Corporate Digital Responsibility in Big Tech Governance: Fiduciary Responsibility and Legitimacy of Minority Shareholders´ and Investors´ Claims in Tech Giants

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1. Introduction

With the passage from Information Society to Network Society,[1] stand-alone informational operating units were replaced with interconnected data networks. Perhaps as a consequence, we are also now said to be in the Age of Environmental, Social and Governance (ESG), [2] in which there is a growing interdependency between the success of market players and their overall synch with local or transnational demands.

Influential ranks of business leaders, investment funds, lawyers, regulatory authorities and policy makers advocate in an increasingly vocal manner for a shift of the strict shareholder-centric paradigm towards a more stakeholder conscious one. [3] That is, a corporate governance model attentive to the business impact and stock value implications which may arise from meeting, or neglecting, stakeholder requirements.

That novel reality translates into considering every corporation's social responsibility – in other words, to recognize the systemic trade-off between giving in a portion of profits and investing in improved image in exchange for a more appealing position in the market –, thereby contributing to a more market-driven and sustainable long-term investment model. For the tech sector, this has meant a specific subset of Corporate Social

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[1] See: Manuel Castells, 'Informationalism, Networks, and the Network Society: A Theoretical Blueprint'. in Manuel Castells (ed), *The Network Society: A Cross-Cultural Perspective* (Edward Elgar 2004) <https://annenberg.usc.edu/sites/default/files/2015/04/28/Informationalism%2C%20Networks%20and%20the%20Network%20Society.pdf> accessed 28 December 2021.

[2] Jessica Strine et al, 'The Age of ESG' (Harvard Law School Forum on Corporate Governance, 9th March 2020) <https://corpgov.law.harvard.edu/2020/03/09/the-age-of-esg/> accessed 28 December 2021.

[3] Claudine Gartenberg and George Serafeim, '181 Top CEOs Have Realized Companies Need a Purpose Beyond Profit' (Harvard Business Review, 20th August 2019) <https://hbr.org/2019/08/181-top-ceos-have-realized-companies-need-a-purpose-beyond-profit> accessed 28 December 2021.

Responsibility (CSR) principles, as scholars now strive to put together a concept of Corporate Digital Responsibility (CDR).[4]

Critics of so-called "stakeholderism" contend that this is a counterproductive distraction from measures that actually work in driving corporate leaderships to effectively address stakeholder embodied concerns, i.e., legislation.[5] However, when it comes to certain tech giants, relying on the correspondence between market goals and the drafting and enforcing of laws is an extremely complex assumption, due to their strong lobbying power and transnational *modus operandi.*

In this piece, we specifically refer to tech giants which operate and are classified as "information intermediaries". The term has been used by scholars to categorize companies that mainly communicate information and knowledge,[6] and which could otherwise be normally qualified as media companies were it not for their technologically mediated operations and their usual insistence on being put in a *sui generis* category of "tech companies".[7] Other terms as "internet intermediaries"[8] and "Online Service Providers" (OSPs)[9] are also used interchangeably. Such players display unparalleled ambition and success in dominating data storage, processing, and transmission globally, and have achieved immense protagonism in the Network Society.

Information intermediaries such as Meta,[10] Alphabet,[11] Twitter, Apple and Microsoft hold overwhelming economic and political power, concentrate civic functions at an unprecedented degree and have become largely impervious to jurisdictional control and to market competition. At the crux of the matter is the fact that these companies are not only economically dominant, but also politically. Differently from other transnational

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[4] Lara Lobschat et al, 'Corporate Digital Responsibility' 122(1) *Journal of Business Research* (2021) <https://www.sciencedirect.com/science/article/pii/S0148296319305946> accessed 28 December 2021.

[5] Lucian A Bebchuk and Roberto Tallarita, 'The Illusory Promise of Stakeholder Governance' 106(1) *Cornell Law Review* (2020) <https://ssrn.com/abstract= or http://dx.doi.org/10.2139/ssrn.3544978> accessed 28 December 2021.

[6] See, e.g.: Martin Moore, 'Tech Giants and Civic Power' CMCP, Policy Institute, King's College London (2016) <https://doi.org/10.18742/pub01-027> accessed 28 December 2021, 5.

[7] Philip Napoli and Robyn Caplan, 'Why media companies insist they're not media companies, why they're wrong, and why it matters' 22(5) *First Monday* (2017) <https://doi.org/10.5210/fm.v22i5.7051> accessed 28 December 2021.

[8] See: Council of Europe Committee of Ministers, Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries (Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14> accessed 28 December 2021.

[9] See: Mariarosaria Taddeo and Luciano Floridi, *The Responsibilities of Online Service Providers* (Springer 2017).

[10] The parent company of Facebook, Instagram, and WhatsApp.

[11] The parent company of Google and YouTube.

companies, information intermediaries shape and design the information environment of citizens and governments,[12] and there is a growing awareness of their potential influence on public opinion-making.[13] However, among policy makers and scholars alike, the functions of information intermediaries are not yet fully understood.[14]

It is imperative to devise ways to acknowledge the power investors and CSR conscious directors shall have to compel tech giants, in the name of actual business judgement, to adopt more multistakeholder-friendly corporate decision-making. By establishing a functional corporate purpose doctrine and making sure CSR commitments are not vain by holding corporate decision-makers against objective good faith standards, information intermediaries could become more transparent. Perhaps even their algorithms, which essentially curate the flow of information online, could be made less opaque.

That should be recognized even under Delaware corporate purpose law (the law governing most tech giants, including Alphabet, Facebook and Twitter), which crystalizes shareholder primacy,[15] on one side, but also applies the notion that a company shall be managed in accordance with good business sense, in the sphere of business judgement.

