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ARTICLE

# The Shareholders Rights Directive II

## The wrong cure for a deadly disease

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**Abstract** The recent attempt to amend the Shareholders Rights Directive provides an opportunity to review the Commission's policy towards corporate governance. The evidence is now clear that the Commission is among the numerous victims of the ideology of "agency theory". It obviously considers that corporate governance is an instrument via which corporate officers and directors are to be transformed into agents pursuing the shareholders interests only. There is mounting evidence, however, that rules of corporate governance based on such principles are damaging the economy as a whole. The Commission should draw the consequences and improve the rules of governance of European companies to get them internalising the consequences of their management decisions over affected interests.

**Keywords** Corporate governance · Agency theory · Stakeholders · Short-termism

On 24 July, 2015, Andrew Haldane, the Bank of England's chief economist, gave an interview to the *Financial Times*.[1] He did not beat around the bush in identifying the source of many of the economic problems of our time, observing that: "*business leaders are serving the short-term interest of shareholders at the expense of the wider economy*". The failure to "*adopt a sufficiently long-term view is hampering economic growth*" and "*the main reason why world growth has been subpar is because businesses have not been investing sufficiently*". The reason he identified is simple: "*while in the 1970s only 10 % of company profits were returned to shareholders, this figure*

[1] *The Financial Times*, July 25, 2015, "BoE's Haldane says corporations putting shareholders before economy".

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*has now climbed up to 60–70 %*". As a result, businesses "*are almost eating themselves*".

These are the views of someone who is hardly an extremist. And the evidence is mounting that inappropriate corporate governance rules are significantly damaging the economy. A March 2015 report by Enderson points to the fact that 1,150 billion US dollars (that's $1,150,000,000,000) have been distributed by companies worldwide to their shareholders, which is 10 % more than in 2014.[2] Another study, looking at France alone, shows that while dividends represented 30 % of the profits of non-financial companies in 1980, the percentage is now 85 %, and the amounts involved represent 2.6 times the investments made.[3] Companies are indeed being eaten alive by their shareholders.

Faced with this situation, one would have thought that the European Commission would have tackled corporate governance issues in Europe with resolve in order to establish more equilibrium between the various affected stakeholders. Instead, it has taken the view that shareholders should be empowered *even more*. In April 2014, the Commission proposed to the European Parliament and the Council an amendment to the Shareholders Rights Directive (2007/36/CE).[4] The object of the proposal is, *inter alia*, "*to create an attractive environment for shareholders*". It is hard to imagine that anyone would have thought that there was an urgent need to *"create an attractive environment for shareholders*". But this is how the Commission views what the present economy requires.

The Commission is the victim of the worldwide success of the ideology of "agency theory". This ideology taints most corporate governance codes and rules and the European economy is only one of its victims (1). The Commission began the Shareholders Rights Directive amendment process with a relatively innocuous proposal disconnected from the real and serious issues of our time (2). It is the Committee on Legal Affairs of the European Parliament (referred to as 'JURI') which reacted and attempted to deal with dysfunctional corporate governance rules. But most of what was innovative in the JURI proposal was deleted by the European Parliament (3). The JURI proposal may have been too controversial but the Commission keeps on proposing the wrong cure for a deadly disease (4). The process now seems to have stalled for lack of a consensus on the need to review fundamentally corporate governance rules, which play an essential role in the overall governance of the institutions of society (5).

[2]https://www.henderson.com/nopi/campaign/6/henderson-global-dividend-index-nov-2015.

[3]*See* Christian Chavagneux's article in *Alternatives Economiques*: http://alternatives-economiques.fr/blogs/chavagneux/2014/03/10/les-distributions-de-dividendes-plombent-l%E2%80%99investissement-des-entreprises.

[4]Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184 of 14 July 2007, pp. 17–24.

