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Corporate Purpose and Sustainability

Law Working Paper N° 559/2020
December 2020

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Abstract

An increasing number of firms make reference to the pursuit of environmental and social goals in the definition of their purpose. This raises important issues with respect to the way in which the trade-offs between profit maximization and social value are solved. As I show in this chapter, there are different perspectives that can be adopted to this end depending on the field of scholarship selected: economics, finance, management and law. Each perspective offers different nuances as to the way in which corporate purpose is defined and the conflict between the pursuit of profit and social value is dealt with.

In section II of this chapter, I argue that a broader concept of corporate purpose has gradually emerged over the years in economics, finance and management studies, as a result of various approaches to corporations such as corporate social responsibility (CSR) and stakeholder theory, which have been gradually integrated into the corporate governance framework. Environmental and social sustainability have come to characterize most of the instances of CSR and some core aspects of stakeholder governance, without discarding the pursuit of corporate profits as a long-term goal of the corporation. At the start of this century, sustainability concerns have entered into the area of finance studies through the theory of "enlightened shareholder value" (ESV) and its homologues like "shared value".

In section III I argue, from a comparative law perspective, that corporate purpose has been variously defined in different jurisdictions, while European laws often consider the company's interest rather than corporate purpose. However, corporate purpose is generally identified in practice with the pursuit of corporate profits, albeit with variations concerning the relevance of given stakeholders and social values in corporate governance. In general, legal definitions of corporate purpose are flexible and allow for different types of solution of the conflict between economic value and social value at firm level and within a given system.

In section IV I critically analyse recent economics and management studies which argue that corporate purpose should be modified to reflect the prevalence of social value over shareholder value, and that the latter should be pursued by managers only derivatively, as a result of pro-stakeholders actions directed to increase the "total pie". I object to this recent trend from a law and finance perspective and show my preference for keeping the relevant discussion within the confines of ESV theory. However, I admit that corporate purpose should be larger than profit from a behavioural perspective if we want to motivate people to perform outstandingly and sustainably in organizations.

In section V, I emphasize the mounting role of regulatory and ethical constraints to business conduct deriving from sustainability concerns. These constraints go beyond the mere calculus required by ESV, which asks management to pursue stakeholder interests only to the extent that this increases the long-term value of the firm. Indeed, ethical considerations as reflected by international standards and consolidated best practices should apply to the running of businesses without necessarily requiring a prior analysis of their precise impact on financial performance.

Keywords: Corporate purpose, corporate governance, corporate social responsibility, shareholder primacy, shareholder value, shared value, social value, stakeholder theory, stakeholder governance, stakeholder capitalism, sustainability

JEL Classifications: G30, G32, G38, K20, K32, L21, M14, P12

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Corporate Purpose and Sustainability [*]

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I. Introduction

The concept of corporate purpose is often articulated in today's business practice to underline that companies should not only pursue profits, but also other objectives concerning the firm's stakeholders, the environment and other public interests, including those of future generations. In this introductory section, I define the present chapter's scope and offer some practical guidance as to the current understanding of corporate purpose also in the light of the current COVID-19 crisis.

1. *Scope and aims of the chapter*

Corporate purpose is a central corporate governance theme,[1] even though its definition and role are still widely debated amongst lawyers, economists and management scholars.[2] Possibly no other concept of corporate law better reflects the social norms and political ideologies prevalent in each society at a given time. Also the practical relevance of this concept is widely discussed and often put into doubt by scholars showing that definitions of corporate purpose are of no consequence for individual corporations and their leaders. Two US legal scholars have even asked, as a research question, whether corporations should have a purpose,[3] whereas a UK economist suggested that corporations should be required by law to articulate their purpose in the charter along the model of benefit corporations (para. 9 below). A similar direction has been followed by the French legislator that has allowed companies to specify their purpose in the charter (para. 7.2).

An increasing number of firms, particularly the largest ones, make reference to the pursuit of environmental and social goals in the definition of their purpose. This raises important issues with respect to the way in which the trade-offs between profit maximization and social value are solved in capitalist systems. These trade-offs are

[1] J. Fish and S. Davidoff Solomon, 'Should Corporations Have a Purpose?', ECGI Law Working Paper 510/2020, https://ecgi.global/working-paper/should-corporations-have-purpose, 3, define it as "the hottest topic in corporate governance".
[2] E. Rock, 'For Whom is the Corporation Managed in 2020: The Debate over Corporate Purpose', ECGI Law Working Paper 515/2020, https://ecgi.global/working-paper/whom-corporation-managed-2020-debate-over-corporate-purpose.
[3] J. Fish and S. Davidoff Solomon, note 1.

treated differently depending on the corporate governance system concerned and the type of industry in which the individual firm operates. Their solution also depends on the perspective from which the relevant questions are asked. As I show in this chapter, there are different perspectives that can be adopted with respect to corporate purpose depending on the field of scholarship chosen: economics, finance, management and law. Each perspective offers different nuances as to the way in which corporate purpose is defined and the conflict between the pursuit of profit and social value is dealt with.

In section II below, I show that a broader concept of corporate purpose has gradually emerged over the years in economics, finance and management studies, as a result of various approaches to corporations such as corporate social responsibility (CSR) and stakeholder governance, which have been gradually integrated into the corporate governance framework. Environmental and social sustainability have come to characterize most of the instances of CSR and some core aspects of stakeholder governance, without discarding the pursuit of corporate profits as a long-term goal of the corporation.

In section III I argue, from a comparative law perspective, that corporate purpose is an old concept, which has been variously defined in different jurisdictions without determining great variations in practice. Continental European laws often consider the company's interest rather than the corporate purpose, i.e. the interest that a company should pursue and which may belong either to the company as such or to its shareholders. However, legal definitions have little relevance in practice, where corporate purpose is generally identified across jurisdictions with the pursuit of corporate profits, albeit with variations concerning the relevance of given stakeholders and social values in corporate governance. A distinction is made in this respect between shareholder governance and stakeholder governance, depending on whether shareholder primacy is the rule or a pluralist approach is followed in which at least some stakeholders are elevated to prominence, as happens for instance with employees under the German codetermination system. In general, legal definitions of corporate purpose are flexible and allow for different types of solution of the conflict between economic value and social value at firm level and within a given system.

In section IV I critically analyse the recent economic theories and policy perspectives which either reformulate stakeholder governance more radically or try to restore

shareholder primacy in its widest possible meaning. The former have been suggested by "social value acolytes", who argue that firms should firstly maximize social value and secondly corporate profits, which shall naturally derive from businesses that excel in innovation and compliance with ethical standards. The latter have been suggested by "shareholder value purists" arguing that stakeholders' interest should be taken into account by corporate leaders only to the extent that this is instrumental to shareholder wealth maximization. For example, employees should be offered either higher salaries or better welfare only if a similar action increases the value of the corporation in the long run. An intermediate position that I will also consider suggests that a distinction should be made between shareholder value and social value from the perspective of behavioural theory, with particular regard to the distinction between extrinsic and intrinsic motivation of the people working in an organization.

In section V I present a holistic view of corporate purpose based on the comments developed throughout the chapter, including my preference for the enlightened shareholder value (ESV) approach as proposed by Michael Jensen and followed by some legislators when defining corporate purpose. However, I suggest that Jensen's approach should be specified today in the sense that stakeholders' interests are met not only when they are strictly instrumental to the maximization of firm value, but also when required by regulation or recommended by ethical standards that firms are expected to follow quite apart from their impact on corporate profit. In the same section, I also consider ways to promote corporate purpose in practice through official statements, corporate charter provisions and company law. I conclude in the last paragraph of section V summarising the main outcomes of the present chapter.

2. *The new stakeholderist credo*

The new credo of large corporations and institutional investors as to corporate purpose is largely reflected in the official pronouncements of national trade associations – like the US Business Roundtable - and of international bodies, like The World Economic Forum (WEF) which recently adopted the Davos Manifesto 2020. The Manifesto opens with the following statement: "The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees,

customers, suppliers, local communities and society at large. The best way to understand and harmonize the divergent interests of all stakeholders is through a shared commitment to policies and decisions that strengthen the long-term prosperity of a company."[4] The economic and management theories reviewed below in section II shed light on the origins and meaning of this statement, which reflects the rise of corporate social responsibility and stakeholder theory in the last decades, and the diffusion of relatively new concepts such as that of "shared value" to express the broadening of corporate purpose.

In commenting the Manifesto Klaus Schwab, the founder of WEF, underlined that shareholder capitalism is currently the dominant model, which first gained ground in the US in the 1970s and then extended its influence globally.[5] However, the "single-minded focus" on profits and short-term results caused this type of capitalism "to become increasingly disconnected from the real economy". As a consequence, attitudes of the public have begun to change thanks to Greta Thunberg and other climate change activists reminding us of environmental unsustainability. Moreover, younger generations "no longer want to work for, invest in, or buy from companies that lack values beyond maximizing shareholder value". In addition, "executives and investors have started to recognize that their own long-term success is closely linked to that of their customers, employees, and suppliers". As a result, stakeholder capitalism is quickly gaining ground, as also shown by the US Business Roundtable's announcing this year that it would formally embrace it, while "impact investing" rises to prominence "as more investors look for ways to link environmental and societal benefits to financial returns".[6]

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[4] Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution, https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution. The Manifesto adds inter alia that companies should pay their fair share of taxes, show zero tolerance for corruption, uphold human rights throughout their global supply chains, and advocate for a competitive level playing field.

[5] Why we need the 'Davos Manifesto' for a better kind of capitalism https://www.weforum.org/agenda/2019/12/why-we-need-the-davos-manifesto-for-better-kind-of-capitalism/.

[6] See the BRT's Statement on the Purpose of a Corporation, at https://opportunity.businessroundtable.org/ourcommitment/. The CEOs of large corporations who subscribed to it committed to delivering value to their customers; investing in their employees; dealing fairly and ethically with their suppliers; supporting the communities in which they work; respecting

The Davos Manifesto was preceded by a paper written for the WEF by Martin Lipton, the celebrated New York lawyer, suggesting a "new paradigm", which "conceives of corporate governance as a collaboration among corporations, shareholders and other stakeholders working together to achieve long-term value and resist short-termism".[7] The new paradigm should "encourage corporations to pursue thoughtful strategies for maximizing profits and equity share value in the long term" and "to incorporate relevant sustainability, ESG (environmental, social and governance) and CSR (corporate social responsibility) considerations in developing their long-term strategies and operations planning". At the same time, the new paradigm should encourage investors to support the pursuit of long-term strategies by the corporations in which they invest, while discouraging them from "supporting short-term financial activists that advocate only short-term profits and value maximization".[8]

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the people in their communities and protect the environment by embracing sustainable practices across their businesses; generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate. They also committed to transparency and effective engagement with shareholders, concluding: "Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country".

[7] Martin Lipton et al., The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth, 2 September 2016, International Business Council of the World Economic Forum, downloadable at https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf.

[8] In a revised version of his paper, Lipton approvingly cited the British Academy project on the Future of the Corporation, led by Professor Colin Mayer whose proposals I critically discuss in sec. IV: Lipton et al., It's Time to Adopt the New Paradigm, a 2019 blog post of the Harvard Law School Forum on Corporate Governance and Financial Regulation, https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm/. However, Lipton criticizes Mayer's proposals to the extent that they require legislation. In his opinion, "no legislation or regulation is necessary to implement The New Paradigm. Corporations, asset managers, and institutional investors can unilaterally announce their acceptance of and adherence to the principles of The New Paradigm. Consistent with observations made by Chief Justice Leo Strine of the Supreme Court of Delaware, in his 2017 Yale Law Journal article, "Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System," from both a corporate law and a trust law standpoint the principles of The New Paradigm are intended to achieve long-term growth in value while eschewing actions and policies that threaten future growth and value, or the franchise itself. Adoption of and adherence to the principles of The New Paradigm is consistent with the fiduciary duties of boards of directors to their corporations and shareholders, and of asset managers to investors and the underlying beneficiaries for whom they are acting". Lipton also endorsed the statements on corporate purpose by several index fund managers, including Larry Finck, the CEO of Blackrock, the world's largest asset manager, who in his 2018 letter to CEOs noted: "Society is demanding that companies, both public and private, serve a social purpose. To prosper over time,

In a more recent blog post,[9] Lipton argued that the proposals of his 2016 paper were closely paralleled by the UK Stewardship Code 2020 and by the UK Corporate Governance Code 2018, which fundamentally commit companies and asset managers and asset owners to sustainable long-term investment. As stated by the UK Financial Reporting Council that has issued both codes, the new Stewardship Code establishes a clear benchmark for stewardship as the responsible allocation, management and oversight of capital "to create long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society".[10] Similar statements are found in the UK Corporate Governance Code 2018, which is introduced amongst others by the following comments: "Companies do not exist in isolation. Successful and sustainable businesses underpin our economy and society by providing employment and creating prosperity. To succeed in the long-term, directors and the companies they lead need to build and maintain successful relationships with a wide range of stakeholders. These relationships will be successful and enduring if they are based on respect, trust and mutual benefit. Accordingly, a company's culture should promote integrity and openness, value diversity and be responsive to the views of shareholders and wider stakeholders".[11] These comments are reflected by the first Principle stated in the Code with respect to corporate purpose under 1. A.: "A successful company is led by an effective and entrepreneurial board, whose role is to promote the long-term sustainable success of the company, generating value for shareholders and contributing to wider society".

3. *Narratives of corporate purpose in business practice*

A few quick references may help clarifying how corporate purpose has been publicly specified by some of the major companies engaged in promoting their business success and sustainability. Looking at their websites, we find either *ad hoc* definitions of

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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."

[9] See at https://corpgov.law.harvard.edu/2019/10/28/the-new-paradigm/.

[10] See at https://www.frc.org.uk/investors/uk-stewardship-code/http-frc-org-uk-investors-uk-stewardship-code.

[11] See at https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf.

corporate purpose or indirect references to it in other documents, such as those defining the corporate "mission" and "vision"[12] and/or including the company's sustainability report.

Danone, to start with, the French food and beverage company, defines its goal as building a balanced, profitable and sustainable growth model.[13] In particular, the company has set its ambition to receive a B Corp certification as a major milestone in its dual economic and social project:[14] "As part of this approach, which aims to create value for consumers and shareholders, Danone is transforming the way in which the food and beverages of its flagship brands are designed and produced, notably by reducing the number of ingredients, and proposing new organic and non-GMO product lines. The Company also commits to promoting sustainable agriculture, encouraging the circular economy, conserving water, reducing waste, reducing its carbon footprint, promoting animal welfare and investing in the community".[15]

Vodafone enounces its corporate purpose under the heading 'we connect for a better future' as follows: "Through our business, we aim to build a connected society that enhances socio-economic progress, embraces everyone and does not come at the cost of our planet. That is why we have committed to improve one billion lives and halve our

[12] See, for a definition of these concepts, Enacting Purpose Initiative, Enacting Purpose within the Modern Corporation. A Framework for Boards of Directors, 2020, 12 ff., https://www.enactingpurpose.org/assets/enacting-purpose-initiative---eu-report-august-2020.pdf.

