Journal of Infrastructure, Policy and Development 2024, 8(7), 4359.
https://doi.org/10.24294/jipd.v8i7.4359

Article

Corporate governance codes: A controversial efficiency?

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CITATION

Yaghi R. (2024). Corporate governance codes: A controversial efficiency? Journal of Infrastructure, Policy and Development. 8(7): 4359. https://doi.org/10.24294/jipd.v8i7.4359

ARTICLE INFO

Received: 23 January 2024
Accepted: 7 March 2024
Available online: 24 July 2024

Abstract: The pursuit of good governance by companies confronts a fundamental challenge: defining what constitutes "good governance". Existing corporate governance codes and their implementation documents fall short of offering a clear answer to this crucial question. Despite the establishment of a reference framework years ago, the focus has shifted from defining the objectives of good governance to a consensus on the means of achieving these objectives. Unfortunately, this consensus often absolves stakeholders from providing detailed explanations. Achieving effective good governance necessitates a shift in focus towards the underlying goals of governance structures. Two potential approaches emerge in this context. While many companies rely on codes without explicitly outlining their objectives, there is a compelling case for urging or mandating them to articulate the purposes of the governance methods they employ in their reports. This level of specificity has the potential to enhance the reflective qualities of the transparency process, fostering a more comprehensive understanding of the governance landscape. Beyond merely discussing the objectives of corporate governance, the pursuit of good governance necessitates the implementation of instruments whose efficacy transcends reliance solely on market discipline. The aim is not to undermine the imperatives of transparency and justification. Instead, the intention is to recognize that these elements, while essential, do not independently ensure the effectiveness of soft law instruments, such as governance codes. Nowadays, it is crucial to assess the extent to which traditional corporate governance codes respond to the needs of companies in the era of digitalization and sustainability. Therefore, conducting a critical analysis of the existing corporate governance codes will contribute in shedding light on the gaps of these instruments to come up with recommendations for improvements. **Aims and objectives:** This article will focus on the following areas: Defining the role and purpose of corporate governance codes in enhancing corporate performance and accountability and discussing the challenges and limitations of corporate governance codes, including compliance issues and enforcement challenges. Presenting empirical evidence on the impact of corporate governance codes on corporate behavior and analyzing, through the principle of comply or explain, whether code adherence leads to improved corporate governance practices and financial performance. Discussing emerging trends in corporate governance and offering recommendations for improving the effectiveness of corporate governance codes.

Keywords: corporate governance; codes; effectiveness; practices; performance-accountability

1. Introduction

A polysemous concept, corporate governance has become the keyword, the catchword since the 1990s. Being a widely controversial subject, the definition of corporate governance has caused a lot of ink to flow. Thus, the ISO 26000 standard, which provides guidelines for social responsibility (Hemphill, 2013), places corporate governance at the center of the central questions of the standard and provides the following definition:

> *"Corporate governance is the system by which an organization makes and implements decisions to achieve its goals. The governance of the organization can include both formal mechanisms of governance, based on defined processes and structures, and informal mechanisms, emerging according to the values and culture of the organization, often under the influence of the people who run the organization. [...] These systems are directed by a person or by a group of people (owners, members, corporate officers, or others) holding the power and having the responsibility to achieve the objectives of the organization."*

Regarding the context of the research, two waves of scandals are at the origin of questioning corporate governance practices. We could link the birth of corporate governance to Adam Smith, who, almost incidentally, laid the foundations of the disciplinary approach to theories of corporate governance, knowing that the main characteristics of today's large corporations were already perfectly defined at the end of the 19th century. However, the history of modern corporate governance probably dates back to the liberal policies pursued concurrently in the United Kingdom by Mrs. Thatcher and in the United States by Mr. Reagan. After the fall of the Berlin Wall in 1989, a wave of scandals rocked the business community, leading them to question good governance practices. The Polly Peck and BCCI cases of 1991 and Maxwell of 1992, all of which occurred in Great Britain, were at the origin of the mission entrusted to Sir Cadbury in 1992. Following these cases, which were somewhat embarrassing for the image of the city, the Financial Reporting Council and the London Stock Exchange created, in May 1991, a commission chaired by Sir Adrian Cadbury. The aim was to issue recommendations for improving corporate governance in listed companies. The Cadbury report, the first version of which dates from 1 December 1992, mainly advocated a division of responsibilities within the board of directors, with the distinction between the positions of chairman and chief executive officer; the presence of outside directors "with genuine independence", and the existence of audit committees to prepare accounts and reports for shareholders and ensure their wide dissemination (Dedman, 2002).

