissions" in its reports. From a scientific policy perspective, it would therefore seem appropriate to replace the vague term "climate neutrality" with the more precise term "greenhouse gas neutrality" in future or alternatively to define the term more precisely (In more detail *Weller/Hößl/Seemann*, ZIP 2024, pp. 330 et seqq).

Legal understanding: climate neutrality = greenhouse gas neutrality. Regardless of the aforementioned criticisms: Firstly, term "climate neutrality" has already become well established in European law (article 2(2) EU Climate Act, article 19a(2) lit. a no. iii Accounting Directive as amended by the CSRD, article 22(1) CSDDD) as well as in practice (In the 2021 reporting year, 30 of the DAX 40 companies had already set themselves a climate neutrality target for the coming decades, *Union Investment*, Wind of Change. Decarbonisation at DAX 40 companies, February 2022, available at https://unternehmen.union-investment.de/dam/jcr:708acebe-46aa-4a69-b470-735bdb1bcc89/Studie%20Dekarbonisierung%20Dax%2040.pdf). Secondly, at least in the legal debate, climate neutrality is currently being equated with greenhouse gas neutrality. Therefore, we base our following considerations on this prevailing understanding in the legal debate.

Scope 1, 2 and *3* emissions

As a company's business activities are often based on many emission sources, the question arises as to which greenhouse gas emissions can be legally attributed to it. According to the *Greenhouse Gas Protocol* (*World Business Council for Sustainable Development/World Resources Institute*, The Greenhouse Gas Protocol. A Corporate Accounting and Reporting Standard, 2004, p. 25 et seqq.; available at www.ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf), an internationally recognised climate accounting standard to which the ESRS also refers, the greenhouse gas emissions of companies can be divided into three different scopes in terms of climate accounting (The (recognised) climate balance attribution, which is currently establishing itself as global *best practice, must be* separated from the (controversial) attribution under tort or liability law, which does not follow the categories of the *Greenhouse Gas Protocol*, but is to be assessed according to the applicable substantive law under conflict of laws (cf. articles 4 and 7 Rome II Regulation)) (For more details on the "de facto standard for greenhouse gas accounting by private organisations", see *Steuer*, Klimaziele im Unternehmensrecht: Freiwillige Verlautbarungen und Perspektiven nach dem CSDDD-Entwurf, ZIP 2023, pp. 13, 15; see also *Gailhofer/Verheyen*, Klimaschutzbezogene Sorgfaltspflichten: Perspektiven der gesetzlichen Regelung in einem Lieferkettengesetz, ZUR 2021, pp. 402, 405)

- According to annex 2 of *ESRS E1 Climate Change*, *scope 1* describes direct greenhouse gas emissions from sources that are owned by the company or over which the company can exercise a controlling influence (Delegated Regulation 2023/2772 supplementing Directive 2013/34/EU with regard to sustainability reporting standards of 31 July 2023, C(2023) 5303 final, with annex 2, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202302772).
- According to annex 2 of *ESRS E1 Climate Change*, *scope 2* describes indirect greenhouse gas emissions from the generation of purchased or otherwise acquired electricity, gas, heating or cooling (Delegated Regulation 2023/2772, annex 2).
- *Scope 3* emissions therefore include (exclusion principle) all indirect greenhouse gas emissions that do not already fall under *scope 2* and that arise in the company's value chain (upstream or downstream) (Delegated Regulation 2023/2772, annex 2).

Climate neutrality of a company

We propose the following concept to assess the climate neutrality of a company.

***Scope 1, 2* and *3* emissions.** In order to assess the climate neutrality of a company, (at least) its *scope 1* and *2* emissions have to be taken into consideration. The attribution of *scope 3* emissions, on the other hand, is controversial.