[13] See https://www.danone.com/about-danone/sustainable-value-creation.html, where the corporate purpose is defined under the heading "creating and sharing sustainable value", as follows: "Through our commitment to social and economic progress, and our passion for bringing health through food to as many people as possible, we aim to generate profitable, sustainable growth now and for many years to come". See also https://www.danone.com/about-danone/sustainable-value-creation/our-unique-growth-model.html, where it is stated: "In an purposeincreasingly volatile and complex environment, Danone strives to strengthen its model of growth through disciplined resource allocation, efficiency gains and cost optimization with a permanent balance in managing the short, mid and long-term horizons. The company therefore favours strategic growth opportunities that create long-term value over tactical short-term allocations".

[14] See https://www.danone.com/about-danone/sustainable-value-creation/BCorpAmbition.html , where it is specified: "Since 2015, Danone has partnered with B Lab to help define a meaningful and manageable path to certification for multinationals and publicly traded companies, as well as accelerate growth of the B Corp movement into the mainstream".

[15] See https://www.danone.com/about-danone/sustainable-value-creation/our-unique-growth-model.html.

environmental impact by 2025, by taking concrete action in three areas: Digital society, Inclusion for All, and Planet."[16]

Enel, the Italian electricity and energy company, defines its "vision" as follows: "Openness is the key feature of our strategy. For this reason we are ensuring our services reach more and more people in a growing number of countries, boosting local economies and extending access to energy… This is the approach that underpins our day-to-day commitment and that motivates all of us in the Enel team. We are Open Power to improve the future for everyone, to drive sustainable progress, to leave no one behind and to make the planet a more welcoming place for future generations. We are Open Power and our aim is to overcome some of the greatest challenges facing the world. This is to be achieved through a new approach which combines attention to sustainability with the best in innovation".[17]

Electrolux, the Swedish home appliance manufacturer, employs similar language in its Sustainability Report 2019, which opens with the following statements concerning the company's sustainability framework: "Sustainability has gone from being very important to crucial for Electrolux, as our planet approaches several extremely significant tipping points…The Better Living Program is an integral part of our new For the Better 2030 sustainability framework, which will enable Electrolux to continue to create better and more sustainable living for people around the world through to 2030. With bold targets focusing on better eating, better garment care and a better home environment, as well as to become climate neutral in our operations and strive towards a more circular business, the program intensifies our contribution to key global challenges".

These are just a few examples of a trend which is on the rise highlighting the role of corporate purpose and similar concepts (such as mission, vision and values) in the communication and practices of large corporations, and its connection with

[16] See https://www.vodafone.com/our-purpose .

[17] See https://www.enel.com/company/about-us/vision, where the following is added: "In line with our Open Power strategic approach, Enel has placed environmental, social and economic sustainability at the centre of its corporate culture and is implementing a sustainable development system that is based on the creation of shared value, both inside and outside of the company…"

sustainability. There is no need to remark that the rhetoric of similar statements does not necessarily correspond to corporate behaviour in practice, so that they should not be taken at face value. Moreover, the pronouncements just reviewed are no doubt generic and need to be substantiated by other documents and corporate actions. However, they show - *prima facie* at least – the new directions of corporate purpose in large enterprises, its constant link to sustainability, and the essential value of both concepts (purpose and sustainability) together with that of value maximization in delineating the goals of corporations and the ways in which they should be reached.

As this chapter tries to show, similar practices are meaningfully aligned with national and international public policies, showing the need for cooperation between governments, corporations, investors and other stakeholders in the attainment of the economic and social goals of modern capitalism. They are also aligned with current trends in the legal and economic literature, which often highlight the need to review the core concepts of the corporation and its regulation. This chapter makes reference to some of the most remarkable scholarly works in these areas and to the policy choices underlying the current trends.

4. *The impact of COVID-19*

The debate over corporate purpose will likely intensify and find new applications as the COVID-19 crisis continues.[18] Since the onset of the pandemic, many companies have demonstrated their commitment to social goals by keeping employees on the payroll, extending benefits post-termination, or showing forbearance to customers' non-payment of debts.[19] However, it is too early to say whether the crisis will have a broader impact on the companies' social sustainability.[20] It is likely that the pandemic will

[18] See the note 'Governing Through the Pandemic' posted by D. McCormack and R. Lamm, Deloitte LLP, on June 24, 2020, on the Harvard Law School Forum on Corporate Governance, at https://corpgov.law.harvard.edu/2020/06/24/governing-through-the-pandemic/.

[19] *Ibidem*.

[20] Criticism has been raised towards companies that have cut jobs rather than dividends and share buy-backs: see A. Scott, R. Kerber, J. DiNapoli, R. Spalding, 'U.S. companies criticized for cutting jobs rather than investor payouts', Reuters, Business News, April 8, 2020, who argue: "While most U.S. companies are scaling back payouts after a decade in which the amount of money paid to investors through buybacks and dividends more than tripled, some are maintaining their policies despite the economic pain. Royal Caribbean Cruises Ltd (RCL.N), Halliburton Co (HAL.N), General Motors Co (GM.N) and McDonald's Corp (MCD.N) have all laid off staff, cut their hours, or slashed

increase the focus on social issues such as diversity, poverty, and inequality. But the economic crisis may also determine a new emphasis on profits as the primary goal of corporations. Indeed, COVID-19 has forced boards to focus on many short-term issues, such as the rupture of supply chains; immediate and severe drops in revenues, liquidity, and cashflows; decisions on laying-off employees, shutting down facilities, and in some cases closing the business permanently.[21]

In any case, the corporate governance of sustainability requires a long-term view for the recovery of firms and the build-up of their resilience in order to survive and grow post-pandemic.[22] Indeed, corporations should now consider how to prepare for future shocks which include other pandemics and the disruption of climate change. Like banks after the great financial crisis, businesses need to build thicker buffers against shocks.[23] Pandemics and climate risk are similar in that they both representexogenous shocks, which then translate into socioeconomic impacts. The current pandemic anticipates what a future climate crisis could entail in terms of simultaneous shocks to supply and demand, disruption of supply chains, and global transmission and amplification mechanisms.[24] Ideally, firms should aim for an "antifragile" approach, which goes "beyond resilience and robustness" so that they can adapt to, and even thrive on, disorder.[25]

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salaries while maintaining payouts, according to a Reuters review of regulatory filings, company announcements and company officials".

[21] See 'Governing Through the Pandemic', note 19.

[22] See The FT View, "Companies should shift from 'just in time' to 'just in case'. Pandemic has shown that businesses neglected vital safety margins", 22 April 2020, at https://www.ft.com/content/606d1460-83c6-11ea-b555-37a289098206?shareType=nongift. The Covid-19 outbreak has exposed the thin margins on which much of global business was run: "Highly indebted companies, working from lean inventory, supported by just-in-time supply chains and staffed by short-term contractors, have borne the brunt of the sudden blow. They will now suffer the rolling, longer-term impact of its unpredictable consequences. Too late, many executives and owners have realised that by pursuing the holy grail of ever greater efficiency, they sacrificed robustness, resilience and effectiveness. In many cases, they will turn out to have sacrificed the business itself.

[23] See D. Pinner, M. Rogers, and H. Samandari, 'Addressing Climate Change in a Post-pandemic World' McKinsey Quarterly, April 7, 2020, https://www.mckinsey.com/business-functions/sustainability/our-insights/addressing-climate-change-in-a-post-pandemic-world#.

[24] Ibidem.

[25] See FT View, note 23, citing N. Taleb, *Antifragile: How to Live in a World We Don't Understand*, Allen Lane, 2012.

II. The Evolution of Corporate Purpose in Economics and Finance

In this section, I consider corporate purpose from an economics, finance and management perspective. In particular, I analyse the main changes concerning the notion of corporate purpose since the great economist Milton Friedman famously stated: "There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud".[26] As I argue below, Friedman's approach to social responsibility of business has been widely replaced by a broader notion of corporate purpose encompassing both the pursuit of corporate profit and other social goals. However, a tension still exists between shareholder value theory – which dominates the financial approach to corporate purpose – and the notion of social value, which largely permeates CSR and stakeholder governance as depicted by management theorists. As I show in section IV below, recent scholarly works tend to polarize to the extremes, either restoring a pure theory of shareholder value or subordinating corporate profit to social value and its direct implementation by firms. In this section, I briefly analyse the evolution of scholarship until the beginning of this century.

5. *Corporate profits and social values*

Three scholarly streams ran parallel concerning the relationship between corporate profits and social values. The first stream is represented by shareholder value theory, the second by corporate social responsibility (CSR) theory and the third by stakeholder theory. All three scientific domains have been heavily influential on business practice. They only changed course with the start of the present century, crossing their paths in ways that I will explain in para. 6.

5.1. *Milton Friedman on the social responsibility of business*

Friedman is often considered as the father of shareholder value theory and therefore also responsible, to some extent, for its negative consequences in the two financial crises

[26] M. Friedman, *Capitalism and Freedom*, University of Chicago Press, 1962, 112.

of this century.[27] His famous 1970 paper on the *New York Times Magazine*[28] is widely quoted as the foundation of such theory, even though such a reading is not entirely correct.[29] Indeed, what is striking about that paper is Friedman's attack on corporate social responsibility (CSR), which was in its infancy at that time and successfully developed in the following years. Moreover, shareholder value theory was developed later by finance scholars and consultants, while its diffusion in corporate practice mainly occurred in the last two decades of the last century.[30]

Friedman referred to the corporate practices of his time, but his emphasis on corporate profits somehow reflected a critical approach to those practices, including normative elements that anticipated shareholder value theory. As Nobel laureate B. Holmstrom and S. Kaplan later explained: "Before 1980, corporate managements tended to think of themselves as representing not the shareholders, but rather 'the corporation.' In this view, the goal of the firm was not to maximize shareholder wealth, but to ensure the growth (or at least the stability) of the enterprise by 'balancing' the claims of all important corporate 'stakeholders'—employees, suppliers, and local communities, as well as shareholders".[31]

The external governance mechanisms available to dissatisfied shareholders, such as proxy fights and hostile takeovers, were seldom used. Corporate boards tended to be dominated by management, making board oversight weak, while internal incentives from management ownership of stock and options were also modest.[32] Partly in response to the neglect of shareholders, the 1980s saw the emergence of the corporate raider and hostile takeovers: "Nearly half of all major U.S. corporations received a

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[27] See B. Cheffins, 'Stop Blaming Milton Friedman!', University of Cambridge Faculty of Law Legal Studies Research Paper Series, Paper N. 9/2020, March 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552950.

[28] M. Friedman, The Social Responsibility of Business is to Increase its Profits, The New York Times Sunday Magazine, September 13, 1970, 32.

[29] See B. Cheffins, note 27.

[30] See G. Davis, *Managed by the Markets*, How Finance Reshaped America, Oxford University Press, 2009, 50 ff.

[31] B. Holmstrom and S. Kaplan, 'The State of U.S. Corporate Governance: What's Right and What's Wrong?' (2003) 15 Journal of Applied Corporate Finance 3, 10.

[32] Ibidem. For example, in 1980 only 20% of the compensation of U.S. CEOs was tied to stock market performance. Long-term performance plans were widely used, but they were typically based on accounting measures like sales growth and earnings per share that tied managerial incentives less directly, and sometimes not at all, to shareholder value.

takeover offer in the 1980s—and many companies that were not taken over responded to hostile pressure with internal restructurings that made themselves less attractive targets."[33] In the 1990s, the pattern of corporate governance activity changed again, as hostile takeovers and leverage declined substantially. However, other corporate governance mechanisms began to play a larger role, particularly executive stock options and the greater involvement of boards of directors and shareholders:[34] "With the implicit assent of institutional investors, boards substantially increased the use of stock option plans that allowed managers to share in the value created by restructuring their own companies. Shareholder value thus became an ally rather than a threat."[35]

In his 1970 paper, Friedman focused on the rejection of corporate social responsibility as a "fundamentally subversive doctrine".[36] He argued that the executives are agents of the stockholders and cannot spend the company's money for social purposes. He also offered a few examples to explain why using corporate resources for social purposes would run counter the interest of shareholders. The first example refers to the case of an executive who refrains from increasing the price of a product in order to contribute to the social objective of preventing inflation. The second considers an executive who makes expenditures on reducing pollution beyond the amount that is in the best interests of the corporation or that is required by law, in order to contribute to the social objective of protecting the environment. The notion of best interest of the corporation is ambiguous, depending on whether we look at short-term accounting figures or long-term firm value. Under today's CSR standards, reducing pollution beyond what is required by law could be instrumental to increasing the reputation of the firm and substantially reducing its exposure to environmental risks.

Nevertheless, Friedman recognised that the long-run interest of the corporation could lead a firm that is a large employer in a small community to devote resources to provide amenities to that community or to improve its government. In his opinion, "that may make it easier to attract desirable employees, it may reduce the wage bill or lessen losses from pilferage or sabotage or have other worthwhile effects". He rejected however

[33] Ibidem.
[34] Ibidem, 11.
[35] Ibidem.
[36] See M. Friedman, note 66, using an expression already found in his book *Capitalism and Freedom*, note 64, 113.

the idea that this was an example of social responsibility, arguing that the action in question was justified by self-interest. In Friedman's view, social responsibility meant pursuing an interest in conflict with the corporate interest. He admitted that stakeholders could be taken into account in the management of corporations, but only to the extent that this would further the corporate interest.

5.2. *The rise and success of CSR*

Subsequent developments of CSR have gone in a direction different than that advocated by Friedman. Thirty years after the publication of his *New York Times* paper, it was possible to note that 'CSR has never been more prominent on the corporate agenda'.[37] Some of the plausible reasons for it were offered by the WEF a few years after the great financial crisis:[38] "In the face of high levels of insecurity and poverty, the backlash against globalisation, and mistrust of big business, there is growing pressure on business leaders and their companies to deliver wider societal value. This calls for effective management of the company's wider impacts on and contributions to society, making appropriate use of stakeholder engagement."

CSR practices are considered today as predominantly aligned with the company's interest, for they promote the reputation of the firm as an entity which regularly complies with ethical standards and satisfy the expectations of those shareholders who follow responsible investment practices.[39] In addition, the coverage of CSR has been expanded to include a range of topics which did not belong to it at its origin, such as environmental sustainability, employees' welfare and supply chain monitoring.[40] As

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[37] N. Smith, 'Corporate Social Responsibility: Whether or How?' (2003) 45 California Management Review, 52.

[38] See World Economic Forum, Responding to the Challenge: Findings of a CEO Survey on Global Corporate Citizenship, cited by N. Smith, note 75.

[39] See N. Smith and G. Lenssen, 'Mainstreaming Corporate Responsibility: An Introduction', in N. Smith and G. Lenssen (eds.), *Mainstreaming Corporate Responsibility*, Wiley 2009, 2, who argue: "The *business case* at the level of the firm is becoming increasingly clear as more companies come to understand that, aside from any moral obligation, it is in their economic interest to address environmental, social and governance issues and in a manner that is integrated with strategy and operations".

[40] See A. Crane, D. Matten and L. Spence, 'Corporate Social Responsibility in a Global Context', in A. Crane, D. Matten and L. Spence (eds.), *Corporate Social Responsibility*. Readings and Cases in a Global Context, Routledge, 2008, 3 ff., where current definitions of CSR and analysis of its core characteristics.

argued by academic experts of the field: "… CSR encompasses issues such as sustainability (meeting the needs of the present without compromising the ability of future generations to meet their needs), stakeholder management and corporate governance, as well as corporate philanthropy, although the latter is increasingly seen as a peripheral consideration".[41] Thirdly, CSR is increasingly integrated with business strategy and positively affects corporate purpose that extends to social goals in addition to the pursuit of corporate profit.[42]

Nonetheless, some finance studies still argue – as Friedman did in his 1970 paper – that CSR is often a manifestation of agency problems within the firm and therefore problematic.[43] Agency problems are manifested, for example, by corporate managers engaging in CSR that either benefits themselves rather than shareholders or reduces their engagement on core responsibilities within the firm.[44] According to this "agency view", CSR is generally not in the interest of shareholders. However, under another view socially responsible firms often implement value-maximizing practices, while well governed firms are more likely to follow CSR standards.[45] The empirical studies testing these two theories have offered mixed results.[46] We shall consider the evidence concerning the "good governance" view again in the final section of this paper.