This piece engages with the immediate aim of enabling general recognition of investors´ role and right for more stakeholder-oriented business judgement under the existing shareholder primacy paradigm. To do so in the context of information intermediaries requires that their corporate nature be firstly understood and effectively conceptualized. Thus, this paper will revisit common law and civil law concepts to build upon existing corporate governance models and conform them to the political and economic particularities of information intermediaries. Revisiting instrumental concepts such as business judgement, corporate purpose, good faith, and others, may help to provide fine tuning to information intermediaries´ internal corporate decision-making in line with Corporate Digital Responsibility, as well as to clarify the vision of what the Network

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[12] Dennis Broeders and Linnet Taylor, 'Does Great Power Come with Great Responsibility? The Need to Talk about Corporate Political Responsibility' in Mariarosaria Taddeo and Luciano Floridi (eds), *The Responsibilities of Online Service Providers* (Springer 2017) 6<https://www.researchgate.net/publication/313176812_Does_Great_Power_Come_with_Great_Responsibility_The_Need_to_Talk_About_Corporate_Political_Responsibility> accessed 28 December 2021.

[13]Wolfgang Schulz, 'Roles and Responsibilities of Information Intermediaries: Fighting Misinformation as a Test Case for a Human Rights-Respecting Governance of Social Media Platforms' (Aegis Series Paper No 1904) Hoover Working Group on National Security, Technology, and Law (2019) <https://www.lawfareblog.com/roles-and-responsibilities-information-intermediaries> accessed 28 December 2021, 1.

[14] *Ibid*.

[15] David G Yosifon, 'The Law of Corporate Purpose' 10(2) *Berkeley Business Law Journal* (2014) 181-230.

Society and its relationship to information intermediaries should look like under future laws.

2. Information Intermediaries and Civic Power

In his seminal paper "Tech Giants and Civic Power", Martin Moore demonstrated how the dominance exerted by information intermediaries is rooted in their deep influence on democratic and civic life, which distinguishes them from other large transnational companies.[16] Such tech giants are necessary to our contemporary global society to such an extent that they have become incomparably more powerful than the American Trusts of the 19th century, and they cannot be as simply broken up.[17] Moore identified and unpacked six types of civic power exercised by information intermediaries: the powers "to command attention"; "to communicate news"; "to enable collective action"; "to give people a voice"; "to influence people's vote"; and "to hold power to account".[18]

Since Moore's snapshot report in 2015, his findings seem to have been continuously confirmed, and Big Tech's immense civic power was increasingly put under the spotlight. For instance, after recognizing the use of their platforms to incite the storming of the Capitol in January 2021, Facebook and Twitter banned Donald Trump's accounts for violating their policies, a move that essentially extinguished Trump's influence online.[19] Also in recent times, Facebook displayed its seamlessly unfettered discretion to control the public debate by withdrawing its policy to take down posts forwarding "the lab theory", after the Biden administration started treating the possibility that SARS-CoV-2 originated in the Wuhan Institute of Virology as a viable mainstream hypothesis for the COVID-19 pandemic outbreak.[20]

Another example of overlapping between business strategies and public functions lies in the field of information security, and more specifically, on the data repository ensured by *cloud computing*. Companies such as Microsoft and Amazon have advertised their secure technological premises vis-à-vis a world of *zero-day* viruses (the ones which cannot be foreseen or addressed by "cyber vaccines") and of cyber-attacks, in which only the highly

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[16] Moore (n 6) 22.
[17] *Ibid*., 3, 11, 59.
[18] *Ibid*., 24.
[19] Drew Harwell and Josh Dawsey, 'Trump ends blog after 29 days, infuriated by measly readership' (The Washington Post, 2 June 2021) <https://www.washingtonpost.com/technology/2021/06/02/trump-blog-dead/> accessed 29 December 2021.
[20] Cristiano Lima, 'Facebook no longer treating 'man-made' Covid as a crackpot idea' (Politico, 26 May 2021) <https://www.politico.com/news/2021/05/26/facebook-ban-covid-man-made-491053> accessed 29 December 2021.

specialized and fully dedicated private sector could offer state-of-the-art security. The same can be said about Microsoft´s offer to centralize and store secret passwords used by individuals, given the security proclaimed with regards to its cloud capabilities. The natural outcome expected from this situation is that private clouds (including segmenting packages of information in different jurisdictions) shall drain backup electronic memory of citizens and of organizations, over the possibility that government could be the guardian of that socially important volume of information.

Microsoft, Alphabet, Meta et al have also become entangled in regulatory efforts to guarantee traditional media's economic, political and operational autonomy from them,[21] and to control the influence of information intermediaries on electoral campaigns, after their new sophisticated instruments for campaigning (such as Facebook's ad microtargeting), coupled with the sheer influence of their established features (such as Google's search engine), impactfully changed the dynamics of elections for good.[22]

The attention of supervising authorities has been inevitably attracted. The Council of Europe has delved specifically into the matter of information intermediaries. In its 2018 Recommendation of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, the Committee recognized that "the power of such intermediaries as protagonists of online expression makes it imperative to clarify their role and impact on human rights, as well as their corresponding duties and responsibilities".[23] Furthermore, in the 2019 Declaration by the Committee of Ministers on the financial sustainability of quality journalism in the digital age, the Committee:

> "acknowledges the necessity to consider the growing responsibilities of those internet intermediaries, notably online platforms, which through their wide geographical reach and user engagement act as main gateways for news dissemination and generate important revenue from online news. Their active role in providing services of public value and their influence in the media ecosystem should be accompanied by public interest responsibilities developed through self-regulatory mechanisms or other appropriate and proportionate regulatory or co-regulatory frameworks, aimed to ensure, *inter alia* that: […] b) In the exercise of

[21] Kari Paul, 'What Facebook's Australia news ban could mean for its future in the US' (The Guardian, 26 May 2021) <https://www.theguardian.com/technology/2021/feb/27/facebook-australia-news-ban-us-legislation> accessed 29 December 2021.

