

Conflicts and coalitions: The drivers of European corporate sustainability reforms

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Abstract

Traditionally, corporate governance debates have contrasted models based on the principle of shareholder primacy with others taking into account the interests of other stakeholders, such as organised labour. The chapter argues that a new corporate governance compromise is emerging, particularly in Europe, driven by responsible investors, civil society and organised labour, which might offer a new way of overcoming the shareholder versus stakeholder dispute. This emerging NGOs-Investor-Union (NIU) nexus is illustrated using various examples of recent regulatory initiatives: the EU Non-financial Reporting Directive; the Dutch Banking Sector Agreement regarding human rights; the UK Modern Slavery Act and the French Law on the 'duty of vigilance'. The chapter draws on the abovementioned cases to elaborate some conjectures on the implications and limitations of this dynamic and fragile convergence of interests for policy-makers and existing debates on sustainable corporate governance reforms.

Keywords: Corporate Sustainability; EU Regulation; Non-Financial Reporting; Modern Slavery; Corporate Governance; Corporate Social Responsibility

1. Introduction

Corporate governance debates conventionally contrast models based on the principle of shareholder primacy with others taking into account the interests of other stakeholders, such as organised labour and local communities. This chapter argues that this binary division is harmful for corporate sustainability and both shareholder-oriented and multi-stakeholder models are overly idealistic, depoliticized and under-socialized. Instead, I propose a more dynamic, processual and contested approach to corporate sustainability regulation. Empirically, I investigate the driving forces behind a recent wave of reforms that have emerged in Europe at different levels of governance, aimed at strengthening corporate social and environmental sustainability. They include the EU Non-financial Reporting Directive; the Dutch Banking Sector Agreement regarding human rights; the UK Modern

Slavery Act and the French Law on the 'duty of vigilance'.¹ On the basis of extensive research conducted between 2010 and 2017, the study reveals the emergence of a new sustainable corporate governance compromise in Europe driven by 'hybrid' shareholder-stakeholder coalitions of civil society, responsible investors and organised labour. Thus, I refer to this dynamic and fragile convergence of interests as the NGOs-Investor-Union (NIU) nexus.² Their strategic policy alignment is mainly aimed at holding large corporations more accountable for financial, environmental and social risks related to global supply chain governance. This compromise might offer a way of overcoming the shareholder - stakeholder divide. Scope conditions and policy implications for developing a stronger approach to corporate sustainability are discussed.

Consistent with the approach adopted by this Handbook, I define sustainable corporate governance regulation as a process aimed at developing and enforcing a set of corporate rules and governance principles that do not only or mainly satisfy economic needs but also have the objective of a) ensuring the long-term stability and resilience of the ecosystems that support human life and b) facilitating the respect and promotion of human rights and other basic social rights.

The chapter is organised as follows. The following section contextualises this contribution in the existing corporate governance policy debate. Section 3 briefly discusses the research methodology, data collection and analysis. Section 4 offers an analysis of findings, focusing on the emergence of a recent wave of sustainable corporate governance reforms in Europe. Section 5 discusses policy implications and scope conditions. Section 6 concludes.

2. Theoretical motivations

This section argues that the two main approaches that have dominated the European corporate governance debate since the mid-1990s, the shareholder-oriented³ and multi-stakeholder models,⁴

¹ Other chapters in this volume have addressed these reforms. See in particular I. H-Y Chiu, 'Disclosure Regulation and Sustainability', Ch. 37; A. Johnston, 'Market-led sustainability through information disclosure: the UK's approach', Ch. 15; J. Zhao, 'Extraterritorial Attempts at Addressing Challenges to Corporate Sustainability', Ch. 3; C. Villiers, 'Global supply chains and sustainability: the role of disclosure and due diligence laws', Ch. 40; Van der Elst and Lafarre, 'Corporate sustainability and shareholder activism in the Netherlands', Ch. 19; and Magnier, 'Corporate Law, Corporate Governance and Sustainability in France: An innovative old-fashioned model of governance', Ch. 20.

² See also D. Monciardini, 'The "Coalition of the Unlikely" Driving the EU Regulatory Process of Non-Financial Reporting.' (2016) 36 *Social and Environmental Accountability Journal* 1, 76-89; D. Monciardini and G. Conaldi, 'The European regulation of corporate social responsibility: The role of beneficiaries' intermediaries' (2019) 13(2) *Regulation & Governance*, 240-259.

³ R., Porta, F. Lopez-de-Silanes, A. Shleifer, R. W. Vishny, 'Legal determinants of external finance' (1997) 52 *The Journal of Finance*, 3, 1131-1150.

are equally inadequate to advance sustainable corporate governance and should be abandoned. Instead, I advance a more processual, contingent and dynamic approach to corporate sustainability regulation that takes into account temporality and structural power relationships.

2.1 Stakeholder versus shareholders: Ideal perspectives on corporate sustainability regulation

Until the mid-1990s, European corporate policies were based on the historical compromise between labour and capital that emerged after the Second World War. This model of corporate governance was characterized by mechanisms such as collective bargaining and the tripartite coordination of government, industry and unions.⁵ While elements of this model are still in place both at the national and EU levels, since that time the European corporate policy and regulatory debate has developed in two different directions, leaning toward either a shareholder-oriented or a multi-stakeholder approach.

Some studies have pointed out that European company law and corporate governance rules have become increasingly financialized, converging towards the shareholder-oriented model.⁶ This approach is underpinned by the mainstream version of 'agency theory' that understands corporate governance regulation as primarily focused on holding company executives (agents) accountable to shareholders (principals).⁷ Taking this view, the main responsibility of managers is to maximize shareholders' returns – also known as 'shareholder value maximization'. The role of policy-makers is to address possible regulatory failures related, in particular, to asymmetric information between principals and agents. Therefore, EU corporate governance policies have strengthened mandatory financial disclosure based on harmonized International Accounting Standards (IAS), arguably making it increasingly aligned to the information needs of transnational financial markets.⁸ Social and environmental matters are taken into account only to the extent that they are financially relevant.

