6 Transforming the Corporation[1]

6.1 Introduction

When we think of economy and prosperity, the role of corporation – be it positive, negative, or ambiguous[2] – will top the list. Most see corporations as organisations, sometimes huge, that sell goods and services we need or like. Corporations have been fundamental for foremost consumer-facing innovation (washingmachines, TVs, computers and smartphones), but they have also been a major cause of environmental and social problems (pollution or worker exploitation). Today, it is the profitability for shareholders that identifies a successful corporation – often expressed as their value on the stock exchange (for public corporations) or the lifestyle they enable to their "owners" (i.e. shareholders) for private corporations.

This privatised understanding of corporation is, however, a relatively recent one. In fact, seeing corporation as a private entity that pursues profit for its "owners" is far closer to Mise's understanding of the "enterprenuer" than a historic definition of corporation: enterpreneuer as: the self-interested capital investor and risk taker,[3] who invests their (hard won) capital into productive activity, delivering socially useful things under conditions of uncertainty, in order to reap the profits of such commercial activity.[4] For most of history, corporations (starting

[1] This chapter draws on the previously published article by Marija Bartl, 'Towards the Imaginary of Collective Prosperity in the European Union (EU): Reorienting the Corporation', *European Law Open* 1, no. 4 (2022): 957–86.

[2] People in Nigeria think differently about corporations than people in the NL, and workers in Bangladesh see these organisations differently than the retail shareholders in Germany.

[3] William Magnuson, *For Profit: A History of Corporations* (Hachette UK, 2022).

[4] Peter G. Klein, *The Capitalist & The Entrepreneur* (Ludwig von Mises Institute, 2010).

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from ancient ones as well as early modern ones such as various Indian companies) were seen as *collective* undertakings, which were granted charters to operate because of some common good they took up to deliver.[5] For a long time then, incorporation was a matter of public choice and collective interest.[6]

This is all about to change at the end of the nineteenth/beginning of the twentieth century, when the first privatising imaginaries of prosperity became dominant. The corporation was privatised via two institutional routes: on the one hand, we see the shift away from the concession to incorporation by simple registration, with the implication that any private purpose was seen as sufficient.[7] On the other hand, the widespread institutionalisation of ‘limited liability’ set grounds for modern capitalism.[8] We can understand this moment as the first *privatisation* of corporation – that is the institution of corporation as a mere *extension* of the individual entrepreneur operating for his own self-interest – rather than a collective entity oriented towards shared goals.[9]

The social excesses of the first round of privatisation were quick to become apparent. Be it cartelisation, financial speculation, or labour exploitation, there was a resounding call for change – coming not only from the labour movement. Thus in this period, we see changes in competition law, financial law, and company law put in place in order to reign in the privatised corporation.[10] After the horrors of WWII, we can speak of the wholesale shift in the imaginary of corporation, with a growing “suspicion of profit”[11] and high taxation of both income and corporate profits, as well as a demand for social responsibility of the business and directors.[12] This new imaginary of corporation was comfortably dominant until the 1970s, when Milton Friedman gave the first powerful expression to the discontents.

Friedman saw the commitment to ‘social responsibility’ by both business and policy leaders as counterproductive: ‘*The businessmen believe that*

[5] Magnuson, *For Profit*.

[6] Giuseppe Dari-Mattiacci et al., ‘The Emergence of the Corporate Form’, *The Journal of Law, Economics, and Organization* 33, no. 2 (2017): 193–236.

[7] Private vice, public virtue.

[8] Dari-Mattiacci et al., ‘The Emergence of the Corporate Form’; Paddy Ireland, ‘Corporate Schizophrenia: The Corporation as a Separate Legal Person and an Object of Property’, University of Bristol Working Paper (2016).

[9] Magnuson, *For Profit*. [10] Magnuson, *For Profit*.

[11] Milton Friedman, ‘The Social Responsibility of Business Is to Increase Its Profits’, New York Times (1970), p. 5.

[12] Thomas Piketty, *Capital and Ideology* (Harvard University Press, 2020).

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they are defending free enterprise when they declaim that business is not concerned "merely" with profit but also with promoting desirable "social" ends; that business has a "social conscience" and takes seriously its responsibilities for providing employment, eliminating discrimination, avoiding pollution and whatever else may be the catchwords of the contemporary crop of reformers'. Yet, the advocacy of corporate social responsibility was, according to Friedman, '*preaching pure and unadulterated socialism*'.[13]

Given the diversity between corporate structures in Europe, it took several decades before Friedmanite positions became more popular,[14] and Europe – like most of the world – partook in the trend of strengthening shareholder rights and instituting practically (if not legally) the "shareholder primacy" model.[15] This second privatisation of corporation was less a matter of company law[16] and more a question of a broader set of neoliberal policy prescriptions, which aimed to commodify and marketise most of the economy, opening them to private ownership, competition, and financial capital.[17] The most prominent element among all these policies was the liberalisation of financial markets, which will become the main vehicle for the institution of the shareholder primacy model across the world.[18]

As with the previous privatisation, this second privatisation of corporation came paired with the narrowing of interests and purposes that the corporation was supposed to serve, creating the "self" in the "self-interested" that ultimately eschewed everything but share prices.[19] Corporate scholars have reminded us time and time again that the "shareholder value" paradigm has never been institutionalised via company law.[20]

[13] Friedman, 'The Social Responsibility of Business Is to Increase Its Profits', p 1.
[14] Thomas J. AndréJr., 'Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany', *Tulane Law Review* 73, no. 1 (1998), 69–171.
[15] Mathias M. Siems, Siems, Mathias M. 'Shareholder Protection around the World ('Leximetric II')'. *Centre for Business Research, University of Cambridge Working Paper,* No. 359 (December 2007).
[16] Mariana Pargendler, 'The Corporate Governance Obsession', *Journal of Corporation Law* 42 (2016): 359–402.
[17] Tim Bartley, 'Transnational Corporations and Global Governance', *Annual Review of Sociology* 44, no. 1 (2018): 145–65.
[18] Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019).
[19] Jean-Philippe Robé, *Property, Power and Politics: Why We Need to Rethink the World Power System* (Policy Press, 2020).
[20] Beate Sjåfjell et al., 'Shareholder Primacy: The Main Barrier to Sustainable Companies', in *Company Law and Sustainability: Legal Barriers and Opportunities*, ed. Beate Sjåfjell and Benjamin J. Richardson (Cambridge University Press, 2015).

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On a narrow reading, there is nothing in corporate law itself, at least in Europe, that forces corporations to take such a narrow understanding of corporate interest.[21] And yet, the combination of several distinct institutional mechanisms, such as financialisation, quarterly reporting, and management remuneration, has made shareholder value a social norm.[22] Corporate law scholars have, however, also played their role in institutionalising this paradigm; the enthusiasm with which they have devoted their research to exploring how to align the interests of shareholders and managers – even in Europe where it was slightly less poignant – has made shareholder primacy the dominant discourse in the field of corporate law for a long time.[23]

Today, there is a growing social consensus, in Europe and elsewhere, that we need to change how economies operate – at least if we are intent on preserving a liveable planet. The negative social and environmental consequences of economic activity are vast,[24] while the economic benefits seem to accrue rather asymmetrically – exacerbating thus a plethora of social and political problems.[25] While the European Green Deal (EGD) aims to present a comprehensive plan to shift economic activity towards sustainability via a number of policy areas, from transport to food, if we truly want to change how the economy operates, we cannot go around the design of the main actor that drives the current model – the corporation.

In this chapter then, I will discuss how the European institutions attempted to change the way in which corporations are structured and operate. Overall, there are two paths for transforming corporation. On the one hand, one can aim to limit the negative effects of corporate activity, by improving certain aspects of the administrative capacity of corporations, to monitor and remove negative impacts – via instruments such as due diligence – paired with some degree of administrative and/or civil liability. On the other hand, one can go after the fundamentals, that is by engaging with more fundamental aspects of corporate governance

[21] Ibid. Of course, if one adopted a broader reading of the corporate law that sees corporate governance codes as part of corporate law, this position would change dramatically.

[22] Sjåfjell et al., 'Shareholder Primacy'.

[23] Jaap W. Winter, 'Dehumanisation of the Large Corporation' (SSRN, 10 January 2020).

[24] Hoesung Lee et al., 'IPCC, 2023: Climate Change 2023: Synthesis Report, Summary for Policymakers. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland', 2023.

[25] Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press, 2014).