[22] Andreas Vou, 'How "big tech" influence electoral processes and why transparency is essential' (European Data Journalism Network, 21 December <https://www.europeandatajournalism.eu/eng/News/Data-news/How-big-tech-influence-electoral-processes-and-why-transparency-is-essential> accessed 28 December 2021.

[23] Council of Europe, Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries (Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14> accessed 28 December 2021, para. 7.

> their curatorial or editorial-like functions whereby they categorise, rank or display content, they develop, in collaboration with media actors, civil society and other relevant stakeholders, mechanisms and standards for assessing credibility, relevance and diversity of news and other journalistic content."[24]

Of course, with *civic power* determining civic responsibility, the ultimate challenge resides in how to address such responsibility (and eventual liability) within the boundaries of shareholder primacy. Besides existing or forthcoming legislative and regulatory developments, it shall be of investors´ own interest to protect corporate image and stock value beforehand.

3. Shades of Corporate Responsibility: ESG, CSR, CDR and CPR

Taddeo has argued that "ethical governance of the digital should not be confused with the legal regulations in place to shape the design and use of digital technologies, nor is this something that erodes the space of legal compliance."[25] At the other end, ESG-sceptics see little value in stakeholder governance and denounce it as a counterproductive *distraction* from binding regulation. Between those two stances, there may be a *tertium* positioning, which may more likely be inspired by those who present ethical corporate governance as the way forward for information intermediaries, contending that "compliance is necessary but insufficient to steer society in the right direction."[26]

As a matter of fact, even if the law were sufficiently sophisticated to deal with information intermediaries, which currently is still far from true, ethical governance standards and best practices would still have a welcome place in guiding corporations and market expectations toward the best possible levels. In the words of Floridi, "digital regulation indicates what the legal and illegal moves in the game are, so to speak, but it says nothing about what the good and best moves could be to win the game – that is, to have a better society".[27]

The connection between ESG and tech giants spreads over various matters. *Green IT* is a movement which claims Environmental contribution from IT companies, particularly

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[24] Council of Europe, Declaration by the Committee of Ministers on the financial sustainability of quality journalism in the digital age - Decl(13/02/2019)2 (2019). <https://edoc.coe.int/en/media/7917-declaration-by-the-committee-of-ministers-on-the-financial-sustainability-of-quality-journalism-in-the-digital-age-decl130220192.html> accessed 28 December 2021.

[25] Mariarosaria Taddeo, 'The Civic Role of OSPs in Mature Information Societies' in G Frosio (ed), *Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020) 14.

[26] Luciano Floridi, 'Soft Ethics and the Governance of the Digital' 31(1) *Philosophy & Technology* (2018) <https://doi.org/10.1007/s13347-018-0303-9> accessed 28 December 2021.

[27] *Ibid*.

from the ones which may cause major impact. The use of assembling vendors which employ personnel under inhuman conditions, or the indiscriminate policies of robotization with no concern for replaced employees, are focuses of attention with respect to the Social component of ESG. Finally, the creation of advisory boards integrated by independent members, for advising tech giants´ policies and practices, has to do with Governance.

ESG and CSR do not have clearly defined and distinct scopes and meanings.[28] Pollman has argued that, while both coincide in requiring legal compliance and additional stakeholder concerns, the difference between ESG and CSR "is that whereas CSR is often framed in terms of social obligations, rooted in ethical or moral concerns, ESG is generally discussed in terms of risk management for firms and investors, individually or systemically."[29]

In its turn, CSR has been defined as "activities that internalize costs for externalities resulting directly or indirectly from corporate actions, or processes and actions to consider and address the impact of corporation actions on affected stakeholders".[30]

The uniqueness and magnitude of the digital market warrant the concept of Corporate Digital Responsibility (CDR), as a specific subset of ethical standards beyond CSR.[31] In making a case for CDR, Lobschat and others explained:

> "Based on the broad idea of business ethics, we define CDR as the set of values and specific norms that govern an organization's judgments and choices in matters that relate specifically to digital issues. Such CDR-related values and norms share some principles and goals with CSR, or an organization's commitment (and accountability) toward social and ecological causes in general. Accordingly, CSR encompasses the economic, legal, and ethical expectations that society has of organizations at a given point in time (Schwartz & Carroll, 2003), and we propose that a similar perspective is inherent to any considerations of CDR as well. Notwithstanding this similarity, we argue that CDR should be considered explicitly and separately from CSR, because of the particularities of digital technologies."[32]

Both CSR and CDR essentially confront the dissociation between corporate purpose formally stated in by-laws, PR and investment materials, and corporate purpose actually

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[28] Elizabeth Pollman, 'Corporate Social Responsibility, ESG, and Compliance' in B Van Rooij and DD Sokol (eds), *The Cambridge Handbook of Compliance* (Cambridge University Press 2021) 666.

[29] Pollman (n 28) 666. See also: Andrea Beltratti , 'The Complementarity between Corporate Governance and Corporate Social Responsibility' 30(3) *The Geneva Papers on Risk and Insurance - Issues and Practice* (2005) <https://doi.org/10.1057/palgrave.gpp.2510035> accessed 28 December 2021.

[30] Gerlinde Berger-walliser and Inara Scott, 'Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening' [2018] 55(1) *American Business Law Journal* 214-215.

[31] Lobschat et al (n 6).

[32] Ibid., 876.

practiced and compared to market and social needs and expectations. Corporations tend to include proforma corporate purpose in their institutional documents and public announcements, misleading investors, minority shareholders and the general public.[33] Both concepts seek alignment all along the chain, entailing responsibility for truthful and consistent discourse and operations.