5.3. *Advances in stakeholder theory*

Stakeholder theory has been developed in the last forty years to counter the dominant theory of the corporation which is shareholder centric.[47] As originally outlined by E. Freeman,[48] this theory tried to explain how business could be understood against the

[41] N. Smith and G. Lenssen, note 78, 2, also noting that the case for business to engage in ESG issues is based on the realization that a new global social contract between business, government and society is needed.
[42] See A. Pettigrew, 'Corporate Responsibility in Strategy', in N. Smith and G. Lenssen (eds.), note 76, 12 .
[43] See R. Benabou and J. Tirole, 'Individual and Corporate Social Responsibility' (2010) 77 Econometrica, 1, and the other works cited by A. Ferrell, H. Liang and L. Renneboog, 'Socially Responsible Firms' (2016) 122 Journal of Financial Economics 585.
[44] See Krueger, 'Corporate Goodness and Shareholder Wealth' (2015) 115 Journal of Financial Economics 304.
[45] See A. Ferrell, H. Liang and L. Renneboog, note 92, 586.
[46] Ibidem, for a review of the relevant works.
[47] See R.E. Freeman, J. Harrison, A. Wicks, B. Parmar and S. De Colle, *Stakeholder Theory*. The State of the Art, Cambridge University Press, 2010, 4.
[48] R.E. Freeman, *Strategic Management.* A Stakeholder Approach, Pitman, 1984.

backdrop of the environmental turbulence which was already in motion. Freeman assumed that the "current approaches to understanding the business environment fail to take account of a wide range of groups who can affect or are affected by the corporation, its 'stakeholders'."[49] Moreover, stakeholder theorists argue that, contrary to what is traditionally assumed in economic theory, the questions of values and ethics must be considered and dealt with together with economic reality.[50] They criticize the separation of business decisions from ethical decisions and suggest to integrate the two types of decisions and recognize the managers' moral responsibility for them.

Stakeholder theory therefore is directed to solve the problem of the "ethics of capitalism" and shows how business can be managed "to take full account of its effects on and responsibilities towards stakeholders".[51] Indeed, such theory has been developed and discussed within the normative business ethics literature and there are many reasons to see stakeholder theory "as having a central place in business ethics (and vice versa)", also considering that "values, a sense of purpose that goes beyond profitability, and concern for the well-being of stakeholders were critical to the origins of stakeholder theory".[52]Also CSR scholars have used stakeholder theory to better specify and operationalize their concepts.[53] In fact, the stakeholder approach to strategic management requires abandoning the idea that shareholder value maximization is the exclusive purpose of the corporation and accepting that specific stakeholder interests should be considered in defining it.[54]

6. *Combining value maximization with stakeholder theory and CSR*

After the two financial crises at the beginning of this century, there have been repeated scholarly efforts directed to reconcile shareholder value with the social instances represented by stakeholder theory and CSR. Indeed, shareholder value has shown its limits and its dark side, with flawed corporate governance and excessive executive compensation being indicated amongst the main causes of both crises, and

[49] Ibidem, 1.
[50] R.E. Freeman et al., note 48, 4.
[51] Ibidem, 9.
[52] Ibidem, 196.
[53] Ibidem, 242, with reference to D. Wood, 'Corporate Social Performance Revisited' (1991) Academy of Management Review, 16, 691.
[54] R.E. Freeman et al., note 48, 242.

short-termism being also considered as one of the main problems of the failures of non-financial companies (in the 2001 crisis) and financial institutions (in the 2008 crisis). In recent years, the increasing attention devoted to environmental and social issues has enhanced the pressure towards a reconciliation of economic value and social value also on a theoretical level.

6.1. *Michael Jensen on "enlightened shareholder value"*

In a seminal paper on value maximization and stakeholder theory, M. Jensen argued that it is logically impossible to maximize in more than one dimension at the same time.[55] For instance, "telling a manager to maximize current profits, market share, future growth in profits, and anything else one pleases will leave that manager with no way to make a reasoned decision. In effect, it leaves the manager with no objective".[56] Consequently, a firm should specify the trade-offs amongst the various dimensions and then identify an "objective function" that explicitly incorporates the positive and negative effects of decisions on the firm. In essence, a firm must have a single objective that tells the directors and managers what is better and what is worse. Jensen submitted that "200 years' worth of work in economics and finance indicate that social welfare is maximized when all firms in an economy maximize total firm value. The intuition behind this criterion is simply that (social) value is created when a firm produces an output or set of outputs that are valued by its customers at more than the value of the inputs it consumes (as valued by their suppliers) in such production. Firm value is simply the long-term market value of this stream of benefits".[57]

Maximizing the total market value of the firm - that is the sum of the market values of equity, debt, and any other contingent claim on the firm - will resolve the trade-off problem amongst multiple constituencies.[58] To the extent that stakeholder theory argues that firms should pay attention to all their constituencies, it is completely consistent with value maximization, which also requires managers to pay attention to all constituencies,

[55] M. Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' (2010) 22 Journal of Applied Corporate Finance 32, and (2002) 12 Business Ethics Quarterly 235, (from which I quote).
[56] Ibidem, 238.
[57] Ibidem, 239, where it is also specified: "When monopolies or externalities exist, the value-maximizing criterion does not maximize social welfare."
[58] Ibidem.

such as customers, employees, suppliers of capital, communities, and so on. The objective function must specify how to make the trade-offs between the often conflicting demands of these constituencies. In the words of Jensen, value maximization offers an answer to these trade-offs: "Spend an additional dollar on any constituency to the extent that the long-term value added to the firm from such expenditure is a dollar or more".[59]

Traditional stakeholder theory, in contrast, contains no conceptual specification of how to make the trade-offs amongst stakeholders, leaving boards of directors and executives without a principled criterion for problem solving. However, according to Jensen, the conflict between value maximization and stakeholder theory can be solved by melding together what he calls 'enlightened value maximization' and 'enlightened stakeholder theory'.[60] Value maximizing tells the participants in an organization how their success in achieving a vision or in implementing a strategy will be assessed. However, it does not say anything about how to create a superior vision or strategy and about how to find or establish initiatives or ventures that create value. It only tells how success in the activity will be measured. Therefore, employees and managers must be given a "structure" that will help them to resist the temptation to maximize the short-term financial performance of the organization, which is a way to destroy value.

Enlightened stakeholder theory plays an important role by leading corporate managers and directors to think more generally and creatively about how the organization treats all constituencies of the firm, not only financial markets, but stakeholders in general.[61] Value cannot be created in the absence of good relations with customers, employees, investors, suppliers, regulators, communities, and so on. Moreover, the value criterion can be used for choosing among those competing interests, because no constituency can be given full satisfaction if the firm is to flourish and survive. Enlightened stakeholder theory includes the processes and audits to measure and evaluate the firm's management of its relations with all important constituencies, while specifying that the objective function of the firm is to maximize total long-term firm market value. In fact, changes in total long term market value of the firm are the scorecard by which success is measured. The reference to long-term market value is

[59] Ibidem.
[60] Ibidem, 245.
[61] Ibidem.

justified by the fact that markets may not know the full implications of a firm's policies until they show up in cash flows over time. Markets will recognize the real value of the firm's decisions as they become evidenced in market share, employee loyalty, and finally cash flows and risk.[62]

6.2. *Michael Porter and Mark Kramer on "shared value"*

In a largely influential paper of 2011, Porter and Kramer essentially propose to merge the two concepts of shareholder value and societal value in that of "shared value".[63] This new concept refers to creating economic value in a way that also creates value for society by addressing its needs and challenges. The two authors argue that in the old view of capitalism business contributes to society by generating a surplus, which supports employment, wages, purchases, investments and taxes. The firm is a self-contained entity and social issues fall outside its proper scope, as argued by Milton Friedman in his critique of CSR.[64] Today, a growing number of companies make important efforts to create shared value by "reconceiving the intersection between society and corporate performance".[65]

The purpose of the corporation should therefore be redefined in terms of shared value, not just profit. The new concept includes the policies and operating practices that enhance the competitiveness of a company while simultaneously advancing the economic and social conditions in the communities in which it operates.[66] The underlying premise is that both economic and social progress must be addressed through value principles, i.e. by looking at benefits relative to costs. Value creating has long been recognized in business, where profit is revenues earned from customers minus the costs incurred.[67] However, societal issues have rarely been approached from a value perspective.

Porter and Kramer show that companies can create economic value by generating societal value in at least three possible ways. Firstly, by reconceiving products and

[62] Ibidem, 246.
[63] M. Porter and M. Kramer, 'Creating Shared Value: How to reinvent capitalism – and unleash a wave of innovation and growth' (2011) Harvard Business Review 3.
[64] Ibidem, 6.
[65] Ibidem, 4.
[66] Ibidem, 6.
[67] Ibidem.

markets in response to the growing demand for products and services that meet societal needs. Food companies, for example, that traditionally concentrated on taste and quantities to drive more and more consumption are refocusing on the fundamental need for better nutrition.[68] Secondly, by redefining productivity in the value chain, where societal problems (externalities) can create internal costs to the firm. The authors refer to the problems of excess packaging of products and of greenhouse gases, which are not just costly to the environment, but also to the business.[69] On the one side, innovation in disposing of plastic used in stores can save millions in lower disposal costs to landfills. On the other, efforts to minimize pollution do not inevitably increase business costs, as major improvements in environmental performance can often be achieved with better technology at nominal incremental costs.[70] Thirdly, by building supportive industry clusters at the company's locations, firms create shared value by improving company productivity while addressing gaps or failures in the framework conditions surrounding the cluster.[71]

On the whole, the shared value approach does not differ significantly from ESV. Rather it specifies the role that the reduction of social costs by an enterprise can play in the generation of profits. As we shall see again when considering Pieconomics (para. 9.2.), the situations described by Porter and Kramer are generally of the "win-win" type for they consider actions which are at the same time beneficial to society and to the business concerned. Of course, the authors do not assume that this will always be the case. They rather suggest that the observation of reality shows that businesses which take care of societal problems are generally profitable. Clearly this could also be a case of reverse causality, given that profitable businesses could more likely seek societal benefits in the performance of their activities.

6.3. *Hart and Zingales on "shareholder welfare"*

[68] Ibidem, 7. See the example of Danone referred to in para. 3 above.
[69] Ibidem, 9.
[70] Ibidem.
[71] Ibidem, 12.

In a much cited paper,[72] Nobel laureate Oliver Hart and Luigi Zingales argue that companies should maximize shareholder welfare, which includes ethical issues, not just shareholder value. Their core intuition is simple: "The ultimate shareholders of a company (in the case of institutional investors, those who invest in the institutions) are ordinary people who in their daily lives are concerned about money, but not just about money. They have ethical and social concerns."[73] It is therefore reasonable to assume that they would want the companies in which they invest to behave accordingly, i.e. to take social factors into account and internalize externalities in their own behaviour.

Hart and Zingales feel close to that part of the literature on corporate purpose that emphasizes CSR and considers the empirical implications of a company's pursuing a broader objective.[74] Despite sharing Milton Friedman's theory of corporate purpose, they reject his criticism of corporate social responsibility. Friedman famously argued that public companies should focus on making money and leave ethical issues to individual shareholders and governments (paragraph 5.1). The former - rather than companies - should decide whether and how to spend their money on prosocial issues, like charity and similar activities. The latter should correct externalities through public regulation. Hart and Zingales submit that Friedman was right only to the extent that "the profit making and damage generating activities of companies are separable or if government perfectly internalizes externalities through laws and regulations".[75] The condition of separability occurs in particular with respect to charity activities, which can be equally or better performed by shareholders.

However, Hart and Zingales believe that corporate activities are often inseparable[76] and invite to consider as an example "the case of Walmart selling high-capacity magazines of the sort used in mass killings. If shareholders are concerned about mass killings, transferring profits to shareholders to spend on gun control might not be as

[72] O. Hart and L. Zingales, 'Companies Should Maximize Shareholder Welfare not Market Value' (2017) Journal of Law, Finance, and Accounting, 247.
[73] Ibidem, 248.
[74] Ibidem, 251, quoting approvingly two legal works in particular: E. Elhauge, 'Sacrificing Corporate Profits in the Public Interest' (2005) 80 New York University Law Review 733; L. Stout, L. Stout, *The Shareholder Value Myth*, BK Publishers, San Francisco, 2012.
[75] Ibidem, 248.
[76] Ibidem, 249.

efficient as banning the sales of high capacity magazines in the first place."[77] As a result, "when profit and damage are inextricably connected for technological reasons" companies should maximize shareholder welfare, not market value.[78] In similar situations, shareholder welfare cannot be assumed to be equal to market value, as it also includes ethical issues which should also be taken care of by firms. Moreover, the two economists argue that regulation is not always efficient in similar cases and that writing rules on the relevant issues (like treating workers with dignity) may be difficult, so that it is better to leave their implementation to shareholders. One way for the shareholders to intervene would be to let them vote on the broad outlines of corporate policy, so that they would be able to express their preferences also in terms of ethical and social values.[79]

Hart and Zingales suggest that their theory is practically relevant for the debate on fiduciary duties of corporate directors.[80] They submit, in particular, that the fiduciary duties to shareholders should be understood as directed to promote shareholder welfare, not just shareholder value. To the possible objection concerning the cost of reaching consensus amongst investors about what objectives (other than money) a company should pursue, they answer that directors could poll their members on some fundamental choices and then decide accordingly.

However, it is not sure that the proposed interpretation of fiduciary duties would add much to what is already the law in many jurisdictions, as shown in section III below.[81] Where a pluralistic approach to corporate purpose is followed, it is already clear that directors can take social issues into account when deciding on corporate actions. Where a profit purpose is narrowly assigned to stock corporations, directors are nevertheless generally allowed or even required to consider ethical and social values in the pursuit of profit. Polling shareholders would not be a good choice in many cases, given the well-known collective action problems affecting similar procedures, which

[77] Ibidem.
[78] Ibidem, 249.
[79] Ibidem, 270.
[80] Ibidem, 262.
[81] Rock, note 2, at 18, makes the following comment on Hart and Zingales paper: "Whether, overall, it would make sense as a matter of corporate governance to embrace the 'shareholder welfare' objective in place of a 'shareholder value' objective is a real world question that their interesting model does not resolve".

lead the same authors to opine, in the end, that "market value maximization can be justified as a second best objective in a world where the social preferences of shareholders are sufficiently heterogeneous."[82]

III. The Comparative Law of Corporate Purpose

In this section, I make a brief comparison of the laws concerning corporate purpose (or broadly similar concepts, such as the company's interest) in a few major jurisdictions and try to understand whether the highlighted differences are meaningful in practice or mainly reflect dominant ideologies of the jurisdictions in question at the relevant time without producing substantial effects on the way in which corporations are run. I also classify the different legal systems depending on whether they follow a shareholder primacy or a pluralistic approach, without overemphasizing however such distinction given that most systems in practice tend to find a place somewhere between the two extremes, notwithstanding their formal shareholder or stakeholder orientation.

