



UiO **Faculty of Law**  
University of Oslo

# Board behaviour: an interplay between reporting and due diligence

PhD Seminar on Sustainability Law 2024



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# Nature of a corporation

- What a corporation is?
- Three phases:
  - Corporations\* as a legal person
  - Parent corporation in the nexus of a group
  - Lead corporation controlling the value chain

\* As a general term, not only companies

# Development of a corporation

- Sole entrepreneur (for ages)
- Partnership (Roman or so)
- Mudarabah / limited partnership (middle Age or so)
- Trade company (XVI century eh)
- Limited liability company (IX century sure)
- Group (end of IX century)
- Value chain (XXI century)

# Development of a corporation

- What is important in business, humans' obligations towards humans
  - (if we ignore AI now)
- These obligations can be described as *accountability*

# Accountability and accountancy

- The humans working for the entity and other humans there have duties toward it/them: they are accountable to it
- Important part of accountability is the tools they use:
  - Metrics, key performance indicators, data points
- Both internally (as a tool in fulfilling their duties) and externally, in reporting how they have performed their duties
- Accountancy serves accountability

# Accountability and accountancy

- The nature of accountancy (and reporting of it) has evolved:
- When you are yourself the main addressee of your own responsibilities, you work for yourself: sole entrepreneur, partners in a partnership
- Next step you are a servant, or ‘steward’ for others: your community, non-active partners in a business; and then gradually others as your contractual parties, and the public (the state and its members)

# Accountancy, accounts and regulation

- Today we talk of the tools and how to use them, the accounts and accountancy
- The history of accountancy and accounts is long and is connected to birth of civilisation (the Andies, Mesopotamia, Egypt ...)
- So, we need to speed up a bit...
- ... and lets's concentrate on businesses

# What is business?

- When we look accountancy in business, we must first think what are we accountable for
- What kind of business model have we?
  - Is it me, as a sole entrepreneur?
  - Is it a partnership of Eléonore and me? As equals or maybe as Eléonore as the general partner making the decisions and me as the silent partner?

