Responsible Corporate Citizenship: It’s the State, Stupid!

ARTICLE

Responsible Corporate Citizenship: It's the State, Stupid!

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This contribution calls for a fundamental rethinking of the foundation of the duty of corporate citizenship. The benefits enjoyed by a legal person, in particular when used as a vehicle to run a listed corporation, come with obligations, not because of some ethical responsibility or a misunderstood noblesse oblige, but because promoting the societal interest is inherent to the purpose of the corporation. Whoever wishes to use the legal person as a vehicle for business activities, with all its associated advantages, thereby also submits to the partly public character of that legal status and thus to the pursuit of public goals. This provides a deeper foundation for corporate social responsibility than the notion of corporate interest, which is strongly related to the actual day-to-day actions of the company and not to the basis for its existence. It is also argued that this should lead to specific binding standards of what corporate citizenship entails. To the extent that such standards cannot be made at the European level, the role of national regulation, and thus of the state, must necessarily increase to protect citizens from the excesses of global capitalism.

Keywords: Corporate social responsibility, legal personality, corporate interest, purpose, stakeholderism

1. INTRODUCTION

Over the past decade, there have been many and incisive pleas by lawyers and economists for a radically different organization of our economy. These pleas are all motivated by the realization that the current – in the words of perhaps the best-known author in this field – 'neo-proprietarian' ideology of 'hypercapitalism'[1] must be recalibrated if we want to avoid further polarization and subsequent disruption of society. A new proverbial social contract between business and society would be needed to counter tax avoidance, growing power of big tech, sharply increased income disparities, skewed wealth growth and ecological damage.[2] It has in this context also been highlighted that corporate law not only sustains the excesses of today's economy, but also has the potential to change these for the better.[3]

It is therefore no surprise that in the last few years legislators and academics proposed to amend corporate law to ensure better compliance with norms of corporate social responsibility in order to prevent further uprooting of companies. And although these proposals range considerably in scope, they share the view that a focus on realizing shareholder value not infrequently gets in the way of the broader responsibility companies bear for society as a whole. In the Netherlands, for example, twenty-five professors of corporate law recently advocated the introduction of a statutory duty of responsible corporate citizenship of the (Dutch) two-tier board (executive and non-executive directors) of a corporation, as well as an annual reporting duty on how larger corporations implement this duty.[4] In France, the *Loi Pacte* opened up the possibility – insofar as this was not already possible – of including a wider societal purpose ('une raison d'être') in the company's articles of association.[5] Similar arguments for change were made in other jurisdictions ranging from European countries to the US.[6]

Pleas like these have proven controversial.[7] While some believe that corporations already act in a responsible manner,[8] others argue that the standard of responsible corporate behaviour is too vague, and is likely to trigger litigation by third parties.[9] Still others argue that the proposals will do little to change the behaviour of corporate boards.[10]

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1 Thomas Piketty, *Capital and Ideology* 648 (Harvard University Press 2020) (*Capital et idéolog*ie, Seuil 2019). Further references in (in Dutch) J. M. Smits, *Vermogensongelijkheid: heeft het goederenrecht een antwoord op Piketty?*, in *'Sjef-Sache': Essays in Honour of J.H.M. van Erp on the Occasion of his Retirement* 153 (Eleven International Publishing 2021).

2 *The FT View: A Better Deal Between Business and Society*, Financial Times (1 Jan. 2018).

3 Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

4 J. W. Winter et al., *Naar een zorgplicht voor bestuurders en commissarissen tot verantwoordelijke deelname aan het maatschappelijk verkeer*, *Ondernemingsrecht* 2020/86 (in Dutch), summarized in Jaap Winter, *Towards a Duty of Societal Responsibility of the Board*, 17 Eur. Co. L. J. 192–200 (2020).

5 Loi No 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises, *JO* No. 0119, 23 mai 2019, changing Art. 1835 of the French Civil Code.

6 An overview (in Dutch) is provided by B. Kemp, *Naar een werkbaar en realistisch model voor stakeholder governance en de rol van aandeelhouders daarin*, *Maandblad voor Ondernemingsrecht* 28ff. (2022).

7 For (a rebuttal of) criticism in the Dutch context e.g., J. W. Winter et al., *Naar een maatschappelijke zorgplicht voor bestuurders en commissarissen: een antwoord op reacties*, *Ondernemingsrecht* 2021/6 and more generally Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 Cornell L. Rev. 91–178 (2020).