7. *Continental Europe*

In the absence of a comprehensive company law harmonisation at EU level, corporate purpose is mainly governed by the national laws of member States, which have a long tradition in this area and show some similarities, at least in Continental Europe. However, there are harmonization efforts presently pending at EU level that I critically consider below in para. 13.3.

7.1. *The German pluralistic approach*

A comparative paper by Holger Fleisher shows that the first definition of corporate purpose in Germany was found in the Corporate Law of 1937, which was strongly influenced by the ideology of the time and made reference to the common good of the enterprise, the people and the Empire, without specifically mentioning the interest of

[82] Hart and Zingales, note 94, 271.

shareholders.[83] This definition was kept in post-war legislation with the understanding that it should be adapted to describe the new economic and political system commonly known as social market economy. The management board was tasked with the reconciliation of the company's interest with the collective one, however as a matter of public policy rather than as a duty of board members.

Corporate purpose was considered again in the works for the German Corporate Law of 1965, the first draft of which reformulated the 1937 provision by stating that the management board should manage the company under its own responsibility, as required by the good of the enterprise, its workers and shareholders, and by the common good.[84] However, the proposed provision was rejected as superfluous and other proposals were also rejected by the legislator, while acknowledging in the preparatory works that corporations should not be run only for profit, but also in the interest of the national economy and in the collective interest. In the end, the old provision which emphatically defined corporate purpose was cut back to the following: "the management board should manage the corporation under its own responsibility".[85] According to Fleischer, the 1965 provision has shown practical importance only in a few cases,[86] while scholars and courts tend to implicitly assume the enduring validity of the 1937 provision and defend a pluralist vision of corporate purpose.

The concept of shareholder value has also gained ground in the definition of corporate purpose.[87] Fleischer recalls that the original formulation of corporate purpose in the German Corporate Governance Code made reference to long-term value creation,[88] but was changed in 2009 to emphasize the role of stakeholders, given the

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[83] See Holger Fleischer, 'Gesetzliche Unternehmenszielbestimmungen im Aktienrecht – Eine vergleichende Bestandsaufnahme', in ZGR, 46, p. 411. I cite from the Italian version of this paper, 'La definizione normativa dello scopo dell'impresa azionaria: un inventario comparato', in Rivista delle Società, 2018, 803.

[84] Ibidem, at 806.

[85] Sec. 76 (1) of the German Corporate Law.

[86] Fleischer, note 15, 806.

[87] See the seminal paper by P. Mülbert, 'Shareholder Value aus rechtlicher Sicht', 26 Zeitschrift für Unternehmens- und Gesellschaftsrecht (2009) 2, 129.

[88] Fleischer, note 15, 808. See Para. 4.1.1 of the German Code of Corporate Governance 2002, convenience translation, which stated: 'The Management Board is responsible for independently managing the enterprise. In doing so, it is obliged to act in the enterprise's best interests and undertakes to increase the sustainable value of the enterprise'.

criticism addressed to capitalism after the financial crisis.[89] The same provision was changed once more in 2017[90] and was further amended in the 2019 edition of the Code, which simply states under Principle 1: "The Management Board is responsible for managing the enterprise in its own best interests". However, the Foreword to 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)'.[91] These repeated changes testify to the continuing discussion and the fluctuating political values involved in it, rather than to the practical relevance of the definitions found in successive editions of the Code. At the same time, they reflect the pluralistic vision of corporate purpose, its link to the social market economy and an overall preference for stakeholder governance.

7.2. *French new legislation and the* raison d'être *of companies*

Interesting developments have recently occurred in France, where Article 1833 Civil Codesimply provided that any company shall have 'a legal purpose and shall be formed in the common interest of the partners'. The PACTE Act of 22 May 2019 added a second paragraph to this Article stating: 'A company shall be managed in its corporate interest, factoring in the social and environmental issues raised by its business activity'.[92] Alain Pietrancosta, in a comment of this new provision, remarks that Article 1833 has remained almost unchanged since the time of Napoleon and has always represented one of the

[89] See Para. 4.1.1 of the German Corporate Governance Code 2009, convenience translation, at https://www.dcgk.de/files/dcgk/usercontent/en/download/code/D_CorGov_final_2009.pdf, stating: 'The Management Board is responsible for independently managing the enterprise with the objective of sustainable creation of value and in the interest of the enterprise, thus taking into account the interests of the shareholders, its employees and other stakeholders'.

[90] See Para. 4.1.1 of the German Corporate Governance Code 2017, convenience translation, at https://www.dcgk.de/files/dcgk/usercontent/en/download/code/170214_Code.pdf, stating: 'The Management Board assumes full responsibility for managing the company in the best interests of the company, meaning that it considers the needs of the shareholders, the employees and other stakeholders, with the objective of sustainable value creation.'

[91] See German Corporate Governance Code 2019, convenience translation, at https://www.dcgk.de//files/dcgk/usercontent/en/download/code/191216_German_Corporate_Governance_Code.pdf.

[92] See the Law No. 019-486 of 22 May 2019 concerning the growth and transformation of enterprises, known as *Loi PACTE*.

cornerstones of the French economic model.[93] Nonetheless, 'the new wording broadly reflects French case law which leans towards an open concept of corporate interest and, therefore, one that is not limited to maximizing shareholder value, as has been often alleged during discussions'.[94] He also noted that the 'reference to factoring in the social and environmental issues is, in itself, more innovative and raises a number of questions', such as the content and scope of the new obligations placed on corporate organs.[95] Pierre-Henri Conac similarly remarks that the recent reform has a strong political dimension, envisaging a broad conception of the company's interest and the need for 'un droit des sociétés sociétal', i.e. a company law subject to social imperatives.[96] In his view, the reform should be seen more as a restatement than a revolution, as French law in the last twenty years and particularly after the 2008 financial crisis has repeatedly acknowledged the corporate social responsibility (CSR) of enterprises in several pieces of legislation. Interestingly, however, the reform bill found strong opposition in the French Senate, which has presently a right-wing majority and objected that the new provisions will increase the legal risk for business enterprises, which could be sued for not taking the environmental and social issues sufficiently into account.[97]

The PACTE Act also added a new provision to article 1835 of the Civil Code, under which companies can specify their 'raison d'être' (corporate purpose) in their charter, which consists of the principles that the company adopts and complies with in the performance of its activities. Clearly, the more specific is corporate purpose, the more likely it is that obligations will derive from it to the company and its directors.[98] A generic statement of purpose will no doubt be less meaningful and more difficult to enforce. French law distinguishes corporate purpose from the company's interest,

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[93] See A. Pietrancosta, '"Intérêt social" and "raison d'être": Thoughts about two core provisions of the Business Growth and Transformation Action Plan (PACTE) Act that amend corporate law', in Réalités Industrielles, November 2019, 2 (I quote from an English translation which was kindly provided to me by the author).
[94] Ibidem, 3.
[95] Ibidem.
[96] See P. Conac, 'Le nouvel article 1833 du Code Civil Français et l'integration de l'intérêt social et de la responsabilité social d'entreprise: constat ou revolution?', in Orizzonti del diritto commerciale, 3, 2019, 500, available at http://www.rivistaodc.eu/HomePage.
[97] Ibidem, 501.
[98] See S. Schiller, 'L'évolution du röle de sociétés depuis la Loi PACTE', in Orizzonti del diritto commerciale, note 28, 525.

however overlaps may occur between these two concepts, given that the company's interest must factor in those social and environmental issues that will be more specifically defined in the charter when dealing with corporate purpose.[99] Also wealth maximization is part of both concepts, to the extent that it characterizes the concept of corporate interest together with other objectives, while the charter's definition of corporate purpose can refer to it at least as a requirement to satisfy when taking care of other interests, such as those of the workers or the local communities. In the end, French corporate law leans towards a mixed notion of the *intérêt social*, which reconciles the interest of shareholders to profit maximization with those of stakeholders and more generally with the interests of the environment and society.

7.3. *From shareholder value to sustainable success in Italian corporate governance*

Italian law is aligned with French law, however more from a doctrinal perspective than based on the text of individual rules. Italian legal scholars traditionally recognize that companies must be managed in the company's interest and the majority of them defines it as the common interest of shareholders.[100] Moreover, they tend to identify the company's interest with the purpose of profit, which is one of the core elements of the general definition of a company under Article 2247 Civil Code.[101] As a result, corporate purpose is usually constructed in terms of maximization of either corporate profits or shareholder value.[102] Exceptions are found in judicial cases, where courts (including the Supreme Court) have in the past defined the company's interest as the interest of the

[99] See I. Urbain Parleani, 'L'article 1835 et la raison d'être', in Orizzonti del diritto commerciale, note 28, 533, at 542.
[100] See A. Mignoli, 'L'interesse sociale', in Rivista delle società, 1958, 725; P.G. Jaeger, *L'interesse sociale*, Giuffrè, 1964; on the evolution of legal scholarship in this area, see the collective volume *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders. In ricordo di Pier Giusto Jaeger,* Giuffrè 2010.
[101] See L. Enriques, *Il Conflitto d'interessi degli amministratori di società per azioni*, Giuffrè, 2000, 173; U. Tombari, *"Potere" e "interessi" nella grande impresa azionaria*, Giuffrè Francis Lefebvre, 2019, 62.
[102] See G. Ferrarini, 'Shareholder Value and the Modernization of European Corporate Law', in K. Hopt - E. Wymeersch (eds.), *Capital Markets and Company Law*, Oxford University Press, 2003, 230. For a radical criticism of this and other concepts of modern corporate law, see G. Rossi, *Il conflitto epidemico*, Adelphi edizioni, 2003, 47 and 71.

company as such, rejecting the contractarian approach followed by the great majority of the scholars.[103]

Interestingly, contemporary legal scholars argue that companies could also pursue the interest of stakeholders whenever a similar behaviour is instrumental to the maximization of corporate profits in the medium-long term.[104] Moreover, they argue that corporate purpose can be specified in the company's charter, despite the fact that this is not explicitly stated in the law.[105] They also acknowledge that a similar definition could include a reference to stakeholders and to sustainability in general.[106] Consistently, the 2020 edition of the Italian Corporate Governance Code [107] states under Principle 1.I that the board of directors leads the company in the pursuit of its 'sustainable success', while defining the latter as the 'creation of value in the long term to the benefits of shareholders, taking account of the interests of other relevant stakeholders'. This definition follows the enlightened view of shareholder value.

In the end, French law and Italian law are close to each other despite the clear differences in the nature and text of the relevant provisions, which have clarified the essence of what scholars already argued in both countries when discussing the company's interest. Yet, the reference to the 'raison d'être' of the company is an innovation of French law which could bring about significant developments in corporate practice and in the end could influence future developments of European law.

8. *UK and US*

In this section, I briefly consider the role of corporate purpose under UK law and US law. Grounded on the same old cases, these two jurisdictions have evolved in different directions as to corporate purpose, even though the practical impact of such differences is modest.

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[103] See L. Enriques, note 33, 162, n. 64.
[104] See the discussion by M. Libertini, in Orizzonti del diritto commerciale, note 28, 602; U. Tombari, *"Potere" e "interessi" nella grande impresa azionaria,* Giuffrè Francis Lefebvre, 2019, 30 ff.
[105] See M. Libertini, 'Un commento al manifesto sulla responsabilità sociale dell'impresa della *Business Roundtable*, in Orizzonti del diritto commerciale, note 28, 627, at 633.
[106] See the discussion by U. Tombari, in Orizzonti del diritto commerciale, note 28, 627, at 633. See however, for critical remarks, F. Denozza, 'Lo scopo della società: dall'organizzazione al mercato', ibidem, 615, at 617.
[107] The Code is available at https://www.borsaitaliana.it/comitato-corporate-governance/codice/2020.pdf.

8.1. *Enlightened shareholder value in the UK Companies Act*

Under Section 172 (1) of the 2006 UK Companies Act: "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 (…)." This duty is "the modern version of the most basic of the loyalty duties owed by directors",[108] which applies to every exercise of judgement that the directors undertake either in the straight implementation of their powers or in situations of conflict of interest.[109] The formulation of this duty was the subject of considerable controversy in the preparatory works of the Companies Act, especially since it was proposed that the statute should not simply repeat the common law duty of directors to act in good faith in what they believed to be "the best interests of the company".[110]

A similar test was considered as too vague, so that the question arose whether the directors should be required to act in the interests of shareholders (shareholder primacy), or give equal status to all the company's various stakeholders (pluralist approach).[111] The final outcome is something between these two extremes. Section 172 (1) continues by setting a non-exhaustive list of six matters to which the directors must "have regard" in performing their duty to promote the success of the company, such as: "(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, and (f) the need to act fairly as between members of the company."

This provision not only rejects the pluralist approach - given that the interests of stakeholders are subordinate to those of shareholders - [112] but also redefines shareholder

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[108] See Gower & Davies, *Principles of Modern Company Law*, 9th ed. by P. Davies and S. Worthington, Sweet & Maxwell, 2012, 540.
[109] Ibidem.
[110] Ibidem.
[111] Ibidem, 541.
[112] Ibidem. See also P. Davies, *Introduction to Company Law*, Oxford University Press, 3rd ed., 2020, at 48, where the author argues: "If an overt stakeholder policy is not in line with the section 172 duty,

primacy. According to the Company Law Review, the philosophy behind the statutory formulation was to be one of "enlightened shareholder value (ESV)", a concept that I have analysed under para. 6.1.[113]

8.2. *US law*

Fish and Davidoff depict the evolution of corporate purpose under US corporate law.[114] The two authors explain that the statutory requirement that corporations articulate in their charter the purpose for which they are formed goes back to the time when there were statutory limitations to the use of the corporate form. Modern corporation statutes eliminated these limitations and presently do not restrict the permissible purpose for which a corporation may be formed, save for the requirement that it is lawful. As a result, most corporate charters contain a generic statement that the purpose of the corporation is to engage in any lawful activity.[115] At the same time, statutes do not require the charters to endorse a shareholder profit maximization norm. Fish and Davidoff believe that the pursuit of stakeholder and societal interest can be reflected in the purpose provisions of traditional for-profit corporations (as typically happens for public benefit corporations); however, 'few corporations contain any language in their charters reflecting a commitment in such a way as to provide questionable legal impact'.[116]

Scholars underline that in the often cited *Dodge v. Ford* the Michigan Supreme Court in 1919 held that a corporation's purpose was to maximize shareholder profit.[117] However, this was an old case, decided with reference to a non-public company, in a non-Delaware jurisdiction.[118] Moreover, it mainly concerned the duties of a controlling shareholder (Henry Ford) towards minority shareholders (Horace and John Dodge).[119] Few other cases have subsequently addressed corporate purpose, notably a number of

there is nevertheless considerable scope for boards to promote non-shareholder interests within the confines of the section ('covert' stakeholderism)".

[113] See DTI, Company Law Reform, 2005, 20.

[114] J. Fish and S. Davidoff Solomon, note 1.

[115] Ibidem, 105.

[116] Ibidem, 105-106.

[117] 204 Mich. 459 (MI 1919).

[118] See L. Stout, note 75, 27.