Certain authorities articulate the differentiated corporate power of information intermediaries through the concept of Corporate Political Responsibility (CPR). Broeders and Taylor argue that CPR would be the appropriate concept with which to frame information intermediaries, inasmuch as "the idea of CSR – in a broad sense – is (a) in need of more serious mechanisms for accountability and (b) in need of politicisation, in the sense of a recognition of the political role of corporations."[34] Furthermore, "OSPs exercise power over their users and are a counter power to state power in all corners of the world. This exercise of power and the political responsibility that results from it should, again, be embedded in a broader framework of responsiveness."[35]

In the present paper, the political responsibilities of information intermediaries are conceptualized through the notion of a special relationship between them and their investors (including but not limited to minority shareholders), framed within corporate legal terminology under both Common Law and Civil Law traditions. Evidence of such particular socio-political relationship between corporation and investors (and ultimately, with stakeholders at large) is given at times by the corporate policies and language of information intermediaries themselves. Broeder and Taylor noted how Zuckerberg poises Facebook as an international benefactor securing the right to universal Internet connectivity to its "population" of users.[36]

The premisses underpinning the responsibilities of information intermediaries to its investors will thus be presented under doctrinal concepts as well as under statutory law and non-binding standards. Put it in another way, they will be framed as stemming from applicable ESG, CSR and CDR in conjunction with relevant corporate purpose law (as the applicable law of corporate purpose informs to which extent a corporation can or should undertake ESG, CSR and CDR commitments).

4. Towards a More Sustainable Corporate Model

[33] See: Jill E. Fisch and Steven Davidoff Solomon, 'Should Corporations Have a Purpose?' 99 *Texas Law Review* (2021) 1316-1318.
[34] Broeders and Taylor (n 12) 8.
[35] *Ibid*, 9.
[36] Broeders and Taylor (n 12) 6.

4.1 Mapping relevant legal doctrines: Business Judgement, Corporate Purpose, *Animus Societatis*, *Bona Fide*, Duty of Loyalty, Public Good

During the passage from ancient eras to newer societal models, including the recent transition from Industrialism to Informationalism, up to the Network Society,[37] traditional concepts known in the corporate world have become increasingly insufficient or even inappropriate to address new phenomena.

Business judgement is a key concept in corporate legal theories, particularly in Common Law (but not only). It sets aside interference by judges whenever a matter is fundamentally of business discretion, not of legal discretion. The basic assumption behind it is that businesspeople know better than judges what is best for a company, so judges should not have a say, either because there would be no reason for it, or because they would not be capable of addressing it. However, tech giants wield civic powers that transcend market or societal checks and balances that could otherwise contain abuses in the absence of judicial discretion. Therefore, in the Big Tech context, business judgment seems like a somewhat blank concept, the delineation of which may require new nuances.

Corporate purpose should enounce the formal and actual mission of a company (beyond generating and sharing profits, as in every for-profit legal entity). By knowing what a corporation purports to do, one can evaluate whether to invest in it. Notwithstanding, tech giants often publish bureaucratic proselytism as corporate purpose, quite different from some of their practices and behaviour. Thus, actual corporate purpose should have a binding effect among all shareholders, implying fiduciary responsibility (and associated liability).

Possibly the first concept aimed to portray the basis of formation of a company, *affectio societatis* dates back to Ancient Rome, and was built over the notion of *animus contrahendi societatis*, meaning one´s will to engage as a partner in a venture, apportioning efforts and/or resources. Such concept rapidly gained universal appeal, given the enormous number of parties interested in teaming up to create or enhance some business. However, although it was initially spread across many geographies, the progressive de-personalization of legal entities has led to the demise of its roots in *intuitu personae* as intrinsic characteristic, and its replacement with *intuitu pecuniae*.

[37] See: Castells (n 1).

The diverse motivations which nowadays inspire shareholders to participate in a tech giant extend far beyond the sole financial interest on return over investments. Hence, *affectio societatis* has been abandoned, especially in Common Law countries, given the lack of correspondence with the kind of comprehensive bond that ties an individual or organization and the company which they join as shareholders.

Alongside the progressive disenchantment with *animus societatis* as a concept for those who inevitably associated it with *intuitu personae* or with *intuitu pecuniae*, there was the issue of the drastic assumption[38] that relevant enforcement would determine the leaving or exclusion of shareholders who no longer show a will to keep partnering.[39] In spite of those difficulties, *affectio societatis* is still applied in a number of Civil Law jurisdictions.[40]

Good faith, or *bona fide,* is another concept that has crossed the timeline of legal systems, as it is hard to oppose to a principle supported by ethical will and similar ingredients. That may explain the persistent use of such expression in contemporary legal doctrine. On the other hand, *bona fide* alone does not seem to fit properly whenever it is called upon an event which requires interpretation of sophisticated business matters or of cultural, subjective standards present in ethnically or politically diverse jurisdictions which tech giants come across. In addition, in court rulings over corporate disputes, the limits of the judge´s role in interpreting *bona fide* of "the company as a whole" are not always clear, although there seems to be some trend to avoid associating *bona fide* with a single party´s (usually the controlling shareholder) spirit and consciousness, as it might otherwise miss the point that other shareholders may have different interests and opinions, and yet are also bearers of *bona fide*.[41]

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[38] The decay of *affectio societatis* was furthered by a general acknowledgement of the subjective judgement on whether a party has maintained or not his will to keep involved in a corporate venture. Effectively, it is quite common that a minority shareholder may diverge from controlling shareholders or from management on some matter, but still recognizes overall advantages in maintaining his/her/its stake in the company; therefore, that judgement is often blurred.

[39] Although such consequence, perhaps present in common sense, is not exactly precise, either with regards to its origin in the Roman Law – where there is no such concept as a legal entity, therefore the lack of *affectio societatis* would determine leaving a contract, not a corporate body – or to contemporaneous realities – where the principle of preservation of the legal entity implies its continuation, despite the leaving of some diverging shareholder(s).