Corporate governance is also a response to the financial scandals that made headlines in American newspapers. It was, therefore, necessary to restore confidence to the shareholders, creditors, and employees harmed by the said scandals. In this context, the series of cases that began in December 2001 in the United States with the fraudulent bankruptcy of Enron is the catalyst that precipitated a new wave of reflections (Cornford, 2004). This black series continued with the indictment of the leaders of five major American telecommunications groups suspected of having cashed in on the favorable appreciation of their securities by Citigroup financial analysts in exchange for signing contracts with the bank; or by the suspicions weighing on the prestigious investment bank Goldman Sachs, which would have, in all illegality, remunerated with packets of its actions the good graces of the leaders of certain firms appearing among its best customers.

Corporate governance codes have become an integral part of the global business landscape (Aguilera and Cuervo, 2004), aiming to establish principles and guidelines for effective governance within organizations. While proponents argue that these codes enhance transparency, accountability, and overall efficiency, skeptics question their impact and whether they contribute to a more effective corporate governance framework. This paper explores the controversy surrounding corporate governance codes, examining both their merits and criticisms to provide a comprehensive understanding of their role in shaping the corporate landscape (section 2).

The question of the effectiveness of governance codes (section 3) is as essential as it is complex. Related to a classic hard law system, effectiveness aims at the conformity of the behaviors observed with those modeled in the legal norm. From the outset, it appeared to us that, due to the optional nature of the code of governance, this conception of effectiveness could not be purely and simply transposed to assess the effects produced by the codes of governance (Aguilera and Jackson, 2003). Indeed, governance codes are most often based on the principle of comply or explain, which provides that the company can either implement the recommendations of the code or deviate from them while justifying their non-compliance. Our questions then become the following: how do we measure the effectiveness of a rule which itself provides for the possibility of deviating from the model of action it includes? How to analyze, in a coherent way, two behaviors which, although radically different, can, theoretically, be analyzed as behaviors of effective implementation of a code of corporate governance? Is the ineffectiveness of a corporate governance code defined both as the situation in which the company deviates from the recommendations of the corporate governance code without declaring and justifying this deviation on the one hand and that in which the justification advanced does not allow us to understand the reasons for this discrepancy, on the other hand? The analysis of the effectiveness of a code of corporate governance is therefore based on two heterogeneous orders of measurement: the conformity of behavior with what is declared if the company declares to comply with the code of corporate governance on the one hand, the quality of the justification given if the company declares that it does not comply with the code, on the other. The first measure involves a survey to measure the gaps between statements and actual behavior, while the second requires relating the discourse to the economic, financial, and organizational realities of the company. This question is at the heart of the study on the prerequisites necessary to develop tools for measuring the effectiveness of corporate governance codes. Seeking to appreciate the extent of an atypical situation in the normative order, this contribution draws up an inventory of the existing institutions in charge, at present, of the evaluation of the effectiveness of the codes, the instruments used, and their limits. Adopting an economic methodology, it also endeavors to present new theoretical debates on the effectiveness of codes and to analyze the externalities existing between hard law and soft law and their effects on the effectiveness of codes of good governance.

The challenge lies in identifying means to make the normative order adopted by corporate governance codes enforceable against companies. One potential avenue is that of co-regulation. Another option involves promoting legal mechanisms designed to alleviate tensions contributing to the ineffectiveness of governance codes through the creation of a novel type of corporate status that companies could voluntarily adopt (section 4).

2. Literature review

The study draws on two sources of information and diverse perspectives on corporate governance codes. First, a review of literature, including academic writing about the importance of corporate governance in modern business and introducing the concept of corporate governance codes and their purpose informed all sections of the paper. Second, the mapping of global trends in corporate governance draws on data extracted from corporate governance codes and offers insights into the overall effectiveness of these codes.