Due to the complexity of identifying them in the value chain and the limited ability of the addressed (parent) company to influence their level upstream or downstream, the inclusion of *scope 3* emissions in the concept of corporate climate neutrality is questionable (In detail *Weller/Hößl/Seemann*, ZIP 2024, pp. 330, 335). Another argument against the attribution of *scope 3* emissions is the systemic coherence with the duty of care in German tort law, which, according to prevailing opinion, does not yet extend to *scope 3* emissions, and with the obligations of the German supply chain due diligence act (*Weller/Hößl/Seemann*, ZIP 2024, pp. 330, 336). On a political level, the protection of small and medium-sized enterprises (SMEs) also speaks against the inclusion of *scope 3* emissions, as they would otherwise be at least indirectly obliged to report greenhouse gas emissions in accordance with the CSRD or even to become climate-neutral in accordance with the CSDDD in order to continue to act as suppliers for the companies actually obliged under the CSRD and CSDDD (Already under the NFRD (2014/95/EU), SMEs are receiving requests to disclose ESG data, which burdens them with quite an administrative effort—"43 % of the respondents who are part of the supply chain of a large company indicate they receive requests to disclose ESG data from companies to which they supply goods or services. In comparison, only 15 % (26 SMEs) of the respondents who are not part of the supply chain of a large company receive requests to disclose ESG data from companies that they supply.", European Commission, Commission Staff Working Document: Impact Assessment SWD (2021) 150 final, Annex 18 p. 97; on the effects of the reporting obligations under the CSRD on SMEs: *Allgeier*, CSRD-Nachhaltigkeitsberichterstattung und KMU-Schutz, NZG 2023, pp. 195, 198; *Hommelhoff*, Primärrechtlich begründete Mängel im CSRD-Vorschlag und deren Beseitigung, DB 2021, pp. 2437, 2441).

Accordingly, the *ESRS E1 Climate Change* only contains comprehensive climate reporting obligations for companies with regard to *scope 1* and *2* emissions; *scope 3 emissions* should only be reported within the climate transition plan:

(1) with regard to a specific *category of emissions* (In detail on the 15 categories of *scope 3* emissions Delegated Regulation 2023/2772, annex 2).
(2) from the *direct use of distributed products* (i.e. only emissions downstream in the value chain, not upstream in the supply chain, may have to be considered), and

(3) only if this category is considered *material* by the company (Disclosure Requirement E1-1 Appendix AR. 3 lit. b with reference to No. 51 Delegated Regulation 2023/2772, annex 1).

In our opinion, for the purpose of standardised terminology, the climate neutrality of a company should also be assessed in this sense. Hence, climate neutrality fully refers to *scope 1* and *2* emissions (see also *Weller/Hößl/Seemann*, ZIP 2024, pp. 330, 335 et seqq) but only partially to *scope 3* emissions (with regard to the category of direct use of distributed products) (see also *Weller/Schwemmer*, Klimatransformationspflichten für Großunternehmen. Vorschläge zur Umsetzung des Art. 22 CSDDD, AG 2024, pp. 517 et seqq.; this is in line with article 22(1) lit. a CSDDD: "The plan should include (a) time-bound targets related to climate change for 2030 and in 5-year steps up to 2050 based on conclusive scientific evidence and, where appropriate, absolute emission reduction targets for greenhouse gas for scope 1, scope 2 and scope 3 greenhouse gas emissions for each significant category").

Emission reduction vs. emission offsetting. According to the legal definition in section 2 No. 9 German Climate Protection Act (Similarly, article 4(1) Paris Agreement and article 4(1) EU Climate Law), greenhouse gas neutrality—and therefore also climate neutrality—means that only as much greenhouse gas is emitted as is removed from the atmosphere, be it through natural emission sinks (e.g. forests and moors) or technical means that reduce the carbon density in the atmosphere: either via Direct Air Capture (DAC) (Meaning to catch carbon at the exact point where it is emitted so that it does not spread into the atmosphere) or via Carbon Capture (Meaning to remove carbon from the atmosphere regardless of where the carbon was emitted) and reuse of greenhouse gases (Carbon Capture and Utilisation (CCU)) or underground storage (Carbon Capture and Storage (CCS)) (*IPCC*, Climate Change 2022: Mitigation of Climate Change, p. 799, 1265, available at https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf; for more details see *Steuer*, Grundlagen des freiwilligen Kohlenstoffhandels, ZUR 2022, pp. 586, 587).