⁴ R.E. Freeman, 'Stakeholder management: framework and philosophy.' (Pitman: Mansfield, MA, 1984); L. Sacconi, 'A social contract account for CSR as an extended model of corporate governance (I): Rational bargaining and justification' (1984) 68 *Journal of Business Ethics*, 3, 259-281.

⁵ See M. Regini 'Social Pacts in the EC Report on Industrial Relations in Europe' in M. Biagi (ed.) *Towards a European Model of Industrial Relations? : Building on the First Report of the European Commission* (The Hague: Kluwer Law International, 2001).

⁶ C. A., Williams and P., Zumbansen (eds.), *The Embedded Firm: corporate governance, labour, and finance capitalism* (Cambridge: Cambridge University Press, 2011).

⁷ M.C., Jensen and W. H., Meckling, 'Theory of the firm: Managerial behavior, agency costs and ownership structure' (1976) 3 *Journal of Financial Economics* 4, 305-360; E.F., Fama, 'Agency problems and the theory of the firm' (1980) 88 *Journal of Political Economy*, 2, 288-307.

⁸ See I. Dewing and P. Russell, 'The role of private actors in global governance and regulation: US, European and international convergence of accounting and auditing standards in a post-Enron world' in H. Overbeek, B. Van Apeldoorn and A. Nolke (eds.) *The transnational politics of corporate governance regulation* (N.Y: Routledge, 2007).

Notably, EU corporate sustainability policies are becoming increasingly focused on sustainable finance as a means to achieve a more environmentally and socially responsible economy.⁹

Other stakeholders, such as workers, have been marginalised from corporate governance policy debates and their concerns are largely framed through voluntary multi-stakeholder initiatives, such as the Global Reporting Initiative or the Forest Stewardship Council. European policy-makers have actively promoted voluntary initiatives to enhance corporate responsibility and accountability, on the basis of generic arguments for the inclusion of societal interests or stakeholder groups.¹⁰ While the agency theory view is very clear in identifying shareholders as the only or main group of actors to which managers are accountable, multi-stakeholder initiatives are deliberately open to all stakeholders and relatively ill-defined. The intended beneficiaries of these initiatives may include customers, workers, and local communities where businesses operate but also the 'global environment' or the 'global common good'.¹¹

While the shareholder-oriented model has been widely criticised for taking a narrow, short-term approach to corporate governance,¹² the multi-stakeholder approach is conventionally considered a better alternative to promote corporate sustainability. For instance, calls for a multi-stakeholder approach to corporate regulation are central to both the 'new governance' approach proposed by John Ruggie¹³ and the 'political CSR' literature closely associated with Habermas' concept of deliberative democracy.¹⁴ However, a growing literature challenges the effectiveness of this model,¹⁵ arguing that voluntary and market-driven multi-stakeholder initiatives neglect asymmetric interests and structural power relationships. Observing that many initiatives have failed and were captured by corporate interests,¹⁶ they dismiss the deliberative and democratic multi-stakeholder ideal as overly

⁹ See in particular the EU comprehensive sustainable finance strategy and action plan. For more information: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance_en

¹⁰ O. de Schutter, 'Corporate Social Responsibility European Style', (2008) 14 *European Law Journal*, 203–236.

¹¹ M-L Djelic and H. Etchanchu, 'Contextualizing corporate political responsibilities: Neoliberal CSR in historical perspective' (2017) 142 *Journal of Business Ethics* 4, 641-661

¹² L.A. Stout, *The shareholder value myth: How putting shareholders first harms investors, corporations, and the public* (Berrett-Koehler Publishers, 2012); Williams and Zumbansen, *The Embedded Firm*.

¹³ J. G. Ruggie, 'Global governance and "new governance theory": Lessons from business and human rights' (2014) 20 *Global Governance* 1, 5-17.

¹⁴ AG. Scherer and G. Palazzo, 'The new political role of business in a globalized world: A review of a new perspective on CSR and its implications for the firm, governance, and democracy' (2011) 48 *Journal of Management Studies*, 899-931.

¹⁵ R. Shamir, 'The De-radicalization of Corporate Social Responsibility' (2004) 30 *Critical Sociology* 3, 669-689; J. Mäkinen and A. Kourula, 'Pluralism in Political Corporate Social Responsibility', (2012) *Business Ethics Quarterly* 22, 649-678; Salles-Djelic and Etchanchu *Contextualizing corporate political responsibilities*.

¹⁶ For instance see S. Moog, A. Spicer S. Böhm, 'The Politics of Multi-Stakeholder Initiatives: the Crisis of the Forest Stewardship Council' (2015) 128 *Journal of Business Ethics* 3, 469-493.

optimistic, claiming that this approach is ineffective and ultimately harmful. Rather than advancing human rights and environmental protection, it enhances corporate power and legitimacy.

This chapter maintains that both the shareholder-oriented and multi-stakeholder models are inadequate and idealistic approaches to sustainable corporate governance and should be discarded. Both models are ultimately de-politicised and under-socialized abstractions. They both respond to the need for market-driven regulation of global corporations that characterises the contemporary neoliberal understanding of corporate 'responsibility' or 'accountability'.¹⁷ Crucially, both models have been criticized for being ineffective in realizing sustainable corporate governance as they do not work in practice.¹⁸ As Salles-Djelic and Etchanchu noted,¹⁹ the real winners in contemporary neoliberal corporate governance arrangements are neither shareholders nor stakeholders but the executives of large multinational enterprises that enjoy unprecedented levels of managerial discretion, especially when it comes to global value chains.²⁰

2.2 Towards a processual and dynamic approach to corporate sustainability regulation

In contrast with the shareholder primacy and multi-stakeholder corporate governance ideals, I propose a more contextual, processual and dynamic perspective to explain some recent sustainable corporate governance reforms in Europe. Building on existing corporate governance and CSR research,²¹ the approach has four distinctive and intertwined characteristics.

¹⁷ Salles-Djelic and Etchanchu Contextualizing corporate political responsibilities.

¹⁸ S. Soederberg, *Corporate Power and Ownership in Contemporary Capitalism: The Politics of Resistance and Domination* (London: Routledge/ RIPE Series in Global Political Economy 2010), 6; P. Fleming *The end of corporate social responsibility: Crisis and critique* (Sage 2012).

