

The Transformation of Corporate Governance

ADRIAAN F.M. DORRESTEIJN: EMERITUS PROFESSOR OF INTERNATIONAL COMPANY LAW, UTRECHT UNIVERSITY*



Corporate governance is no longer solely relating to the division of powers within the company and the way in which companies are managed and controlled. In the new fourth edition of the book *European Corporate Law* the conclusion is drawn that corporate governance is actually taking on a broader dimension and becomes more outward-looking by formulating principles on how companies should act in view of societal interests.¹ The Shareholders Rights Directive, for instance, emphasizes that ‘Directors’ performance should be assessed using both financial and non-financial criteria, including, where appropriate environmental, social and governance factors’.² Furthermore, the Proposal for a Directive on corporate sustainability due diligence is presented in light of the EU Commission’s conclusion that voluntary action has not resulted in large scale improvement across sectors to achieve the transition to a climate-neutral and green economy.³ In other words, more social responsibilities and accountabilities are required from businesses. Their free reign will be more tightened in view of overriding societal interests.

Even if you welcome this development you might remember the writing on the wall by Milton Friedman: ‘Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible’.⁴

Is the free society indeed endangered by requiring more social responsibilities of businesses? To appreciate Friedman’s statement one must realize that his view is based on the idea that corporate officials are not the right party to determine what society’s interests are. He questioned whether ‘self-selected private individuals [can] decide what the social interest is?’⁵

How does Friedman’s view relate to the law, more specifically to corporate governance? The law, apart from structure related rules such as company law, contains mostly prohibitions and sanctions. But such norms have not prevented our societies from getting nearer to the abyss.

From a societal perspective positively phrased norms are necessary to have impact on the actual business decisions. An impact that is appropriate to create long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society.⁶

In other words, businesses should internalize external factors in their policy and must put an end to externalizing costs. This is the direction in which corporate governance has to guide businesses in an ever more compelling way. Yes, corporate officials have a social responsibility but not to their own liking. We can agree with Friedman that societal interests must be determined by society itself, preferably by democratic means. Corporate governance should deliver the translation of these increasingly intrusive interests to corporate boards.

This editorial coincides with the farewell to Steef Bartman, initiator and long functioning main editor of this journal. We owe much to Steef’s initiative, his inspirational guidance of the editorial board and his commitment to involve authors from many EU Member States. Thank you, Steef!

* E-mail: afmdorresteyn@online.nl.

1 Adriaan F. M. Dorresteyn, Mieke Olaerts, Bastiaan Kemp, Marcus Meyer, Thomas Biermeyer & Tomas Arons, *European Corporate Law* (4th ed., Alphen aan den Rijn: Kluwer Law International 2022) (ISBN-13: 9789403532233), para. 3.33.

2 Directive (EU) 2017/828.

3 Proposal for a Directive on corporate sustainability due diligence, Brussels, 23 Feb. 2022 COM(2022) 71 final.

4 Milton Friedman, *Capitalism and Freedom* (Chicago/London: University of Chicago Press 1962). The quote is taken from the Kindle Edition, at 161.

5 See *ibid.*

6 UK Stewardship Code 2020.