Climate neutrality is to be achieved primarily through the company's own greenhouse gas reduction (e.g. through lower-energy production processes or the purchase of electricity from renewable energies). *Offsetting* (e.g. acquisition of carbon credits (Delegated Regulation 2023/2772, annex 2) from the financing of reforestation projects) could also be considered when calculating climate neutrality (OLG Frankfurt am Main, judgement of 10 November 2022 - 6 U 104/22; LG Stuttgart, judgement of 30 December 2022 - 53 O 169/22; OLG Düsseldorf, judgement of 6 July 2023 - I-20 U 72/22; *Steuer*, GRUR 2022, pp. 1408, 1410 et seqq.; for more details on offsetting and the *carbon credits* system see *Weller/Hößl/Seemann*, ZIP 2024, pp. 330, 337, 338); however, according to article 4(1) of the EU Climate Law, the reduction of greenhouse gas emissions must be prioritised over offsetting (Section 4(1)(3) of the EU Climate Law states: "In order to ensure that sufficient *mitigation measures* are taken by 2030, for the purposes of this Regulation and without prejudice to the review of Union legislation referred to in paragraph 2, the *contribution of net removals* of greenhouse gases to the Union's 2030 climate target shall be *limited* to 225 million tonnes of CO_2 equivalent." (emphases added by *author*)). In the explanatory memorandum to the German Climate Protection Act, the German legislator also assumes that offsetting alone is not sufficient to achieve climate neutrality, but that a significant greenhouse gas reduction of around 95% compared to the base year 1990 will be necessary (Only the *unavoidable* residual emissions that then remain may be compensated via sinks, BT-Drucks. 19/14337, S. 24). According to *ESRS E1 Climate Change*, the climate targets are to be achieved through reduction as part of the transition plan; the possibility of offsetting is not mentioned here (Disclosure Requirement E1-1 No. 16 Delegated Regulation 2023/2772/EU, annex 1).

The clear priority of reduction expressed in all regulations corresponds to the observation that offsetting projects often only make a dubious contribution to greenhouse gas removal or storage (problem of greenwashing (BGH, judgement of 27 June 2024 – I ZR 98/23: Reduction and compensation of greenhouse gases are not equivalent measures in reaching a state of climate neutrality; Supporting the necessity of disclosure on whether the status of climate neutrality was achieved via reduction or compensation of greenhouse gases (amongst many others): Higher Regional Court of Frankfurt am Main, decision of 10 November 2022 - 6 U 104/22; Advertising Standards Authority (ASA) Ruling on Charles Tyrwhitt Shirts Ltd, accessible at https://www.asa.org.uk/rulings/charles-tyrwhitt-shirts-ltd-a23-1210029-charles-tyrwhitt-shirts-ltd.html; Regional Court of Berlin, Deutsche Umwelthilfe v. HelloFresh Germany, ruling of 10 October 2023 – 102 O 15/23; Regional Court of Stuttgart, ruling of 30 December 2022 - 53 O 169/22; OLG Düsseldorf, judgement of 6 July 2023 - I-20 U 72/22; in detail *Jung/Ludwig*, Werbung mit "Klimaneutraität" und klimabezogenen Werbeaussagen, IPRB 2023, p. 146; *Lamy/Ludwig*, Die Werbung mit Klimaneutralität, KlimR 2022, p. 142; *Ruttloff/Wehlau/Wagner/Skoupil*, Greenwashing – aus materiell-rechtlicher und prozessualer Sicht, CCZ 2023, p. 201; *Thomalla*, Die Werbung mit "klimaneutralen" Produkten, VuR 2022, p. 458)) and therefore do not make a reliable contribution to climate neutrality (see reference 118 and in detail on the weaknesses of the voluntary certificate market *Battocletti/Enriques/Romano*, The Voluntary Carbon Market: Market Failures and Policy Implications, 95 University of Colorado Law Review 2024, pp. 519 et seqq).

In our opinion, the design of any climate protection regulations in company law should be based on this *reduction-compensation gradation*. It should only be an option to compensate greenhouse gas emissions if there are no technologically and economically feasible options to reduce those emissions (Our recommendation is based on Article 10(2) of the Taxonomy Regulation, which stipulates special requirements for economic activities "for which there is *no technologically and economically feasible low-carbon alternative*" in order to nevertheless make a significant contribution to climate protection. See also section 16 (1) EnEfG: "Companies are obliged to avoid the waste heat generated in their company according to the state of the art and to reduce the waste heat generated to the proportion of technically unavoidable waste heat, *insofar as this is possible and reasonable. Within the scope of reasonableness, technical, economic and operational concerns must be taken into account."* (emphases added by *author*)).