¹⁹ Salles-Djelic and Etchanchu Contextualizing corporate political responsibilities.

²⁰ For instance, see S. Barrientos, 'Contract labour: The 'Achilles heel' of corporate codes in commercial value chains' (2008) 39 *Development and Change* 6, 977-990.

²¹ This approach builds on the work of various scholars, including C. Crouch, 'Modelling the firm in its market and organizational environment: Methodologies for studying corporate social responsibility' (2006) 27 *Organization Studies* 10, 1533-1551; P. Ireland and RG Pillay, 'Corporate Social Responsibility in a Neoliberal Age' In P. Utting and J Marques (eds), *Corporate Social Responsibility and Regulatory Governance* (Palgrave Macmillan UK, 2010), 77-104. P. A. Gourevitch and J. Shinn, *Political power and corporate control: The new global politics of corporate governance* (Princeton, Princeton University Press 2005); H. Overbeek, B. Van Apeldoorn and A. Nolke (Eds.), *The transnational politics of corporate governance regulation* (N.Y: Routledge 2007); S. Brammer, G. Jackson, D. Matten, 'Corporate social responsibility and institutional theory: New perspectives on private governance' (2012) 10 *Socio-Economic Review*, 1, 3-28; D. Levy,, J. Reinecke,, , S. Manning, 'The political dynamics of sustainable coffee: Contested value regimes and the transformation of sustainability' (2016) 53 *Journal of Management Studies* 3, 364-401; Djelic and Etchanchu, 'Contextualizing corporate political responsibilities'.

First, this approach stresses the importance of temporality. Current conceptions of corporate governance and responsibilities have been criticized for overlooking history and institutions.²² By taking a process perspective,²³ I encourage a more contextual understanding of the interactions between business and civil society, capital providers, regulators, organized labour and other groups of actors relevant to a specific political and institutional arena. Rather than applying a 'one-size-fits-all' model of corporate sustainability policies, this approach conceptually builds our understanding on the 'social, material, spatio-temporal relations among economic and extra-economic activities, institutions and systems and their encompassing civil society.'²⁴

Second, both the shareholder-oriented and multi-stakeholder models are constructed on the idea that corporate governance aims to eliminate conflicts and tensions (between principal and agent or amongst stakeholders). Both sustainable finance and multi-stakeholder initiatives emphasise a win-win-win rhetoric. Eventually, sustainability will benefit all the parties involved and generate a triple bottom line that takes into account people, planet and profits. Against this depoliticized perspective, classic sociologists like Georg Simmel and Lewis Coser already suggested that conflict can be a very positive social force that prevents stagnation, stimulates learning and the search for new solutions.²⁵ Building on this tradition, conflicts should not be treated as a 'negative' but as a 'variable' that can help to forge and test norms and rules and articulate successful bargains and negotiations. Specifically, in the context of this analysis, conflicts and coalitions are not opposite poles but rather structurally linked, constructive elements of social change dimensions.

Third and relatedly, coalitions of actors are not pre-defined according to divisions between business and civil society or other aprioristic distinctions. Deploying a more dynamic approach, they emerge as part of an 'extended, interactive and somewhat unpredictable process'.²⁶ Rather than having a model through which real-world struggles, contestations and representations are ordered and assessed, this study suggests that business, investors and NGOs deploy a broad range of corporate sustainability tactics that go beyond unyielding divisions.

²² Ireland and Pillay; Marens etc; Kinderman; Brammer, Stephen, Gregory Jackson, and Dirk Matten.

"Corporate social responsibility and institutional theory: New perspectives on private governance." *Socio-economic review* 10.1 (2012): 3-28. Salles-Djelic and Etchanchu;

²³ See Levy, Reinecke and Manning, 'The political dynamics of sustainable coffee'.

²⁴ B. Jessop, 'Cultural political economy and critical political studies' (2010), *Critical Political Studies*, 3, 336-56: 348.

²⁵ G. Simmel, *Conflict and the Web of Group-affiliations* (NY: Free Press 1955); L. Coser, *The Functions of Social Conflict* (NY: The Free Press 1956).

²⁶ Levy, Reinecke and Manning, 'The political dynamics of sustainable coffee', p. 368.

Finally, public authorities and lawmakers are currently marginalized in corporate governance debates. In the shareholder model, the central stage belongs to shareholders and executives. In multi-stakeholder models they are formally equalized with any other stakeholder. Against these views, this perspective underlines what Bourdieu called the special linguistic and social power of public authorities and lawmakers 'to do things with words'.²⁷ Essentially, the law-making process should be seen as the site of struggles for the definition of meaning and categories that are formalized and become widely accepted. A case in point is the influential definition of CSR given in 2001 by the European Commission as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'.²⁸ By defining CSR as voluntary, EU policy-makers heavily shaped shared meaning and practices and legitimized a market-driven and narrow approach. Only ten years later, the European Commission redefined CSR as 'the responsibility of enterprises for their impacts on society', stressing that respecting applicable legislation is a prerequisite for meeting that responsibility.²⁹

3. Case studies, methods and data collection

Consistent with this emphasis on temporality and processual dynamics, this study adopted a 'process theory' perspective to investigate empirically changes in the European regime of sustainable corporate governance regulation.³⁰ This research methodology gives particular attention to time ordering of the contributory events as a way of capturing the key factors that explain the role of different actors in shaping policy and regulatory changes. The research strategy consists of a 'causal reconstruction', linking initial conditions to observable outcomes.³¹

Sustainable corporate governance regulation can take different forms. I will focus on European regulation – both EU and national – related to transparency and reporting for three reasons. First, reporting has a special place because it is one of the few areas of mandatory sustainable corporate governance regulation. Second, European public regulation in this area is on the rise and recent

²⁷ P Bourdieu, 'The force of law: Toward a sociology of the juridical field', (1986) *Hastings Law Journal* 38, 805.

²⁸ European Commission, Green Paper—Promoting a European Framework for Corporate Social Responsibility, COM(2001) 366 (Bruxelles, European Commission, 2001).