List of corporate governance codes:

Common law countries:

United States:

- Common Sense Principles 2.0 (2018)
- Stewardship Framework for Institutional Investors (2017)
- Corporate Governance Principles for US Listed Companies (2017)
- Principles of Corporate Governance (2016)

United Kingdom:

- UK Corporate Governance Code (Financial Reporting Council, 2024a)
- UK Corporate Governance Code (Financial Reporting Council, 2018)

Civil law countries:

European Union:

- Directive 2017/1132—Digital company law (EUR-Lex, 2017)
- Directive 2019/1151 (EUR-Lex, 2019a)
- Directive 2019/2121 (EUR-Lex, 2019b)

France:

- Corporate Governance Code of listed corporations (2022)

Belgium:

- The 2020 Belgian Code on Corporate Governance (Corporate Governance Committee, 2022)

Gulf countries:

Saudi Arabia:

- New Companies Law issued in 2022 and entered into force in 2023 (Ministry of Commerce, 2022)
- Corporate Governance Regulations (Kingdom of Saudi Arabia Capital Market Authority, 2024)

Bahrain:

- Central Bank of Bahrain Rulenbook (2024)

2.1. Merits of corporate governance codes

Corporate governance codes play a crucial role in improving positive organizational dynamics through enhanced transparency, accountability, and stakeholder confidence. These codes establish comprehensive reporting standards, ensuring companies disclose relevant information about their financial health and decision-making processes, which promotes transparency among stakeholders. The delineation of clear responsibilities for boards and executives in governance codes contributes to a culture of accountability, allowing stakeholders, including shareholders and regulatory bodies, to hold management responsible for their actions and decisions. Furthermore, governance codes are perceived as valuable tools for mitigating risks associated with corporate misconduct, making companies adhering to these standards more attractive to investors who prioritize ethical practices and responsible governance. The emphasis on long-term sustainability and strategic planning in governance codes not only improves board effectiveness by ensuring objective oversight but also positions companies to better navigate economic challenges. Additionally, alignment with international best practices provides a recognized standard of governance that transcends national borders, conferring a competitive advantage and attracting investors and partners who value ethical business practices (Allen, 2005). Finally, governance codes' focus on creating long-term shareholder value is correlated with better financial performance, making companies with effective governance structures more appealing to capital markets (Bracanovic, 2021).

Furthermore, it is essential to explore in greater detail the criticisms and challenges associated with corporate governance codes:

2.2. Challenges associated with corporate governance codes

The challenges associated with corporate governance codes are multifaceted. In many jurisdictions, the voluntary nature of adherence to these codes raises concerns about companies choosing non-compliance without facing significant consequences, potentially undermining the intended impact and thwarting meaningful governance improvements. Some organizations adopt a "box-ticking" mentality, fulfilling the formal requirements of governance codes without genuinely embracing their underlying principles, leading to a superficial commitment to governance practices. The one-size-fits-all approach of these codes is criticized for its inflexibility, as it may not consider the diverse structures, sizes, and industries of companies, imposing uniform standards that could burden certain organizations. Pressure for immediate results may encourage a short-term focus on compliance, potentially neglecting long-term value creation. The complexity and redundancy of documentation, policies, and procedures stemming from governance codes can result in bureaucratic inefficiencies, diverting attention from core business operations. Resistance to change within organizations may hinder the effective adoption of recommended governance practices. Limited stakeholder engagement is a concern, as some argue that governance codes may prioritize shareholders over other stakeholders, potentially neglecting broader impacts. In dynamic business environments, governance codes may struggle to adapt to rapid changes, making it challenging for companies to adjust their practices to emerging challenges and opportunities. Additionally, the emphasis on compliance over culture in governance codes may overlook the importance of fostering a corporate culture based on ethics, integrity, and responsible decision-making.

In conclusion, while corporate governance codes aim to enhance accountability and transparency, these criticisms highlight the challenges and limitations associated with their implementation. Striking a balance between standardization and flexibility, encouraging a genuine commitment to principles over mere compliance, and addressing the diverse needs of companies are essential considerations for strengthening governance frameworks. Ongoing dialogue and adaptation are crucial for ensuring that governance codes effectively serve their intended purpose in diverse and dynamic business environments.