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and ownership, as these condition the exercise of power and the distribution of surplus of economic cooperation. This chapter describes the EU's attempt to adopt what we can call a mixed approach, trying to address both administrative capacity and a few elements of the "fundamentals". After the pushback by its own internal body, the Regulatory Scrutiny Board (RSB), the Commission has retreated from its more transformative plans, focusing mostly on limiting corporations' negative impacts. The ultimate shape of the legislation is, however, still up for grabs, as both the Parliament and the Council have their own positions. In the last section then, I pick up on the possibilities still open for engaging with the fundamentals of corporate activity differently – by publicly facilitating those enterprises and organisations that have different fundamentals (ownership and governance), with a view to at least increase the pluralism of the corporate ecosystem.

6.1.1 *'Corporate Governance File'*

The "modern" story of the reigning in the corporation, especially in the countries of the Global South, starts in the 1970s. The attempt of the Global South to institutionalise a 'New International Economic Order' required the regulation of multinational corporations (MNCs), including their fundamentals, as one of its priorities. But as these efforts faltered, for a variety of reasons,[26] also the question of the regulation of MNCs has vanished from the radar. This was the case until the 1990s, when we see the birth of the so-called "business and human rights movement".[27]

The business and human rights movement has booked several successes over the course of the past decades, with the introduction of several international soft law instruments such as the UN Principles[28]

[26] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, vol. 37 (Cambridge University Press, 2007); Mohammed Bedjaoui, 'Towards a New International Economic Order', 1979; Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2020).

[27] Florian Wettstein, 'The History of Business and Human Rights and Its Relationship with Corporate Social Responsibility', in *Research Handbook on Human Rights and Business*, ed. Surya Deva and David Birchall (Edward Elgar Publishing Limited, 2020), 23–45.

[28] United Nations Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (United Nations, 2011), www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, last accessed 10 January 2024.

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and the OECD Principles.[29] Some of the due diligence principles introduced via these instruments have been more recently adopted by several nation states, such as France, Germany, or the UK, as mandatory law at the national level.[30] A more serious attempt to regulate the liability of MNCs is currently taking place at the level of the UN, with the Binding Treaty on Business and Human Rights being drafted.[31] But this UN measure (as is often the case) is being met with lukewarm support from "developed countries".[32]

The European Union (EU) itself enters this space of business and human rights' relatively late.[33] It has introduced obligatory due diligence in specific high-risk sectors, such as timber,[34] and conflict minerals.[35] Furthermore, in 2014 the EU promulgated a more general measure, the 'non-financial reporting directive',[36] which required the largest corporations to publish 'non-financial information' related to environmental protection, the treatment of employees, human rights, anti-corruption, bribery, diversity on company boards, and any diligence procedures throughout the supply chain – if they had any.[37] The

[29] OECD, 'OECD Guidelines for Multinational Enterprises on Responsible Business Conduct' (2023), https://mneguidelines.oecd.org/mneguidelines/, last accessed 10 January 2024.

[30] Such laws have been promulgated in the UK, the Netherlands, or France, as committed to under UN principles: F. Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability', *Journal of Human Rights* 14, no. 2 (2015): 237–59.

[31] United Nations OEIGWG 'Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises' Third Revised Draft, www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf, last accessed 10 January 2024.

[32] Lydia de Leeuwe, 'Progress and Challenges: Recap of 2023 UN Binding Treaty Negotiations on Business and Human Rights', *SOMO* (2023), www.somo.nl/recap-2023-un-biding-treaty-negotiations/, last accessed 10 January 2024.

[33] European Commission, A Renewed EU Strategy 2011–14 for Corporate Social Responsibility, COM(2011) 681 final.

[34] Regulation (EU) No. 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.

[35] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum, and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

[36] Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

[37] The reporting strategy proved not to be effective enough in reigning in the problems caused by transnational business activity – not least because of the low degrees of accountability and enforcement of reporting standards. To remedy at least the issue of

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directive was primarily successful in revealing that very few large corporations actually undertook any due diligence across the chain at all.[38] Somewhat more promisingly, the EU has also started developing a 'green finance' package. While still a part of the "reporting paradigm", it contains some important tools for steering investments towards green initiatives.[39] All these initiatives found an overarching ambitious policy framework in the 2019 European Green Deal (EGD).[40]

With the launch of EGD, the question of the role of businesses in delivering (or not) the objectives of EGD became paramount.[41] The European Commission thus started a revision of its corporate governance framework in 2020, with a view of aligning it with the EGD. This action took place on two fronts. First, the Commission undertook the overhaul of the 2014 non-financial reporting directive, with the DG FISMA having prepared a new corporate sustainability reporting directive.[42] While the primary objective was to help investors make more sustainable investment decisions, the transparency element was also expected to have a broader disciplining effect on corporate behaviour. Somewhat later, the Commission also opened a 'due diligence' file, under the directorship of DG Justice.[43] Going beyond transparency of 'material information', the due diligence framework was expected to set material

standards, the EU later published more elaborate guidelines on environmental (2017) and climate (2019) reporting and proposed a revised directive in 2021: Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No. 537/2014, Directive 2004/109/EC, Directive 2006/43/EC, and Directive 2013/34/EU, as regards corporate sustainability reporting.

[38] European Commission, Directorate-General for Justice and Consumers, Torres-Cortés, F., Salinier, C., Deringer, H. et al., *Study on Due Diligence Requirements through the Supply Chain: Final Report* (Publications Office, 2020).

[39] The EU Sustainable Finance Package includes several important elements, including Taxonomy Rules and corporate sustainability reporting and disclosures. For more, see https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance_en. For a critical assessment, see Jennifer de Lange, 'Great Expectations of Sustainable Finance: A Critical Analysis of EU Sustainable Finance Strategy and Sustainable Finance Regulation', UVA Doctoral Thesis (2024). On file with the author.

[40] European Green Deal 2019.

[41] See the presentation by DG Justice Commissionaire Reynders, at https://?responsiblebusinessconduct?.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/.directive.

[42] Directive (EU) 2022/2464 on corporate sustainability reporting.

[43] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, COM(2022) 71 final.

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standards on the corporate action of large European, and even larger non-European, firms.

However, the Commission's ambitions went further than just due diligence – something that became obvious from the preliminary stages of the due diligence proposal, starting with commissioning a report on the 'directors' duties and sustainable corporate governance'.[44] Tasking the reporter (Ernst & Young) to explore the impacts of 'short-termism' in corporate governance, the Commission appeared interested in tackling some elements of the fundamentals, namely the role of 'investment', in the interplay between financial markets and corporate governance. These efforts may have followed on from the European Banking Authority report of December 2019, which found some evidence of short-termism in relation to the corporate sector (and less so in the banking sector), precisely thanks to the changes in the underlying legal and governance framework: '*Changes in banking regulations since the financial crisis, notably on remuneration, have been designed specifically to counter undue short-termism, and the outcomes of these changes themselves are reflected in this report*'.[45]

The study on 'directors' duties and sustainable corporate governance' was delivered by Ernst & Young, in July 2020, finding that short-termism is indeed strongly present in the EU's corporate arena and leads to both unsustainable choices in terms of the company's bottom line (the lack of investment in innovation and people) and irresponsible behaviour towards all other stakeholders and environment.[46] In the same year, the European Parliament (in reaction to this and other studies and initiatives) also called on the European Commission to revise the Directive on non-financial reporting and propose a more robust 'sustainable corporate governance' framework that would solve some of the identified issues.[47]

[44] European Commission, Directorate-General for Justice and Consumers, 'Study on Directors' Duties and Sustainable Corporate Governance: Final Report' (Publications Office, 2020), https://data.europa.eu/doi/10.2838/472901, last accessed 10 January 2024.

[45] 'Final EBA Report on Undue Short-Term Pressures from the Financial Sector', European Banking Authority (2019), www.eba.europa.eu/file/461440/down, last accessed 10 January 2024.

[46] European Commission, 'Study on Directors' Duties and Sustainable Corporate Governance'.

[47] European Parliament Resolution of 17 December 2020 on sustainable corporate governance (2020/2137(INI), www.europarl.europa.eu/doceo/document/TA-9-2020-0372_EN.html, last accessed 10 January 2024.

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In response, in Spring 2021 the Commission published a so-called inception impact assessment ('a roadmap') that outlined ideas of how to move forward in the field of corporate governance.[48] The roadmap was opened to public consultation and became a basis for the assessment of the first ideas by the Commission's 'regulatory watchdog', the RSB.

The inception impact assessment recognised short-termism as a systemic problem and envisaged a relatively broad range of interventions in the field of company law to ensure 'sustainable value creation'.[49] These interventions included several (previously unthinkable) hard law measures, including defining directors' duties and liabilities, the composition of company board(s) as well as the remuneration of their members, the inclusion of sustainability in business strategy, and the provision for stakeholder involvement. The Commission had thus intended to remedy several of the systemic constraints on the operation of public corporations via company law. Even if these constraints may not have originated in company law in a narrow sense, market operation could not be expected to remedy them – according to the European Commission – and resultantly hard law changes in company law were necessary.