## 1 "Agency theory", corporate governance and the state of the economy

We live today in a world in which the overwhelming mantra is that the shareholders are the "*owners of the business*" and that the managers are their "*agents*".[5] Even corporate law experts such as Henry Hansmann and Reiner Kraakman have fallen victim to this purported "economic analysis of law". In their view, we have reached *The End of History for Corporate Law*. For them,

> "*the triumph of the shareholder oriented model of the corporation over its principal competitors is now assured.... the ideological and competitive attraction of the standard model will become indisputable, even among legal academics. And as the goal of shareholder primacy becomes second nature to politicians, convergence in most aspects of the law and practice of corporate governance is sure to follow...Moreover, the new activist shareholder-oriented institutions are today acting increasingly on an international scale. As a consequence, their influence now reaches well beyond their home jurisdictions. We now have not only a common ideology supporting shareholder-oriented corporate law, but also an organised interest group to press that ideology*".[6]

What was clearly presented as an "*ideology supporting shareholder-oriented corporate law*" has become imbedded in the thinking and teachings of most corporate law professors.[7] Even for the highly qualified Roberta Romano, "*...the classic agency problem...goes to the heart of corporate law...how do principals—the shareholders—ensure that their agents—the managers—behave faithfully*".[8] And the "*activist shareholder-oriented institutions*" have obviously reached European shores. They clearly occupy Brussels, Belgium.

Of course, a "*shareholder-oriented corporate law*" significantly taints firm governance: if only shareholders' interests are being taken care of, the other interests affected must be addressed either by the affected persons themselves or by political institutions via laws. The governance of the enterprise, narrowly understood as the governance of the corporation, further understood as the governance of the shareholders' property, thus significantly increases the workload of "political" institutions. And in a globalised world, the issue is even more difficult to address: individual States may not be in a position to take care of externalised interests; individually, they may not have enough weight to correct the imbalance without fear of losing dearly-won foreign direct investment. And, collectively, governments clearly face great difficulties in building consensus on such difficult issues.

As a result, agency theory and the ensuing mandate to maximise short term shareholder value have contributed, for example, to a concentration of income at the top.

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[5] For the godfather of this ideology, see *Friedman* [2]; On the deconstruction of his analysis, see *Robé* [7] or [10], pp. 11–32.

[6] *Hansmann/Kraakman* [3].

[7] There are of course a few exceptions. See *Stout* [12] and her sources.

[8] *Romano* [11], emphasis added. See also *Jensen/Meckling* [4], pp. 309–310 for whom "Since the relationship between the stockholders and manager of a corporation fits the definition of a pure agency relationship it should be no surprise to discover that the issues associated with the "separation of ownership and control" in the modern diffuse ownership corporation are intimately associated with the general problem of agency...".

Aligning officers' compensation with the increase in "shareholder value" has led to the result that, in 2012, the annual remuneration of the 500 highest paid executives in the United States averaged $30.3 million of which 82 % came from stock-based pay.[9] These numbers are high and shock many. But the main problem is not really how much CEOs are making—this represents a very small fraction of the "shareholder value" created. The main problem is that to get these substantial incomes, CEOs create "shareholder value" often by creating significant "negative externalities" which, by definition, are not accounted for. Firms endorsing shareholder value maximisation tend to concentrate upon squeezing costs to produce immediate returns, and so reduce the quality of employment (*e.g.*, wages, pensions provision, job security) even when this is not outsourced, offshored, *etc*. This results in lay-offs and plant closures, which have devastating effects on the relationship with stakeholders. This also has a tendency to encourage regulatory dumping.[10] "Maximising shareholder value" has also legitimised the use of international tax structures through tax havens.[11] This has become a strategic imperative, shaping global value chains, which are often disconnected from real life economic exchanges.[12] It has eroded the tax bases of the jurisdictions that provide for high-quality physical and technological infrastructure, education, health and welfare and educated workers that firms rely on for their continued operations.[13] This has contributed at least in part to increasingly unbalanced public budgets and growing public debt, and to declining demand in advanced economies.[14] All these costs generated by existing rules of firm governance show up nowhere in the firm's accounting system. Corporations' finances provide evidence of the creation of value (*i.e.*, of "shareholder value") when, strictly speaking, the firm may actually have *destroyed* value when all the costs deriving from the decisions made are taken into account.