[40] See, e.g.: Ivan Tchotourian, 'L'Affectio Societatis en tant que Critère de Validité et de Qualification des Sociétés : L'Illustration Française' 110(3) *Revue du Notariat* (2008) 877–899.

[41] Sealy LS, '"Bona Fides" and "Proper Purposes" in Corporate Decisions' 15(3) *Monash University Law Review* (1989) 278. "It is clear from our examination of the cases that our judges now have a myriad of overlapping formulae which they can invoke if they are disposed to review corporate decisions, and particularly directors' decisions. The "proper purposes" concept may at one time have been little more than a fifth wheel on the coach, a rephrasing of the traditional test of *bona fides*; but (to change the metaphor) it has become a springboard for a major development in the law - a development that appears to have begun

Duty of loyalty is an instrumental concept for asserting the respect controlling parties shall nurture towards controlled ones. As a matter of fact, every shareholder contributes to the success of a company, by investing in it and possibly cooperating with it, and hence deserves that respect. However, the more diverse is the picture of a corporate profile, the more difficult to ascertain the required pattern of loyalty, as simultaneous loyalty to quite different actors may result in no loyalty to anyone.

Public good is a value, more than a principle or a rule. In theory, a legal system finds its justification in the search of public good, as well as in the defence of individual dignity. Depending on political or ideological views, public good may be associated with the interest of the entrepreneur, not of the company as a whole, nor of surrounding communities. Thus, public good is a great source of inspiration as a philosophy, but not very practical from an enforcement standpoint.

In short, contemporary corporate life demands a balance between the interests of controlling and controlled shareholders and of investors which can no longer be achieved solely by means of traditional elements associated to concepts such as business judgement, corporate purpose, *affectio societatis*, *bona fide*, duty of loyalty or public good. The Network Society puts several factors in conjunction which overcome contrasting boundaries dictated by those overly generic concepts and by strictly sectoral perceptions or interests.

4.2 Can the Phenomenology of Tech Giants Justify New Elements for the Doctrine of Corporate Fiduciary Responsibility?

> "Ohio's Attorney General filed a lawsuit against Meta, formerly known as Facebook, on Monday, accusing the company of violating federal securities law by failing to disclose internal research about its platforms' harmful effects on children to investors. The case was filed on behalf of the Ohio Public Employees Retirement System and Facebook investors, who collectively lost more than $100 billion in market share since employee-turned whistleblower Frances Haugen first leaked internal documents to the Wall Street Journal".[42]

earlier, and has since been taken further in Australia than in England. It may still be true, in principle, that "business decisions are for business men", and not a matter for review by the courts, but for a judge of sufficiently robust disposition that principle is not the deterrent that it may once have been."

[42] Katie Canales, 'Facebook, now Meta, just got hit with its first major lawsuit since a whistleblower exposed a trove of internal documents' (Business Insider, 15 November 2021) <https://www.businessinsider.com.au/facebook-papers-whistleblower-lawsuit-ohio-pension-system-seurities-fraud-2021-11> accessed 29 December 2021.

Information intermediaries may be an illustrative phenomenon on the need of new elements for fiduciary responsibility notions aimed to serve the Network Society.

For instance, reactions against tech giants´ abuses of individuals´ privacy have not been fostered by groups of competitors or deflagrated by customers as parties interested in triggering some sort of activism. To the contrary, protests and retaliation from virtually everywhere were perceived by investors – being them large investment funds or home-broking individuals, or any profile within that spectrum – as an overwhelming tide which would cause loss of stock value in the short or long run if the corporation still decided to keep going against the current.

The fast pace of transformation which characterizes the digital environment seems to not allow that controlling shareholders insist on steady positions which conflict with clear, major trends indicated by the market. Tech giants must constantly renew their strategies in order to adapt technological evolution to social requirements, which in turn are reshaped by technological advances on the other way around. If shareholder primacy is totally insensitive to such constraints, the very grounds of investing or taking part in a corporation are compromised, as supposedly no one is interested in making bets on technologies threatened by increasing troubles.

Green IT, quoted above as an example of effective ESG concern, suggests that internal pressure from minority shareholders may be irresistible. In an iconic case, an investment fund known for acquiring shares in corporations aligned with ecological concerns complained[43] that Apple´s policy of not selling spare parts was detrimental to the goal of avoiding unnecessary discharge of old equipment. In effect, by forcing customers to often replace defective equipment with new ones due to unreasonably expensive cost if the user chooses to go for Apple´s own network of technical assistance, the company was undoubtedly inconsistent with "Green IT" concerns, besides upsetting customers with a deadlock largely seen as unfair policy. Apple´s high management and controlling shareholders tried to resist, but the investment fund launched request of investigation by the Security Exchange Commission on the economic outcome of that policy, and the

[43]"Investors are extremely concerned about Apple's disingenuous combination of promoting environmental sustainability while inhibiting product repair. (...) (...) Consumers want to reduce their own carbon footprints by fixing their electronics, and Apple must help them get there". (...) It's what's best for the company, its consumers and the planet." (Leslie Samuelrich, president of Green Century Capital Management, Apple´s shareholder, which successfully caused the company to change its policy of not selling spare parts to consumers). Green Century Funds, 'New Green Century Shareholder Proposal Presses Apple to Expand Access to Repair' (Green Century, 13 September 2021) <https://www.greencentury.com/green-century-shareholder-proposal-presses-apple-to-expand-access-to-repair/> accessed 29 December 2021.

company then realized that it might be caught in the middle of a regulatory turmoil with unpredictable developments, which might further hurt its reputation and market positioning, causing major business losses. In other words, the case was of internal pressure, grounded on clear, external factors of large outreach.