However, the Commission's ambitious agenda faced notable opposition. According to the report of the Corporate Europe Observatory, during the preparation of the corporate governance file the DG Justice refrained from extensive consultation with the business community[50] – something that stands in contrast to other EU legislative proposals. In the wake of the inception impact assessment then, the industry and some member states (MSs) (especially Nordics, such as Denmark), as well as many corporate law and corporate finance scholars, set out a broad range of challenges to the Commission's proposal.

Still, in the end it was the Commission's RSB that actually forced it to cut back most of its more ambitious proposals. The RSB is an internal body established by the Juncker's Commission in 2015, with the US Office of Information and Regulatory Affairs (OIRA) in mind. As such,

[48] European Commission, 'Inception Impact Assessment: Sustainable Corporate Governance' (2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en, last accessed 10 January 2024.

[49] Ibid., p. 3.

[50] Kenneth Haar et al., 'Inside Job: How Business Lobbyists Used the Commission's Scrutiny Procedures to Weaken Human Rights and Environmental Legislation' (Bund, Corporate Europe Observatory & Friends of the Earth Europe, June 2022), p. 6.

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both its methodologies (economic/cost-benefit analysis[51]) and composition (it is populated mainly by members who have economics and business administration backgrounds)[52] are meant to limit the regulation – constraining the power of the government and giving more "breathing space" to commercial actors.[53] Due to its methods and composition, the RSB understands *better* regulation mainly as *less* regulation, and presents thus (another) layer of institutionalisation of neoliberal imaginary of privatised prosperity – enforced eventually long after other actors institutions may have moved on.

The RSB rejected the Commission's inception impact assessment on several grounds, the most important one being that the Commission had not shown that the problem – unsustainable corporate governance – existed at all.[54] It called on the Commission to provide evidence on both the problem description and its impacts. DG Justice thus went back to the drawing board and "strengthened" this time with the new co-lead Thierry Breton, from DG Internal Market, as a guarantor that industry interests will be better safeguarded.[55] And yet, a couple of months later, the newly drafted full impact assessment, in a quite exceptional move, was again rejected in November 2021,[56] on the grounds that it still did not sufficiently demonstrate the existence of the problem (unsustainable corporate governance) nor the solutions proposed (a need to change how businesses operate).[57] From within the imaginaries of privatised prosperity, both the Commission's problems and solutions appeared as gibberish.

[51] Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (The New Press, 2005).

[52] Haar et al., 'Inside Job', p. 20.

[53] The cases where the RSB has vetoed twice the measures are relatively scarce, and they concern, except for sustainable corporate governance, issues such as preventing and combating gender-based violence, or energy performance of buildings. See report 2021, Annex, https://ec.europa.eu/info/sites/default/files/rsb_report_2021_en.pdf, last accessed 10 January 2024.

[54] European Commission Regulatory Scrutiny Board, 'Opinion: Impact Assessment/ Sustainable Corporate Governance', Ares(2021)3065513.

[55] Haar et al., 'Inside Job', p. 28.

[56] Klaas Hendrick Elller and Ioannis Kampourakis, 'Through the Quantitative Lens: The EU Regulatory Scrutiny Board and the Sustainable Corporate Governance Initiative', Verfassungsblog (21 February 2022), https://verfassungsblog.de/quantifying-better-regulation/, last accessed 10 January 2024.

[57] European Commission Regulatory Scrutiny Board, 'Opinion: Impact Assessment/ Sustainable Corporate Governance' SEC(2022) 95, p. 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=PI_COM:SEC(2022)95&from=EN, last accessed 10 January 2024.

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Ultimately then, the RSB has booked a half win. The Commission has still put forth a proposal, after the decision of the Board of Commissionaires. The reason for this decision was the recognition that '*[t]he market and competitive dynamics together with the further evolution of companies' corporate strategies and risk management systems are considered insufficient as regards the assumed causal link between using corporate sustainability tools and their practical effect in tackling the problems*'.[58] The published proposal is, however, a considerably watered-down version of its previous ideas: '*The Directive is more focused and targeted compared to the preferred option outlined in the draft impact assessment. The core of it is the due diligence obligation, while significantly reducing directors' duties by linking them closely to the due diligence obligation*'.[59]

What changes were introduced in the final version? To start, the title of the measure is not as broad – with 'sustainable corporate governance' being narrowed down to 'corporate sustainability *due diligence*'.[60] This signals the limited ambition to tackle fundamentals, including the incentives driving public companies towards 'short-termism'. Thus, directors' duties and liabilities, as well as management remuneration, are mentioned in a much more limited way. The stakeholder involvement has almost disappeared from the proposal. Also, the ideas on sustainable corporate strategy have been watered down, with no reference in the proposal to the need to include science-based targets nor inclusion of any specific requirements on the content of transition plans or strategies. As the Commission explains, '*Further reaching specific directors' duties that had been put forward in the impact assessment are not retained*'.[61]

The Proposal seemed to get another hit with the publishing of the Council position on 1 December 2022.[62] In terms of scope, the Council proposes to slow down the application, introducing a "phase in" approach, with only the largest corporations being expected to comply first (art. 2). The Council further proposed to abandon the concept of 'established business relationship', in favour of 'business partner', and to abandon 'value chain' in favour of 'chain of activities' – all in order to further limit the downstream partners falling within the due diligence

58 Corporate Sustainability Due Diligence Proposal 2022, p. 22
59 Corporate Sustainability Due Diligence Proposal 2022, p. 21.
60 Corporate Sustainability Due Diligence Proposal 2022.
61 Corporate Sustainability Due Diligence Proposal 2022, p. 22.
62 See Council of the European Union, General Approach with regard to the Commission's proposal on the Sustainable Corporate Due Diligence Directive, of 30 November 2022, available at https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf.

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obligations (art. 3). In line with the international soft law instruments, the Council also proposes to strengthen the risk-based approach (art. 3), while it intended to leave to MSs the decision whether to apply the directive to regulated financial undertakings (art. 2 and ff). Some of the more remarkable changes concern the Council proposal to delete the provision linking the climate change obligation to the variable part of directors' remuneration (art. 15) as well as to delete two articles dedicated to directors' duty of care (art. 25 and art. 26). As it concerns civil liability, the Council held that the company should not be liable if the damage was caused only by business partners in its chain of activities, while also expressing concern that the 'full compensation for victims' should not lead to overcompensation (art. 22).[63]

If the Competitiveness Council thought gutting the proposal is what is necessary, the European Parliament considered that the proposal is not ambitious enough. Thus, on several levels it proposes a text that is more ambitious than the European Commission's proposal. According to the Parliament, the new rules should apply to a wider range of companies, from all sectors, including financial services (art. 6), if they have more than 250 employees and a worldwide turnover of more than €40 million (art. 2). The Parliament further demanded that companies engage in prevention, not only via contractual arrangements with partners with whom they have a business relationship but also by adapting their business models and strategies, including purchasing practices (art. 7), in order to prevent potential adverse impacts. Companies should monitor and assess the impact of their business partners, that is not only suppliers but also partners in areas such as sales, distribution, transport, storage, and waste management (art. 7). When negative impacts occur, companies should take steps to remedy or contribute to the remedying of any adverse impact, with a view to restore the affected individuals, groups, communities, and/or the environment to a situation equivalent to or as close as possible to that which existed prior to the adverse impact (art. 8). On the climate front, companies should implement 'a transition plan' to limit global warming to 1.5 Celsius, with specific content (art. 15). Companies with more than 1,000 employees on average should have an effective policy, ensuring that part of any variable remuneration for directors is linked to the company's transition plan (art. 15).

[63] Critically on the civil liability provisions, see Alessio M. Pacces, 'Civil Liability in the EU Corporate Sustainability Due Diligence Directive Proposal: A Law & Economics Analysis', European Corporate Governance Institute-Law Working Paper, no. 691 (2023).

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Non-compliant companies would be liable for damages and could be sanctioned with fines worth at least 5 per cent of the company's net worldwide turnover (art. 20). The limitation periods for victims cannot be shorter than ten years (art. 22).

As the trialogue is ongoing at the time of writing, it is worth noting that the split we observe follows institutional (between different institutions – Commission, RSB, EP, Council etc.) rather than ideological (within institutions) lines. It could be that in the periods of change of a more "paradigmatic" nature, such as the current moment, the main division will emerge around whether one is *within* or *outside* a particular "paradigm" - a type of differentiation that is more likely to follow institutional lines.[64] Depending on what imaginary of prosperity one endorses, disagreements will be present at the most basal level: is there a ***problem*** at all, and if so of what nature; are the ***solutions*** we have relied upon until now sufficient to deal with the problem; what is the necessary ***expertise*** in order to assess and react to the situation; and, finally what is the ***collective*** interest (what is and how we get to prosperity) and what is the ***individual*** (corporate) responsibility.