"Maximising shareholder value" legitimated the replacement of a "retain and reinvest" allocation regime that invested in productive capabilities with a "downsize and distribute" regime that reduced the labour force and distributed the resultant "free" cash flow to shareholders. A study by Reuters published on 16 November, 2015 revealed that out of 3,297 non-financial US companies studied, about 60 % had bought back shares since 2010 and, in the fiscal year 2014, their spending on buybacks and dividends *surpassed their combined net income*.[15] That means that the shareholders of these corporations extracted *more money from the corporations than the corporations themselves made*. "Maximising shareholder value" diverted the use of corporate funds away from productive investment and supported a decline in innovation. This

[9] http://www.purposeofcorporation.org/documents/project_outputs/modern-corporation-statement-on-economics.pdf, p. 2.

[10] See *The Modern Corporation Statement on Management*, item #4, available at http://www.purposeofcorporation.org/en.

[11] *Supra*, note 9, p. 3.

[12] See generally *Robé* [8].

[13] *Supra*, fn. 9, p. 3.

[14] *Id.*

[15] http://www.reuters.com/investigates/special-report/usa-buybacks-cannibalized/. There is a wealth of evidence that buy-backs which are driven by capital market pressures, impact negatively on productive investment (Hecht 2014; Lazonick 2013; Orhangazi 2008; Stockhammer 2004).

focus has led many firms to neglect investing in areas like research and development. The result is that future performance, which comes from spending on innovation, is being effectively undermined. The reduced time horizon for strategic decision-making has encouraged an increased emphasis on cost management and financial engineering, and has invited increasing asset churn (mergers, acquisitions, buyouts and demergers). The obsession with maximising short-term shareholder value has actually destroyed *long-term* shareholder value and it has significantly decreased the average life span of corporations during the past 30 years.[16]

## 2 The Commission's proposal

It is in this context that the Commission submitted a proposal to revise the Shareholder Rights Directive in March 2015. The proposal focused on five specific goals:[17]

1. Increasing the level and quality of "*engagement*" of asset owners and asset managers with their investee companies. Institutional investors and asset managers should be required to develop and disclose a policy on shareholder engagement. They should also disclose how their investment strategy in equities aligns with the long-term increase in value of the assets in which they are invested;
2. Creating a better link between the pay and the performance of company officers. To that effect, listed companies should publish a remuneration policy and a remuneration report and submit them to a shareholder vote. The decision as to the actual remuneration to be paid would still remain with the board, however;
3. Enhancing transparency and shareholder oversight on related party transactions;
4. Ensuring reliability and quality of advice of proxy advisors. Proxy advisors, in particular, should implement measures to guarantee the accuracy and reliability of their voting recommendations;
5. Facilitating the transmission of cross-border information (including voting) across the investment chain in particular through shareholder identification.

This proposal was rather innocuous and it failed to address significant issues in corporate governance. Also, there was nothing about "*long term shareholding*" in the original text published by the Commission. It was the Legal Affairs Committee (JURI) which introduced this notion in its report of 7 May 2015.

## 3 The JURI's innovative position and the Parliament's rejection

The JURI completely changed the text prepared by the Commission. 84 amendments were introduced to the draft Directive by the JURI committee which voted by a narrow 13 to 10 majority:

[16] *See The Modern Corporation Statement on Management*, item #6, available at http://www.purposeofcorporation.org/en.

[17] For a detailed and critical analysis see *Johnston/Morrow* [5].

1. The JURI suggested that the Directive should be applicable not only to listed issuers but also to "*large companies and large groups*";
2. The JURI also suggested that there should be measures ensuring greater engagement of all *stakeholders* (employees, local authorities and civil society) and not only *shareholders*;
3. The JURI finally suggested that there should be measures favouring long term shareholding through at least one of four measures: additional voting rights; tax incentives; loyalty dividends or loyalty shares.