Similarly, Facebook´s experience with the creation of a special board in charge of advising on privacy policies is informative on the convenience of structuring creative ways to address concerns which might otherwise be voiced by minority shareholders. The abrupt and steep price falls of Facebook´s shares as a result of world-wide news on its controversial privacy policies have motivated Facebook to anticipate an internal forum, whose guidance would be up to the high management (and the controlling shareholder) to evaluate and possibly adopt.[44] Shareholder primacy was maintained, but a new channel was opened, bringing fresh air to internal corporate affairs. Was the performance by such advisory board sufficient to peacefully meet minority shareholders concerns so far? Apparently yes, but a longer experience is required in order to show whether minority shareholders will be resigned with the status of such board as a body whose recommendations are not binding on the company´s decisions.[45]

Tech giants are subject, in proportion, to gigantic protesting against their policies whenever these are perceived as abusive. That may affect Apple´s tie-in of its line of products and eventual abusive pricing, Facebook´s Cambridge Analytica illegal data sharing scandal, Google´s huge fines for anticompetitive practices, and so forth. That makes it clear that a new notion of corporate fiduciary responsibility is necessary, otherwise "explosive" inputs from outside may turn tech giants´ shareholder primacy into an overprotective theory.

In the past, at the times of the Information Society, business information was essentially kept as trade secrets, and corporate life was practically conceived as a self-sufficient environment, where decisions were taken based on an individual sense of business judgement. In the transition to the Network Society, it is unfeasible to keep most information reclusive, as their value resides in the eventual flow and almost everything is interconnected, including the gathering of facts and judgement for corporate decisions,

[44] Emily Glazer, 'Shareholders Press Facebook for Governance Changes' (The Wall Street Journal, 13 December 2021) <https://www.wsj.com/articles/shareholders-press-facebook-for-governance-changes-11639404002> accessed 29 December 2021.

[45] Kevin Roose, 'Facebook's 'Supreme Court' Tells Zuckerberg He's the Decider' (The New York Times, 6 May 2021) <https://www.nytimes.com/2021/05/06/technology/facebook-oversight-board-trump.html> accessed 29 December 2021.

which lies on the basis of corporate fiduciary responsibility.[46] That does not mean receding to some sort of unlimited Rousseaunian *social contract*, but on the other end, it is also far from translating into Medieval notions of segregated joint interests which generated the idea of *corporation*.

4.3 Updating the Notion of Corporate Fiduciary Responsibility: Benefits and Challenges

> "A corollary to the mistaken belief that sustainable investing means sacrificing some financial return is the belief that fiduciary duty means focusing only on returns—thereby ignoring ESG factors that can affect them, particularly over time. However, more recent legal opinions and regulatory guidelines make it clear that it is a violation of fiduciary duty not to consider such factors. Although adoption of this new understanding has been slow in the United States, other countries, such as Canada, the UK, and Sweden, are taking steps to redefine the fiduciary duty concept. On November 28, 2018, the Swedish parliament approved major reforms requiring the four main national pension funds to become "exemplary" in the field of sustainable investment. As Will Martindale, head of policy at PRI, bluntly put it to shareholders, "Failing to integrate ESG issues is a failure of fiduciary duty."[47]

The dichotomy of shareholder primacy and stakeholder primacy has paralyzed attempts to move forward towards adjustment of corporate legal doctrines in the Network Society. Primacy of controlling shareholders is no longer sufficient for running tech giants which count on an immense critical mass of interested parties, within and outside a corporation. Reversely, stakeholder primacy is not structured to become an internal assumption and institutional *modus operandi.* If those distant ends are to be considered as sole parameters for discussion, interpretation of corporate matters fall short of a notion that bridges those concepts rather than further isolates them.

Reality is, however, that shareholder primacy (not stakeholders´ social or economic legitimacy) still is – and may continue to be for long – the criterion in effect under the legal environment of many jurisdictions, both in statutory law and in case law.[48]

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[46] "As defined by the International Integrated Reporting Council, 'an integrated report is a concise communication about how an organization's strategy, governance, performance, and prospects, in the context of its external environment, lead to the creation of value.' In practice, this means that company reports should include a materiality analysis that identifies the ESG issues that affect financial performance. Such a report is an effective way to demonstrate to shareholders and other stakeholders that the company is practicing 'integrated thinking' regarding its role in society. It is a way of changing the orientation from short-term financial results to long-term value creation." Robert G Eccles and Svetlana Klimenko, 'The Investor Revolution: Shareholders are getting serious about sustainability' (Harvard Business Review, May 2019) <https://hbr.org/2019/05/the-investor-revolution> accessed 29 December 2021.

[47] Ecles and Klimenko (n 46).

[48] See: Yosifon (n 15).

In parallel, globalization, virtualization and massive customization, altogether, have caused the market to determine whether certain corporate decisions are good business or not. In other words, "business judgment", which so far relied on controlling shareholders to be exercised, is now migrating, in practice, to good market practices, expectations and claims, and deviating from which may translate into bad business, originated by bad judgement, subjecting to characterization of breach of fiduciary duty.

Such phenomenon is particularly acute as regards tech giants, and it is no surprise that CDR has primarily targeted them. So, what should be the objectives and challenges of a notion of corporate governance which might reconciliate good internal judgement and global market inputs?

First, such a notion shall pave the way for permeability in corporate decision-making. CDR tends to be interpreted as a source of liabilities generated *and* enforced from outside a corporation, so it does not seem the best choice for meeting such objective, as it attracts the attention and concern of those who remind that shareholder primacy (the inner view, the decisions taken from the inside) is the one to be enforced under current law in most common law and civil law jurisdictions.

Putting it simply, a new notion should authorize incorporating externalities in a way compatible with shareholder primacy. The advantage expected from that is taking benefit of a significant legacy of legal doctrine built over the latter, as well as circumventing resistance from those affiliated with the idea that corporate means *intra muros*.