8 *See* e.g., (in Dutch) H. J. de Kluiver, *Over de verantwoordelijke onderneming*, *Ondernemingsrecht* 2020/126 and A. J. Kaarls, *Vage praatjes vullen geen gaatjes*, *Ondernemingsrecht* 2021/4.

9 Such criticism is discussed in Winter, *supra* n. 4, at 198.

10 (in Dutch) P. F. van der Heijden, *Oostenwind, of: van zacht recht naar harde handhaving*, *Ondernemingsrecht* 2021/12.

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This calls for addressing a fundamental question: why exactly should, and how can, corporate law contributes to company boards better taking into account societal interests? In answering this question, we should not underestimate the role corporate law has in setting the boundaries of what companies are allowed to do.[11] As any other field of private law, corporate law not only facilitates parties, it also puts limits to their actions. It is less relevant here whether some companies de facto already care about their duties towards society. This will often be the case but, given the social unrest about executive behaviour that flares up very regularly this is certainly not always the case. Their actual behaviour is also less relevant for the normative question of the desired regulation of companies. To paraphrase Eric Posner: while maximizing their profits, businesses can (like Facebook) violate their customers' privacy, can (like Twitter and Google) facilitate hate speech, can (like Shell) continue to emit greenhouse gases, can (like Coca Cola) make people addicted to sugar and can (like DSM), despite huge profits, threaten to relocate their headquarters if local subsidies are not obtained.[12] These same companies can also evade taxes on a large scale. If social outrage or government intervention is needed *after* the fact to correct this behaviour, the question arises whether it would not be better to aim to prevent it *beforehand*.

The purpose of this contribution is not to repeat the long-standing debate on the values of shareholderism. It is much more modest. I am concerned with criticizing and supplementing the arguments exchanged in the debate so far on two points. Successively, I address the question of why companies should behave responsibly at all – still disputed in the current discussion – (section 2), and make some suggestions as to how corporate law can contribute to this goal (section 3). Section 4 offers some brief conclusions.

2. WHY A GENERAL DUTY OF RESPONSIBLE CORPORATE CITIZENSHIP? *EXIT* THE CORPORATE INTEREST

In the Rhineland model of corporate governance, as is prevalent in Germany,[13] the Netherlands,[14] Austria, Switzerland and most Scandinavian countries, there is no doubt that (the board of) the corporation must serve the interests of multiple stakeholders. Next to the shareholders, these are employees, customers, creditors, suppliers, and other contractually involved third parties having an interest in the continuation of the corporation. In these countries, the famous notion of the corporate interest is a holistic concept that obliges the board to strive to create value over the long-term. This model was termed *pluralistic stakeholderism*,[15] exactly because these other parties contractually involved with the corporation also benefit from the creation of value. This view is on the rise, also in jurisdictions that traditionally adhere to a unilateral focus on creating value for the shareholders only.[16]

While such a view of pluralistic shareholderism is accepted in the Rhineland model, be it to a different extent in the various jurisdictions involved,[17] the fundamental question in the debate on corporate social responsibility is whether the corporation must, as a matter of law, also take into account *other* interests than those of these contractually involved parties. Such interests include the general societal interest in a sustainable environment and climate, diversity, good tax ethics, socially acceptable remuneration, etc., in short: the interests of people and planet. There is no doubt that insofar as there is a legal duty to take such interests into account, these must be complied with. But the key question is whether the corporate purpose must by default entail a *general* duty to act responsibly in society. Whereas the more limited notion of the corporate interest does not require this under applicable law, the core of pleas for extended stakeholderism is to make such responsible corporate behaviour mandatory on the basis that it is the *corporate interest* that includes a responsibility to realize those societal goals.

In my view, however, the corporate interest is not the best possible basis for the corporation's duty to comply with such norms of corporate social responsibility (including the duty to take broader societal interests into account). My objection is not that the corporate interest is an open standard that leaves (too) much room for interpretation or discretionary judicial review. My objection is a different one. In my view, to stretch the concept of corporate interest to the extent that it also includes the pursuit of general societal goals, would dispose it from its distinctive character. The very core of that concept is that it requires taking into account the interests of the actors involved *with the corporation*. To argue that violating standards of responsible corporate behaviour may harm the corporation because it could lead to buyer strikes, labour market problems or exclusion of suppliers, and *therefore* be in conflict with the corporate interest,[18] is, in my view, an overextension of that concept. Moreover, the notion of the corporate interest is unfit to differentiate according to *the extent to which* companies have to act in the societal interest, which may differ from one company to another. Taking the corporate interest as the foundation for acting in line with societal goals[19] is in my view still too much based on the