The Commission's proposal, as amended by the JURI, was submitted to a vote at the plenary session of the European Parliament on 8 July 2015. The Parliament approved the proposal but rejected a large number of the JURI's amendments. The preamble of the adopted proposal provides a relatively appropriate description of present issues in corporate governance and on how to address them. But the text of the Directive in fact has lost most of its (in any case, small) teeth: large companies and large groups have been carved out of the scope of the Directive, the emphasis on long-term shareholding has been repealed, "say-on-pay" by employees is no longer envisaged and having a shareholders' vote on remuneration policy is now merely advisory.

As regards the Council, no agreement has been yet reached and it appears that the Parliament, Council and Commission will seek to work out a compromise in the Trilogue process. No timeline is as yet available.

Although the JURI tried to improve the Commission's proposal, none of the European institutions seems to have understood the importance of proper rules of corporate governance for the European economy as a whole and regarding the urgency of the need to cure it from a self-inflicted deadly disease.

After the vote in the plenary session of the Parliament on 8 July 2015, not much was left of the JURI's proposal. There is actually now a complete discrepancy between the objectives set out in the preamble and the means put forward for achieving these objectives:

1. Section 2 of the preamble indicates that "*Although they do not own corporations, which are separate legal entities beyond their full control, shareholders play a relevant role in the governance of those corporations*".

   This acknowledgement that shareholders do not own corporations is very important. Although no consequences are drawn from this statement, this could be the beginning of the end for "agency theory" in Brussels. If shareholders do not own corporations, corporate officers cannot be their agents. If the consequences end-up being drawn from this legal truth, it could mean that the door is opening slightly to stopping enterprises from being managed, *contra legem*, in the sole interest of shareholders.
2. In Section 2a of the preamble, the consequence of the reality of the legal relationships in an enterprise are immediately drawn: "*since shareholders' rights are not the only factor which need to be taken into consideration in corporate governance, they should be accompanied by additional measures to ensure a greater involvement of all stakeholders, in particular employees, local authorities and civil society*".

   But this bold statement, in comparison with past practices, has almost no consequences in the text of the Directive…

3. The same applies to Section 3 of the preamble in which it is stated that "*proper involvement of stakeholders, in particular employees, should be considered an element of utmost importance in developing a balanced European framework on corporate governance*". But, again, no consequences follow from this in the draft Directive.

No consensus is in sight on how to exit an ideologically charged system of corporate governance which *is* successful: its purpose has been to align officers' compensation to the increase in shareholder value. "Agency theory" is an unqualified success in this respect. But it is "*at the expense of the wider economy*", as Haldane puts it—*i.e.*, at the expense of what should be at the top of the Commission's list of priorities.

## 4 The wrong cure for a deadly disease

Article 1(a) of the adopted proposal provides that the purpose of the amendments suggested is "*to facilitate shareholders' engagement in the long term*".

To put it abruptly, "long term" (2 years…) shareholding taken in isolation from other reforms is only a (bad) means to a (good) end: fighting short-termism. *Short-termism is not the disease; it is a symptom*. Converted to agency theory ideology, regulators and reporters worldwide have advocated that the purpose of corporate governance is to align the interests of managers with those of the shareholders. That this has led to bad enterprise management has become more and more evident. But instead of stripping the law books of this ideology, the Commission has found no better idea than attempting to now *align the interest of the shareholders with those of firms*. The logic is completely upside-down: now that agency theory has been successfully implemented, that enterprises are managed in the sole interest of shareholders at the expense of all other interests present in enterprises and in society, the solution identified by the Commission for curing a self-inflicted disease is to align the interest of shareholders with those of firms by giving them incentives to act in the "long-term"—which, in the Commission's world, is two-years!