On the other side, such a notion might face the complexities which usually challenge the apostles of stakeholder primacy. For instance, how should the external world be framed so as to accommodate its diversities in a manageable way for shareholders eager to establish the mirroring image of their interests? What if there is no shareholder convinced on that matching and therefore none willing to endorse externalities?

In principle, the crossroad of those benefits and complexities can be enlightened by world-wide recognition on facts and likely consequences, which may illuminate the positive balance for the corporation should it properly address globally voiced demands. That may be the case, for instance, of global awareness on the abuse of privacy rights by social networks, which may be seen as almost universally undisputed.

In short, the benefits of a fresh notion of shareholder primacy can be aligned so as to overcome inherent challenges, provided market forces are identified as blatant evidence of positive effect of cooperation, materializing good business judgement.

4.4 Proprietary Algorithms: New Governance Strategies

The expression "Code is law" has been a mantra since its creation, designating the power of imposing behaviour by means of software programming.[49] By far, more silent and discreet than enacting legislation or issuing court rulings, yet with the same envisaged outcome.

Likewise in the corporate world, where decision-making power is increasingly allocated to algorithms, often proprietary algorithms (those classified as trade secrets).[50] That may mean, in practice, fewer general assemblies for voting, fewer minutes of shareholders meetings, fewer shareholder agreements. Just proprietary algorithms.

If those algorithms are enshrined by good business judgment, theoretically there would be not much room for questioning. However, if they are used as a subreptitious means to spread aggressive tactics making it difficult for opposing third parties to tackle such "dark" mechanism,[51] such motivation may be one more reason for raising particular elements to qualify corporate fiduciary responsibility in the case of tech giants.

As a matter of fact, the "volatile" nature of digital actions triggered by commands embodied in algorithms allows that they extend throughout various production and consumption chains, affecting thousands, millions or even billions (as in the case of tech giants) of individuals.

Understandably, several cases of malicious purposes behind tech giants´ algorithms were unveiled by whistleblowers, as in the latest case involving Facebook.[52]

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[49] "It was Lawrence Lessig, in his article of the same name and the book, Code and Other Laws of Cyberspace, who coined the phrase "code is law." (…) Rather, when he wrote that "code is law," Lessig was arguing that the internet should incorporate constitutional principles. Lessig astutely observed early on that the software that underlies the very architecture and infrastructure of the internet governs it as a whole. But who decides what the rules of code are? Who are the architects behind these code-based structures? There is an obvious and troublesome lack of transparency." Olga V Mack, 'Code Is Law': Should Software Developers Protect Our Freedoms?' (Above the Law, 12 August 2019) <https://abovethelaw.com/2019/08/code-is-law-should-software-developers-protect-our-freedoms/> accessed 28 December 2021.

[50] See, e.g.: Kevin X. Kuhn, Algorithmic Decision-Making and Corporate Risk: Toward Transparency Through Corporate Disclosures, 100(4) *Nebraska Law Review* (2021).

[51] It seems worth noting New York´s regulation imposing biases audit for algorithms used by employers in hiring processes. Nathaniel Mott, 'New York City Passes Bill to Address Bias in AI-Based Hiring Tools' (PC, 21 November 2021) <https://uk.pcmag.com/business-1/137190/new-york-city-passes-bill-to-address-bias-in-ai-based-hiring-tools> accessed 29 December 2021.

[52] Amanda Silberling, 'Facebook whistleblower Frances Haugen testifies before the Senate' (Tech Crunch, 5 October 2021) <https://techcrunch.com/2021/10/05/facebook-whistleblower-frances-haugen-testifies-before-the-senate/> accessed 29 December 2021.

In Germany,[53] there are movements claiming for transparency of algorithms, in different degrees, according to five categories of criticality of their application. That is a sign that civil society (and government) wish that, in justifiable situations (guided by the criterion of severity of associated risks), the internal boundaries of trade secrets as exclusive intellectual property and confidentiality not necessarily constitute barriers to the discovery of coded programming intended to bypass controls by civil society at large, that is, by the market.

Certainly, hidden business judgement shall not favour shareholder primacy, as transparency is required for the sake of preserving its legitimacy, supported by the concepts of duty of loyalty and of *bona fide*. Shareholder primacy which sustains dominance by controlling shareholders at any cost is opposite to the fundaments of Network Society.

Blockchain is perhaps an icon of the new agenda of corporate governance. "Off-chain" blockchain reserves space for a company to control admission of participants and to establish some rules. "On-chain" blockchain, on the contrary, presupposes that every business rule is contemplated in the electronic code, which may be offered as open-access or as trade secret.[54] The new set of options and features imply new corporate contents and strategies, feeding corporate bond with new ingredients and configurations.

5. Does the Law Legitimize Investors´ Claims in Tech Giants Towards Prevention or Indemnification of Losses to Stock Value for Neglecting CDR-Driven Concerns?

> "I suggest that the power holders are networks themselves. Not abstract, consciousless networks, not automata: they are humans organized around their projects and interests. But they are not single actors (individuals, groups, classes, religious leaders, political leaders) since the exercise of power in the network society requires a complex set of joint action, that goes beyond alliances to become a new form of subject (…). An example of the new codes in the global financial networks is the project of evaluating company stocks according to their environmental ethics in the hope that this ultimately would impact the attitude of investors and shareholders vis a vis companies deemed to be bad citizens of the planet.

[53] Unabhängiges landeszentrum für datenschutz, 'Position Paper - Transparency of public administration using algorithms is indispensable for the protection of basic human and civil rights' (Commissioners for Freedom of Information in Germany, 16 October 2018) <https://www.datenschutzzentrum.de/uploads/informationsfreiheit/2018-Position-Paper-Transparency-of-algorithms.pdf> accessed 29 December 2021.