[119] Ibidem, 26 arguing that the court's statements on corporate purpose are to be seen as a dictum.

cases in Delaware concerning mergers and acquisitions. In *Revlon v. MacAndrews & Forbes Holdings, Inc.* [120] the court held that in a change of control situation the board was required to obtain the 'highest price for the benefit of the stockholders' rather than prioritizing the interests of noteholders.[121] As argued by E. Rock, in such cases the corporation is sold for cash and the shareholders will not have any long term interest in it.[122] In similar circumstances, "Delaware courts are crystal clear that the duty of the board is to secure the highest value reasonably available for shareholders, and may not balance the interest of shareholders against the interests of other stakeholders".[123]

More generally, Rock analyses corporate purpose focussing on the corporate form. He argues that in "traditional" jurisdictions the "objective" of the corporation is that identified by Chancellor William Chandler of the Delaware Supreme Court: "to promote the value of the corporation to the benefit of its stockholders".[124] The situation is different in "constituency jurisdictions" like Pennsylvania, where the statute explicitly rejects the shareholder primacy and allows the board of directors to consider all relevant interests, making it clear that the board need not put shareholders' interest first. Nevertheless, in traditional jurisdictions like Delaware, shareholder primacy is not dictated by the statute, but grounded on case law.[125] In cases of conflict between the interests of shareholders and those of stakeholders, the courts either are in a condition to defer to the discretion of the board under the business judgement rule or affirm the primacy of shareholders interest.

Rock also criticises the thesis advanced by shareholder value opponents, including the late Lynn Stout, who argued passionately that the business judgement rule would ensure that managers of public company have no enforceable legal duty to maximize shareholder value. [126] Rock concedes that outside of the sale of company context there is no general legal duty to *maximize* shareholder value, but insists that there is a general

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[120] 506 A.2d 173 (Del. 1985), 182.
[121] J. Fish and S. Davidoff Solomon, note 40, 120, who argue that the rationale behind Revlon and other Delaware takeover cases was regulating inherent conflicts of interest and therefore managerial loyalty, rather than shareholder primacy, citing Z. Gubler, 'What's the Deal with Revlon? (working paper, draft dated Feb. 24, 2020) to this effect.
[122] E. Rock, note 2, 9.
[123] Ibidem.
[124] Ibidem, 8, referring to e-Bay Domestic Holdings, Inc. v. Newmark, 16 A.3rd 1, 34 (Del. Ch. 2010).
[125] Ibidem, 9.
[126] See L. Stout, note 75, 32.

legal duty to *pursue* or *promote* such value as decided in the *e-Bay* case.[127] He concludes however that the shareholder primacy framework of Delaware corporate law does not answer many of the questions that "partisans" think it should. It does not decide, for instance, that shareholders as "owners" of the corporation "have the right to tender into a tender offer at a premium to the current market price"; or that corporations "must reduce wages to the minimum to maximize current share price".[128] He adds that Delaware corporate law is deeply "board centric" and that under the business judgement rule courts give great discretion to the board to the extent that directors are disinterested and act in good faith. As a result, "disinterested directors seeking in good faith to promote the value of the corporation have the discretion to make the decisions that they believe are best for the corporation and its stakeholders".[129]

Moreover, Rock suggests that constituency jurisdictions do not diverge from traditional ones beyond the point of rejecting the *Revlon* doctrine in the sale of control context.[130] On one side, boards in traditional jurisdictions may take into account the interests of stakeholders in a large range of areas under the discretion granted to boards outside of "conflict" scenarios. On the other, courts in constituency jurisdictions follow traditional approaches outside of the sale of company context; some of them even interpret the constituency laws as consistent with the shareholder primacy approach.

8.3. *A brief comparison*

Corporate law is criticized by some for mainly focusing on shareholder wealth and considering profit as the corporate purpose par excellence.[131] However, this criticism does not hold from a comparative law perspective, as shown by our analysis of European and US laws, which do not necessarily consider shareholder value as the sole corporate purpose despite the emphasis put on this concept in financial practice. Noteworthy examples are the "constituency" jurisdictions in the US and German law, which are more oriented to the enterprise than to the corporation and are to some extent focussed on

[127] Rock, note 2, 13. For the e-Bay case, see note 124.
[128] Ibidem, 11.
[129] Ibidem, 12.
[130] Ibidem.
[131] See the works by C. Mayer and A. Edmans discussed below at para. 9.1. and 9.2.

stakeholders, as shown in particular by the codetermination regime applicable to large corporations in Germany.[132]

True, other corporate laws in Europe and the US define corporate profit as the main purpose of the company and the shareholders' interest as the main interest to pursue in the management of companies.[133] However, stakeholders are taken care of on governance grounds even in countries that do not follow the pluralist model of corporate governance, but a shareholder primacy model. Stakeholders' protection in these countries mainly depends on either contracts or regulation (such as environmental and labour laws), but also on corporate governance to the extent that stakeholders' interests are considered at board and management levels. Under this approach, the task of the board of directors and top management is to reconcile the interests of shareholders with those of stakeholders in view of maximizing the enterprise value over the long term.[134]

In a similar vein, the theory of enlightened shareholder value that I considered in para. 6.1. above suggests that shareholder wealth should be maximized in the medium-long term, which requires the interests of stakeholders to be met as a condition for maximizing the value of the firm.[135] Section 172 of the UK Companies Act, which was quoted above, reflects this theory.[136] Moreover, a shareholder value approach has been widely followed by corporate governance codes applicable to listed companies in all major jurisdictions, including Germany where corporate law is stakeholder oriented, but shareholder value concepts have been imported as a consequence of capital markets development.[137] No doubt, the emphasis on shareholder value is stronger when a company is listed and its shares are traded on the capital markets, given that investors

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[132] See K. Hopt, 'Labour Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe' in R. Buxbaum et al. (eds.), *European Economic and Business Law* (Berlin/New York 1996) 269.

[133] See G. Ferrarini, note 103, 230 ff.

[134] See M. Becht, P. Bolton and A. Roell, 'Corporate Governance and Control', ECGI Finance Working Paper 02/2002, arguing that corporate governance is concerned with the resolution of collective action problems among dispersed investors and the reconciliation of conflicts of interest between various corporate claimholders.

[135] See M. Jensen, note 56, 8.

[136] See V. Harper Ho, 'Enlightened Shareholder Value: Corporate Governance beyond the Shareholder-Stakeholder Divide' (2010) 36 Journal of Corporation Law 59.

[137] See Ferrarini, note 103, 232 ff.

expect a return on their investment which can derive both from dividends and capital gains.[138]

IV. Social Value Acolytes v. Shareholder Value Purists

The statements of international bodies and corporations cited in section I of this paper find strong support in recent scholarly writings on the economics and politics of corporate purpose, but are heavily disapproved by others. In the present section I critically analyse three of these works, two wholeheartedly supporting the current stakeholderist trends and the third objecting to them from a pure shareholder value perspective. My criticism of similar approaches moves from an intermediate perspective, which is substantially grounded on ESV, however with the refinements specified in para. 13 below.

9. *Colin Mayer on "Prosperity" and corporate purpose*

Prosperity by Colin Mayer, an Oxford economist and professor of management,[139] has influenced the policy discussion in several countries, suggesting an enlarged view of corporate purpose that goes beyond the mere pursuit of profit. Having recently published an extensive review of this book,[140] in this paragraph I summarize its main ideas and limits.

9.1. *Commitment to corporate purpose*

Mayer defines the corporation as an instrument of commitment, which must be understood as commitment to corporate purpose. In his words, the corporation assures commitment, which generates trust and facilitates the relations with the different parties involved, in adherence to corporate purpose.[141] He argues that the firm's key

[138] See P. Davies, 'Shareholder Value, Company Law, and Securities Markets Law', in Hopt and Wymeersch (eds.), note 19, 261 ff.
[139] C. Mayer, *Prosperity*. Better Business Makes the Greater Good, Oxford University Press, 2018.
[140] G. Ferrarini, 'An Alternative View of Corporate Purpose: Colin Mayer on Prosperity' (2020) Rivista delle società, 1, 27 (downloadable as a working paper at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552156).
[141] Mayer thinks of the corporation as an institution: "the law recognizes that the corporation is a legal personality distinct from its shareholders" (*Prosperity*, …). However, in his theory relations play a decisive role.

determinants are purpose, ownership and governance. But corporate purpose is not simply to make profits, which are rather its product. Successful corporations have a clearly defined purpose, stable and supportive ownership, and accountability of boards and directors. Mayer defines them as "enlightened corporations". They balance and integrate the six components of capital that ground business activities: human, intellectual, material, natural, social, and financial capital. In his opinion, company law should be reformulated to require corporations to articulate their purposes, along the model of the benefit corporation under US corporate law.[142]

Mayer believes that it is wrong to protect shareholders by emphasizing their rights and powers, and viewing the corporation as their instrument. However, he also thinks that it would be wrong to transfer control of the corporation to stakeholders such as creditors, customers or employees, for this would make it difficult to raise capital. He rather suggests to enhance the separation of management control from ownership of the firm and focus on the fiduciary responsibility of directors to the members of the corporation. This is what Hansmann and Kraakman define as the 'trustee model' of stakeholder governance, distinguishing it from the 'representative model'.[143] Both models address the problem of protecting non-shareholder interests in the corporation. However, under the representative model qualified non-shareholder constituencies appoint their own directors, who together elaborate policies that maximize the joint-welfare of all stakeholders subject to the bargaining between different groups in the boardroom. Under the trustee model the board of directors and the senior managers act on behalf of the entire enterprise by co-ordinating the contributions and returns of all of its stakeholders.

9.2. *Governance of purpose*

In Mayer's proposed model, directors balance the interests of shareholders with those of creditors, employees, customers, and communities, in pursuit of the long term

[142] The benefit corporation has a stated public purpose alongside its commercial objectives, which are enshrined in its charter. Moreover, directors have a fiduciary duty to uphold those public purposes and "if they fail to do so then shareholders can seek injunctive relief to prevent them abusing the corporation's purposes"(p. 42).

[143] See H. Hansmann and R. Kraakman, 'The End of History for Corporate Law', in 89 Geo. L. J. 439 (2001).

prosperity of the corporation. In fact, an excessive focus either on shareholders returns or on stakeholder interests would jeopardize the delicate balance between present members and future generations. A similar argument was advanced by Blair and Stout in their works on the team production theory of corporate law, which focuses attention on the mediating role of the boards of directors.[144] Mayer similarly assigns to the board the role of defining and implementing the corporate purpose and of monitoring the firm's commitment to it. In his theory, corporate purpose should be defined by contract and fiduciary duties should be based on the corporate purpose so defined. This would originate trust in the corporation by its members. The solution proposed is clearly grounded on private law. Indeed, Mayer argues that regulation has been a failure because the interests of regulators are opposed to those of shareholders. Company law should be reformed so as to replace regulation, which would require redefining corporate purpose and avoiding its identification with the pursuit of profit.

Mayer describes corporate governance as 'governance of purpose', while defining purpose as 'the reason for a company's existence'.[145] However, 'corporate governance is not and should not be about enhancing shareholder value'.[146] The correct focus of corporate governance should be about how all aspects of ownership, boards, and remuneration promote corporate purpose and the success of companies. Company's customers should comprise all of its consumers, communities, and citizens. In this way, corporate governance enhances economic growth, entrepreneurship, innovation, and

[144] M. Blair and L. Stout, 'A Team Production Theory of Corporate Law', in 85 Vanderbilt L. R. 247 (1999). The two authors started from the premise that the central problem to be solved in organizing production activities in corporations is a 'team production' problem, which typically occurs when several types of resources are used, the product is not the sum of separable outputs of each cooperating source, and not all resources used in the team production belong to one person. Some economists have suggested that one solution to the team production problem is to give final authority over the allocation of the output to an outsider to the team. Blair and Stout argue that this governance arrangement fits the role that the law assigns to boards of directors in corporations. Indeed, corporate law requires that many of the most conflicted and contentious decisions about corporate policy must be made by the board of directors, and in some cases by a subset of directors who form a committee of disinterested directors. See also M. Blair, 'Boards of Directors and Corporate Performance under a Team Production Model', in J. Hill and Randall Thomas, *Research Handbook on Shareholder Power*, Elgar, 2015, 249, at 257.

[145] Mayer, note …, 109. He also argues that companies exist to do things, not simply to make profits: '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'.

[146] Ibidem, 113.

value creation. It may also lead to increased shareholder value; but in an inversion of the traditional ranking 'purpose is primary and shareholder value derivative'.[147] This last statement reflects the widespread and well known criticism of the shareholder value philosophy. However, similar criticism is usually addressed to managerial excesses in the pursuit of corporate profits, particularly short-term profits, rather than to the practice of long-term value maximization which also takes into account stakeholders' interests.

If we take the suggested 'inversion' literally – purpose is primary and shareholder value derivative – Mayer's theory appears to be a radical version of stakeholder theory. Under the prevailing theory, stakeholders' interests are satisfied subject to long-term shareholder value maximization, whereas Mayer subordinates shareholder value maximization to the realization of corporate purpose. Therefore, shareholder wealth is not necessarily maximized when corporate purpose, as announced in the corporate charter, is fulfilled. Indeed, there might be cases in which the activities required by the commitment to corporate purpose are pursued by the managers even in the absence of a foreseeable long-term value maximization.

Mayer rejects regulation as an appropriate response to the problems of today's corporations, save for financial firms. He would mainly rely on private law and corporate governance as means to ground commitment to corporate purpose. He also suggests to specify corporate purpose in the articles of association of companies, a solution that has been recently adopted by the French legislator allowing them to define their *raison d'être* in the statute. Clearly, there are limits to this remedy, for the wording of corporate purpose will often be generic; managers will always find ways to circumvent it; shareholders will find it difficult to monitor compliance; enforcement of similar undertakings in cases of breach will be too difficult.[148]

9.3. *Our view*

I personally believe that regulation should have a greater say in disciplining corporations than Mayer suggests. We cannot expect companies to fully internalize the

[147] Ibidem, 114.

[148] For a strong criticism of this type of solution from a legal perspective, see M. Ventoruzzo, 'Brief Remarks on "Prosperity" by Colin Mayer and the often Misunderstood Notion of Corporate Purpose' (2020) Rivista delle società, 1, 43, at 46.

social costs of their externalities in areas like, for instance, climate change or corruption. Similarly, we cannot rely on corporate governance and shareholders as the main instruments to preserve the integrity of corporations. We need regulation and to some extent criminal law to obtain compliance with the legal principles protecting the environment and the social conditions within the firms. No doubt, corporate governance and ownership (including institutional investors and controlling shareholders) can contribute to effective compliance and are therefore good complements to regulation, but we should not expect them to become substitutes for regulation. Environmental and social issues are, for many aspects, similar to the stability and systemic issues generated by financial institutions, which are widely dealt with under financial regulation.

Company law is largely enabling today and leaves room for private autonomy, including the definition of corporate purpose. However, mandatory provisions for corporations are increasingly found in securities regulation, which applies to listed companies and often works as a substitute for corporate law.[149] Also corporate governance is to some extent subject to regulation, the reason being that we cannot always expect corporations and their managers to take care of investor protection. Mayer rightly comments that rules protecting minorities may diminish the effectiveness of controlling shareholders in pursuing idiosyncratic value and therefore reduce the growth and prosperity of companies. However, arguments of this type highlight some serious limits of regulation, but should not substantially detract from the core reasons for it.