²⁹ European Commission, A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM(2011) 681 (Bruxelles, European Commission, 2011).

³⁰ A. Langley 'Strategies for theorizing from process data' (1999) 24 *Academy of Management Review* 4, 691-710; Levy, Reinecke and Manning, 'The political dynamics of sustainable coffee'.

³¹ R. Mayntz, 'Mechanisms in the analysis of social macro-phenomena' (2004) 34 *Philosophy of the Social Sciences* 2, 237-259

changes call for renewed attention to the role of public regulation.³² Finally, transparency rules can be seen as a 'first port'³³ for broader changes in the governance of corporations, as it implicitly outlines the division of rights and responsibilities among civil society, states and market actors and some of the means for achieving them.³⁴

Deploying an inductive approach, I have initially identified the key actors in the dynamics of sustainable corporate governance through analysis of the data, particularly using EU and Member States' official policies and documents as well as documents produced by various interest groups. Rather than being an aprioristic decision, our analytical framework has gradually emerged from the data collection through an iterative process. Raw data were linked to aggregate categories and themes by means of coding while theoretical insights gradually emerged in a continuous interaction between data and existing literature.³⁵

The data collection took place between 2010 and 2017, and the research covers the period from 2000 to 2016. It is based on three main sources of data:

1) A content analysis of the responses received by the EU Commission in two public consultations held in 2011 and 2016 concerning the construction and adoption of the EU Directive on non-financial reporting. The data were used to understand the position and roles of the different actors in the sustainable corporate governance regulatory field and helped to structure some preliminary hypotheses on the connections between different groups of actors and their policy preferences. This analysis confirmed the key role played by the NIU nexus in the recent wave of sustainable corporate governance reforms.

2) Forty-two semi-structured, in-depth interviews with NGOs, responsible investors, unions, experts and regulators completed in two phases: 20 interviews (2010-2013) and 22 interviews (2016-2017) (see the Annex for the list of all interviews). In particular, the interviews have offered insights about behind-the-scenes informal relations between the groups of actors; their internal organisation; and their role in the construction of various sustainable corporate governance reforms.

³² JS. Knudsen, J. Moon, R. Slager, 'Government policies for corporate social responsibility in Europe: A comparative analysis of institutionalisation' (2015) *Policy & Politics* 43, 81-99.

³³ Interview#10

³⁴ P. Newell, 'Civil Society, Corporate Accountability and the Politics of Climate Change', (2008) 8 *Global Environmental Politics* 3, 122-153.

³⁵ B. Glaser and A. L. Strauss, 'The Discovery of Grounded Theory' (Chicago: Aldine 1967). For a more detailed account see Monciardini and Conaldi, 'The European regulation of corporate social responsibility'.

3) A longitudinal qualitative content analysis of documents that cover the period 2000-2016. Some of the documents were provided by the interviewees, while others are publicly available (press releases, records, publications). The document analysis has provided a detailed understanding of cumulative institutional changes and a better comprehension of the interplay between different groups of actors in shaping the regulatory process.

4. Findings: The emergent NGO-Investor-Union nexus

This section empirically addresses the research question focusing, as an example, on a cross-section of recent sustainable corporate governance reforms that have emerged in Europe at different levels of regulation and through varying modes of governance. First, at the EU level, I consider the forces driving the emergence of the Non-Financial Reporting Directive. Then I explore the situation at the Member States level, focusing on three important reforms: the 2017 French Law on the 'duty of vigilance'; the 2016 Dutch Banking Sector Agreement on international responsible business conduct regarding human rights; and the 2015 UK Modern Slavery Act.³⁶

The data show that all these reforms have been driven by 'hybrid' coalitions including some groups of shareholders and some groups of stakeholders. More specifically, this regulatory change has been driven by what I call the NIU nexus, a strategic convergence of interest between some NGOs (N), responsible investors (I) and trade unions (U).³⁷ The research suggests that these emergent sustainable corporate governance coalitions are mainly aimed at holding managers of large corporations more financially, environmentally and socially accountable for growing risks related to supply chain governance. The convergence between the three groups of actors is particularly strong in the areas of transparency regulation and benchmarking.³⁸

4.1 Drivers of the EU non-financial reporting directive

The EU Directive 2014/95/EU ('the Directive') requires all large public-interest companies with more than 500 employees to provide information about their policies, risks and outcomes regarding environmental matters, social and employee aspects, human rights, anti-corruption and bribery, and diversity. This applies to over 6,000 European companies and includes listed companies, banks, and

³⁶ See Ch. 19 and Ch. 20.

³⁷ Monciardini and Conaldi, 'The European regulation of corporate social responsibility'; see also Monciardini, 'The 'Coalition of the Unlikely'.

³⁸ This element was already identified by previous conceptualizations of this alignment – such as the 'transparency coalition' studied by Gourevitch and Shinn, *Political power and corporate control*. However this was very much focusing on the US political-economic environment characterised by active institutional investors. This was also not including NGOs but focusing on the investor-labour convergence.

insurers. Following its adoption by the European Parliament and the Council in 2014, all EU Member States have transposed the Directive into national legislation. The entities that fall within the scope of this new EU regulation have to apply it starting from the financial years beginning on or after 1 January 2017.