6.2 New Problems, New Solutions

So, what are the problems that the RSB could have a hard time accepting? The European Commission framed the problem of the neoliberal corporation in this way: '*many companies, in particular those listed on regulated markets, face pressure to focus on generating financial return 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*'.[65] It continued, '*company as a whole, the company interest and directors duties are interpreted narrowly favouring maximisation of short-term financial value*'.[66] This leads to business strategies, the Commission suggested, which '*hamper investment crucial for the sustainability transition, into productive facilities, innovation, upgrading and employee retraining. It may also contribute to income inequality as short-termism creates*

[64] Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 2nd ed. (The University of Chicago Press, 1970).

[65] European Commission, 'Inception Impact Assessment', p. 1.

[66] Inception Impact Assessment: Sustainable Corporate Governance 2020, p. 2.

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pressure to depress non-executive wages and employees often do not benefit from shareholder payouts'.[67]

In the Ernst & Young study, which precedes the Commission's position, these dynamics are shown to have translated in several "drivers of short-termism":

'1. *Directors' duties and company's interest are interpreted narrowly and tend to favour the short-term maximisation of shareholder value;*
2. *Growing pressures from investors with a short-term horizon contribute to increasing the boards' focus on short-term financial returns to shareholders at the expense of long-term value creation;*
3. *Companies lack a strategic perspective over sustainability and current practices fail to effectively identify and manage relevant sustainability risks and impacts;*
4. *Board remuneration structures incentivise the focus on short-term shareholder value rather than long-term value creation for the company;*
5. *The current board composition does not fully support a shift towards sustainability;*
6. *Current corporate governance frameworks and practices do not sufficiently voice the long-term interests of stakeholders;*
7. *Enforcement of the directors' duty to act in the long-term interest of company is limited.*'[68]

The European Parliament concurred that even if company directors have the duty to act in the general interest of the company, this has so far too often been understood as the financial interests of shareholders.[69] This led both the European Parliament and the European Commission to conclude that what we need is a different kind of corporation. Society has created firms and markets that favour short-term interests, rather than long-term perspectives – even against companies' own best interests. Instead, as the European parliament suggests, '*companies should make*

[67] Inception Impact Assessment: Sustainable Corporate Governance 2020, p. 2.

[68] European Commission, 'Study on Directors' Duties and Sustainable Corporate Governance', p. 10.

[69] '*Company directors have the legal and statutory duty to act in the interest of their company; whereas this duty has been the subject of different interpretations in different jurisdictions and the interest of the company has often been equated with the financial interests of the shareholder; . . . whereas a narrow interpretation of this duty with an excessive focus on short-term profit maximisation is detrimental to the company's long-term performance and sustainability, and hence the long-term interests of its shareholders*', European Parliament resolution of 17 December 2020 on sustainable corporate governance (2020/2137(INI)) www.europarl.europa.eu/doceo/document/TA-9-2020-0372_EN.html, last accessed 10 January 2024.

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a more active contribution to sustainability as their long-term performance, resilience and even their survival may depend on the adequacy of their response to environmental and social matters'.[70]

Adopting this long-term horizon will require, according to the European Commission, '*encouraging businesses to frame decisions in terms of environmental (including climate, biodiversity), social, and human impact for the long-term, rather than on short-term gains*'.[71] Such responsible corporate behaviour cannot be driven, however, by '*[v]oluntary action* [that] *does not appear to have resulted in large scale improvement across sectors and, as a consequence, negative externalities from EU production and consumption are being observed both inside and outside EU*''.[72] It is both the impact of sustainability challenges on the company's long-term performance and the company's impact on the planet – double materiality – that should guide corporate behaviour.[73]

In order to get there, both the European Commission and the European Parliament in its 2021 position have proposed two sets of measures when it comes to 'sustainable corporate governance'. One set of measures, which are better at surviving pushback, are the due diligence measures. In line with a longer recent history of international (soft law) efforts to hold companies accountable for their supply chains, and several MSs regulating due diligence nationally, the EU had a responsibility to act in order to prevent distortions of the internal market. This time around, however, the due diligence was not meant to be only a voluntary commitment but be paired with administrative and civil liability (with the latter having a hard time currently, from the side of the Council).[74]

The other set of measures, which primarily tried to address some of the more systemic "drivers of short-termism" identified not least by the Ernst & Young study,[75] came under the heading of 'director's duties'.

[70] European Parliament resolution of 17 December 2020 on sustainable corporate governance, para. 18.

[71] European Commission, 'Inception Impact Assessment', p. 1.

[72] Corporate Sustainability Due Diligence Proposal 2022, p. 2.

[73] Proposal for a Directive 2021/0104 Amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC, and Regulation (EU) No. 537/2014, as regards corporate sustainability reporting.

[74] European Council, Position on the CSDDD Proposal, 2022/0051(COD) available at https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf, last accessed 10 January 2024.

[75] The issue of short-termism comes up also in the European Banking Authority: 'Final EBA Report on Undue Short-Term Pressures from the Financial Sector', European Banking Authority (2019), www.eba.europa.eu/file/461440/down, last accessed 14 October 2022.

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Alongside the articulation of the problem and the description of the corporation, it is these proposals that were placed under the most significant pressure – first from the RSB, and today being squeezed in the Council position.[76] The directors' duties included a whole package of issues, such as limiting the negative impact of remuneration incentives, the need for a serious integration of sustainability in business strategy, and a duty of care with regard to all stakeholders – that is, also workers, consumers, and communities at home. To put it in EP's own terms: '*whereas company directors have the legal and statutory duty to act in the interest of their company; whereas this duty has been the subject of different interpretations in different jurisdictions and the interest of the company has often been equated with the financial interests of the shareholder; whereas what is considered to be the interest of the company should also incorporate the interests of relevant stakeholders, including employees, and wider societal interests; whereas a narrow interpretation of this duty with an excessive focus on short-term profit maximisation is detrimental to the company's long-term performance and sustainability, and hence the long-term interests of its shareholders*'.[77]

This set of prescriptions that the Commission and the Parliament had in mind required a more significant departure from the neoliberal corporation, which was premised on the idea best formulated by Friedman, '*In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to their basic rules of the society, both those embodied in law and those embodied in ethical custom*'.[78] But as the 'basic rules of the society' changed due to the pressures of globalisation, financialisation, and privatisation, the social norm of shareholder primacy became ever more onerous.

This is exactly what the European institutions thought was crucial to reverse – to expand the duties of care of the company directors to a range of 'social responsibility' obligations: to care for all its stakeholders, in value chains and at home, to care for the environment, in a scientifically credible way, and to implement serious monitoring as well as proper

[76] European Commission Regulatory Scrutiny Board, 'Opinion: Impact Assessment/ Sustainable Corporate Governance' SEC(2022) 95; European Council, 'Position on the CSDDD Proposal'.

[77] European Parliament resolution of 17 December 2020 on sustainable corporate governance (2020/2137(INI)); Pascal Durand, 'Report on Sustainable Corporate Governance', European Parliament Report A9–0240/2020 (2020) (2020/2137(INI)), p. 7.

[78] Friedman, 'The Social Responsibility of Business Is to Increase Its Profits', p. 1.

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mitigation strategies – under the (still very limited) threat of administrative and civil liability.[79]

Importantly, in terms of the legal imaginaries behind the proposal, even if (in continental Europe at least) the Commission recognised that the company law *stricto sensu*[80] has not ushered itself the "collective irresponsibility", it also realised that it needed law in order to engineer back the neoliberal transformation, as a change of discourse and the soft law measures relied upon until present were anything but successful.[81] Thus, the Commission argued that '*it will need to be established which issues would need to be laid down in legislation*',[82] announcing the return of legal strategies to repair corporate governance.

6.2.1 *Wait a Bit* – What Problems?

Immediately after publishing the inception impact assessment, which favoured a more serious intervention in corporate governance with hard company law rules,[83] a plethora of actors and voices came forward to challenge it. The industry, which had received relatively limited access to the Commission in the period of preparation, entered on a warpath. It mobilised all kinds of actors in support of its cause – including MSs and the RSB.[84] Several Nordic MSs, most notably Denmark (with its business associations very active on the issue), engaged in considerable "diplomacy" with a view to cut back on the Commission's ambitions.[85] In addition to this, many corporate governance and company law scholars organised academic events often critical of the proposals.[86]

[79] European Parliament resolution of 17 December 2020 on sustainable corporate governance.

[80] The core question here is whether the 'corporate governance codes', which have been strongly shaped by the shareholder primacy principles, are part of company law or not. But that discussion need not be taken up here.

[81] Corporate Sustainability Due Diligence Proposal 2022, p. 2.

[82] European Commission, 'Inception Impact Assessment', p. 4.