As argued in my review of *Prosperity*, corporate purpose should rather be seen from the intermediate perspective of the enlightened shareholder value theory, which represents a compromise between the traditional shareholder primacy theory and the stakeholder approach to the corporation.[150] Moreover, corporate purpose should be

[149] The importance of corporate law is however declining as a result of the rise of institutional investors: see Z. Goshen and S. Hannes, *The Death of Corporate Law*, ECGI Law Working Paper N° 402/2018 May 2018, arguing that the more competent shareholders become, the less important corporate law will be. Increases in shareholder competence reduce management agency costs, intensify market actors' preference for private ordering outside of courts, ultimately driving corporate law into oblivion.

[150] The former is well exemplified by M. Friedmann, 'The Social Responsibility of Business is to Increase its Profits', The New York Times Magazine, September 13, 1970; the latter by R. Freeman, *Strategic Management: A Stakeholder Approach*, Cambridge University Press, 2nd ed. 2010.

specified and implemented in practice mainly by the board of directors and the top managers, who should reconcile the interests of the shareholders with those of other stakeholders and the community in general.

10. *Alex Edman's "Pieconomics"*

Another book deals innovatively with corporate purpose and with the question whether firms should be run mainly for shareholders. In *Grow the Pie* by Alex Edmans, [151] a professor of finance at London Business School, the pie represents the value an enterprise creates for society. The different members of society capture different slices of the pie, depending on what strategy management chooses to adopt. They are investors, on one side; stakeholders (customers, employees, suppliers, environment, government and communities), on the other. Investors enjoy profits, but the pie includes more than profits. It includes the value that an enterprise gives to its employees, "their pay, but also training, advancement opportunities, job security, and the ability to pursue a vocation and make a profound impact on the world".[152]

10.1. *Pie-splitting v. pie-growing*

The pie also includes the value that customers enjoy over and above the price they pay ("surplus"). Moreover, it includes the value accruing to suppliers through a stable source of revenue, i.e. the value of funding.[153] Furthermore, the pie includes the value provided to the environment, by reducing resource consumption and carbon emissions. In addition, it includes the value enjoyed by communities, as an enterprise provides employment opportunities, contributes to schools, donates its knowledge or products to local initiatives, etc. Lastly, the pie includes the value given to the government through tax revenues. On the whole, stakeholders enjoy value, while investors enjoy profits which are a form of value.

Edmans defines the traditional approach to his book's topic as "pie-splitting mentality." Such approach views the pie as being fixed in size, so that the only way to

[151] A. Edmans, *Grow the Pie*. How Great Companies Deliver Both Purpose and Profit, Cambridge University Press, 2020.
[152] Ibidem, 19.
[153] Ibidem, arguing that "what matters is not only how much money suppliers receive, but how promptly they're paid"

increase one member's share of the pie is to split it differently. Since the pie is fixed, at least in the short-term, the only way to maximise profits is by taking from stakeholders.[154] Pie-splitting can be done almost immediately at zero cost. Enterprises can take surplus from customers either by "price-gouging" or by pushing products that customers don't need or don't understand.[155] They can also exploit employees - e.g. by paying workers below the minimum wage – or squeeze suppliers by paying them as late as possible.[156]

The new approach suggested by Edmans – that he dubs "pie-growing mentality" - sees the pie as expandable "to create value for society … Profits, then, are no longer the end goal, but instead arise as a by-product of creating value (…)."[157] Investors do not need to take from stakeholders, and stakeholders don't need to defend themselves from investors. Edmans uses the term *Pieconomics* to capture "an approach to business that seeks to create profits only through creating value for society".[158] His views differ from traditional CSR which in his opinion typically refers to activities such as charitable contributions. *Pieconomics* rather ensures that the primary mission of the core business is to serve society. Being a responsible business isn't about splitting the pie differently (e.g. sacrificing profits to reduce carbon emissions), but about growing the pie by innovating and being excellent at its own business. Indeed, enterprises often fail to serve society not by giving too much to leaders or investors, but by failing to grow the pie by sticking to the status quo.[159]

10.2. *Comparison with ESV*

Edmans shows that enlightened shareholder value (ESV) agrees with the pie-splitting mentality that an enterprise's goal is to maximise profits, but recognises that doing so in the long run requires it to grow the pie and thus serve stakeholders. Therefore ESV takes

[154] Ibidem, 20.
[155] Ibidem, 23, noting that from 1990 until the mid-2010s, UK banks sold payment protection insurance to customers who took out mortgages, loans and credit cards. This insurance had the potential to create value by repaying customers' debts if they lost their jobs or became ill, but it was mis-sold.
[156] Ibidem.
[157] Ibidem, 26.
[158] Ibidem.
[159] Ibidem, 27.

a long-term approach, albeit to maximise profits rather than social value. ESV has many similarities with Pieconomics. Both highlight the criticality of companies investing in their stakeholders. Both argue that investor value and stakeholder value are highly correlated in the long run. Both stress the importance of profits. However, ESV argues that an enterprise's ultimate goal is to increase long-term profits, while Pieconomics argues that an enterprise's ultimate goal is to create value for society – and by doing so, it will increase profits as a by-product. Profits are an outcome, as in Mayer's *Prosperity*, not a goal.

Edmans concedes that ESV is better than Pieconomics under two angles. First, ESV is "concrete" having a single, clear objective: to increase long-term profit. Pieconomics has multiple objectives and therefore does not offer a clear-cut way to take decisions.[160] Second, ESV is "focused". A company practising ESV will only take an action if it boosts its profits. It won't spend millions on reducing emissions if they're already below the level that would lead to a fine, whereas a pie-growing enterprise might do so, simply to help the environment and such actions may reduce profits.[161] Edmans argues, nonetheless, that the pie-growing mentality is preferable because it is "intrinsic" rather than "instrumental". Under ESV, a company should only create value for stakeholders if this increases profits in the long term. In other words, for ESV an enterprise should be instrumentally motivated to create profits, whereas for Pieconomics it should be intrinsically motivated to create social value.

However, the reason why "intrinsic" is better than "instrumental" is not clear, as Edmans rather focuses on the limits of the ESV approach. He objects that the idea of instrumental profit maximisation often does not work in practice, because it is very difficult to estimate the costs and benefits of most actions. When decisions are driven by the desire to achieve outcomes, they should be made on the basis of outcomes that can be quantified with some degree of accuracy, but most important outcomes cannot be quantified. He refers to "stakeholder capital" as an example, i.e. to the strength of an enterprise's relationships with its stakeholders, including the trust that customers place in a company's brand and the commitment of employees to its mission. The returns to

[160] Ibidem, 43:"By trying to be everything to everybody, a pie-growing enterprise can end up being nothing to nobody".
[161] Ibidem.

intangibles like stakeholder capital are uncertain and distant: "even if they do arise, they will be far into the future".[162]

Edmans argues that Pieconomics is different. A pie-growing enterprise makes decisions for intrinsic reasons – to create value for society. Stakeholders are the end itself, rather than a means to an end. Moreover, in the long run, almost all value becomes financial value. Growing the pie provides clearer practical guidance than growing profits, and leads to more investments, because it's much easier to see how an investment will affect stakeholders than profits.[163]

10.3. *Assessment*

All this is interesting, but raises some difficulties. Why is creating social value directly better than creating it through the pursuit of profit? Who assures that the pursuit of social value will generate profits in the long run? While it is easier to see how an investment will affect stakeholders than profits, how should one choose such an investment with respect to others without having regard to profits? Here the limits of Pieconomics as a multiple-objectives approach emerge. Indeed, the criteria for choosing between different investments in favour of stakeholders are left undefined, which is hard to accept for a private enterprise which invests shareholder capital.

Edmans adds to the merits of Pieconomics that it also takes externalities into account, while ESV considers only profits. Most actions creating social value will increase long-run profits, but a few will not. Pieconomics argues that corporate leaders should go beyond their legal responsibility to shareholders and care about externalities. Also investors care about externalities not only due to being stakeholders themselves, but also for altruistic reasons. As Oliver Hart and Luigi Zingales have argued, shareholder welfare includes not only shareholder value, but also externalities (para. 6.3 above). Indeed, these externalities are becoming increasingly important to investors who largely invest under Socially Responsible Investing (SRI) strategies, which choose stocks on social rather than purely financial criteria.[164] Even many mainstream investors, who are

[162] Ibidem, 45.
[163] Ibidem, 47, noting that "Maximize shareholder value is a futile objective, since you can't predict how most actions will affect long-term shareholder value".
[164] Ibidem, 53.

not classified as 'socially responsible', take externalities very seriously.[165] All this is fine, but still we should better understand what motivates the "intrinsic" approach, that is to say what are the values justifying a similar approach and which are the sources of these values, a task that I will try to perform in para. 13.

11. *Rebecca Henderson on Reimagining Capitalism*

Another brilliant book touching upon the topics of this section and emphasizing the role of social value in the management of big business was recently published by Rebecca Henderson, an economist and University Professor at Harvard Business School.[166] The book is based on a successful MBA course on *Reimagining Capitalism* regularly given by the author and is considered here mainly for those parts which are connected with this chapter's topic.

11.1. *The promise and limits of shared value*

Henderson starts her journey to a new conception of capitalism from shared value, a theory that we have seen championed by Porter and Kramer (para. 6.2.). She argues that the evidence supports "a business case for creating shared value or for treating people well and reducing environmental damage".[167] She considers particularly three cases of large companies which have shown how business and therefore capitalism can be rethought.

The first is Unilever's switching to the distribution of 100 percent sustainably grown tea under the Lipton brand, which took place after the beginning of this century and was motivated by risk management and marketing considerations. The first was that ensuring the supply of tea would reduce the firm's exposure to risk, given that the prevailing practices of growing tea – such as deforestation and large-scale application of insecticides, pesticides and fertilizers - were putting the entire viability of the supply

[165] Ibidem, arguing that "Across all investors, 2,372, representing $86.3 trillion of assets, had signed the UN Principles for Responsible Investment – a commitment to incorporate environmental, social and governance (ESG) issues into investment decisions – by March 2019. That's substantially higher than the 63 investors and $6.5 trillion of assets when the principles were founded in 2006".
[166] Rebecca Henderson, *Reimagining Capitalism.* How Business Can Save the World, Penguin Business, 2020.
[167] Henderson, note 166, 49.

chain at risk.[168] The second argument also concerned risk exposure on the supply chain, with particular regard to the grim working conditions on conventional tea plantations: tea workers were often paid less than $1 a day and many suffered from inadequate housing and sanitation.[169] The third argument stated that embracing sustainability would increase consumer demand for Unilever's teas. Indeed, most consumers are not willing to pay more for sustainable products, which are seen by most of them as something "nice to have" rather than a "must have".[170] However, "if they find a product that they like – one that ticks all the right boxes in terms of quality, price, and functionality – then many of them will switch to the more sustainable product".[171] As a result of this and other initiatives, "in June 2019, Unilever announced that its 'sustainable living' brands were growing 69 percent faster that the rest of the business and generating 75 percent of the company's growth".[172]

The second case referred to by Henderson is that of Walmart, the gigantic retail company which over thirty years reinvented its business developing skills in logistics, purchasing and distribution that led it becoming one of the largest companies in the world.[173] After being increasingly under fire for anti-union activities, gender discrimination, employment of illegal immigrants, child labour etc., Walmart decided to take a strong stance on corporate responsibility.[174] As a result of its sustainability programs, the company found to its surprise that saving energy was making it gain a great amount of money: "By 2017 Walmart had met its goal of doubling the transportation fleet's efficiency and was saving more than a billion dollars a year in transportation costs – around 4 percent of net income".[175] While at Unilever building a sustainable business model meant identifying fundamental shifts in consumer behaviour, Walmart's success came from focussing on the everyday operational details

[168] Ibidem, 52.
[169] Ibidem, 53.
[170] Ibidem, 54.
[171] Ibidem, 59.
[172] Ibidem.
[173] Ibidem, 60.
[174] Ibidem, 62.
[175] Ibidem, 64.

of its business from the profoundly different perspective of sustainability: "In its way, Walmart's commitment was just as transformative as Lipton's."[176]

The third business case concerns renewable energy and in particular CLP, one of the largest investor-owned utilities in Asia. CLP announced in 2004 that 5 percent of its power would come by 2010 from renewables and in 2007 reiterated that 20 percent of its generating capacity would be carbon free by 2020.[177] In 2013 the CEO of CLP explained the company's strategy by saying: "We see carbon as a long-term threat to any business. In 2050, if you are a carbon-intensive business, you are in big trouble; chances are you won't be in business by then".[178] Henderson comments that "the flip side of risk is opportunity … moving to carbon-free energy ahead of the competition was potentially an exceedingly attractive business opportunity".[179] Subsequent events have proven this assumption to be correct, as alternative energies like solar and wind are already in some places cheaper than coal.

Henderson concludes the case studies just summarized by noting that there is enormous opportunity to create shared value.[180] By addressing environmental and social problems firms can build successful new businesses (CLP), reduce their costs (Walmart), and ensure long term sustainability of their supply chains while increasing demand for their products (Unilever).[181] This is in line with what already argued by Porter and Kramer who showed that companies can create economic value by generating societal value in at least three possible ways (para. 6.2.). Firstly, by reconceiving products and markets in response to the growing demand for products and services that meet societal needs (CLP and alternative energy; Unilever and sustainable tea). Secondly, by redefining productivity in the value chain, where societal problems can create internal costs to the firm (Walmart and the reorganization of its logistics to save on energy and transportation costs). Thirdly, by building supportive industry clusters at the company's locations, improving company productivity while addressing

[176] Ibidem, 64-65.
[177] Ibidem, 65.
[178] Ibidem, 69.
[179] Ibidem.
[180] Ibidem, 82
[181] Ibidem.

gaps or failures in the framework conditions surrounding the cluster (Unilever and the tea industry).

11.2. *Organizational purpose as key to change*

Henderson argues that, in addition to shared value, organizational purpose is key to change.[182] The reasons for it are grounded on organizational psychology more than anything else. Purpose "aligns everyone in the organization around a common mission"; "it gives everyone a reason to work toward the goals of the organization as a whole"; "it unleashes … creativity, trust and sheer excitement".[183] Henderson acknowledges the importance of "extrinsic" motivation – such as that deriving from money, status and power – but argues that "intrinsic" motivation is often more powerful.[184] "Shared purpose" makes people in the organization feel that their work has "meaning", "creates a strong sense of identity" and enhances "positive emotions".[185]

This is the language of behavioural science and motivational theory. We know that human motivation has at least three drivers: autonomy, mastery and purpose.[186] As argued by Daniel Pink, the prolific writer on business and human behaviour, "autonomous people working toward mastery perform at very high levels. But those who do so in the service of some greater objective can achieve even more. The most motivated people … hitch their desires to a cause larger than themselves."[187] Mihaly Csikszentmihaly, the great psychologist, similarly remarked: "In the lives of many people it is possible to find a unifying purpose that justifies the things they do day in, day out – a goal that like a magnetic field attracts their psychic energy, a goal upon which all lesser goals depend."[188]

If we translate these concepts into the language of business, we recognise that "the profit motive, potent though it is, can be an insufficient impetus for both individuals and

[182] Ibidem, 83.
[183] Ibidem, 92.
[184] Ibidem.
[185] Ibidem, 93.
[186] See D. Pink, *Drive*, Canongate, 2009, 85 ff.
[187] Ibidem, 133.
[188] See. M. Csikszentmihalyi, *Flow.* The Psychology of Optimal Experience, HarperCollins, 1990, 218.

organizations".[189] To illustrate it, Gary Hamel, the influential business thinker, makes reference to Whole Food Market, a company with a game changing business model and the following corporate purpose: "to reverse the industrialization of the world's food supply and give people better things to eat".[190] Its CEO "sees profits as a means to the end of realizing Whole Foods' social goals."[191] In 2005 he wrote: "We want to improve the health and well-being of everyone on the planet through higher quality food and better nutrition"; but also specified: "We cant' fulfil this mission unless we are very profitable."[192] Hamel acutely posits: "At Whole Foods, profits are the score, not the game".[193]

11.3. *Comparative assessment*

If we compare Henderson's work with the other ones examined in this section, two main differences are worth noticing beyond the obvious commonalities. Firstly, Henderson explicitly adheres to the shared value approach highlighting its potential contribution to the promotion of sustainability in business. True, it is not always easy to create shared value, which often requires technological innovation, investment of large amounts of money and management foresight, as documented by the business cases referred to by the author. However, the shared value approach is a good candidate to explain many of the situations in which Mayer and Edmans see the need for social value to prevail over corporate profit or at least for corporate profit to play a balancing role in corporate actions directed to the pursuit of social value. Secondly, Henderson follows a conception of corporate purpose which is mainly grounded on organizational theory and behavioural science, helping to explain the role of corporate purpose as a motivator beyond profit. This allows the author to keep both profit and social value in her reference framework, possibly configuring profit as an intermediate step in the way to produce social benefits through business activities.