The legislative process that led to the adoption of the Directive has been very long – starting in 2011 – and contested,³⁹ due in particular to the strenuous opposition of BusinessEurope, the influential association of European employers. They claimed sustainability reporting should be a voluntary practice and that the Directive would create an additional ‘administrative burden’ making European companies less competitive in a period of crisis.⁴⁰ While such opposition is not particularly surprising,⁴¹ the data analysis suggests that this reform was possible due to the alignment between the interests of three main groups of actors: various small and large NGOs, coordinated at the EU level by the European Coalition for Corporate Justice (ECCJ); the European Sustainable Investment Forums (EUROSIF), the pan-European network of long-term, sustainable investors; and the European Trade Union Confederation (ETUC). They managed to exploit the narrow ‘window of opportunity’ opened by the 2008 global financial crisis to push for this accounting reform. The data show that ECCJ and Eurosif engaged in countless meetings, initiatives, workshops, press releases and collaborations aimed at moving the Directive up in the EU agenda and overcoming pure voluntarism (e.g. ECCJ 2010; Eurosif 2009). Notably, they initially lobbied the Commission separately. However, around 2011 they joined forces and involved also ETUC in their collaboration. According to the interviewees, this broader coalition was not planned. It emerged over time due to ‘affinity’ and ‘communalities’⁴² because ‘we add to each other’s business case and we lobby for the same idea’.⁴³ According to the coordinator of ECCJ, during the process of developing the Directive he was ‘regularly in touch’ with the director of Eurosif. They ‘managed to easily exchange information, share contacts with MEPs, invite each other to some of the key meetings.’ He concluded ‘investors became very helpful for NGOs and unions because they are the ones that are in between civil society and business.’⁴⁴ Ultimately, although the final version of the Directive is a compromise and presents

³⁹ Monciardini, ‘The ‘Coalition of the Unlikely’.

⁴⁰ DP, Kinderman, ‘Corporate Social Responsibility in the EU, 1993–2013: Institutional Ambiguity, Economic Crises, Business Legitimacy and Bureaucratic Politics’ (2013) 51 *JCMS* 4, 701-720; DP Kinderman, ‘Time for a Reality Check: Is Business Willing to Support a Smart Mix of Complementary Regulation in Private Governance?’, (2016) 35 *Policy & Society* 1, 29-42.

⁴¹ Fairbrass, ‘Exploring corporate social responsibility policy in the European Union’.

⁴² interview#18

⁴³ interview#30

⁴⁴ interview#26

various limitations,⁴⁵ what matters for the scope of this study is the pattern created by the unlikely success of the NIU nexus in influencing EU policy-makers. It is remarkable that this strategical convergence had a substantial effect on the regulatory process and outcome, despite the powerful opposition of BusinessEurope and its members.

The centrality of responsible investors and NGOs in the regulatory process is confirmed by several interviews with policy-makers. For instance, one EC official affirmed, ‘NGOs have been very vocal with us, especially in the initial phase. We found them very helpful.’ Additionally, ‘I think the investors were key drivers for this.... We considered the fact that investors are discussing this as one of the key evidence that the market was demanding for increased transparency.’⁴⁶ This is a major change as compared to previous EU policy debates when unions and organized civil society had failed to obtain mandatory disclosure of information related to the environmental and human rights impact of large business organizations.⁴⁷

The effectiveness of NGOs, responsible investors and unions in obtaining the adoption of the Directive was somewhat surprising even for them. They have traditionally struggled in the EU agenda setting and negotiation process ‘because they can put less money and resources in it’ compared to large companies’ representatives like BusinessEurope.⁴⁸ However, NGOs, unions and responsible investors have managed to overcome their relatively limited organisational capabilities by joining forces. The interviews and documents provide abundant evidence that from 2011 to 2014 they started to increasingly collaborate to counteract the powerful opposition to the Directive and exert greater influence over EU policy-makers.

Crucially, this collaboration only began in 2011 after the EU Commission (1) opened the regulatory process to all stakeholders, beyond the narrow focus on companies and investors taken before the 2008 financial crisis; and (2) took a more interventionist economic approach and announced a legislative proposal on sustainability reporting,⁴⁹ following the appointment of Michel Barnier as Internal Market Commissioner.

⁴⁵ D. Monciardini, 'Regulating Accounting for Sustainable Companies: Some Considerations on the Forthcoming EU Directive' (2014) 11 European Company Law, Issue 2, pp. 121–124; C Villiers and J. Mähönen, Article 11: Integrated Reporting or Non-Financial Reporting? in B. Sjaafjell and A. Wiesbrock (eds) *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge, 2014), 118-143).

⁴⁶ interview#13

⁴⁷ Fairbrass, 'Exploring corporate social responsibility policy in the European Union'

⁴⁸ Interview#13

⁴⁹ See, for instance, the 'Single Market Act II: twelve priority actions for new growth' adopted in 2012 by the EU Commission.

The sudden urge for this collaboration came in 2011-12, a period when the EC proposal on non-financial reporting was stalled for several months.⁵⁰ The representatives of the three constituencies – NGOs, responsible investors and unions – obtained a joint meeting with Commissioner Barnier to reiterate their support to the Commission’s initiative to address corporate transparency through legislation. The meeting was ‘a very key moment, because it really proved to trade unions and investors that this kind of collaboration could help us being very influential’.⁵¹ Coordination between the organizations intensified further as a consequence until the Directive was adopted in 2014. The data suggest that this collaboration – particularly the contribution of investors – has been crucial to shape the policy debate in a completely new direction, overcoming the argument that business did not want the Directive. As an EC official put it, ‘I think if I look at it objectively, one of the roles of the investors’ interest [in this reform] is to make it no longer a “black versus white” debate.... Then it is not simply the NGOs’ agenda. It becomes, if I am honest, an easier agenda to sell.’⁵²

Sections 5 and 6 will further discuss some of the scope conditions of the success obtained by the NIU nexus and possible implications for policy-makers.

4.2 Corporate sustainability reforms in France, the United Kingdom and the Netherlands

In the exploratory study of the constituencies driving recent sustainable corporate governance reforms in Europe, it soon emerged that the NIU nexus was not limited to the collaboration of ECCJ, ETUC and Eurosif at the EU level. Following formal and informal links between members of ECCJ (NGOs), ETUC (trade unions) and Eurosif (responsible investors), similar compromises are emerging also at the national level and have been equally influential in shaping corporate sustainability reforms.

Through a series of interviews, we investigated 12 formal bonds between members of ECCJ, ETUC and Eurosif – this refers to specific national organisations that belong to multiple networks, e.g. both ETUC and Eurosif, or Eurosif and ECCJ. We found that they exist in Spain, France, the Netherlands and the UK. While a detailed outline and discussion of national varieties of the NIU nexus goes beyond the scope of this chapter, we present here the cases of France, the Netherlands and the UK to illustrate the ramifications and different forms of NIU coalitions.