[54] See, e.g.: G. Martins de Almeida, P.R. Borges de Carvalho, F.F. Bourguy de Medeiros, 'Blockchain as a Preventive Measure Against Corruption: Navigating Conflicting Legal Interests On and Off the Chain' in *Good Governance and Anti-Corruption: Opportunities and Challenges in the Era of Digital Technology* (Nhà xuất bản Khoa học xã hội, 2020).

> Under these conditions, the code of economic calculation shifts from growth potential to sustainable growth potential. More radical reprogramming comes from resistance movements aimed at altering the fundamental principle of a network. (…) The concept of the network society shifts the emphasis to organizational transformation, and to the emergence of a globally interdependent social structure, with its processes of domination and counterdomination."[55]

In certain circles, stakeholder primacy has been invoked as a moral imperative, if not a legal criterion. Under Elizabeth Warren's "Accountable Capitalism Act" bill, the standard of conduct would demand directors and officers of U.S. corporations to consider not only the interests of shareholders, but also that of stakeholders materially affected by the corporate conduct, in pursuance of "a general public benefit".[56] By the same token, in other circles, stakeholder primacy has been confounded with =activism which would undermine the rule of law.[57]

For a new corporate axis to "gain traction" in the Network Society, it shall "connect the dots" of the market as a whole though not purporting to be a platform for some unreasonable activism.

As a matter of fact, reflection of market requirements assessed via independent sources seems essential for getting continuous *momentum*, as a broader view theoretically enlarges the sampling of interests and thus better portray sustainable directions.[58]

Such a sampling, virtually congregating global communities, should hardly be ignored. Nowadays, data privacy issues may lead to ceasing on-line operations and commercial data flows; antitrust issues may cause split of business units; intellectual property issues may determine quitting lines of products; climate change issues may induce customers´ preferences. Controlling shareholders who neglect paying attention to those claims are compromising company´s business.

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[55] Manuel Castells, Informationalism, Networks, and the Network Society: A Theoretical Blueprint. in Manuel Castells (ed), *The Network Society: A Cross-Cultural Perspective* (Edward Elgar 2004) <https://annenberg.usc.edu/sites/default/files/2015/04/28/Informationalism%2C%20Networks%20and%20the%20Network%20Society.pdf> accessed 28 December 2021.

[56] Sec. 5 (C)(1). H.R.6056 - Accountable Capitalism Act. 116th Congress (2019-2020) <https://www.congress.gov/bill/116th-congress/house-bill/6056/text> accessed 29 December 2022. Conversely, shareholder primacy is at least rebuked: Lynn A. Stout, 'The Problem of Corporate Purpose' 48 (June) Issues in Governance Studies (2012).

[57] See, e.g.: Bebchuk and Tallarita (n 5).

[58] For the sustainability of this argument it is imaterial whether current methodologies such as ESG are suited to serve this function, as long as *a* metric *could.* In other words, criticism of ESG methodolies does not necessarily spell doom for stakeholder-oriented Governance, as long as some adequate alternative methodology can take its place. See, e.g.: The Economist, 'ESG should be boiled down to one simple measure: emissions' (21 July 2022) <https://www.economist.com/leaders/2022/07/21/esg-should-be-boiled-down-to-one-simple-measure-emissions> accessed 27 July 2022.

Climate change is an illustrative topic in such regard. Now, there is global pressure towards precautions which may slow down the deterioration of climate, and such precautions are not always pushed together with demonstration on the business relevance of investing in ecological, anti-climate change products and services inclusively for the reason that this is usually good business.

Hence, there is now, strictly from an internal corporate standpoint, an interplay between business interest and civic interest. Of course, minority shareholders count on the corporation to realize that and to benefit from it. Otherwise, what should be the point to keep investing in the corporation? Such civic-business interest is a bond that unites all shareholders.

In the past, *affectio societatis* lost a significant level of acceptance in view of the obsolescence of the concepts of *intuitu personae* or of *intuitu pecuniae* as inherent elements. Perhaps, the new corporate link may revamp the notion of *affectio societatis*, not again aiming to justify exclusion of shareholders subjectively found to be unwilling to maintain their stake in the company, but rather targeting to legitimize minority shareholders to stand up and oppose decisions contrary to global business common sense reflected in CSR or CDR standards.

In such connection, the will of someone (or of some organization) to continue partnering in a corporation should be contemporaneously seen as corresponding to the will of causing it to match market – and why not to say, societal – goals concerning the attitudes and performance of such corporation.

Collective goals so enshrined in corporate goals turn to be the basis for a new bond between shareholders, irrespectively of being denominated as *affectio societatis* or corporate purpose, or of being considered as business judgement, good faith, or other qualification. Such notion may reflect civic duties behind CSR and CDR, and yet, address corporate goals in synch with overall market requirements. In a nutshell, such concept may reconciliate business judgment and sustainable business environment. To such extent, the answer on whether the law legitimizes minority shareholders´ and investors´ claims towards prevention or indemnification of losses to stock value for neglecting CDR-driven concerns seems to be affirmative.

6. Conclusion

New elements of corporate fiduciary responsibility triggered particularly by the phenomenon of tech giants indicate that, if a corporation insistently fails in the exercise

of business judgment by going against what clearly is the likely avenue through which sustainable opportunities will flow, those elements could be argued to delegitimize that wrong and damaging decision.

Such update on the elements of fiduciary responsibility seems to make sense from a conceptual standpoint, and points to the relevance of addressing practical usage with sensible application. The idea here is not exactly to exclude some shareholder (most likely, a controlling shareholder) from the corporate entity (which has been the dramatic remedy pursued by many who invoke *affectio societatis* as a defence) in the event that said shareholder is deemed to be no longer interested in staying in the corporation.

The ultimate objective would rather be to compel decision-making power to be redirected towards market sustainable opportunities and constraints, not merely to short-sighted, short-run, views of a subset of stakeholders. That would seem to reconcile business judgement with the context of the Network Society, particularly in the case of information intermediaries.