[189] Pink, note 187, 134.
[190] See G. Hamel, *The Future of Management*, Harvard Business Review Press, 2007, 76.
[191] Ibidem, 77.
[192] Ibidem.
[193] Ibidem.

12. *Lucian Bebchuk and Roberto Tallarita on stakeholderism*

Departing from the theoretical approach just examined, which highlights the importance of social value in business firms, a recent paper by two Harvard law and economics scholars, Lucian Bebchuk and Roberto Tallarita, takes issue with the views indicated in sec. I of this chapter and warns against the growing acceptance of stakeholderism.[194] Their opposition to this rising trend in corporate governance is unconditional. Stakeholderism should not be expected to benefit stakeholders; to the contrary, it would impose substantial costs on them and society, as well as on shareholders.[195]

12.1. *Is ESV different to traditional shareholder value?*

The two authors argue that corporate leaders have strong incentives to enhance shareholder value, but little incentive to treat stakeholder interest as an end in itself. Corporations will pursue stakeholder interests only to the extent that it is beneficial to shareholders. In addition, stakeholderism makes corporate leaders less accountable by insulating them from shareholder pressures: "Indeed, (…) the support of corporate leaders and their advisors for stakeholderism is motivated, at least in part, by a desire to obtain insulation form hedge fund activists and institutional investors".[196]

Bebchuk and Tallarita distinguish between two different versions of stakeholderism: the "enlightened shareholder value" (ESV) approach and the "pluralistic approach". Under the ESV, corporate directors and top executives take stakeholder interests into account as a means to maximize long-term shareholder value. The two authors call it "instrumental stakeholderism", but suggest that it is not different to shareholder value *tout court*. In their opinion, whenever treating stakeholders well in a given way is useful

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[194] L. Bebchuk and R. Tallarita, 'The Illusory Promise of Stakeholder Governance' (February 26, 2020), forthcoming, Cornell Law Review, December 2020, available at https:/ssrn.com/abstract=3544978. See also, in a similar direction, Matteo Gatti and Chrystin Ondersma, 'Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera' forthcoming The journal of Corporation Law, November 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547791, focussing however on stakeholderism's incapacity to redress inequality. Gatti and Ondersma aim to demonstrate that a stakeholder approach can do nothing to ameliorate inequality concerns and suggest a multidisciplinary framework to evaluate policies inside and outside corporate governance.

[195] Ibidem, 2.

[196] Ibidem, 5.

for long-term shareholder value maximization, such treatment would be called for under either ESV or shareholder value.[197]

The two authors ask what could be the reason for switching to ESV and offer three possible reasons. The first is that referring to stakeholder effects has "informational and educational value" for the board and management of corporations.[198] However, they argue that there is no evidence that corporate leaders have systematically underestimated the stakeholders' effects on shareholder value maximization, finding therefore no reason for educating the same. The second reason is that ESV provides "moral support and practical coverage for directors who wish to offer some benefit to stakeholders at the expense of shareholders".[199] They object nonetheless that also under "old-fashioned" shareholder value directors would be able to justify a stakeholder-friendly decision on the basis that it would contribute to long-term value maximization. The third reason is that the move to ESV would improve the way in which corporations are perceived by outsiders and therefore produce positive reputational effects.[200] Nevertheless, they argue that the move could have significant adverse effects by reducing demand for meaningful legal and regulatory reforms that could effectively protect stakeholders.

In my opinion, none of these objections is decisive. Firstly, the fact that directors and managers already consider stakeholder interests that are instrumental to long term shareholder value maximization does not deprive ESV of educational value. In fact, reiterating the benefits of similar behaviour is not costly and may be beneficial in some cases. Secondly, the fact that not only ESV, but also "old fashioned" shareholder value allows directors and managers to act in the interest of selected stakeholders when their actions are in the long-term interest of shareholders, is insufficient to discard ESV, which is different to shareholder value exactly for its emphasis on the long-term, enlightened view of the corporation. Thirdly, there are no doubt reputational advantages from the corporations' acting in the interest of selected stakeholders, which however should not necessarily lead to the legislator's excluding or limiting their protection. A similar

[197] Ibidem, 12.
[198] Ibidem, 13.
[199] Ibidem.
[200] Ibidem, 14.

outcome will mainly occur when the incentives for corporations to further the interest of given stakeholders at the expense of shareholders' short-term interest are too low.

12.2. *Limits of the pluralistic approach*

Bebchuk and Tallarita describe the second version of stakeholderism as one treating "stakeholder welfare as an end in itself rather than a mere means". It is a "pluralistic approach" because it requires directors to weigh and balance a plurality of autonomous ends. They see several conceptual problems arising in this respect. The first is to identify the stakeholder groups whose interests should be taken into account. The term "stakeholders" usually refers to individuals who are affected by corporate decisions; however "for many companies, the set of individuals who are directly or indirectly affected by the activities of the corporation is very large indeed".[201] Deciding which stakeholders should be especially considered is difficult and the criteria for taking this type of determinations are often impossible to establish *ex ante*. As a result, much discretion is left to directors who are therefore free to choose which interests should be prioritized and for what reasons. Moreover, the two authors note that "potential trade-offs between shareholders and stakeholders are ubiquitous", and that the criteria for solving them are often left unexplored by stakeholderists.[202]

I agree on this critique of stakeholderism for reasons already explained in the two preceding paragraphs, given the risk that the interests of stakeholders will prevail over those of shareholders even on a long-term view, if the decision criteria are not specified ex ante and the corporate decision makers want to advantage selected stakeholders. This would be clearly against ESV, which remains my preferred choice subject to the qualification that I further explain below.

V. REDEFINING CORPORATE PURPOSE

In the preceding sections, I have critically reviewed the main theories and the current trends concerning corporate purpose and tried to understand the role played by

[201] Ibidem, 18.
[202] Ibidem, 20.

sustainability inside this concept. A more general question to ask in the light of similar theories and trends is to what extent corporations can effectively contribute to the enhancement of sustainability goals in practice, complementing government regulation of environmental and social issues. To this end, one should explore what are (or should be) the respective domains of public regulation, soft law – including international guidelines and national codes of best practice - and corporate governance in facing the urgent issues that the environment and society pose to mankind on a global scale.[203] No doubt, answering these questions comprehensively would require another paper addressing the suitability of the corporate governance framework to deal with sustainability issues. Given the limits of the present chapter, I will confine my comments to a research agenda on "repurposing" the corporation and ask whether and to what extent a redefinition of corporate purpose could help in the policy discussion concerning sustainable governance.

13. *A holistic view of corporate purpose*

For the proposed aim, I shall adopt a holistic view of corporate purpose – rather than a sectoral one, such as those found either in law or in economics and finance - and test it on the policy issues presently debated at international level as to sustainable governance. I shall then submit my own view on the role of sustainability in the analysis of corporate purpose.

13.1. *The multiple uses of corporate purpose*

As shown throughout the chapter, corporate purpose has been analysed from different perspectives with different aims in mind.[204] Lawyers look at corporate purpose mainly to establish for whom the corporation is run and what are the duties of directors.[205] The legal systems examined diverge on definitions, but not very much on

[203] See the fundamental work by J. Sachs, *The Age of Sustainable Development,* Columbia University Press, 2015, 42, where the pathways to sustainable development are examined, including the good governance of firms.
[204] See Rock, note 2, 6, arguing that there are four separate debates over corporate purpose: the legal, academic finance and economics, management and political debates.
[205] Ibidem and section III above. On the goals of corporate law, see in general J. Armour, H. Hansmann, R. Kraakman and M. Pargendler, 'What is Corporate Law?', in R. Kraakman et al., *The*

substance, given the limited relevance of corporate purpose in the practice of law. Moreover, the discussion on corporate purpose generally extends to the definition of the company's interest, which grounds the duty of loyalty of directors and the rules on conflicts of interest.[206]

Economists focus on corporate purpose to define the role of firms in a market economy and the incentives – including the pursuit of profit - through which business corporations efficiently serve their productive function.[207] Finance scholars are especially interested in valuation issues and mainly think of corporate purpose in terms of either shareholder value or firm value maximization. Recent works by finance and management scholars argue, however, that the value to maximize is not only shareholder value (or firm value), but also (and for some predominantly) social value.[208] Similar works implicitly vindicate the importance of CSR and stakeholder management, which have been largely neglected by economists and finance scholars until the beginning of this century.[209]

Management studies in general show how corporate purpose and its derivatives (like corporate mission, vision and values) can be resorted to in orienting the corporate organization towards the goals that the directors and managers choose to follow in the strategy and activities of their firm. Clearly these goals are not identified exclusively with the pursuit of profit, but extend to social responsibility issues. Moreover, the definition of purpose in detail depends on management style, corporate culture and the specificities of the industry concerned.

I have already expressed my preference for an approach to corporate purpose based on ESV, which requires stakeholder interests to be satisfied subject to firm value maximization. This approach essentially moves from a law and finance perspective, but also concerns other disciplines concerning the management of corporations. Indeed, after being suggested by economics and finance scholars, ESV has been accepted – explicitly or implicitly - by a good number of legal systems and is widely adopted in

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Anatomy of Corporate Law: A Comparative and Functional Approach, Oxford University Press, 3rd ed., 2017, 28.

[206] J. Armour, H. Hansmann and R. Kraakman, 'Agency Problems and Legal Strategies', in R. Kraakman et al., note 169.

[207] See section II above and particularly the references to M. Friedman and M. Jensen's works.

[208] See section IV, para. 9 and 10.

[209] See section II, para. 5.

policy discussions and in corporate practice, possibly with variations such as those suggested by the theory of shared value (para. 6.2.). However, ESV needs refinement today to take account of some of the criticisms and insights found in the scholarly works analysed in para. 9 above, as I argue below.

13.2. *Enhancing economic value under environmental and social constraints*

To start with, stakeholder protection in corporate governance should not be seen exclusively as instrumental to long-term value maximization – as narrowly suggested by ESV - but also as an outcome of the compliance with legal rules and ethical standards, which apply to different types of firms and aim at controlling externalities that either directly or indirectly derive from their activities. In a rising number of situations firms internalize externalities not only because they find it profitable in the long-run or at least suitable to reduce their risk exposures, but also to comply with the regulatory or ethical standards that protect given stakeholders. In such cases, social value is created as a result of the firms' compliance with legal requirements, soft standards and moral obligations, which are either binding on the individual firms or voluntarily accepted by them, their directors and managers.

The role of regulation in constraining firm value maximization is easily understood. Environmental protection, to make an obvious example, largely depends on government regulation, which is binding on firms and models their actions. No doubt, firms comply with this type of regulation not only for ethical reasons, but also to avoid the administrative and criminal sanctions which would derive from violations of the relevant rules and would negatively affect their economic value. Stakeholder protection in similar cases cannot be seen as directly instrumental to firm value maximization, for it is primarily required by regulation. No matter what the corporate managers think about the merits of regulation and its effectiveness in protecting the relevant stakeholders, they have to comply with the prescriptions in question.

Moreover, many actions are performed by firms, particularly the largest ones, in compliance with ethical standards that are globally recognized in statements and guidelines issued by international organizations and subscribed by firms for the protection of given stakeholders. Prominent examples are the documents either

published or referred to by the UN Global Compact[210] and the Guidelines for Multinational Corporations published by the OECD.[211] These documents are not binding per se, but their principles are often reflected in the applicable national laws and for the rest may be followed voluntarily by the corporations concerned, especially when their managers are officially committed to respect the relevant standards.

The voluntary application of international standards might be motivated by reputational concerns, but also by the personal conviction of the managers about the morality of the actions undertaken. Therefore, like in the case of regulation, the calculus of instrumentalism may be "indirect" in similar cases and the protection of stakeholders may simply derive from the compliance with the relevant standards. As a result, the managers do not compare the shareholders' interests with those of given stakeholders, nor ask to what extent protecting the latter will enhance the long term value of the firm – as theoretically required under the ESV approach – given that their action is required per se under the international standards.

Of course, to the extent that discretion is left to the managers under the individual standard – particularly if the latter is broadly formulated and there are no implementing provisions – the managers will also refer to the impact of their actions on the long-term value of the firm. But they may also decide on similar actions on purely moral grounds, filling their discretion in a way that they deem consistent with the content and spirit of the standard to apply. Once more, reputational concerns will also be at play, in addition to the ethical beliefs of the managers, to the extent that either the consumers or the investors monitor the firm's compliance with the relevant standards.

13.3. *Sustainability as a game changer*

[210] See the Ten Principles of the UN Global Compact (https://www.unglobalcompact.org/what-is-gc/mission/principles), which are derived from the Universal Declaration of Human Rights (https://archives.un.org/sites/archives.un.org/files/UDHR/udhr.pdf), the ILO Declaration on Fundamental Principles and Rights at Work (http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf), the Rio Declaration on Environment and Development (https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/288&Lang=E) and the United Nations Convention against Corruption (https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

[211] See the OECD Guidelines for Multinational Enterprises, 2011, at http://mneguidelines.oecd.org/guidelines/.

The increasing importance of sustainability multiplies this type of situations, given that not all aspects of sustainable growth are specifically dealt with by regulation, while the urgency of the problems involved requires the active cooperation of corporations, which increasingly follow (or simply declare to follow) the international guidelines and standards both in environmental and social matters. Sustainability can therefore be seen as a game changer, to the extent that not only regulation, but also conduct guidelines and ethical standards operate as constraints on the behaviour of enterprises and their pursuit of profits.