3. Effectiveness of corporate governance codes

The question of the effectiveness of governance codes understood as their ability to guide the behavior of actors, is essential in that it aims to ensure that the behaviors observed comply with those provided for by the codes. Originally, the question is addressed by mobilizing a double legal and economic prism, calling in particular on the tools and analyses of the economy of law to study the modes of implementation of corporate governance codes in comparison with other modes of legal regulation (Bolton and Becht, 2002). This is why it would be essential to analyze the prerequisites necessary for the development of tools for measuring the effectiveness of governance codes. Drawing up an inventory of the existing institutions in charge, at present, of the evaluation of the effectiveness of the codes, the instruments used, and their limits, it is necessary to carry out a critical review of the theoretical debates on the effectiveness of codes of governance and develop an analysis of the relationship between hard law and soft law and their effects on the effectiveness of codes of good governance by mobilizing the economic concept of externalities.

At the same time, the legal analysis studies the difficulties encountered in implementing the principle of comply or explain on which the effectiveness—and sometimes the ineffectiveness—of corporate governance codes is primarily based. This analysis underlines that the limits to the effectiveness of the codes are mainly due to declaratory implementation methods based on market discipline more than effective control.

3.1. Instruments for measuring the effectiveness of corporate governance codes

Effectiveness refers to the ability of a legal or extra-legal text to generate the desired behaviors among interested parties. Assessing the effectiveness of governance codes is tricky because, like any system anchored in a self-regulatory approach, this system codifies standards but does not contain binding measures or formal sanctions to enforce these practices by the economic actors concerned. The question of effectiveness therefore arises even more acutely than for legal texts, which are themselves often accompanied by sanctions, capable of giving the necessary incentives to economic actors.

The question of the effectiveness of the codes was already at the center of the OECD’s reflections on the issue of corporate governance in 2004. Initially, the very existence of codes of good governance was not mandatory, and the application of the recommendations contained in the codes was entirely up to the goodwill of companies (Cernat, 2004). Then, little by little, the use, particularly in Europe, of codes of good governance became compulsory, and the principle of comply or explain (comply with the standards laid down by the code or, if not, clearly explain the reasons for it) is imposed as a mode of application (Directive 2013/34/EU of 26 June 2013—article 46 bis). This soft law, requiring more transparency about the functioning of boards of directors and corporate governance and encouraging the use of “good practices” through the publication of reference codes, had as its primary objective to provide more information to investors so that they direct their investments accordingly and thus “discipline” companies by encouraging them to follow the governance recommendations promoted by the codes. In doing so, market players (investors and shareholders) had to make this extra-legal regulation, this soft law, effective. A large part of the academic literature, but also part of the practitioners, however, today consider that the shareholders and investors have not played their role, calling into question the actual effectiveness of the codes. This raises the question of the reforms to be implemented to ensure the effectiveness of the regulations dedicated to corporate governance: soft law (extra-legal regulation) and, by extension, hard law (legal regulation).

For soft law, the question of effectiveness amounts to asking, initially and when the principle of application is of the comply or explain type, whether the recommendations formulated in the codes of governance are followed and, if not, the reasons for which they are not. For hard law, the logic is reversed. If companies are affected by the law, they must comply with it and therefore do not have to indicate that they do so since it should be the case by default. There are no means of derogating from the law unless special conditions of derogation have been specified and provided for by the legislation. In addition, penalties are usually provided.

However, in the field of corporate governance, the elements of regulation relating to soft law and those relating to hard law are increasingly intertwined. As a result, the boundaries are less and less evident between the two types of regulation in the field of corporate governance. Corporate governance codes thus commonly take up existing legislative texts, giving them greater visibility with companies by clearly defining behaviors that comply (and as opposed to non-compliance) with the law. The legislation also imposes the use of these codes and their principle of application, comply or explain (Cuervo, 2002). But more broadly, the texts of laws sometimes propose methods of monitoring and control very close to those used by a regulation of the soft law type, with, for example, requirements without effective sanctions. This hybridization of the two types of regulation, hard law and soft law, is likely to modify their respective effectiveness and therefore complicates the question of the effectiveness of corporate governance codes. It is necessary to precisely define the contours of this desired effectiveness in terms of corporate governance to be able to propose adequate measuring instruments. The prerogatives given to the various actors in charge of monitoring, the sources of information mobilized by them, and the measuring instruments used constitute, in fact, the basis of the incentives that we wish to give to economic actors and depend mainly on the contours of the effectiveness expected by regulators. The type of monitoring implemented thus generates incentives and must make it possible to act on the behavior of the economic actors concerned by corporate governance (beyond their intrinsic motivations).