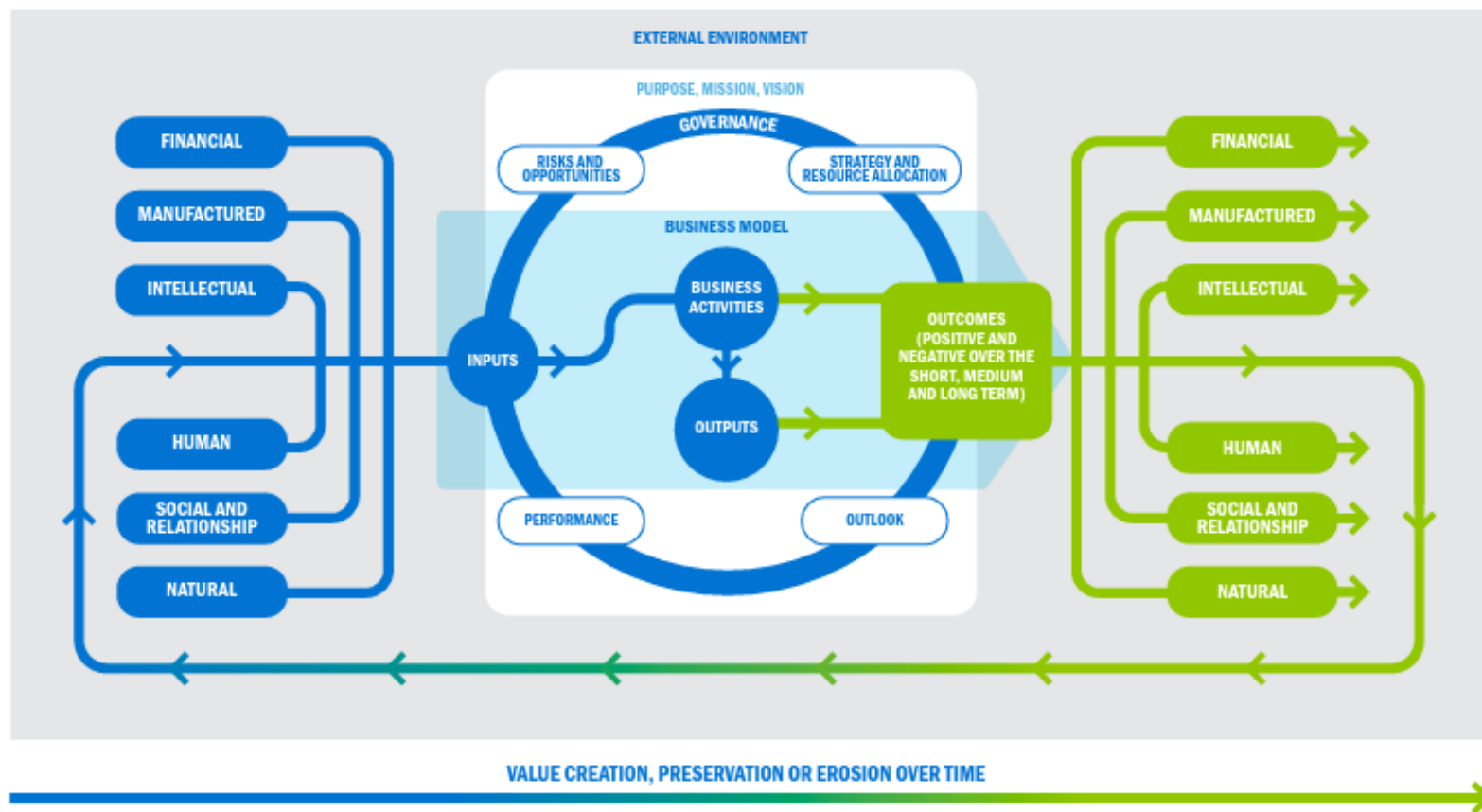


# What is business?

- Or is it a more complex, consisting of several types of partners/members, other investors, contractual parties, public interest
- Business models as we know them now, developed from the Middle Ages along the Silk Road from China to Italy (as *mudarabah* to *commenda*)
  - And also tools for accountability and accountancy

# Role of accounting in business

- Business accounting as a vehicle to recognise inputs and outputs in a business model
  - Capitals in → inputs
  - Business activities
  - Outputs → capitals out



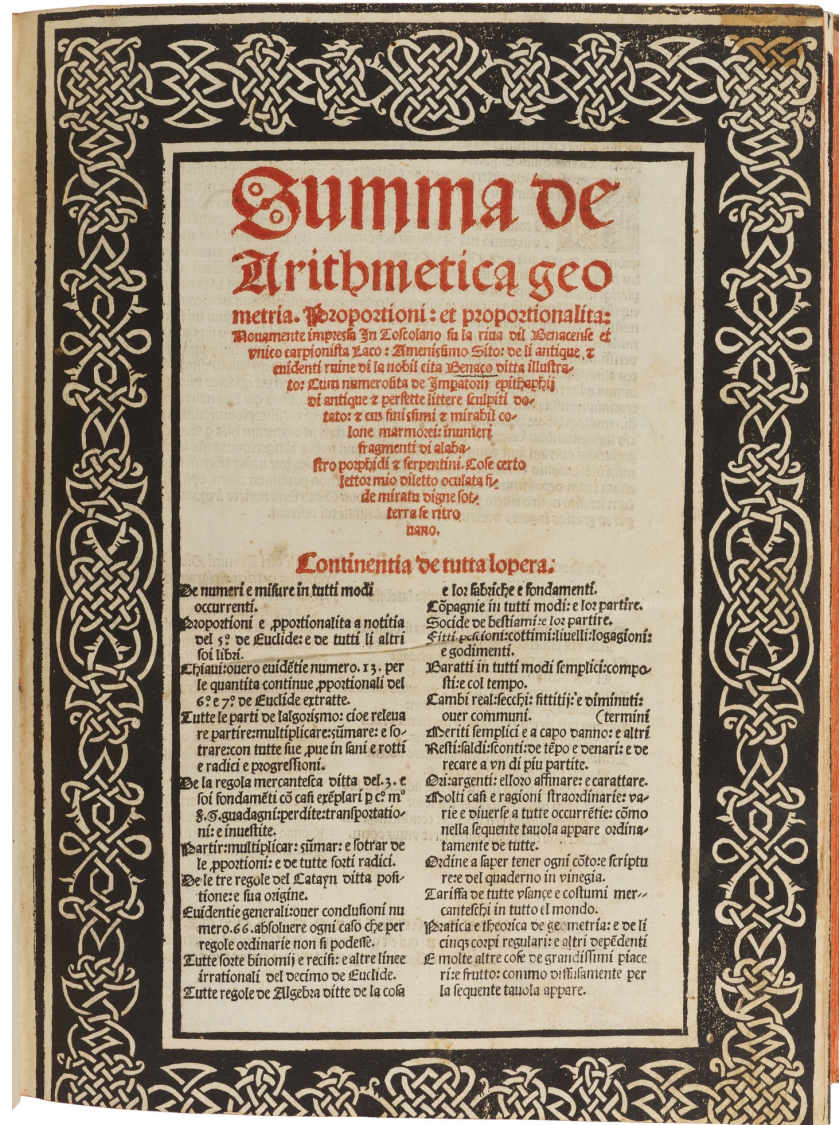
IFRS Foundation, International <IR> Framework (2021)