[83] Of course, the inception impact assessment also outlines 'no action', or 'self-regulation' as an option for dealing with the issue, but as with all impact assessments, the preference of the legislator is clearly noticeable in the articulation of the problem and constraints of action via market instruments. Some MSs (notably Denmark), industry, and the RSB all notice the same.

[84] Reference to Laura Wolters' group and evidence on many meetings with the industry. See here https://?responsiblebusinessconduct?.eu/wp/.

[85] Haar et al., 'Inside Job'.

[86] For example, at the 2022 Global Corporate Governance Colloquium in Oxford, June 2022 <https://ecgi.global/content/2022-global-corporate-governance-colloquium-gcgc>, and in Marvyn King et al., *Call to Action on Sustainable Corporate Governance* (Harvard Law School

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But it is rather telling that the most consequential pushback against changing imaginaries of prosperity behind the sustainable corporate governance came, at least initially, from the RSB. Unsurprisingly, industry focused its efforts there – ultimately gaining the access it wanted and discussing the substance of the Commission's inception impact assessment with the RSB (arguably in violation of its own rules[87]).

The RSB has rejected the Commission proposal twice: first the inception impact assessment and then the full impact assessment. In its first opinion, the RSB argued that the Commission's inception impact assessment set out '***a very broad and intangible problem***' and did too little to show the existence of that same problem, since it was not '***substantiated with clear evidence that EU businesses do not sufficiently address sustainability***'.[88] Yet, it was not an issue of the *quantity* of information provided by the Commission. Even the ninety-seven-page impact assessment, put together by the Commission knowing the stakes and trying to make their most substantiated case, did not as much as introduce an element of hesitation in the second opinion of the RSB, who claimed the '***problem description remains vague and does not demonstrate the scale and likely evolution of the problems the initiative aims to tackle does not provide convincing evidence that EU businesses, in particular SMEs, do not already sufficiently reflect sustainability aspects or do not have sufficient incentives to do so***'.[89]

The RSB could build upon a number of academic contributions that have been submitted to the consultations that followed the publication of the inception impact assessment. While many academics contributed, to illustrate the academic contestation I will single out in this chapter the contributions by two larger groups of scholars that are likely to have had a bigger impact, that is the ECGI group of corporate governance

Forum on Corporate Governance, 2021) https://corpgov.law.harvard.edu/2021/03/09/call-to-action-on-sustainable-corporate-governance/.

[87] European Parliament Working Group on Responsible Business Conduct 'MEPS for Responsible Business Conduct' (RBC), 'MEPS Call For Transparency and Information Over the Independence Of the Commission's Regulatory Scrutiny Board' (2021), https://?responsiblebusinessconduct?.eu/wp/2021/12/15/meps-call-for-transparency-and-information-over-the-independence-of-the-commissions-regulatory-scrutiny-board/, last accessed 11 January 2024.

[88] European Commission Regulatory Scrutiny Board, 'Opinion: Impact Assessment/ Sustainable Corporate Governance', Ares(2021)3065513, pp. 1 and 2.

[89] European Commission Regulatory Scrutiny Board, 'Opinion: Impact Assessment/ Sustainable Corporate Governance' SEC(2022) 95, p. 1. All emphases in the quotes in this chapter were added by the author of this book

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scholars (counting eighty-six people) and the (self-appointed group) of Nordic professors (counting twenty-seven people).

Both these groups have made public statements against the problem definition that the Commission puts forth. In a long piece article submitted to the consultation by the Nordic professors, it is suggested that the Ernst & Young study (and thus also the Commission's inception impact assessment) '***exaggerates the problem of climate change** and neglects the many other, equally serious, problems facing both company directors and EU legislators in their obligations to their respective constituencies*'.[90] The Nordic professors advise the Commission to place more trust in the efforts businesses are already making, insofar as '*the regulatory options recommended by the Study would seriously harm European business and prevent it from continuing to contribute to the sustainable growth and prosperity that the Union needs to fulfil its overall policies*'.[91] The same group of Nordic professors also suggest that there was no need to change corporate law to address the non-existent problem: '*Just as the company interest includes a multitude of stakeholders so does the concept of directors' duties comprise the same multitude and* ***current company law needs not change to reflect this***'.[92]

The bigger ESGI group, although more sympathetic to the environmental urgency, also did not share the enthusiasm for the company law reform and rather suggested that the '*regulation should instead focus on correcting market failure, through taxing externalities, curbing monopoly power and improving information disclosure*'.[93] In truth, for those who have followed the discussion in this field, such statements may sound a bit like a broken record. Information provision, taxation, and competition law – measures favoured in law and economics scholarship – have been shown as either ineffective (information provision),[94] insufficient, or impracticable in the context of globalisation (taxation),[95] or simply

[90] Nordic Company Law Scholars, 'Response to the Study on Directors' Duties and Sustainable Corporate Governance' LSN Research Paper Series No. 20–12, p. 2.

[91] Ibid. [92] Ibid.

[93] Alex Edmans, Luca Enriques, Jesse Fried, Mark Roe, and Steen Thomsen, 'Call for Reflection on Sustainable Corporate Governance' (2021), https://ecgi.global/news/call-reflection-sustainable-corporate-governance, last accessed 11 January 2024. This call for reflection was based on the ECGI policy workshop on sustainable corporate governance, and it was supported by eighty-seven corporate governance scholars.

[94] Corporate Sustainability Due Diligence Proposal 2022, p. 2.

[95] Tax Justice Network, '"Tax us if you can" Briefing Paper', (2005), www.taxjustice.net/cms/upload/pdf/tuiyc_-_eng_-_web_file.pdf, last accessed 11 January 2024.

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inapplicable to the issues of concern (competition law came to endorse monopoly power).[96]

6.2.2 *Wait a Bit* – What Solutions?

6.2.2.1 How Capable Are Directors?

Perhaps the strongest pushback was mounted against the Commission's idea to introduce changes regarding director's duties. The Council expressed '*the strong concerns expressed by Member States that considered Article 25 to be an inappropriate interference with national provisions regarding directors' duty of care, and potentially undermining directors' duty to act in the best interest of the company*'.[97] On what intellectual basis does the Council, and RSB before it, base their concerns about placing a more demanding set of duties and responsibilities on the directors?

The positions of both groups of the abovementioned scholars provide a hint. Thus, the group of Nordic professors write in their position paper: '*Strangely, the* [Commission's] *Study appears to believe that directors as opposed to shareholders have an incentive to act in the long-term interest of the company and would do so if not restrained by shareholders [...]. rude experience that directors are in fact not long-term oriented, but motivated by short-time enrichment and if left unsupervised prone to* ***divert company funds to their own pockets or use them for self-aggrandising projects like unnecessary investments and empire-building takeovers***'.[98] The ECGI group adds that placing more duties on the managers would lead to an even '*bigger danger for stakeholder value* [which] *is not shareholder capitalism but* ***"managerial capitalism,"*** *where unaccountable managers shrink the pie for both shareholders and stakeholders*'.[99]

One may ask, why now this demonisation and infantilisation of directors? Fifty years ago, Milton Friedman was in no way concerned that corporate executives were *not able* to take the interests of workers, the environment, or inflationary pressures into account, but rather that they have done so too *eagerly* – and at the *expense* of the shareholders. That is, Friedman was concerned that the social responsibility of directors

[96] Michelle Meagher, *Competition Is Killing Us: How Big Business Is Harming Our Society and Planet-and What to Do about It* (Penguin UK, 2020).

[97] European Council, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 – General Approach, ST 15024 2022 REV 1, p. 10.

[98] Nordic Company Law Scholars, 'Response to the Study on Directors' Duties and Sustainable Corporate Governance', p. 12.

[99] Edmans et al., 'Call for Reflection on Sustainable Corporate Governance', section 3.

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amounted to not acting "in the interest of their employers"[100] [ie. shareholders] and it meant "spending" someone else's [ie. shareholders'] money.[101]

After many years of discussing how to align the agency of managers to that of shareholders, however, this corporate governance constituency became distrustful not only of the willingness but also the capacity of corporate leaders to act responsibly. But if the directors so eagerly assumed the obligation to balance very complex sets of interests in the past – much to the dismay of Friedman – why could they not do it today? All the more so given that their personal capacities must have grown multiple times – judging by the fact that they earn some ten to fifteen times more than their colleagues in the 1960s and 1970s.[102]

The obvious irony here is that the preoccupation of corporate scholarship with constraining the power of managers meant that managers grew considerably richer, while their responsibilities grew thinner. The pay gap between managers and workers increased more than tenfold over the past forty years[103] – with huge bumps usually justified with a "war for talent" type of argument,[104] or with the lack of willingness to take the job without large pay.[105] And yet, these highly paid talented people were considered as not being capable of caring for more than one thing only (i.e. profit) and had to be accountable only to one group of stakeholders (i.e. shareholders). This development is perhaps one of the most notable shifts that has taken place from the time that Friedman wrote his famous article.