Implementation of article 22 CSDDD by a *Climate Quota*

Article 22 CSDDD transposes the supranational and national goal of climate neutrality onto companies. To implement article 22 CSDDD into national law, we recommend the introduction of an instrument we call "climate quota" (This *climate quota* was designed for an expert opinion for the Association of German Jurists, who convenes biennually in order to discuss the need for reforms in German law. The climate quota is hence described in more detail there: *Weller*, Empfehlen sich im Kampf gegen den Klimawandel gesetzgeberische Maßnahmen auf dem Gebiet des Gesellschaftsrechts?, DJT-Gutachten 2024).

Conception of the *Climate Quota*

The proposed *climate quota* describes a numerical target of greenhouse gas emission reduction that is to be set annually by listed or co-determined companies. It has to be based on a climate transition plan which must lead to the climate neutrality of the company by 2050. The *climate quota* should not be a rigid quota imposed on companies by politicians as part of a state planned economy. Rather, reduction targets are deemed to be set *flexibly and individually* by the company management with regard to the respective business model. The only mandatory benchmark with which the climate quota would have to aligned, is the goal of climate neutrality, which is to be achieved by 2050 at the latest in European Member States. With its flexibility and its individual margin of appreciation, the climate quote would therefore be an instrument in line with private autonomy.

The reduction targets should be published in percentages relative to the reference year of 2024. 2024 is a suitable reference year, as the new CSRD reporting obligations will apply for the first time this year and large companies will have to report on their greenhouse gas emissions in any case.

The preparation of the climate transition plan and the determination of the *climate quota* are part of the executive board's management responsibility and should therefore be passed as a resolution of the executive board (On the legal nature of management board resolutions, see *Holle*, Legalitätskontrolle im Kapitalgesellschafts- und Konzernrecht, 2014).

Embedding in a climate transition plan

The annual *climate quota* should be embedded in a long-term *climate transition plan*. The latter is already provided for in article 22 CSDDD and in article 19a(2) lit. a no. iii of the Accounting Directive as amended by the CSR D.

The climate transition plan should be drawn up by the board of directors in accordance with its management responsibility. This responsibility covers the managerial duty to deal with climate-damaging emissions and their science-based reduction (see, for example, the *Science Based Targets initiative – SBTi* (The *Science Based Targets Initiative (SBTi)* is a partnership between the *Carbon Disclosure Project*, the *United Nations Global Compact*, the *World Resources Institute* and the *World Wide Fund for Nature*. It supports companies in setting science-based emission reduction targets on the way to a "net zero" society, more information at https://sciencebasedtargets.org. Many of the DAX companies (e.g. *Lufthansa, RWE, adidas*) already use and rely on these *science-based targets in* their non-financial reporting in accordance with section 289b (1) sentence 1 of the German Commercial Code (HGB))) with the ultimate goal of being climate-neutral by 2050 (see the relevant definition of the *German Corporate Law Association* in the context of a Say on Climate, statement on the draft German Corporate Governance Code 2022 of 21 January 2022, AG 2022, 239, 240, 242 et seq).

In terms of content, companies can organise the plan according to their respective industry standards or their own specific needs. The catalogue in article 22(1) CSDDD provides an example of the content that the plan may address (Article 22(1) CSDDD: *"(...) a) time-bound targets related to climate change for 2030 and in five-year steps up to 2050 based on conclusive scientific evidence and, where appropriate, absolute emission reduction targets for greenhouse gar for scope 1, scope 2 and scope 3 greenhouse gas emissions for each significant category; b)a description of decarbonisation levers identified and key actions planned to reach the targets referred to in point (a), including, where appropriate, changes in the product and service portfolio of the company and the adoption of new technologies; c)an explanation and quantification of the investments and funding supporting the implementation of the transition plan for climate change mitigation; and a description of the role of the administrative, management and supervisory bodies with regard to the transition plan for climate change mitigation"*). The *ESRS E1 Climate Change* gives additional detailed information (Disclosure Requirement E1-1 No. 14 et seqq. Delegated Regulation 2023/2772/EU, annex 1).

Scope of application of the *Climate Quota*

Large businesses across all sectors. The obligation to set a *climate quota* should be limited to large companies. This is distributively fair insofar as they are responsible for a major share of global greenhouse gas emissions (The majority (71%) of greenhouse gases emitted between 1988 and 2015 can be attributed to just 100 companies, CDP Carbon Majors Report 2017, p. 8).

From a dogmatic point of view, there are three possibilities for the scope of the *climate quota*.