⁵⁰ K. Bizzarri, ‘Business Hollows Out New EU Corporate Social Responsibility Rules’ (2013) *Corporate Europe Observatory*.

⁵¹ interview#26

⁵² Interview #14

The French case mirrors some of the key features of the EU-level convergence outlined above for the Directive. Certainly, the NIU nexus was crucial to support the recent introduction of the law on the 'devoir de vigilance'.⁵³ The law obliges large companies to monitor and prevent possible violations of human rights and environmental risks in their supply chains. As the Chair of the French Sustainable Investment Forum (FIR) revealed, FIR worked with trade unions and NGOs to promote this reform.

The fact that we took a position that we're in favour of this law, that we think it makes sense, did make a big difference and I think we had a big impact on that Obviously, the members of Parliament that were in favour of that particular law used the fact that they had FIR in their favour to say, 'Look, this is not anti-business. We have people coming from business who say it's good'.⁵⁴

Similarly to the EU Directive, the support of socially responsible investors was critical in overcoming one of the main obstacles that had been blocking these reforms in the past: employers could present them as an anti-business legislation.

At the same time, an analysis of the membership of FIR as much as Eurosif, demonstrates how the conventional approach to investors – as rational economic actors merely interested in maximizing their financial returns – is misleading and too narrow.

FIR effectively is a strange animal because it's a multi-stakeholder organisation and we have around the table businesses, asset managers, investors, advisers And we also have NGOs and trade unions, etc.⁵⁵

Thus, organizations like FIR or Eurosif are key epistemic communities where the NIU nexus can elaborate a compromise position that combines investor perspectives with the different points of views of unions and NGOs. In addition, in the NIU compromise the responsible investor community operates as a bridge between purely social stakeholders and purely economic shareholders. In particular, it is able to translate human rights and environmental battles into the language of finance.

In the Netherlands, this cooperation appears more structured and formalized. The Netherlands is the largest market for socially responsible investments in Europe, due to a consolidated tradition

⁵³ Law n° 2017-39, 27 March 2017

⁵⁴ interview#35

⁵⁵ interview#35

and to the presence of very large occupational pension funds.⁵⁶ In this situation, unions have played a crucial role in the establishment of the Dutch responsible investment movement as they have statutory representation in the board of these large pension funds. There is also a strong relation between NGOs and investors. For instance, VBDO, which is part of Eurosif and represents the main platform for responsible investors in the Netherlands, is also a member of the VMOPplatform, which is the Dutch member of ECCJ.

Beyond these more formalized cross-affiliations, there are informal yet clear signs of a systemic approach to sustainable corporate governance built around the NIU compromise. In particular, as part of the National Action Plan on Business and Human Rights, the Dutch government has been active in facilitating the development of voluntary agreements on International Responsible Business Conduct between companies, NGOs and other partners at sector level. This approach is very different from conventional voluntary CSR as it is much more coordinated: it includes a negotiation between the parties under the auspices of the government.⁵⁷ In this sense, it resembles the tripartite social dialogue that characterised European corporate regulation until the 1990s. The goal of the process is to reach an agreement that – within three-five years – would effectively avoid adverse effects of and improve circumstances for groups affected by specific human rights abuses (e.g. child labour, low wages, human rights violations or environmental pollution). Furthermore, it openly acknowledges the need for a collective solution to problems that businesses are unable to solve on their own. So far, agreements have already been concluded in several sectors including gold, garments and textiles. Possibly, the most important agreement was reached in the banking sector – after two years of tough negotiations.⁵⁸ Similarly to the other cases discussed above, the driver for this sustainable corporate governance reform was an NIU compromise between the Dutch banks, trade unions, NGOs and the Dutch government. The aim has been to join forces on international responsible business conduct regarding human rights within the banking sector. The agreement was signed on 28 October 2017 and it entails the creation of a steering committee where government representatives from the Dutch Ministry of Finance and Foreign Affairs will run a negotiation with representatives from the banking sector, NGOs such as Amnesty International and trade unions. Notably, the agreement also includes the creation of a complaints and disputes mechanism administered by the steering committee. The parties and the adhering banks can

⁵⁶ interview#21; #41; and #37

⁵⁷ See Agreements Promoting International Responsible Business Conduct (IRBC agreements) for an overview: https://www.imvoconvenanten.nl/?sc_lang=en

⁵⁸ Social and Economic Council 'Dutch Banking Sector Agreement on international responsible business conduct regarding human rights' (SER, 2017) The report can be retrieved at: https://www.ser.nl/~media/files/internet/publicaties/overige/2010_2019/2016/dutch-banking-sector-agreement.ashx

activate it in case of non-compliance by parties and/or adhering banks. Crucially, contrary to multi-stakeholder initiatives that are often funded by corporations, all these activities are funded by the Dutch government.

Finally, In the UK this NIU compromise is also well-established, driven by the combined presence of a large financial sector and major NGOs, such as Oxfam, E3G, and WWF. Unlike in the Netherlands, unions do not have a statutory role in occupational pension funds. However, according to my interviews, they have increasingly engaged in shareholder activity.⁵⁹ As in the other cases, the NIU nexus is particularly strong in the areas of human rights risk management in supply chains.⁶⁰ The interviews also suggest a strong common interest – particularly in the case of investors and NGOs – in tackling environmental issues.

The NIU nexus has supported the adoption of important sustainable corporate governance legislation, including the Modern Slavery Act (2015).⁶¹ In relation to corporate transparency and accountability, Section 54 of the Act requires companies with an annual turnover above £36 million to produce a Slavery and Human Trafficking statement, indicating the steps they are taking to prevent modern slavery abuses in supply chains and operations. The Act requires companies to start publishing the statements by 30 September 2017. The statements are to be signed by a company director on behalf of the board and made available at a prominent place on the company's website. The information contained in the statements include policies on modern slavery and human trafficking; identified risks of modern slavery and steps taken to mitigate the risks; staff training and capacity to tackle modern slavery and human trafficking. For instance, according to one NGO:

There are different pieces of legislation in which we know that the conversation with investors has been important. It hasn't always been successful.... on the UK Modern Slavery Act there was the positioning of Aviva as well as some other individual businesses, which came to be important and determinant in showing that legislation was not feared by businesses, that there were some that supported and were calling for it.⁶²

Also in the case of the UK Modern Slavery Act, one of the successful features of NIU compromises is its ability to overcome the divide between 'business' and 'anti-business'; 'social' and 'financial'. If the responsible investor community is able to mobilize large mainstream investors like Aviva and

⁵⁹ interview#36 and 38

⁶⁰ interviews# 37; 38 and 40

⁶¹ Other chapters in this volume offer a comprehensive discussion of the Modern Slavery Act see Ch. 15; Ch. 3; and Ch. 40.