But the problem should be treated at its roots, not in its consequences. Short-termism is only the evidence that (many) shareholders do not care about the well-being of enterprises; they only want to maximise the return on their investment. And as a consequence, they trade faster and faster. In 2011, the average holding period was 22 seconds;[18] or 5 months if one discounts the impact of high speed trading. This is not an issue in itself. Shareholders do as they please with what they own. The issue is that shareholders should not be treated as the owners of something they do not own and (for many of them) do not care about, as an owner would. They do not own *firms* (or *enterprises*). They own *shares*.

The disease is agency theory: managers are not the shareholder's agents; they are the company's agents. Agency theory leads to bad management: serving the shareholders at the expense of stakeholders and of the economy. And further empowering shareholders will only make things worse.[19] While the preamble (read, the JURI)

[18] *The Telegraph*, January 18, 2012.

[19] "*Shareholder empowerment delivers management a simple and emphatic marching order: manage to maximise the market price of the stock*"; see *Bratton/ Wachter* [1], p. 653.

notes that proper corporate governance "*depends on checks and balances between the different organs and different stakeholders*", the proposed Directive contains no provisions mandating or even facilitating input into corporate governance by those different stakeholders. The Commission has chosen an approach to corporate governance regulation which is based only on shareholder empowerment. But increasing shareholder empowerment will merely allow activist investors (who have never invested a penny in any enterprise since they are only active on the *secondary* market for shares, *i.e.*, they buy shares from other shareholders) to place further pressure on companies to increase their short-term share price.[20] It will not create any incentive for currently passive institutional investors to assert a more dominant voice.

The current proposal relies *exclusively* on shareholders to drive the shift to a longer-term perspective. How this miracle will happen remains unclear, however. If one looks at the emphasis put on "say-on-pay", there is clear evidence that very few shareholders have used advisory "say-on-pay" votes in the UK and US to express dissatisfaction with pay policies.[21] Nor is there any reason to believe that moving to a binding shareholder vote will suddenly result in remuneration policies that better align executive incentives with outcomes beneficial to companies, shareholders, employees and broader society. If CEOs make a bundle, it is because shareholders make a bundle; that was the whole purpose of aligning their compensation solely with the shareholders' interests—which in reality translated into the shareholders' *short-term* interest because CEOs are less and less sure to hold their position in the long term.[22]

The urgency is to shift away from the current shareholder-centric approach to corporate governance and company law towards a model that prioritises the long term interests of the company, whilst respecting the interests of shareholders and other stakeholders.

## 5 The importance of corporate governance

The Commission still fails to realise that corporate governance is a very significant part of the overall institutional system of governance. It is important for all those affected: shareholders, employees, officers and directors, managers, local communities - in fact, for all of us. It is not only a matter of relationships among the officers, directors and shareholders. We all suffer from the dire consequences of dramatically imbalanced corporate governance rules.

One primary reason for the importance of corporate governance is that issues created by improper governance at the enterprise level have to be addressed at other levels of the governance system. For example, so-called "negative externalities", *i.e.*,

[20] On the impact of this fact on the purported position of the shareholders as "residual claimants", see *Robé* [9], pp. 24–29.

[21] In the US, where it is mandatory to hold a shareholder advisory vote on executive compensation at least every three years, a survey across all publicly listed companies found that only 2 % of pay plans (123 out of 4,113) considered in 2014 failed to receive majority shareholder support. *See* http://www.purposeofcorporation.org/documents/briefing-shareholder-rights-directive.pdf.

[22] *See The Modern Corporation Statement on Management*, item #2, available at http://www.purposeofcorporation.org/en.

negative effects of a transaction or of a decision which are not taken into account by parties to the transaction or by firm managers have to be dealt with by the political/legal system. When the demand to correct a negative externality becomes vocal enough, norms have to be created to attempt to "internalise" the negative externality in the price system. To take an example, in the event that an enterprise decides to opt for a cheap production process generating pollution, the cost imposed on the environment is not taken into account in the price of the goods produced using the polluting production process. In case a political majority takes the view that the pollution should be prevented, mandatory norms can be adopted so that the polluting production process is prohibited. A cleaner, more expensive process will have to be used (and, all other things being equal, the cost of making the products will increase). Hence, via mandatory rules, a cost which otherwise would not have been taken into account now enters into the accounting system of the enterprise, the environment will be left unspoiled; but prices will be higher. Enterprises play by the rules as they are and will go for the lowest cost solution for any given product quality level; but in the event that the outcome of economic competition is perceived as requiring redress, it should be possible for new mandatory norms to be adapted via the political system.