# Role of accounting in business

- Traditionally (1400-1960s), accountability on
  - Members' share
  - Creditors' share
  - Society's share
- How to achieve: Historical cost, prudence, conservatism
  - Valuation and accounting stuff David, Vera and Iris talked (go ACC4FUTURE))



Jacopo de' Barbari: Ritratto di Luca Pacioli (ca. 1495) (some Leonardo da Vinci might have helped but who cares)



Luca Pacioli: *Summa de arithmetica, geometria, proportioni et proportionalita*  
(Venezia: Paganini, 1494)



# Fra Luca's accounting

- Although Fra Luca had partnerships and sole entrepreneurs in mind, his double-entry bookkeeping became the standard to understand accounting for a business entity
  - Companies from the late sixteenth century
  - Cooperatives
  - Other business forms
- Balance sheet, income statement
  - Generally accepted accounting principles (GAAP)

# European accounting regime

- Based on fra Luca's idea: Traditionally, financial accounting serving not only the board, the management and the members of a firm but the society as a whole
  - Creditor protection, tax accounting
  - Prudence and historical cost
- Connection to birth of a legal person with limited liability



# Accounting serving accountability

- The main role of accounting has not changed: serving accountability
- But to whom are you accountable has changed
- And of what are you accountable of:

# Accounts

- Entity
- Group
- Value chain
- And in regulation:
  - Annual accounts
  - Consolidated accounts
  - Sustainability accounts
  - Value chain accounts

## Or in the European terms

- Fourth Directive on annual accounts (1978)
- Seventh Directive on consolidated accounts (1983)
  - ➔ Consolidated Accounting Directive (2013)
- Non-financial Reporting Directive (2014)
  - ➔ Corporate Sustainability Reporting Directive (2022)

**So,**

- Those who are accountable, are accountable of accounts
- Or as formulated in the Accounting Directive,

*Article 33*

**Responsibility and liability for drawing up and publishing the financial statements and the management report**

▼M4 ↓

1. Member States shall ensure that the members of the administrative, management and supervisory bodies of an undertaking, acting within the competences assigned to them by national law, have collective responsibility for ensuring that the following documents are drawn up and published in accordance with the requirements of this Directive and, where applicable, with the international accounting standards adopted pursuant to Regulation (EC) No 1606/2002, with Delegated Regulation (EU) 2019/815, with the sustainability reporting standards referred to in Article 29b or Article 29c of this Directive, and with the requirements of Article 29d of this Directive:

- (a) the annual financial statements, the management report and the corporate governance statement when provided separately; and
- (b) the consolidated financial statements, the consolidated management reports and the consolidated corporate governance statement when provided separately.

▼B ↓

2. Member States shall ensure that their laws, regulations and administrative provisions on liability, at least towards the undertaking, apply to the members of the administrative, management and supervisory bodies of the undertakings for breach of the duties referred to in paragraph 1.

## So, the board

- is responsible of correct information on the
  - Economy
  - Business model
  - Due diligence
- Of the company, the group and the value chain

## On the other hand

- Do we take into consideration the investors' interests only
  - 'single materiality'
    - International financial and sustainability reporting standards (IFRS regime)
- Or impact to others, too?
  - 'double materiality'
    - Corporate Sustainability Reporting Directive and European Sustainability Reporting Standards (CSRD & ERSs)

# The question is, how far this responsibility goes

- Three phases of sustainability regulation:
  - Reporting laws
  - Due diligence laws (loi sur le devoir de vigilance, Lieferkettensorgfaltspflichtengesetz, aktsomhetsloven)
  - Liability laws?

\*) J. Salminen & M. Rajavuori: 'Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and a Framework for Analysis' (2019) 26 *Maastricht Journal of European and Comparative Law* 602.



## Is there room for liability laws?

- *Milieudefensie et al v. Royal Dutch Shell Plc*,  
Rechtbank Den Haag 26 mei 2021,  
ECLI:NL:RBDHA:2021:5339
- *ClientEarth v Shell Plc & Ors (Re Prima Facie Case)* [2023] EWHC 1137 (Ch) (12 May 2023)

# Is there room for liability laws?

- Corporate Sustainability Due Diligence Directive proposal (2022)
  - Civil liability (Art 22)?
  - ‘Directors’ duties (Art 25)?

# Discussion points

- What is the role of the board?
- What is the liability of the board?
- Is the board the corporation?

# Sustainability Law at the University of Oslo

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