6.2.2.2 The Conflicting Imaginaries of Prosperity

To the credit of the abovementioned critical groups of participants in the public consultations, they have not missed the fact that 'sustainable corporate governance' starts from a very different imaginary of political economy, a very different imaginary of prosperity. Not unsimilar to Friedman decades ago, this is how Nordic professors present the

[100] Friedman, 'The Social Responsibility of Business Is to Increase Its Profits', p. 2.
[101] Ibid. [102] Piketty, *Capital in the Twenty-First Century*.
[103] James Suzman, *Work: A History of How We Spend Our Time* (Bloomsbury Publishing, 2020).
[104] Kibum Kwon and Soebin Jang, 'There Is No Good War for Talent: A Critical Review of the Literature on Talent Management', *Employee Relations: The International Journal* 44, no. 1 (2021): 94–120.
[105] Rutger Betlem, Mathijs Rotteveel, and Pieter Couwenbergh, 'Opvolging bij banken steeds groter problem', FD (2022), https://fd.nl/financiele-markten/1444588/opvolging-bij-banken-steeds-groter-probleem, last accessed 11 January 2024.

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Commission's synthesis: '*We are surprised of the apparent hostility to shareholders as a group and the idea that to serve shareholders' interest is to increase inequality and somehow unfairly benefit the ultra-rich "1 per cent." It is sentiments that we mostly associate with anti-market ideologies that are difficult to reconcile with the framework of a* ***free market*** *economy,* ***private*** *ownership rights and* ***innovation*** *and* ***progress*** *through* ***competition*** *upon which the European Union is based*'[106] [emphasis added].

The 'framework' (or imaginary) of prosperity they allude to is premised on a different synthesis of political economy, which places the 'free market economy', 'private property', and 'competition' in the driving seat of 'innovation' and 'progress'. Nordic professors thus outline (succinctly and effectively) the imaginary of neoliberal imaginary of prosperity and corporation that has become hegemonic, across the political spectrum and society,[107] from the 1990s.

The Commission's proposal presents a different imaginary of prosperity and corporation, which sees social responsibility rather than market forces as the drivers of prosperity, while resting on a different relationship between public and private, political and economic, individual and collective. The Commission's imaginary resembles in part the post-WWII imaginary of corporation that Friedman identified as 'collectivist': '*the doctrine of "social responsibility" taken seriously would (. . .) not differ in philosophy from the most explicitly collective doctrine. It differs only by professing to believe that collectivist ends can be attained without collectivist means*'.[108] The new synthesis adds, however, at least two new irritants – the allegedly exaggerated concern with climate, and (if too carefully) the concern with the prosperity of people abroad. '*This Directive aims to ensure that companies active in the internal market contribute to sustainable development and the sustainability transition of economies and societies by respecting human rights and the environment, through the identification, prevention and mitigation, bringing to an end remediation and minimisation, and where necessary, prioritisation, of potential or actual adverse human rights and environmental impacts connected with companies' own operations, subsidiaries and value chains, and ensuring that those affected by a failure to respect this duty have access to justice and legal remedies*'.[109]

[106] Nordic Company Law Scholars, 'Response to the Study on Directors', p. 15.

[107] Martin Gelter, 'EU Company Law Harmonization between Convergence and Varieties of Capitalism', ECGI, 2017.

[108] Friedman, 'The Social Responsibility of Business Is to Increase Its Profits', p. 6.

[109] European Parliament, Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the

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6.3 Paradigm Shift in Knowledge and Expertise

The new imaginary of prosperity will often be preceded by the observation of problems and developments that usually (but not always[110]) translate into the production of academic knowledge aiming to systematise and provide answers to the problems uncovered. This has also been the case for the sustainable corporate governance file, as we have learnt through the backdoor. Namely, many of the criticisms levelled at the Commission for its reassessment of the complex problem seemed to stem from the knowledge used in the preparation of the Ernst & Young report, as well as consequent Commission and Parliament positions.

The Ernst & Young study (serving as the basis for the Commission's initial impact assessment, the Parliament's recommendation, and the final proposal of the Directive) seems to draw primarily on green finance and corporate (law) scholarship regarding business and human rights on the one hand and the climate and environment on the other. Such a choice is not immediately a surprising one. Given the subject matter of the report, the Ernst & Young consultants reached out to what dealt with the questions they were tasked to explore. However, the considerable outcry in the wake of the inception impact report made clear that there was far more to the story.[111]

Scholars who usually claim ownership of the field of 'company law' and 'corporate governance' are company law scholars, law and economics scholars, and law and finance scholars. These fields are white and male dominated,[112] something that any participant in a conference who

Council on Corporate Sustainability Due Diligence, www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html, last accessed 11 January 2023, Recital 14.

[110] Marija Bartl, 'Contesting Austerity: On the Limits of EU Knowledge Governance', *Journal of Law and Society* 44, no. 1 (3 February 2017): 150–68.

[111] One can find a plethora of very critical contributions on the Oxford Business Law Blog and in the *Harvard Business Law Review*; see Mark Roe, Holger Spamann, Jesse Fried, and Charles Wang, 'The European Commission's Sustainable Corporate Governance Report: A Critique', Harvard Business School, Working Paper 21-056 (2020), www.hbs.edu/ris/Publication%20Files/21-056_51410b50-5488-477a-9aa3-df8f81138e53.pdf, last accessed 14 January 2024; Marcello Bianchi, Mateja Milič, 'EC Corporate Governance Initiative Series: "European Companies are Short-Term Oriented: The Unconvincing Analysis and Conclusions of the Ernst & Young Study,"' Oxford Business Law Blog (2020), https://blogs.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-european-companies-are, last accessed 14 January 2024.

[112] For instance, if one looks at the list of scholars who represent themselves as the 'Nordic Professors of Company Law', the group is comprised of twenty (out of twenty-one) male academics. But that will be a perception of everyone who has ever attended the

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does not fit the suit would realise upon entering the room. These fields also often include a large proportion of practising corporate lawyers. Now, given that these fields have led the way on the study of problems raised by the neoliberal corporation – shareholder primacy, shareholder activism, and agency problems (at times with the ESG flavour)[113] – the knowledge they produced failed to provide an obvious source that a consultancy firm such as Ernst & Young would look to when trying to identify the "root causes" of corporate short-termism.[114]

The omission of this mainstream knowledge precipitated an offence, best illustrated by the group of Nordic company law scholars who, when responding to the Commission's (and Ernst & Young's) claim that the position in the report presents the mainstream in the field of corporate law and sustainability, say: '*In legal discourse, silence is not acquiescence, but more likely reflects genuine disinterest*'.[115] By implication, these company lawyers admit that they were neither interested in the topics that were taken as relevant by Ernst & Young (climate or human rights) nor were they bothering to engage with scholars dealing with these matters.

However, while the owners of the corporate governance field remained concerned with perfecting the alignment between shareholders' and managers' interests, something shifted. Much to their surprise. When the European Commission came to explore how corporate law and governance relate to some of the problems it increasingly identified – from the perspective of sustainability (as articulated by natural and social sciences)[116] and inequality (as articulated by an ever-growing

conferences organised in this field. Nordic Company Law Scholars, 'Response to the Study on Directors'.

[113] Today, with a growing concern for impending environmental catastrophe, this type of scholarship is still strongly shareholders/investors focused, exploring often whether and how shareholders and investors can bring about more environmentally friendly behaviour. The most prominent venue for this kind of scholarship is www.ecgi.global/.

[114] While most corporate scholars claim the shareholder perspective to be a long-term orientation, the problem is that this characteristic does not really convince in contemporary financial markets and globalised economy. See Robé, *Property, Power and Politics*.

[115] Nordic Company Law Scholars, 'Response to the Study on Directors', p. 3.

[116] See, for instance, B. Sjåfjell and C. Bruner (eds.), *Cambridge Handbook on Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press, 2019). For two important collective proposals for the transformation of corporate governance, see Johnston, J. Veldman et al., 'Corporate Governance for Sustainability' (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3502101, last accessed 14 January 2024; Beate Sjåfjell, Jukka Mähönen, Tonia Novitz, Clair Gammage, and Hanna Ahlström, 'Securing the Future of European Business: SMART Reform

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body of economic, social, and legal sciences) – the types of scholarship produced by the aforementioned corporate law groups appeared irrelevant. In a world where corporations produce 50 per cent of CO_2 emissions and inequality has become rampant (much to the advantage of large shareholders and managers), aligning the interests of managers and shareholders may seem somewhat redundant.