11 Pistor, *supra* n. 3, at 229.
12 Eric A. Posner, *Milton Friedman Was Wrong*, The Atlantic (22 Aug. 2019), https://www.theatlantic.com/ideas/archive/2019/08/milton-friedman-shareholder-wrong/596545.
13 For discussion on varieties of capitalism with a focus on Germany: Christian Marx & Morten Reitmayer, *Introduction: Rhenish Capitalism and Business History (Introduction to Special Issue)*, 61 Bus. Hist. 745–784 (2019).
14 Hoge Raad 4 Apr. 2014, ECLI:NL:HR:2014:797, *NJ* 2014, 286 (*Cancun*).
15 Bebchuk & Tallarita, *supra* n. 7, at 91.
16 For an overview of the discussion in the US: *ibid.* and, (in Dutch) in comparative perspective, Kemp, *supra* n, 6, at 27.
17 Kemp points out that Dutch law may be at one extreme of the axis: Kemp, *supra* n. 6, 42ff.
18 As is argued by (in Dutch) C. A. Schwarz, *De impact van het vennootschappelijk belang: machtsverhoudingen, verantwoordelijkheid en aansprakelijkheid* 35 ff. (BJU 2018).
19 As e.g., advocated by Winter et al., *supra* n. 4.

Law & Economics inspired view that the corporation is ultimately made up of a nexus of contracts that the parties involved with the corporation conclude as they see fit, and too little on the track of the corporation as having legal personality.[20]

I therefore believe that the corporation's duty to act in a societally responsible way must be based on a more fundamental basis. This basis also allows differentiation between different types of companies. The starting point here is that – contrary to what quite a few participants in the debate on stakeholderism seem to assume – the legal person in private law is not in all respects equal to a natural person. The basis of all private law is that actions can be taken without the prior consent of others, or the state.[21] Natural persons may, against the better judgment of anyone else, decide for themselves with whom and about which they contract, who they want to become the owner of their property before or after death, whether and with whom they start a family, and whether they seek compensation from those who harm them. In doing so, private law empowers individuals to shape their lives through self-determination.[22] Of course, this autonomy is limited by other principles,[23] but this does not alter the fact that natural persons are free – within the limits of the law and without any obligation to account for it – to drive a Hummer, treat their daughters unequally, make misogynistic statements, and pay as little tax as possible through clever tricks within the boundaries of the law. On the other hand, these same natural persons are liable for their own actions and cannot maintain any assets in the long run – after death.

Compared to natural persons, the legal person has significant advantages. In the case of the corporation, in addition to the limited financial liability of shareholders and directors (when acting on behalf of the company), this is the ability of the corporation to continue to exist, in principle, in perpetuity. This gives this legal entity more rights than a natural person will ever have.[24] No wonder that, historically, the privilege of legal personality was granted by the state and only to those who at least partly promoted the public interest. The corporation was quasi-public by its very nature. This was the case not only in what is considered the first prime example of the modern corporation (the Dutch East India Company), but also in many other jurisdictions until the rise of present-day capitalism in the second half of the nineteenth century. An 1809 Virginia Supreme Court ruling speaks volumes: 'If the business applicants' object is merely private or selfish; if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privileges [of chartering]'.[25]

Despite the liberalization of markets and accompanying deregulation, this vision of the corporation – the corporation as a concession[26] – has never completely disappeared. For instance, the government supervision of companies that existed – in diluted form – in many countries until the early 2000s[27] perfectly fits the idea that the company also has a public task. Government approval to run a company is not the proverbial (tacit) social contract between society and that company, but a very real and explicit consent. Public outcry over irresponsible behaviour of (directors of) large companies can also be explained in this way: among the general public, the idea that companies exist only by the grace of the public interest is deeply rooted.