(1) One would be—based on the existing instrument of the gender quota e.g. in Germany, Norway, Belgium, Italy and Portugal to apply it to limited liability companies that are listed on the stock market (or in Germany co-determined by representatives of the employees) (see in detail *Mensi-Klarbach/Seierstand*, Gender Quotas on Corporate Boards: Similarities and Differences in Quota Scenarios, European Management Review, 17 (2020) p. 615, 620). The *climate quota* would therefore cover around 2,300 companies in Germany for example (Sixth Annual Information of the Federal Government on the Development of the Proportion of Women in Management Levels and in Committees of the Private and Public Sector of 11 January 2023, p. 44, available at https://www.bmfsfj.de/resource/blob/209010/a6daaf83b8e8111e495f5055192ff3c8/bericht-sechste-jaehrliche-information-data.pdf. The Sixth Annual Report shows the development up to the 2019 financial year), in total only a small proportion of European companies would be covered (*Mensi-Klarbach/Seierstand*, Gender Quotas on Corporate Boards: Similarities and Differences in Quota Scenarios, European Management Review, 17 (2020) p. 615, 620).
(2) Alternatively, the scope of application could be aligned with article 22 CSDDD. This would, broadly speaking (For further detail and modalities regarding parent companies and groups see article 2 CSDDD), affect companies that are formed in accordance with the legislation of a member state that have more than 1000 employees on average and a net worldwide turnover of more than 450,000,000 €. It would also affect companies that are formed in accordance with the legislation of a third country and generate a net turnover of more than 450,000,000 € in the European Union in the financial year preceding the last financial year. It is apparent that the scope of companies obliged by the *climate quota* needs to be at least of this size in order to implement article 22 CSDDD in a satisfactory and sufficient way.
(3) Another approach would be to apply the scope of the CSRD. This would affect large, small and medium-sized undertakings, except micro undertakings, which are public-interest entities (defined in article 2 point (1) lit. (a) Accounting Directive). According to article 3 Accounting Directive, this means that a company must exceed at least two of the following three thresholds: achieve a net turnover of 700,000 €, present a balance sheet total of 350,000 € and engage at least 10 employees on average during the financial year.

Sticking to the scope, the CSDDD determines, appears most convincing, coherent and realistic.

In any case, the climate quota should apply across all sectors—with exceptions in cases of hardship—in order to prevent waterbed effects in terms of greenhouse gas emissions (see *Rosendahl*, EU ETS and the waterbed effect, nature climate change 2019 Vol. 9, p. 734 for a brief overview or *Rosendahl*, EU ETS and the new green paradox, cesifo working papers 2019 pp. 4, 9 et seqq. on the waterbed effect in interaction with other carbon-abatement measures; in detail as well *Tröger*, Gorporate Governance und Klimawandel, Festschrift Cahn, 2024 (forthcoming)).

Regulation in Company Law or in the Supply Chain Act?. Depending on the aforementioned scope of application, the question arises in which field of law Art. 22 CSDDD should be transposed and—interdepending—whether the proposed climate quota should be regulated in Company Law or rather in the specific Supply Chain Acts of the Member States.

On the one hand, the *climate quota* could be introduced in national Supply Chain Due Diligence Acts, in Germany and France therefore in the existing *Lieferkettensorgfaltspflichtengesetz* or *loi de vigilance*. This seems to be the obvious choice, as article 22 CSDDD is enacted as part of the European Supply Chain Due Diligence Act.

However, article 22 CSDDD is different in nature to the rest of the interlocking system of Supply Chain Due Diligence. It seems to show more similarities to the reporting obligations of the CSRD. At the same time, it is more far-reaching than a reporting obligation in the sense that it additionally calls for active climate protection measures by implementing climate transition plans.

Therefore, on the other hand, an alternative would be to introduce the *climate quota* in national company law, such as the German Stock Corporation Act and the German Act on Limited Liability Companies. The benefits of this latter option would be the better integration into company law. Paired with a *say on climate*, the *climate quota* within the Stock Corporation Act would offer a coherent overall system.