Fortunately for this group of scholars, they still found a sympathetic ear in the RSB, which also based its extraordinary double rejection on the fact that it did not recognise either the problems or the solutions as discussed earlier and instead advised that the '*report should be revised to present the evidence in a more balanced and neutral way*'.[117] Or, in the second round, that '*the report should present more systematically the views of different stakeholder categories. It should find a better balance between supportive and critical views expressed*'.[118]

The famous philosopher of science Thomas Kuhn argued decades ago that it is the accumulation of anomalies and contradictions that will drive "normal science" – such as that of mainstream corporate (law and finance) scholarship today – increasingly out of its dominant position.[119] The inability of traditional corporate governance scholarship to provide answers to the problems plaguing the corporate world leaves this scholarship, and by extension the RSB, only with the option of interpreting away any problems. But that gets one only so far.

6.4 The Contours of New Imaginary of Prosperity

What kinds of different understandings of political economy are being instituted via the EU's attempts to change what corporation stands for? In whatever final form the CSDDD will take effect, it will present important discursive and normative building blocks for the new imaginary of prosperity – if and when it is instituted. In what follows, I will first outline shifts that have taken place thus far and then turn to discuss some rather conspicuous omissions.

Proposals', University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2020–11 (2020), https://ssrn.com/abstract=3595048, last accessed 14 January 2024.

[117] European Commission Regulatory Scrutiny Board, 'Opinion: Impact Assessment/ Sustainable Corporate Governance', Ares(2021)3065513, p. 3.

[118] European Commission Regulatory Scrutiny Board, 'Opinion: Impact Assessment/ Sustainable Corporate Governance' SEC(2022) 95, p. 5.

[119] Kuhn, *The Structure of Scientific Revolutions*.

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To start, the European Commission has produced the CSDDD proposal on the basis of a very different understanding of how the economy, law, politics, government, society, and nature work and ought to work together, in order to bring us into a more prosperous future. The Nordic academics accurately point to this paradigmatic shift, by suggesting that the Commission's proposal departs from the neoliberal understandings of '*free market economy, private ownership rights and innovation and progress through competition*'[120] that have been prevalent in the EU until the present. Rather, the Commission (and European Parliament) reappraise the problems economies and societies face today– social and environmental – and propose a different mix of solutions that move beyond reliance on markets and shareholders alone, and suggest that law and government have a more important role to play.

Starting with legal imaginaries, in the CSDDD proposal, law is not a laggard behind technology or business. Rather, it is seen as *constitutive* of social and economic relations, also in its absence (!), and thus at the same time capable of reshaping those relations. The room for manoeuvre that company law leaves today for private parties to fill – for instance, by social norms of shareholder value – should be supplanted by public norms that embrace more constructive pursuits. Soft law, which has been so popular in the neoliberal imaginary of prosperity, is out of the picture – not only did it not work (like in the case of the non-financial reporting directive)[121] but it also makes far less sense to leave the questions of collective good entirely to the decisions of private actors.

What fundamentally distinguishes the contemplated imaginary of prosperity from both the neoliberal imaginary of prosperity and the welfare state imaginary of shared prosperity is the rearticulation of the relationship between nature and society. If the neoliberal imaginary of prosperity did not see either nature (at all) or society (viewing it only as a collection of individuals), the welfare state imaginary of shared prosperity mainly linked questions of nature to that of precaution.[122] The 'sustainable corporate governance', inspired by the EGD, aims to reshape society in a much more nature-centric way. It is thus no surprise that 'sustainable corporate governance' placed sustainability and the

[120] Nordic Company Law Scholars, 'Response to the Study on Directors', p. 15.

[121] Directive (EU) 2022/2464 on corporate sustainability reporting, Explanatory Memorandum.

[122] See Timothy O'Riordan and James Cameron, 'The History and Contemporary Significance of the Precautionary Principle', in *Interpreting the Precautionary Principle* (Routledge, 1994), p. 12.

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directors' duties of care at the centre.[123] The final trimming down of the ambition, prompted by commentary that climate and nature played too dominant a role,[124] only underscores this ambition.

When it comes to the conception of the "corporate self", the set of concerns, interests, and duties that the corporation embraces are to *expand* (via legal intervention) beyond the narrow, profit-driven neoliberal corporate self. Companies in this new imaginary are certainly not there to further "shareholder value" alone, and shareholders themselves are not seen as the only, or the best, "accountability mechanism" for the corporation. Instead, it is clear to lawmakers that the ethics of corporate conduct needs to change. Again, it is responsible directors that Friedman so abhorred, and current corporate scholars' mistrust, that need to be committed by *hard law* to social responsibility. Currently, both their socialisation[125] and their financial incentives[126] work against responsible conduct. The new rules should expand the gaze of directors towards all stakeholders as well as a bigger chunk of the supply chain.

Profit (which has come to mean "shareholder value"), celebrated first by Friedman and later by much corporate law scholarship for its relative "clarity"[127] and "precision" in directing directors action,[128] cannot be the main guiding star for managerial conduct. If anything, the shareholder perspective must be paired with 'stakeholder' perspectives,[129] which in turn need to account for our interdependence with nature – a complex ecosystem that cannot be controlled, but instead approached with respect, precaution, and care.

Finally, the exasperation of EU institutions with waiting for voluntary action by corporations has led to a shift in enforcement strategies. In this proposal, we see a growing role for the administrative enforcement that, next to courts, must ensure that companies are socially responsible. And while civil liability has been trimmed down due to pressures exerted

[123] See the summary at the website of the European Commission, at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en.
[124] Nordic Company Law Scholars, 'Response to the Study on Directors', p. 5.
[125] Winter, 'Dehumanisation of the Large Corporation'.
[126] Beate Sjåfjell, 'Redefining the Corporation for a Sustainable New Economy', *Journal of Law and Society* 45, no. 1 (2018): 29–45.
[127] Friedman, 'The Social Responsibility of Business Is to Increase Its Profits', p. 1.
[128] Ibid.
[129] Stakeholders' involvement was maintained in the Proposal in a very limited fashion, as the obligation to consult with regard to the prevention and mitigation plans 'where relevant' (Corporate Sustainability Due Diligence Proposal 2022, arts. 7 and 8).

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upon the Proposal, administrative liability has remained mostly untouched.

This is certainly not to say that this is the most ambitious way of socialising the corporation – either in the Commission's, Parliament's, or the Council's version. Many NGOs have argued that the proposal is not ambitious enough in terms of scope (i.e. which companies are subject to due diligence rules), the breadth of directors' duties, the engagement with the distribution of value in the economy, the rights of workers, the participation of other stakeholders in governance, etc.[130]

My more specific concern is that the current proposal fails to engage with the 'fundamentals' of corporate activity – be it ownership or governance, power or profit. This is particularly problematic because this proposal aims to tackle the grossly unfair "terms of trade" between Europe and "developing' countries",[131] which gets expressed in HR violations, exploitation, and tax evasion.[132] The attempt to solve the problems of global maldistribution by increasing the administrative capacity of MNCs can be seen as optimistic (at best) and cynical (at worst). While the proposal makes an identifiable shift on what corporation is and ought to be, the response to the question of whether this is going far enough, quickly enough, remains doubtful.

6.5 Going Beyond: *Pluralising Economy, Transforming Imaginaries*

If transforming the "mainstream" business is difficult to achieve, is there perhaps an alternative way forward that would instead work *around* mainstream business? In this section, I want to argue that not only is there such an alternative path, but that it is also an obvious choice for the EU institutions to take up, as it has become clear in various policy fields that there is such a "low hanging fruit" for achieving various EU objectives.

One way to make the economy "work for people" is to facilitate and support those businesses that today (want to) operate on the basis of different principles than represented by the mainstream model. Such

[130] Robé, *Property, Power and Politics*.
[131] Daniela Caruso, 'Non-Parties: The Negative Externalities of Regional Trade Agreements in a Private Law Perspective', *Harvard International Law Journal* 59 (2018): 389.
[132] Robé, *Property, Power and Politics*.

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enterprises exist, and have existed for a long time,[133] and they are recognised in the EU under a broader term of 'social economy'. These organisations share a couple of traits. First, they have social purpose, that is, they are committed to '*the primacy of people as well as social and/or environmental purpose over profit*'.[134] Second, when they make a surplus, they do not extract it as profit. Rather, they '*reinvest most of the profits and surpluses to carry out activities in the ("collective interest") or ("general interest")*'. Finally, they have and embrace more '*democratic and/or participatory governance*'.[135]

These social economy organisations are social or non-extractive by design. Not being motivated by the extraction of profits, they have more space to care both for people and the planet, inside and outside of the enterprise. Such organisations usually have numerous positive impacts: not only do they *not* create social, labour, and environmental harm in order to increase their profits, but – as the European Commission itself underscores – they have positive effects on providing resilience in crises[136] while further increasing social inclusion, creating social innovations as well as innovations in circularity, and caring for nature.[137] They are particularly important today, when the benefits of economic cooperation accrue to the lucky few – either because of their geographical location, age, or their social status – while the harms of economic activity are distributed broadly.[138]

Social economy entities are often highly innovative, not only on the technological but also on the social and legal plain. Just consider the degree of social and legal innovations within the so-called Miethausersyndikat in Germany. This cooperative housing network ensures that people on all budgets can live in affordable (cooperative rentals), sustainable (they build with sustainable technologies), and inclusive (they ensure that residents are mixes of various groups) housing, developing new social and legal designs in order to guarantee the continuous decommodification of these properties, while further investing in building more non-extractive housing projects, to house more people.[139]

[133] As (social) cooperatives, steward owned (foundation or association owned) enteprises and social enterprises more narrowly understood.