This is not to say that under current law the existence of the legal entity, and the company associated with it, can or should be based solely on the concession idea.[28] But incompatible with this idea is the misconception that, *on the one hand*, the government's task is to promote the societal interest while, *on the other hand*, the corporation may pursue only its own economic interest and pass on the negative externalities of its actions to society. Instead, the corporation as a legal person derives its far-reaching powers and privileges entirely from the state, which is willing to outsource some of its public tasks – providing products and services to citizens or, if one likes, promoting the well-being of society in general. This is no conclusion different from the one recently drawn by Pistor from a different perspective.[29]

Therefore, I do not find the basis for the corporation's responsible participation to society in a too far stressed conception of the corporate interest; instead, I seek it in the corporation's legal personality. Whoever wishes to use the legal person as a vehicle for business activities, with all its associated advantages, thereby also submits to the (at least partly) public character of that legal status

20 Compare Paul B. Miller, *Corporations*, in *The Oxford Handbook of the New Private Law* 341–359 (Andrew S. Gold et al. eds, Oxford University Press 2020): 'The concept [of personality] is foundational to the legal idea of a corporation'.

21 With many details and references: Jan M. Smits, *Advanced Introduction to Private Law* (Edward Elgar 2017).

22 *See also* Hanoch Dagan, *Autonomy and Pluralism in Private Law*, in *The Oxford Handbook of the New Private Law* 177–193 (Andrew S. Gold et al. eds, Oxford University Press 2020).

23 Smits, *supra* n. 21.

24 Compare Jeffrey D. Clements, *Corporations Are Not People* (Berrett-Koehler 2012).

25 Referred to by Richard L. Grossman & Frank T. Adams, *Exercising Power Over Corporations Through State Charters*, in *The Case Against the Global Economy* 374–386 (Jerry Mander & Edward Goldsmith eds, Sierra Club Books 1996).

26 On the origins of the modern public company in the French *Code de Commerce*: Klaus J. Hopt, *Comparative Company Law*, in *The Oxford Handbook of Comparative Law* 1161–1191 (Mathias Reimann & Reinhard Zimmermann eds, Oxford University Press 2006).

27 In the Netherlands e.g., until 2011. *See* Asser-Van Olffen-Rensen, M. Van Olffen & G. J. C. Rensen, *Asser's handleiding: 2. Rechtspersonen; deel IIa NV en BV (oprichting, vermogen en aandelen)* (5th ed., Kluwer 2019).

28 *See* Miller, *supra* n. 20, at 341, rightly advocating an integrative approach: the corporation has features of both a concession and a nexus of contracts. On the idea of constructing the corporation as concession in Dutch law: B. Kemp, *Aandeelhoudersverantwoordelijkheid: De positie en rol van de aandeelhouder en aandeelhoudersvergadering* 43 (Kluwer 2015).

29 Pistor, *supra* n. 3; *see also* Susan Mary Watson, *The Corporate Legal Person*, 19 J. Corp. L. Stud. 137–166 (2019).

and thus to the pursuit of public goals. This provides a deeper foundation for corporate social responsibility than the notion of corporate interest, which is strongly related to the actual day-to-day actions of the company and not to the basis for its existence. This also eschews the misconception that, in times of Covid, the public can expect more ethical behaviour from corporations because of the financial assistance they received from the state.[30] The need to act in line with societal interests is not dependent on receiving financial support, but is directly based on the very nature of the legal personality the corporation has.

An additional advantage of finding the need to comply with societal values in the legal personality of the company is that it allows for differentiation. It is obvious that the larger the company is, the greater the impact of its activities on society (the aforementioned externalities) and, consequently, the greater the duty to also care for societal objectives. More can be expected from a publicly listed company than from a smaller limited company.

With his foundation in the legal personality of the company, nothing is said about the concrete obligations corporations may have under the broad umbrella of corporate social responsibility. The established foundation for corporate behaviour could serve both for liability under a general standard of corporate social responsibility *and* could provide the basis for specific legislation in this field. The next section therefore looks closer at how, given this foundation, compliance with corporate social responsibility can be promoted.

3. HOW TO PROMOTE CORPORATE CITIZENSHIP? *INTRA* THE STATE

How to legally shape the objective of corporate citizenship? The prevailing view has for a long time been that responsible corporate citizenship is best achieved by adhering to a non-enforceable general standard to behave responsibly.[31] However, the question is whether this standard is specific and binding enough to actually prompt companies to change their behaviour. The recent trend is therefore more towards creating specific enforceable rules in the realization that twenty-five years of experience with soft standards of corporate social responsibility did not yield sufficient results.[32] One is in need of specific norms if one really wants to influence executive behaviour through the law. To use the term responsibility is in this respect too much of an appeal to unenforceable ethical standards or even the company's conscience. This is why I prefer to use the term 'corporate citizenship'.