These regulatory and ethical constraints on firm behaviour do not necessarily determine a reduction of firm value. Some empirical studies on the relationship between CSR and economic performance rather prove the opposite. A. Ferrell, H. Liang and L. Renneboog in particular find that well governed firms that suffer less from agency concerns engage more in CSR and have higher CSR ratings.[212] They also find that a positive relation exists between CSR and value, suggesting that CSR in general is not inconsistent with shareholder value maximization.[213] Their general argument is interesting for present purposes: "Corporate social responsibility need not to be inevitably induced by agency problems but can be consistent with a core value of capitalism, generating more returns to investors, through enhancing firm value and shareholder wealth".[214]

These conclusions support the thesis advanced by some scholars that "doing good does also well".[215] However, we should not forget that behaving badly is often profitable, at least in the short-term. As shown by Nobel laureates George Akerlof and Robert Shiller,[216] markets have no morals and economic and commercial conduct often succeeds by deceit and manipulation. Therefore, as argued by Colin Mayer, doing well by doing good is a management innovation as challenging as technological

[212] Ferrell, Liang and Renneboog, note 92, 585. These authors consider well governed firms as represented by lower cash hoarding and capital spending, higher pay-out and leverage ratio and stronger pay-for-performance.
[213] Ibidem, 602.
[214] Ibidem, 605.
[215] See Mayer, note 140, 116.
[216] G. Akerlof and R. Shiller, *Phishing for Phools. The Economics of Manipulation and Deception*, Princeton University Press, 2015.

innovation.[217] In addition, while it may be easy to measure profits, social performance is difficult to measure, which makes it difficult to establish whether a CEO is doing well by doing good.[218] Also excellent empirical works, like that by A. Ferrell et al. quoted above, are based on CSR indices which may present limits in their design and effectiveness.

14. *Towards a sustainable corporate purpose*

Both scholars and practitioners often ask whether corporate purpose can be an useful tool in practice and whether the recourse to it should be promoted as suggested particularly by the supporters of social value and stakeholder capitalism. In this section, I briefly examine three aspects of this question concerning respectively the credibility of the official statements of CEOs on corporate purpose; the proposals directed to specify corporate purpose in the corporate charter; and the proposals directed to reform company law as to corporate purpose and directors' duties.

14.1. *Are firms and CEOs credible?*

The first question concerns the practical impact of statements on corporate purpose such as those issued either by national trade bodies (like the BRT in the US) or international private organizations (like the WEF) and briefly analysed in para. 2 above. This topic has been expressly considered by Bebchuk and Tallarita in the paper commented upon in para. 9.3, where the two authors question the credibility in practice of the BRT statement.[219] To this end, they examine whether the firms' decision to join the statement was approved by each company's board of directors as required for the most important corporate decisions. Of the 48 companies that responded to their enquiry, 47 said that the decision was approved by the CEO but not by the board of directors.[220] Two companies further specified that their best practices were already consistent with the BRT principles, so that they did not expect to make major changes in their treatment of stakeholders in the future.

[217] Mayer, note 140, 119.
[218] Ibidem.
[219] On the BRT statement, see note 7.
[220] Bebchuk and Tallarita, note 166, 25.

Bebchuk and Tallarita comment that this could explain why the decision to join the BRT statement was commonly not approved by the company's board of directors. However, they also remark that in this case "the BRT statement merely reflected the CEO's positive assessment of how their companies have been treating stakeholders thus far, as well as the CEOs' expectation that the statement will not lead to substantial changes in how stakeholders are treated".[221] Another test that the two authors apply is asking whether companies whose CEOs signed the BRT statement amended their corporate governance guidelines following the BRT statement. They report that "none of the twenty companies reviewed amended its corporate governance guidelines to incorporate stakeholder welfare as an independent end of the corporation".[222] Interestingly, they also indicate that many of the companies reviewed "contain a strong statement of the shareholder primacy principle" contrary to what is foreseen by the BRT statement.[223]

We should therefore conclude that the impact of the BRT statement in practice will be modest and will mainly depend on the reputation of individual CEOs and corporations that have subscribed to it. Still, one could ask for what reason the BRT has taken the initiative to modify its traditional position on shareholder primacy by issuing a statement which emphasizes the role of stakeholders in the management of corporations. According to Mark Roe, two forces help to explain why the BRT felt that it needed to say something now.[224] First, activist investors: "US corporate leaders are building a coalition against activist shareholders, and want employees, customers, and those demanding more ethical sourcing to support them. Freeing boards and executives from shareholder influence, the statement implies, will enable corporate America to treat employees, the environment, and communities better". Second, public opinion: "Anti-corporate ideas are in the air, and they do not originate from the political leaders who are expressing them". Moreover, any politician pursuing a similar agenda would need allies to implement policies targeting large corporations: "If their potential allies are

[221] Ibidem.
[222] Ibidem, 26.
[223] Ibidem.
[224] M. Roe, 'Why America's CEOs Are Talking About Stakeholder Capitalism', Project Syndicate, Nov. 4, 2019, https://www.project-syndicate.org/commentary/america-business-roundtable-ceos-corporate-purpose-by-mark-roe-2019-11?barrier=accesspaylog.

more or less satisfied with corporate America's new statement of purpose – especially if CEOs act on it in a media-visible way – then populist anti-business measures will lose traction".[225]

14.2. *Should corporate purpose be specified in the charter?*

If the official statements of trade bodies have limited credibility, other ways are available to give force to the new concept of corporate purpose that corporations seem to be ready to follow. Mayer's *Prosperity* suggests that corporate purpose should be defined by contract and that fiduciary duties should be based on the corporate purpose so defined (para. 9 above). This would generate trust in the corporation by its members. The solution proposed shows a preference for private law. Indeed, Mayer argues that regulation has failed because the interests of regulators are opposed to those of shareholders. Company law should be reformed so as to replace regulation, which would require redefining corporate purpose and avoiding its identification with the pursuit of profit. Interestingly, French law was recently reformed along similar lines by the PACTE law which allows corporations to specify their corporate purpose (*raison d'être*) in their statute (para. 6.2. above).

I do not believe that a contractarian approach, such as that proposed by Mayer, would lead to efficient outcomes in practice and that regulation should be replaced by company law. As argued already (para. 9), we cannot expect companies to fully internalize the social costs of their externalities. Similarly, we cannot rely on corporate governance and shareholders as the main instruments to preserve the integrity of corporations. We need regulation and to some extent criminal law to obtain compliance with the legal principles protecting the environment and the social conditions within the firms. No doubt, corporate governance and ownership can contribute to effective compliance and are therefore good complements to regulation, but we should not expect them to become substitutes for regulation.

In any case, I do not expect corporations to meaningfully exploit the possibility of specifying corporate purpose in their charter. It is unclear why corporate leaders would propose shareholders to define corporate purpose in the charter in terms other than the

[225] Ibidem.

pursuit of profit. Leaders are rather incentivized to stick to the pursuit of profits by the corporation, given that their variable pay is based on financial performance. It is also uncertain that shareholders would accept a similar proposal, unless the relevant clause in the charter were sufficiently generic simply adding other purposes to profit.

However, the managers would likely pay lip service to similar undertakings and possibly circumvent the same, while shareholders would find it difficult to monitor compliance by the managers with the agreed definition of purpose. Most corporate actions in this regard would not be easily observable and the managers could justify their behaviour even when departing from corporate purpose as defined in the charter. In any case, the managers' duties as to corporate purpose would be difficult to enforce, given that most of their actions in this regard would fall under the business judgement rule.[226]

Moreover, there is no need to specify the purpose of the corporation in its charter, even without considering the difficulties of such a definition and of its enforcement in practice. Several documents are periodically approved by the board which clarify the purpose pursued by the company and its management, such as the strategic plans, the financial statements and non-financial disclosure. Plenty of information is already published by corporations explaining their goals and the ways in which managers implement them, including statements on purpose, mission, vision and values that are published on the companies' websites and circulated amongst stakeholders. No doubt, corporations could do more, however no further stipulations are generally needed to specify their purpose. This is a task that the managers should perform, under the board's monitoring and in compliance with their fiduciary duties, while running the company.[227]

14.3. *Should company law serve sustainability goals?*

Assuming that a private law solution based on contract is not likely to assure that firms shall adopt an effective definition of corporate purpose including both corporate profit and sustainability constraints, policy makers should consider whether a similar

[226] See Ron Gilson's remarks at the Columbia Law School Symposium on Corporate Governance "Counter-Narratives", note 4, at 19.
[227] See Stout, note 23, 115.

definition should be given by company law along the lines already followed in the UK and France. The discussion is intertwined with that on fiduciary duties, which in the opinion of some policy makers should be clarified and include the compliance with sustainability standards as a condition for the performance of the directors' duty of care along the British model considered above (para. 8.1.).

In a recent document,[228] the European Commission considers preliminary legislative proposals on director duties and sustainability which could indirectly affect the concept of corporate purpose. The Commission refers to its communication on "The European Green Deal" stating amongst others that "sustainability should further be embedded into the corporate governance framework, as many companies still focus too much on short-term financial performance compared to their long-term development and sustainability aspects".[229] The Commission also grounds its proposals on a new Study on directors' duties and sustainable corporate governance,[230] which aims to show that many listed companies in Europe "focus on generating financial returns in a short timeframe and redistribute a large part of the income generated to shareholders, which may be to the detriment of the long-term development of the company, as well as of sustainability".[231]

Yet, the data on short-termism in European listed companies used by the Study are open to discussion, particularly considering that many UK companies are included in the relevant dataset despite Brexit.[232] Moreover, the issue of short-termism and its negative impact on companies and markets are widely debated internationally, also with

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[228] European Commission (DG Justice, A3 Company law unit), Inception Impact Assessment, Sustainable corporate governance, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12228-Carbon-Border-Adjustment-Mechanism.

[229] European Commission, Communication on The European Green Deal, Brussels, 11.12.2019, COM(2019) 640 final, available at https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en#actions.

[230] Study on directors' duties and sustainable corporate governance. Final report prepared by EY for the European Commission DG Justice and Consumers, July 2020, https://ec.europa.eu/info/business-economy-euro/doing-business-eu/company-law-and-corporate-governance_en#studies

[231] European Commission (DG Justice, A3 Company law unit), note 193, 1.

[232] See Consultation on Sustainable Corporate Governance: Feedback from European Company Law Experts (ECLE), 28 September 2020, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/feedback?p_id=8270916&page=10; Feedback from Assonime, 8 October 2020 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F594565.

respect to US financial markets,[233] so that policy conclusions cannot be drawn too hastily.[234] Furthermore, the causal link between managerial short-termism and the neglect of sustainability matters by corporations is unclear, as the focus on short-term financial performance does not necessarily exclude the engagement of a corporation in either environmental or social issues, also considering that some of these issues need to be dealt within a short timeframe given their urgency and impact on firm value.[235]

Nonetheless, the Commission identifies a connection between what it defines as a narrow interpretation of company laws – particularly of the rules on the company's interest and directors' duties – which would favour short-term financial value and the fact that companies, in the Commission's opinion, do not adequately address sustainability problems. As a result, it proposes to modify the codified company law Directive (2017/1132) and the consolidated Shareholder Rights Directive (2007/36). The Commission's initiative aims to ensure that sustainability is further embedded into the corporate governance framework with a view to better align the long-term interest of managers, shareholders, stakeholders and society.[236] Two specific areas of intervention are suggested. The first concerns the measures that companies should take to address their adverse sustainability impacts, such as climate change and human rights harm, in their own operations and in their value chain, by identifying and preventing relevant risks and mitigating their impact (due diligence duty). The second concerns the duties of directors who should take into account all stakeholders interests which are relevant for the long-term sustainability of the firm, as part of their duty of care to promote the interests of the company and pursue its objectives.

These two types of intervention appear to be aligned with international standards, but need better refining. The first appears to be grounded on risk management concepts and on international guidelines, such as those issued by the OECD on due diligence

[233] See Mark Roe, 'Stock Market Short-Termism's impact', ECGI Law Working Paper N. 426/2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171090.
[234] See Mark Roe, Holger Spamann, Jessie Fried and Charles Wang, The European Commission's Sustainable Corporate Governance Report: A Critique, October 14, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3711652; Jessie Fried and Charles Wang, Short-termism, Shareholder Payouts, and Investment in the EU, ECGI Law Working Paper 544/2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3706499.
[235] See Mark Roe et al., note 206, who object that the Commission's Report conflates time-horizon problems (short-termism) with externalities and distributional concerns.
[236] European Commission (DG Justice, A3 Company law unit), note 193, 2.

requirements in responsible business conduct.[237] The second proposed intervention implicitly refers to those legislative solutions that have been adopted in the UK and in France, which require directors to pursue the company's interest subject to due consideration being given to the interest of stakeholders and/or to environmental and social sustainability. However, the Commission's proposals are still too generic to allow conclusions to be drawn in this regard and may develop in different directions depending on the detail of the relevant provisions and on the type of enforcement of fiduciary duties that a future directive may foresee.

In any case, it is doubtful that a directive is needed to pursue similar goals. On one side, it is not sure that company law should be modified to host an enlarged concept of corporate purpose, given that most legal systems allow for sufficient flexibility in this respect, as already shown in section III from a comparative law perspective. On the other side, it is still to be proven that member States cannot reach similar outcomes on their own, either through soft law measures – such as codes of corporate governance and stewardship codes – or national legislation, so as to justify a directive at EU level under the subsidiarity principle. Indeed, national corporate governance codes not only apply under comply or explain provisions, which reinforce their practical value, but already take sustainability into account either in the definition of corporate purpose or in the principles that apply to the organization and functioning of boards.[238]

15. *Concluding remarks*

This chapter has shown that corporate purpose is an evolving concept, which has been analysed from different perspectives and has been periodically updated in the light of developments in practice. Since the '80s, sustainability has been increasingly taken into consideration and has influenced the academic discussion particularly in the field of management studies which have focused on CSR and stakeholder theory. At the beginning of this century, sustainability concerns entered into the area of finance studies

[237] See OECD Due Diligence Guidance for Responsible Business Conduct, 2018, https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm; OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High- Risk Areas, https://www.oecd.org/daf/inv/mne/mining.htm.

[238] See Shanshan Zhu and Michele Siri, 'Integrating sustainability in EU Corporate Governance Codes', in this volume.

through the theory of enlightened shareholder value and its homologues (like shared value and shareholder welfare). Company law has offered little resistance to this evolution, given the relative flexibility and adaptability of corporate purpose and similar concepts, including company's interest. However, company law reforms have been adopted in some European States touching upon corporate purpose and fiduciary duties in ways that reflect the increasing importance of environmental and social sustainability, and the enhanced focus on stakeholders in corporate governance.

The mounting pressure on businesses to comply with sustainability standards in crucial areas like climate change, corruption and child labour, and the raising awareness of public opinion and politicians about the gravity and urgency of these and other problems, are causing shock waves which invest both corporations and governments calling for immediate action. No doubt, government regulation is predominantly needed to give adequate responses to these calls, but corporations should also play their part within the constraints of their economic purpose and productive function. Recent economics and management studies argue that corporate purpose should be modified to reflect the prevalence of social value over shareholder value, and that the latter should be pursued by managers only derivatively, as a result of pro-stakeholders actions directed to increase the "total pie".

In the present chapter, I objected to this recent scholarship and showed my preference for keeping the sustainability discussion within the confines of ESV theory. At the same time, I suggested to emphasize the mounting role of regulatory and ethical constraints to business conduct deriving from sustainability concerns. These constraints go beyond the mere calculus required by ESV, which asks management to compare stakeholder interests with those of shareholders and pursue the former only to the extent that this increases the long-term value of the firm. Indeed, ethical considerations as reflected by international standards and consolidated best practices should apply to the running of businesses without necessarily requiring prior analysis of their precise impact on financial performance. Needless to say, the ethical behaviour of firms will generally reflect on their long-term economic success, but this should not always condition the compliance with the ethical standards that should apply per se, despite their cost to the firm.

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