Enforcement of the *Climate Quota*

Concerning enforcement, we do *not* recommend specific sanctions for not achieving the self-set *climate quota* or for failing to fulfil the self-set targets in the climate transition plan. Rather, the role model for the enforcement of the climate quota and the climate transition plan should be the German gender quota in section 76(4) German Stock Corporation Act (Governmental explanatory memorandum, BT-Drucks. 16/3784, 119 et seq) introduced by the German legislator in 2015. It works in a similar way to the *climate quota* as the executive board has to set its own individual gender quota for certain levels of management. Its implementation mechanism deliberately refrains from hard sanctions in the case of missing the self-set quota and instead relies on the reputation mechanism and negative publicity in the event of low ambitions or failed quota setting (Governmental explanatory memorandum, BT-Drucks. 16/3784, 119 et seq.; see also *Koch*, AktG, 17th edition 2023, section 76 marginal no. 84). In our opinion, a similar approach should be taken with the *climate quota* and the climate transition plan.

This might come as a surprise, as the gender quota was said to not be particularly successful in Germany (*Burrow/Fedorets/Gibert*, The effects of a gender quota on the board of German largest corporations, April 2018, accessible at https://www.su.se/polopoly_fs/1.417933.1545051481!/menu/standard/file/The%20effects%20of%20a%20gender%20quota%20on%20the%20board%20of%20German%20largest%20corporations.pdf; Steiner, Die Sanktionieung der flexiblen Frauenquote, 2018, p. 478.); a newly published study shows, however, a slighly increasing success (FidAR e.V., press release as of 22 July 2024, https://www.fidar.de/webmedia/user_upload/PM_240722_FidAR_WoB-Index_185_end.pdf). Irrespective of its success, there is one decisive difference between the gender and the *climate quota*. The latter sets a clear time frame in terms of the fixed goal of climate neutrality by 2050. Along the way, the greenhouse gas emission goals are the company's own responsibility and left to its judgement. Compliance with the climate quota is therefore less easy to monitor than compliance with the gender quota, as many parameters such as the distribution of emission reductions and offsetting or the availability of new carbon storage technologies have to be taken into account. Harsh sanctions for non-compliance, such as the dissolution of the company in Norway or the suspension of Executive Board remuneration in Belgium or France (For a detailed comparative law analysis *Mensi-Klarbach/Seierstand*, Gender Quotas on Corporate Boards: Similarities and Differences in Quota Scenarios, European Management Review, 17 (2020) p. 615, 620), therefore appear too rigid. Furthermore, sanctioning the failure to reach a self-set goal seems very inefficient, since it would rather lead to companies deliberately setting lower goals in order to avoid failure. It would further put them at risk of facing legal actions, which puts pressure on the companies and distracts from the real goal of climate protection.

Of course, the fundamental failure to comply with the *climate quota* would be sanctioned simply by the already existing general sanctioning mechanisms for violations of the corporate duty of care, i.e. the liability of the directors for mismanagement of the company (cf. section 93 para. 2 German Stock Corporation Act). A fundamental failure would be, for example, not setting a certain yearly emission reduction quota or being obviously unable to reach the 2050 goal of climate neutrality with the implemented (unsuitable) transformation measures.

Compatibility with article 22 CSDDD

What differentiates the *climate quota* from the Member State's mandatory implementation requirements under article 22 CSDDD is the fixed end goal, that *the company* itself *must* be climate neutral by 2050 (with exceptions in cases of hardship). Article 22 CSDDD only requires companies to develop transition plans that *align* the business model to the European goal of climate neutrality by 2050 through *best efforts*. What exactly this means for each company will be hard to determine. It is therefore neither justifiable nor does it give companies legal certainty. Meanwhile, it is evident and researched that companies need legal certainty in order to act (at least in order to act in an efficient way) (*Noerr/Welpe/Weller*, Einfluss von ESG auf die Unternehmenstransformation, June 2024, p. 12: "The interviewees emphasised the importance of legislation and regulation in the ESG context: companies need clear and reliable guidelines for ESG strategies, a reduction in bureaucracy and standardised ESG requirements in order to reduce formal burdens"). This legal certainty is guaranteed to a much higher extent by the *climate quota*.

A further difference are the shorter intervals for reporting emission reduction goals. The *climate quota* provides for yearly reporting while article 22 CSDDD requires companies to report every 5 years. The yearly reporting obligations, however, align with the reporting obligations under the CSRD, along with which they should be published in the company's sustainability report.