⁶² interview#34

business organizations, this affects the policy debate and shows that there is a broad support for corporate sustainability reforms.

5. Discussion: policy implications and scope conditions

In this chapter I have explored the socio-economic constituencies driving a recent wave of corporate reforms that have emerged in Europe at different levels of regulation. I have maintained that they were driven by a little-studied convergence of shareholders and other groups of stakeholders: NGOs, responsible investors and unions. On the basis of this empirical study, I elaborate on some key implications for current policy debates on sustainable corporate governance, also offering some conjectures on the scope conditions of my findings.

Policymakers should be cautious about rules and standards for sustainable corporate governance and accountability that are narrowly focused only on incentivizing or encouraging sustainable and green finance. Despite the lessons of the 2008 global financial crisis, the business rhetoric of shareholder primacy and value maximization is regaining currency. For instance, recently the EU has outlined a Sustainable Finance initiative⁶³ that is mainly centred on the role of investors and the financial sector as the sole or main means to advance a low-carbon, more resource-efficient and sustainable economy. This narrower regulatory strategy risks limiting the emergence of a broader compromise across different groups of actors interested in holding managers accountable for the social and environmental impact of large corporations. By looking at sustainable finance in isolation, the regulator risks building weak mechanisms of sustainable corporate governance.⁶⁴ Responsible investors have limited influence on executives and regulators as compared to a broader coalition of actors. Furthermore, they are interested in social and environmental issues that also affect corporate financial performance. This excludes many important aspects of ‘strong’ sustainability. Finally, even the EU High Level Group (HLEG) on Sustainable Finance warned that excessive emphasis on financial market incentives to improve the environment and deliver social benefits may create a ‘green bubble’ and market distortions.⁶⁵

Rather than taking a zero-sum regulatory approach that privileges investors over other social and economic constituencies, such as organized labour and civil society, policy-makers should promote

⁶³ See European Commission, Action Plan: Financing Sustainable Growth, COM(2018) 97 (Bruxelles, European Commission, 2018).

⁶⁴ See J. Cullen and J. Mähönen, ‘Taming unsustainable finance: the perils of modern risk management’, Ch. 8 in this volume.

⁶⁵ The final report of the High-Level Expert Group on Sustainable Finance first published on 31 January 2018 can be retrieved: https://ec.europa.eu/info/publications/180131-sustainable-finance-report_en

synergies between providers of sustainable financial services and other regulatory intermediaries,⁶⁶ such as NGOs and unions. Investors, NGOs and unions have different means to directly and indirectly influence corporations. However, in isolation they have limited capabilities and influence. By joining forces, they can better perform crucial regulatory roles, such as agenda setting, implementation, monitoring and enforcement.

Further, policymakers should be sceptical of the win-win rhetoric that characterizes both green finance and multi-stakeholder ideals. Both views are overly optimistic about the possibility that, in the long-run, sustainability policies will ultimately create shared value or benefit all stakeholders. As discussed in section 2, the current policy debate tends to deny conflicts and trade-offs. Instead of considering conflicts as negative, policymakers should acknowledge them and the need for balancing opposed forces as the engine for finding a stronger sustainable corporate compromise. The approach taken by this study suggests that conflicts can help to form rules and norms. Our data show that the compromise amongst investors, NGOs and unions is constructed against the discretionary power of corporate executives. These three groups of actors have different worldviews, interests and even terminologies to define corporate sustainability. However, they can be united by the common objective of holding corporations more effectively accountable for financial, environmental and social risks. In addition, the differences, tensions and even contrasts that exist within the NIU nexus can enrich the corporate governance and sustainability debate. Thus, regulators should pay more attention to conflicts as positive social forces to advance new regulatory solutions and a stronger framework for corporate sustainability.

Overall, policymakers should pursue a more pragmatic and processual approach to sustainable corporate governance. In contrast with abstract shareholder-oriented and multi-stakeholder models, the NIU alignment of interests that I discuss through this study is a contextualized compromise. It emerged from existing conditions and institutional settings that are present today in Europe, but not necessarily elsewhere, and that are subject to change over time. It also reflects the relative power of the actors involved in struggles for changing EU and Member States' corporate governance regulation. Therefore, it is worth highlighting here some scope conditions without which NIU corporate governance compromises could not emerge.

First, developed financial markets are a precondition for a dynamic responsible investor movement and an NIU nexus to emerge. ESG analysts and green finance are a luxury for countries where stock

⁶⁶ Monciardini and Conaldi, 'The European regulation of corporate social responsibility'; KW. Abbott, D. Levi-Faur and D. Snidal, 'Theorizing Regulatory Intermediaries: The RIT Model' (2017) 670 *The ANNALS of the American Academy of Political and Social Science*, 1, 14-35.

markets and financial services are underdeveloped. This condition concerns for instance most Eastern European countries and, until recently, most Continental European jurisdictions. In fact, until a decade ago, in Europe a relatively strong presence of responsible investors was mainly limited to the UK. Ever since, responsible investments have experienced a remarkable growth - in the UK but also in other EU countries.⁶⁷ This growth helps explain the emergence of NIU compromises.

Second, NIU compromises require the presence of relatively well-organised NGOs and unions that have the organizational capabilities to exert their influence on both policy-makers and corporations. As for the relative power of unions in the EU policy arena, this varies across Member States and it has been generally declining. However, the European context is still characterised by the strong presence of organized labour and its institutional recognition through various forms of collective bargaining and social dialogue. This differs from other contexts such as the US.⁶⁸ As for NGOs, in Europe organized civil society struggles to match the capacity of business to influence public authorities and the regulatory process. Nonetheless, it is also relatively strong as compared to other regions and, in recent years, European NGO networks have also become more coordinated, developing a stronger capacity to influence EU as well as Member States policies. Again, the relative power of unions and NGOs is unevenly distributed across Europe and this also explains the emergence of a variety of NIU compromises.