The fact that non-enforceable (open) standards are not the best possible instrument to achieve the goal of corporate citizenship also has to do with the fact that the corporation – unlike the natural person – moves on an inherently competitive market. Regulation of that market aims to create a level playing field for all companies, the idea being that if government creates a level playing field for companies, the market will do the rest. This means that as long as norms are not binding, even firms striving to do the right thing have a strong tendency to refrain from doing so simply because their competitors will continue to maximize profits and thus externalize the harmful social side effects of their activities.

An example of this phenomenon concerns tax obligations of internationally operating companies. The traditional way companies compensate for the negative consequences of their actions is by paying taxes. Thus, the main corporate social responsibility codes rightly stipulate that companies must comply with tax laws in countries in which they operate not only to the letter, but also to the spirit.[33] However, it is no secret that quite a few companies subscribe to such codes on the one hand, while on the other hand minimizing paying taxes as much as possible, precisely to strengthen their competitive position and thus increase shareholder value.[34]

This is an argument for specific binding standards of what corporate citizenship must entail. To the extent that such standards cannot be made at the European level, the role of national regulation, and thus of the state, must necessarily increase. Indeed, for the French writer David Djaïz, this is the only way to protect citizens from the excesses of global capitalism.[35] Corporate citizenship should therefore not be based on some ethical sense (as in *noblesse oblige*), but because the state obliges it: *l'État oblige.* The example of international tax avoidance I just mentioned shows this is only possible by adapting the existing national and European rules on international choice of law and limiting jurisdictional competition.[36] This is obviously not an easy task.

This prompts the question which (national or European) rules should be introduced to promote corporate citizenship. It is not possible here to address all the topics covered by this broad concept: human rights, employment, climate, corruption, consumer interests, remuneration policies, diversity, tax morality and other topics each require their own rules. Instead, I make two more general suggestions for the direction in which corporate law could evolve to better align corporate activities with the societal mission that listed companies in particular have. In doing so, I build on the idea unfolded

30 Compare Winter, *supra* n. 4, at 199.

31 Still advocated by, e.g., the twenty-five Dutch professors of corporate law: Winter et al., *supra* n. 4, summarized in Winter, *supra* n. 4, at 192.

32 Li-Wen Lin, *Mandatory Corporate Social Responsibility Legislation Around the World: Emergent Varieties and National Experiences*, 23 U. Pa. J. Bus. L. 429–469 (2021).

33 For example the *OECD Guidelines for Multinational Enterprises* (OECD 2011), para. XI.

34 Compare Joseph E. Stiglitz, *People, Power, and Profits* (Norton 2019) and Reijo Knuutinen, *Corporate Social Responsibility, Taxation and Aggressive Tax Planning*, Nordic Tax J. 36–75 (2014).

35 David Djaïz, *Slow Démocratie* 18 (Allary Éditions 2019): 'pas d'autre choix que de réhabiliter la nation'.

36 Compare Pistor, *supra* n. 3, at 221: 'for roving capital, the law of a given state is just an option, which its holders and their master coders will exercise only if it promises greater wealth than the laws of another state'.

in section 2 that the basis for corporate citizenship should be sought in the corporation as a legal person.

My first suggestion concerns the unlimited lifespan of the corporation. I already noted that the legal person used as a vehicle to operate the company is in principle immortal. This has not always been the case. The first corporations were subject to a time limit so that the state (read: the citizens) could periodically reassess whether the activities could also be carried out in a new period of time.[37] This assessment could include the extent to which the activities of the corporation also served the public interest. The question is whether this type of government supervision could not once again be useful. It would at least make citizens realize that *they* ultimately determine which company is allowed to obtain the benefits of legal personality. Company boards in turn realize better that the long-term survival of the company is also determined by their actions. Of course, such a framework for government supervision should contain specific standards: its purpose must not be to create directors afraid of being held liable for their reasonable actions or having to face a loss of reputation when undertaking even the slightest risk.[38] But the framework would allow intervention in exceptional cases. This fits nicely with an earlier plea to limit the duration of rights: with the challenges facing today's world, law is not primarily there to defend the status quo, but to change it where necessary.[39]

A second suggestion deals with the role of shareholders in listed companies. If a focus on maximizing shareholder value has negative consequences for society, it seems logical to restrict the power of shareholders. This is not a step taken in the Dutch discussion,[40] and rightly so. Shareholders can play a crucial role in implementing, for instance, more sustainable policies on environment and remuneration. Research shows that company boards are also more likely to be guided by activist shareholders than by general social outrage.[41] However, the problem is that in listed companies, the influence of precisely these activist shareholders is cancelled out by the power of institutional investors (such as mutual fund managers and pension funds). This calls not so much for a restriction of the power of shareholder as such, but rather for preventing that large investors get in the way of implementing measures to promote corporate citizenship.