[134] European Commission, Building an economy that works for people: an action plan for the social economy, COM(2021) 778 final, p. 5.

[135] Social Economy Action Plan 2021, p. 3.

[136] Social Economy Action Plan 2021, p. 9.

[137] Social Economy Action Plan 2021, p. 10.

[138] Piketty, *Capital and Ideology*.

[139] David Bollier and Silke Helfrich, *Free, Fair, and Alive: The Insurgent Power of the Commons* (New Society Publishers, 2019).

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The most encouraging news is that we are not only talking about the fringes when we talk about social economy in Europe. According to the European Commission, '*there are 2.8 million social economy enterprises, representing 10% of all businesses in the EU. Almost 13.6 million people – about 6.2% of the EU's employees – work for social economy enterprises*'.[140] And many more people engage in voluntary work in social economy. Social economy organisations are often not legally and publicly seen and recognised, but in countries where they have received some public support, such as in Italy, they present a serious economic force.[141]

What is rather surprising is that despite the fact that the Commission clearly recognises the vast benefits of social economy in providing resilience in the face of crises, inclusion, innovation, etc., the EU institutions have shown very little "public leadership" to promote social economy. In fact, the EU has been developing 'action plans' for social economy for more than a decade, but not much actual support has come from those efforts.[142] So why not take a logical step and provide public support to social economy – just as we are providing it today to clean technologies?

6.5.1 Mainstreaming Non-extractive Organisations

What would it take to provide public support for social economy? I want to argue here for using the tools of industrial policy to support social economy. This would certainly not be an exceptional way of supporting a certain sector of the economy – as we have seen some of those tools in Chapter 5, with regard to, most recently, clean technology. In order to make it easier and more attractive for emerging and existing organisations to become social organisations, many facilitations can and should be proposed:[143]

[140] See Commission's website, https://single-market-economy.ec.europa.eu/sectors/proximity-and-social-economy/social-economy-eu_en.

[141] Antonio Fici, 'The New Italian Code of the Third Sector. Essence and Principles of a Historic Legislative Reform', in *The Law of Third Sector Organizations in Europe*, ed. Fici (Springer Nature Switzerland, 2023), 115–39.

[142] See Commission's website https://single-market-economy.ec.europa.eu/sectors/proximity-and-social-economy/social-economy-eu_en.

[143] These proposals build on the extensive empirical research within the framework ERC N-EXTLAW project (no. 852990), which mapped various legal and non-legal obstacles that social economy enterprises face. The research is on file with the author; it will be made available as country reports at the end of project.

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(A) Giving legal recognition to social economy entities. Social economy organisations that respect the principles mentioned earlier cannot be distinguished from mainstream enterprises in many of the EU MSs. Nor can they easily find a legal form that would foster their social purpose. Thus, Europe and its MSs should in the first instance provide a recognisable legal form, or distinguishable public label, and thus both increase recognition while lowering the costs of setting up and running this type of organisation.

(B) Another traditional way of supporting a sector would be to provide social economy organisations with privileged access to public procurement. Giving such privileged access to social economy organisations would also help the EU MSs to fulfil the environmental and social aspirations that they have within the framework of procurement policy, while at the same time help social economy to become more useful to European economy.

(C) One could also consider giving social economy organisations various subsidies, guarantees, tax benefits, and rebates – as we have just seen in the industrial policy chapter in relation to clean technologies. Some countries already do this (such as Italy and Germany), but this should ideally become a rule across Europe.

(D) Importantly, it is crucial to ease the administrative burden on social economy enterprises. Given that many administrative requirements today are intended for mainstream economy, they may be at times less necessary, or necessary in a modified form, for social economy organisations. Just like we have seen before, we need to create 'one-stop-shops', national agencies for social economy that would not only promote social economy, but also help social economy organisations fulfil, or eventually dispose of, administrative requirements that serve no purpose in relation to their operation.

(E) Finally, ensuring effective public and private financing for social economy is fundamental. As social economy organisations need small-scale financing, they are usually commercially uninteresting. Alternatively, they are seen by banks as too risky, given that they are not oriented to profit extraction. They are also commercially uninteresting to investors, including impact investors, who still expect high returns. In order to foster truly socially responsible economy, the governments have to play a much more prominent role – and like in the case of the Net Zero Industry Act – provide loans and guarantees, in exchange for social economy delivering various necessary products and services, etc. Thus, not only a Hydrogen Bank, but a Social Economy Bank, is what Europe needs today.

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6.5.2 *Transforming Imaginaries*

There are several ways in which social economy can help pluralise the way we think about, and do, economy. First, and the most obvious one, is that the proliferation of organisations with different motivations and ways of operating would not only have positive environmental and social impacts, as the Commission underscores at present, but would also provide a different way of thinking about economic activity along with the people that populate it. Social economy enterprises show a different face of the "corporate self", demonstrating that narrow self-interest is not the only reason why people want to engage in entrepreneurship, and in turn, whatever gains entrepreneurship brings, it is not dependent on oversized profit. Economic activity is possible and also beneficial on the basis of more caring and less extractive relations with both human and non-human nature.

Second, as the European Commission itself suggests, '*Social economy business models can influence and create spill-overs to mainstream business. A growing number of mainstream businesses are moving closer to social economy goals. For example, "benefit corporations" and "impact enterprises" incorporate sustainable ambitions in their missions, while other enterprises are adopting ad hoc measures to improve transparency and engage more actively with communities. This and the gradual incorporation of environmental, social and corporate governance (ESG) criteria in the governance of mainstream businesses and the investment policies of financial institutions and investment funds, are creating new opportunities for cooperation and cross-fertilization as well as access to new markets. The Commission will also reinforce the interactions between social economy entities and mainstream businesses by promoting best practices such as in the field of social intrapreneurship*'.[144]

Third, the visibility of social economy would also make new policy solutions available. Perhaps one of the most remarkable proposals on this front was Elisabeth Warren's 'Accountable Capitalism Act', which put forward how to make gigantic corporations more socially responsible. According to this proposal, every gigantic corporation (worth 1 billion or more) would have to take the form of a 'public benefit corporation' (the equivalent of 'social enterprise' in Europe). Such corporations would then be able to reinvest most of its surplus in advancing socially beneficial purposes, while submitting to being governed more democratically. The proposal did not make it through Congress, but

[144] Social Economy Action Plan 2021, p.13.

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perhaps the conditions in the US were not ripe. With a stronger presence and visibility of social economy, this may change.[145]

The legislator could also actively create more spillovers and interactions between the 'social economy' file and the corporate governance file. First, one could consider expanding the purpose of business, going beyond 'due diligence' or even the more ambitious 'sustainable value creation' of the inception impact assessment, to making social and environmental impacts the central goals of business activity. Second, the Proposal could tackle profits, to make sure that for the most part they are reinvested in the company and its social purposes – instead of being privatised by those paying them out either to shareholders or management. Third, the corporate governance needs to go beyond identifying, mitigating, and remedying violations of human rights and aspire to greater democratic governance of companies, which by extension would influence how the benefits and costs of cooperation are both made and distributed.[146]

Last but not least, supporting social economy would have benefits also at the level of imagination, helping us to reimagine what corporation, and economy, can stand for. Economic activity is possible also on the basis of a more caring and less extractive attitude with regard to both human and non-human nature, helping to pluralise value-making practices and enabling private action to be both sustainable and distributive by design.[147]

[145] Colin Mayer, Leo E. Strine Jr., and Jaap Winter, 'Fifty Years Later, Milton Friedman's Shareholder Doctrine Is Dead', *Fortune* (13 September 2020), https://phyleon.com/wp-content/uploads/2021/03/Fortune-Milton-Friedmans-shareholder-doctrine-is-dead-on-its-50th-anniversary-20200913.pdf, last accessed 11 January 2024.

[146] These organisations include in the Netherlands, for instance, Buurtzorg (see www.buurtzorg.com), Triodos (see www.triodos.nl), or Odin (see www.odin.nl).

[147] Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a Twenty-first-Century Economist* (Chelsea Green Publishing, 2017).

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