In this regard, "corporate governance" is very much part of the overall institutional system of government. If companies are managed with the sole mandate of maximising shareholder short-term value, then the other interests affected but not taken into account in corporate decisions will have to resort to the political system to adopt the necessary mandatory rules. With a broader mandate, the issues to be addressed by the political system are fewer and less severe.

A major issue of our time is that corporate governance, as presently understood, has led to increased inequalities, under-employment, reduced research and development, insufficient demand, tax evasion and limited economic growth. Today, the division of labour among "economic institutions" (enterprises) on the one hand and "political institutions" on the other (namely states, and the European Union) is totally dysfunctional. There is a fundamental design flaw in corporate governance rules. Enterprises are not producing negative externalities as a *side effect* of their activities. Because their management is tainted by the ideology of "*agency theory*", firms *willingly* produce negative externalities on a large scale in order to increase short term shareholder value.

The cures needed to address the design flaw in (corporate) governance are hard to implement in a globalising world.[23] But the task is not impossible. A priority is to build into corporate governance mechanisms allowing resistance against the powerful forces of short-termism which are now afflicting corporate behaviour. One must reduce these pressures and give incentives for companies and shareholders to invest in long-term real growth. Large, long-term investors, such as BlackRock, have already indicated they would support such moves.[24]

1. One first device would be to make it mandatory for large companies each year to lay out for shareholders a strategic framework for long-term (say, ten years) value

[23]On these issues *Robé/Lyon-Caen/Vernac* [6].

[24]See http://uk.businessinsider.com/blackrock-ceo-larry-fink-letter-to-sp-500-ceos-2016-2?r=US&IR=T. BlackRock is the world's largest investor with $4.6 trillion invested.

creation. These strategic plans should be approved following a process involving the affected stakeholders and the Board.

2. A second device is the development of financial metrics supporting a framework for long-term growth. The objective of these metrics would be to internalise externalities into the accounting of the company's operation to pursue *real* value creation as opposed to merely "*shareholder* value". Components of executives' long-term compensation should be linked to these metrics.
3. Third, generating sustainable returns over time requires a sharper focus on environmental and social factors. Over the long-term, environmental, social and governance issues have real and quantifiable financial impacts which should be built-in into the strategic plans and companies' financial metrics.
4. Large investors should be required to integrate environmental, social and governance considerations into their investment processes and report on their implementation.
5. The tax system should be adjusted to encourage long-term investments in shares, in line with the time-line of the companies' strategic plans. Short-term capital gains should be heavily taxed, with a decreasing tax rate for each year of ownership beyond a threshold (say three years) while long-term ones could, at some point in time (say ten years) become tax free.

These proposed measures are not the end of the story. But they show that it is possible to do something about what is happening to us.

After the 2007 financial crisis, the de Larosière Report,[25] which was requested by the European Commission to explain how such a disaster could have happened, concluded that the EU's corporate governance framework was "*one of the most important failures*" of the financial crisis. The financial system "*did not carry out its task with enough consideration for the long-term interest of its stakeholders*". "*Most of the incentives ... encouraged financial institutions to act in a short-term perspective and to make as much profit as possible*." "*Returns on equity ... hugely outpaced for many years real economic growth rates*." "*...much of this behaviour was ingrained in the incentive structure*."

Thanks to this Report, which was right on point—and given the passivity of the Commission's towards the real problems of corporate governance—we know we are in marching order towards the next financial crisis.

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