In our market economy, the classic solution to this problem lies in healthy competition. This leads not only to lower prices and higher quality of products and services in the short term (and thus to lower profits), but also to more diversity and innovation in the long run.[42] If some companies have sustainability and other societal goals high on their agenda, and shareholders are willing to invest in these companies to the detriment of less socially-oriented companies, competition theoretically leads to an overall higher level of achievement of societal goals.

The only problem is that this competition does not work as well in practice if large institutional investors spread their risks. Posner and Weyl show that large investors typically invest in multiple companies within one sector.[43] For example, they invest not only in Volkswagen, but also in GM, Renault and Ford.[44] This type of powerful investor does not benefit from competition between these companies because it lowers the prices of their products, resulting in lower profits. This leaves little incentive for these companies to really change anything. Posner and Weyl therefore argue that institutional investors should be required to diversify across sectors (the investor may have an unlimited stake in Ford, but then cannot have a stake in GM, etc.). An alternative Posner and Weyl propose is to allow diversification within one industry, but then with a maximum of 1% of the shares of a specific company. One need not accept this radical proposal to realize that the success of responsible corporate citizenship largely depends on how corporate governance is organized. I repeat that the state (and where it has competence, the European Union) is in the best position to create the framework for this.

4. CORPORATE LAW: NOT BUSINESS AS USUAL

Corporate social responsibility has been in the spotlight for twenty-five years. Governments and other actors in the field of corporate law have long assumed that the creation of non-enforceable standards is sufficient to achieve responsible behaviour of companies. However, recent pleas in both Europe and the US attest to the growing understanding that more is needed. In this exploratory contribution, I showed that this calls for a fundamental rethinking of the foundation of the duty of corporate citizenship and the role of the state in setting rules. The benefits enjoyed by a legal person, in particular when used as a vehicle to run a listed corporation, come with obligations, not because of some ethical responsibility or a misunderstood *noblesse oblige*, but because promoting the societal interest is inherent to the purpose of such a company. Taking this insight seriously means that future corporate law is not business as usual. The quest for the foundations of corporate law is of the highest priority for those who want to prevent the further uprooting of corporations from society.

37 Terry L. Besser, *The Conscience of Capitalism* (Praeger 2002).
38 Compare (in Dutch) M. J. Kroeze, *Bange bestuurders* (Kluwer 2005).
39 Pistor, *supra* n. 3, at 231; cf. Smits, *supra* n. 1, at 160.
40 Compare (in Dutch) De Kluiver, *supra* n. 8.
41 S. Lakshmi Naaraayanan, K. Sachdeva & V. Sharma, *The Real Effects of Environmental Activist Investing*, ECGI Working paper No. 743/2021.
42 Compare Michael E. Porter & Claas van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, 9 J. Econ. Persps. 97–118 (1995), highlighting the trade-off between environmental regulation and competitiveness.
43 Eric A. Posner & E. Glenn Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* 168 ff.(Princeton University Press 2018).
44 Thus, the top 100 of shares held by Dutch pension fund ABP (holding a total investment of 500 billion euro) include stakes in Apple, Microsoft and Samsung. *See* www.abp.nl/over-abp/duurzaam-en-verantwoord-beleggen/waarin-belegt-abp (accessed 27 Dec. 2022).

5. REFERENCES

Asser-Van Olffen-Rensen, M. Van Olffen & G. J. C. Rensen, *Asser's handleiding: 2. Rechtspersonen; deel IIa NV en BV (oprichting, vermogen en aandelen)* (5th ed., Kluwer 2019).

Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 Cornell L. Rev. 91–178 (2020).

Terry L. Besser, *The Conscience of Capitalism* (Praeger 2002).

Jeffrey D. Clements, *Corporations Are Not People* (Berrett-Koehler 2012).

Hanoch Dagan, *Autonomy and Pluralism in Private Law*, in *The Oxford Handbook of the New Private Law* 177–193 (Andrew S. Gold et al. eds, Oxford University Press 2020).