In essence, a *climate quota* would be compatible with article 22 CSDDD and would not be an overburdening of the addressed companies—on the contrary: Many companies are already voluntarily setting themselves emission reduction targets, including the goal of climate neutrality (see, for example, the non-financial reporting of RWE, 2022, pp. 78 et seqq., esp. p. 81, available at: 2023-03-21-rwe-geschaeftsbericht-2022.pdf; and from Merck, 2022, available at: Non-financial statement - Merck Annual Report 2022 (merckgroup.com); and Volkswagen, 2022, p. 5, available at: 2022_Volkswagen_Sustainability_Report.pdf). This goal and its intermediate targets are—to put it in a nutshell—important (1.) for the reputation of businesses on the market, not only regarding customers and employees (*Noerr/Welpe/Weller*, Einfluss von ESG auf die Unternehmenstransformation, June 2024, pp. 38 et seq), but also investors (*Eccles/Klimenko*, The Investor Revolution. Shareholders are getting serious about sustainability, Harvard Business Review, May-June 2019, available at https://hbr.org/2019/05/the-investor-revolution), (2.) for their resilience to future regulations (transition risk) (Also with regard to litigation risks, *Fogarty*, Climate litigation a "trillion-dollar" risk for big polluters: Study, The Straits Times, 25.01.2024, available at https://www.straitstimes.com/world/climate-litigation-a-trillion-dollar-risk-for-big-polluters-study), (3.) for driving climate-friendly innovations and (4.) for their financial profitability (Also with regard to physical risks, *S&P Global*, Quantifying the financial costs of climate change. Physical risks for companies, 20.11.2023, available at https://www.spglobal.com/esg/insights/featured/special-editorial/quantifying-the-financial-costs-of-climate-change-physical-risks) at least in the long-term perspective (*Galvin*, Six business benefits of setting science-based targets, article from 09/07/2018, available at: https://sciencebasedtargets.org/blog/six-business-benefits-of-setting-science-based-targets).

Say on climate

In stock corporations, corresponding to the preparation of the climate transition plan and the determination of the *climate quota* at the level of the executive board, a *say on climate* should be introduced in the national Company Laws at the level of the annual general meeting (For pros and cons, see *Fleischer/Hülse*, Klimaschutz und aktienrechtliche Kompetenzverteilung: Zum Für und Wider eines "Say on Climate", DB 2023, 44 ff.; *Sommer/Tufford*, Say on Climate: Investor Distraction or Climate Action?, MSCI, article from 15 February 2022, accessible at https://www.msci.com/www/blog-posts/say-on-climate-investor/03014705312#:~:text=Divided%20opinion,best%2C%20a%20misallocation%20of%20resources: A yearly vote on a companies climate strategy could also address the concern of greenwashing, as it could help investors, who might lack the expertise needed to challenge climate strategies effectively, to assess the company's decarbonisation efforts over time; *Vetter*, Sind Say-on.Climate-Beschlüsse sinnvoll?, AG 2023, pp. 564 et seqq.; *Weller/Hoppmann*, Environment Social Governance (ESG), AG 2022, pp. 640, 641 et seqq). This allows the entire general meeting to vote on the company's climate strategy developed by the executive board and to approve the annual executive board report on its implementation and adaptation. The example of the US, where making non-binding shareholder resolutions on the climate policy of the executive board is already possible *de lege lata*, shows that shareholders are increasingly making use of this right (Pro-ESG Shareholder Proposals Regaining Momentum in 2024, ISS-Corporate, article from 22.05.2024, available at https://www.iss-corporate.com/library/pro-esg-shareholder-proposals-regaining-momentum-in-2024/; see by contrast *Cools*, Why Climate-Related and Social Shareholder Proposals Are Difficult (and Rare) in Continental Europe, Oxford Business Law Blog, article from 21.03.2023, available at https://blogs.law.ox.ac.uk/oblb/blog-post/2023/03/why-climate-related-and-social-shareholder-proposals-are-difficult-and-rare). A recent study also shows that environmentally conscious investors play a key role in the economical transformation towards climate neutrality and that climate-related shareholder activism, in fact, improves the climate performance of companies (Diaz-Rainey et al., Shareholder Activism on Climate Change: Evolution, Determinants and Consequences, Journal of Business Ethics 193 (2024), p. 481, 505; see further Jaeger, Say No to Climate Change, Say Yes to "Say on Climate", Oxford Business Law Blog, article from 13.07.2021, available at https://blogs.law.ox.ac.uk/business-law-blog/blog/2021/07/say-no-climate-change-say-yes-say-climate).