Finally, the support of policy-makers is crucial for the emergence of NIU compromises. Specifically, the study illustrates that the NIU nexus has emerged where and when policy-makers became more interventionist in the economy, backing a shift away from purely voluntary corporate sustainability policies. This means that they overcame the conventional business-centred approach to corporate governance that underpins both shareholder-oriented and multi-stakeholder models. By looking for pragmatic corporate accountability solutions supported by stronger and larger coalitions, public authorities have facilitated the formation of NIU compromises. NIU coalitions are never purely market-driven. They are politically orchestrated and motivated bargains between actors that have (often sharply) different values and worldviews about sustainability but share a common interest in holding executives accountable.

⁶⁷ Eurosif (2016) European SRI Study: <http://www.eurosif.org/wp-content/uploads/2016/11/SRI-study-2016-HR.pdf>.

⁶⁸ R Marens, 'Generous in Victory? American Managerial Autonomy, Labour Relations and the Invention of Corporate Social Responsibility' (2012) 10 Socio-Economic Review, 59–84, 599-630.

6. Conclusions: Scepticism and hope for strong corporate sustainability

As Andrew Johnston argues in this volume in the UK context, at the moment ‘the best that can be hoped for is a degree of ‘weak’ sustainability’.⁶⁹ Admittedly, there is a considerable gap between the limitations and shortcomings of the sustainable corporate governance reforms that have been the object of this study and the need for a ‘strong’ approach to corporate sustainability.⁷⁰ For instance, Ahern has criticized the EU Directive maintaining that its ‘non-prescriptive approach to the reporting framework negates the possibility of a uniform approach being taken to sustainability reporting by companies within the EU. As a knock-on consequence, the ability to engage in meaningful cross-company comparisons by stakeholders is likely to be significantly hampered.’⁷¹ Similarly, others have harshly criticized the limitations and weaknesses of the 2015 UK Modern Slavery Act.⁷² The lack of a clear and meaningful framework for disclosure, adequate sanctions and enforcement mechanisms led to widespread non-compliance and a ‘suspicious uniformity’ among statements.⁷³

Keeping in mind this sobering picture, rather than restating these shortcomings, this chapter has shifted attention from the individual reforms to the coalitions that are driving them. This is not to offer easy solutions to ‘strong’ sustainability but rather a more processual, dynamic and contested approach to overcome the current ‘weak’ corporate sustainability paradigm. Deploying this perspective can offer some reasons for hope as well as legitimate scepticism about the actual possibility of NIU compromises to advance strong sustainability. The main point remains that any progress will be – as always – the result of social struggles and political compromises.

Specifically, the emergence of a stronger corporate sustainability compromise through the NIU coalitions can contribute to address two deadlocks that hinder stronger corporate sustainability reforms.

First, the current debate is very narrow and technical, looking at transparency as an end in itself. What is missing is not only a better sustainability accounting framework but a public and democratic debate about corporate accountability. The emergence of a broader societal alignment amongst responsible investors, NGOs and unions can help to create this broader public debate.

⁶⁹ Ch. 15.

⁷⁰ B. Sjøfjell and C.M. Bruner, ‘Corporations and Sustainability’ Ch. 1 in this volume.

⁷¹ D. Ahern, ‘Turning Up the Heat? EU Sustainability Goals and the Role of Reporting under the Non-Financial Reporting Directive’ (2016) 13 *European Company and Financial Law Review* 4.

⁷² See Johnston, Villiers and Zhao chapters.

⁷³ UK Parliament, Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, Sixth Report of Session 2016-17, HL Paper 153, HC 443, 5 April 2017, paras 92-105.

Second, stronger corporate sustainability legislation has been successfully resisted by framing it as 'red tape' and 'anti-business'. The emergence of the NIU nexus allows overcoming the business-civil society divide. The most significant challenge in advancing 'strong' sustainability is how to balance the current discretionary power of global corporations. By empowering these social constituencies that have some leverage on corporate conduct, policymakers can orchestrate a more effective monitoring and enforcement regime for corporate sustainability.

Appendix. List of interviews

#	ORGANISATION	DATE	#	ORGANISATION	DATE
1	EU Commission	22/04/2010	21	Sustainalytics	23/06/2016
2	EU Commission	30/04/2010	22	WHEB	14/07/2016
3	Global Reporting Initiative	08/04/2011	23	Oekom	14/07/2016
4	SOMO	15/04/2011	24	SRI expert	19/07/2016
5	Aegon Asset Management	02/06/2011	25	MSCI	14/09/2016
6	APG	06/06/2011	26	ECCJ	16/10/2016
7	ETUI	08/06/2011	27	ChristianAid	11/10/2016
8	ETUC	15/06/2011	28	Frank Bold	17/10/2016
9	ECCJ	17/06/2011	29	EU Commission	25/10/2016
10	EU Commission	26/06/2012	30	EUROSIF	05/12/2016
11	EU Commission	23/07/2012	31	CORE Coalition	15/05/2017
12	EU Commission	25/07/2012	32	EU Commission	03/04/2017
13	EU Commission	30/07/2012	33	SpainSIF	21/04/2017
14	EU Commission	08/08/2012	34	CDSE	05/04/2017
15	SRI expert	07/09/2012	35	FIR	02/05/2017
16	ETUC	02/11/2012	36	Trade Union Confederation	12/04/2017
17	EU Commission	03/11/2012	37	ERIN/ShareAction	20/04/2017
18	EUROSIF	22/01/2013	38	ETUC	08/05/2017
19	Transparency International	24/01/2013	39	EU Commission	10/05/2017
20	CSR regulation expert	01/03/2013	40	ShareAction	10/05/2017
			41	VBDO	16/05/2017
			42	Business and Human Rights expert	19/05/2017