David Djaïz, *Slow Démocratie* (Allary Éditions 2019).

The FT View: A Better Deal Between Business and Society, Financial Times (1 Jan. 2018).

Richard L. Grossman & Frank T. Adams, *Exercising Power Over Corporations Through State Charters*, in *The Case Against the Global Economy* 374–386 (Jerry Mander & Edward Goldsmith eds, Sierra Club Books 1996).

P. F. van der Heijden, *Oostenwind, of: van zacht recht naar harde handhaving, Ondernemingsrecht* 2021/12.

Klaus J. Hopt, *Comparative Company Law*, in *The Oxford Handbook of Comparative Law* 1161–1191 (Mathias Reimann & Reinhard Zimmermann eds, Oxford University Press 2006).

A. J. Kaarls, *Vage praatjes vullen geen gaatjes, Ondernemingsrecht* 2021/4.

B. Kemp, *Aandeelhoudersverantwoordelijkheid: De positie en rol van de aandeelhouder en aandeelhoudersvergadering* (Kluwer 2015).

B. Kemp, *Naar een werkbaar en realistisch model voor stakeholder governance en de rol van aandeelhouders daarin*, *Maandblad voor Ondernemingsrecht* 27–58 (2022).

H. J. de Kluiver, *Over de verantwoordelijke onderneming*, *Ondernemingsrecht* 2020/126.

Reijo Knuutinen, *Corporate Social Responsibility, Taxation and Aggressive Tax Planning*, Nordic Tax J. 36–75 (2014).

M. J. Kroeze, *Bange bestuurders* (Kluwer 2005).

Li-Wen Lin, *Mandatory Corporate Social Responsibility Legislation Around the World: Emergent Varieties and National Experiences*, 23 U. Pa. J. Bus. L. 429–469 (2021).

Christian Marx & Morten Reitmayer, *Introduction: Rhenish Capitalism and Business History (Introduction to Special Issue)*, 61 Bus. Hist. 745–784 (2019).

Paul B. Miller, *Corporations*, in *The Oxford Handbook of the New Private Law* 341–359 (Andrew S. Gold et al. eds, Oxford University Press 2020).

S. Lakshmi Naaraayanan, K. Sachdeva & V. Sharma, *The Real Effects of Environmental Activist Investing*, ECGI Working paper No. 743/2021.

OECD Guidelines for Multinational Enterprises (OECD 2011).

Thomas Piketty, *Capital and Ideology* (Harvard University Press 2020) (*Capital et idéolog*ie, Seuil 2019).

Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

Michael E. Porter & Claas van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, 9 J. Econ. Persps. 97–118 (1995).

Eric A. Posner, *Milton Friedman Was Wrong*, The Atlantic (22 Aug. 2019), https://www.theatlantic.com/ideas/archive/2019/08/milton-friedman-shareholder-wrong/596545.

Eric A. Posner & E. Glenn Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* (Princeton University Press 2018).

C. A. Schwarz, *De impact van het vennootschappelijk belang: machtsverhoudingen, verantwoordelijkheid en aansprakelijkheid* (BJU 2018).

Jan M. Smits, *Advanced Introduction to Private Law* (Edward Elgar 2017).

J. M. Smits, *Vermogensongelijkheid: heeft het goederenrecht een antwoord op Piketty?*, in *'Sjef-Sache': Essays in Honour of J.H.M. van Erp on the Occasion of his Retirement* 153–161 (Eleven International Publishing 2021).

J. M. Smits, *Maatschappelijk ondernemen: l'État oblige*, in *Eindeloos getob: Liber Amicorum Kid Schwarz* 413–423 (Kluwer 2022).

Joseph E. Stiglitz, *People, Power, and Profits* (Norton 2019).

Susan Mary Watson, *The Corporate Legal Person*, 19 J. Corp. L. Stud. 137–166 (2019).

J. W. Winter et al., *Naar een zorgplicht voor bestuurders en commissarissen tot verantwoordelijke deelname aan het maatschappelijk verkeer*, *Ondernemingsrecht* 2020/86.

Jaap Winter, *Towards a Duty of Societal Responsibility of the Board*, 17 Eur. Co. L. J. 192–200 (2020).

J. W. Winter et al., *Naar een maatschappelijke zorgplicht voor bestuurders en commissarissen: een antwoord op reacties*, *Ondernemingsrecht* 2021/6.