As a *facultative* resolution, shareholders would have to reach a certain threshold, e.g. at least one twentieth of the share capital, in order to demand a *say on climate* (For an international comparison see *Bakker*, Shareholder Proposals and Sustainability: An Empirically-Based Critical Reflection, ECFR 2023, pp. 276, 284 et seq). In addition, a *say on climate* on the initiative of the executive board would also be conceivable. Besides being facultative, the *say on climate* should be designed as a *non-binding* consultation resolution so as not to provoke any new risks of legal action (*Vetter*, AG 2023, pp. 564 et seq). The *say on pay* resolution in section 120a German Stock Corporation Act provides a template in this respect ("The resolution does not create any rights or obligations. It is not contestable pursuant to section 243") (In favour of transferring the *Say on Pay* to the *Say on Climate* *Fleischer*, Klimaschutz im Gesellschafts-, Bilanz- und Kapitalmarktrecht, DB 2022, pp. 37, 45; *Drinhausen*, Weiterer Reformbedarf im Aktienrcht – Mehr Aktionärsdemokratie wagen, ZHR 186 (2022), pp. 201, 210). Against the background of the non-binding nature of the resolution, actions for rescission or cancellation would not be admissible (On section 120a German Stock Corporation Act *Gärtner/Himmelmann*, Beschlüsse der Hauptversammlung zur Vorstandsvergütung nach ARUG II, AG 2021, pp. 259, 265: "The legislator sees no need for actions for avoidance due to the merely recommendatory nature of the resolution and does not want to offer professional plaintiffs a new target."). Despite their non-binding nature, such resolutions typically have such a high level of authority that they are observed by the executive board (*Gärtner/Himmelmann*, AG 2021, pp. 259, 260; on the role of "investor activism as a driver of change" *Kuntz*, How ESG is weakening the business judgement rule, in: Kuntz, Research Handbook on Environmental, Social and Corporate Governance, 2024, pp. 67, 74 et seqq).

Summary

(1) Tackling climate change is the task of the century. Building on the special responsibility of large companies in particular for climate protection (*corporate climate responsibility*), we recommend a *corporate climate enforcement* via a *greening of company* law.

(2) A central concept of the European Climate Law is the goal of "climate neutrality". This goal not only applies to European Member States, but is now also extended to the private sector, e.g. in article 22 CSDDD and in the new section 18 German Energy Efficiency Law ("climate-neutral companies").

(3) At the European level, the CSRD and the CSDDD aim to align companies' business models with the macroeconomic goal of climate neutrality by 2050 and require them to draw up a "transition plan" based on this goal.

(4) In its current form, the term "climate neutrality" is *scientifically* imprecise and therefore misleading. It would be preferable to use "greenhouse gas neutrality". However, climate neutrality has already established itself as a legal term (see, for example, Article 2 of the European Climate Law). We therefore recommend that the legal term "climate neutrality" is used uniformly for legislative measures in the area of company law.

(5) A company's climate neutrality should be determined by its *scope 1* and *2* emissions. Inclusion of its *scope 3* emissions is recommended only partially. The inclusion of *scope 3* emissions is provided for under European law, at least with regard to the category of direct use of distributed products.

(6) The ideal and legally predetermined way to achieve climate neutrality is to *reduce* greenhouse gas emissions (instead of offsetting emissions through CO_2 certificates). Legislative measures should therefore be designed in such a way that they incentivise companies primarily to reduce greenhouse gas emissions.

(7) An annual *climate quota* to be set individually and flexibly by large companies across all sectors (the scope of the CSDDD is to be applied), understood as an annual target for reducing greenhouse gas emissions, is recommended and would serve as an implementation of article 22 CSDDD. The *climate quota* should be based on a long-term *climate transition plan*. Both the *climate quota* and the climate transition plan should be designed in accordance with the respective business model in such a way that they lead to the company's climate neutrality by 2050 at the latest.

(8) In line with the introduction of the proposed *climate quota*, we also recommend a modernisation of the rights of the shareholders in the General Assembly by introducing a so-called *say on climate*, designed in a similar way to the already in some countries existing *say on pay*.

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Additional information
Correspondence and requests for materials should be addressed to Marc-Philippe Weller.