First, we will review what already exists: the institutions in charge of evaluating the effectiveness of the codes, the instruments used, and their limits. Secondly, we will focus on new theoretical debates on the effectiveness of codes of governance, on the externalities existing between hard law and soft law, and their effects on the effectiveness of codes of good governance.

Concerning the institutions in charge of evaluating the effectiveness of the codes, there is a multiplicity of institutions in charge, officially or not, of monitoring the codes of governance. For example, in France, there is a specific diversity, here is a (non-exhaustive) list of representative examples:

- The Authority of Financial Markets (AMF): official authority in charge of monitoring companies' compliance with the recommendations of the AFEP-MEDEF Code, producing an evaluation report on implementation based exclusively on reports supplied by the companies themselves;
- The High Committee for Corporate Governance (HCGE): an ad hoc body created by the AFEP-MEDEF employer representatives, which institutionalizes peer review by producing a monitoring report on the implementation of the AFEP-MEDEF code, and also producing a guide intended to promote collective learning, by making the recommendations of the code as intelligible (and therefore applicable) as possible by companies;
- Proxy advisors: voting assistance organizations at general meetings, whose monitoring is more fragmented and less accessible to the public, but which, through their monitoring and alert work, also provide part of the monitoring;
- The media follow certain aspects of governance, such as executive compensation, and help to disseminate information.

From a more general point of view, we note that the public and/or private institutions, which are responsible for monitoring the application of codes of corporate governance in companies, offer summaries relating to compliance and, possibly, to the quality of the explanations in the event of non-compliance, but that they do not, on the other hand, do any work of verifying the information provided. They are, therefore, more observers than real "policemen" of governance codes. The criticisms issued by these institutions may relate to the form of the information provided by the companies, in particular its lack of clarity or readability, but not to the accuracy of the information provided (CVs of directors, operation of the board of directors, etc.). The summaries of the reports thus produced are therefore dependent on the quality of the raw material used (the reporting documents provided by the companies).

Indeed, the institutions in charge of monitoring and evaluating the effectiveness of governance codes generally have limited prerogatives, which do not allow them to have access to additional sources of information. These could either be requested directly from the companies or obtained through possible independent investigations. The crossing of this additional information with the information provided spontaneously by the companies would, however, allow the verification of the information provided by the companies and would thus reinforce the effectiveness of this soft law. Despite a trend towards expanding the prerogatives given to the institutions in charge of monitoring the effectiveness of governance codes, the monitoring carried out therefore remains generally relatively passive. The strengthening of the prerogatives and powers of control of these institutions is, therefore, perhaps the first element on which the reflection on the effectiveness of the codes must focus.

The Financial Reporting Council (FRC) is the leading institution that assesses the effectiveness of the UK corporate governance code, the combined code. This evaluation takes place very regularly (every two years) and generally goes hand in hand with a public consultation on the code with a view to its continuous updating. The revisions carried out by this institution are done piecemeal. The FRC chooses specific points on which it makes recommendations in order to amend the code in an appropriate and progressive manner, that is to say, by making sure to acquire a certain degree of expertise on the chosen subjects and by integrating, if possible, the point of view of other stakeholders (shareholders, institutional investors, investment consulting firms, rating agencies, employees, state). The combined code is structured around principles, among which we distinguish the main principles and the supporting principles) and provisions, which correspond to more concrete and detailed formulations of the main principles set out and are used more by companies than the principles themselves. The main reason is their ease of use and tick box type (Gorman and Ward, 2010). Companies then only have to indicate whether they comply with a particular provision to the letter rather than writing explanations on compliance with the spirit of the associated general principle (principle). The cost of processing information for monitoring the concrete implementation of the code by companies is significantly reduced, and the results obtained are easier to read for the end users of this information (institutional investors and shareholders).

The FRC prepares and distributes draft revisions to the code, which it submits to public consultation. The feedback obtained is the subject of a synthesis (feedback statement), which serves as the basis for the revision of the code. In addition, the FRC publishes a guide explaining how to comply with or use the principle of comply or explain, while respecting the spirit of the code as much as possible. Finally, since 2010, the FRC has supplemented these mechanisms, directly linked to the code of governance, with a UK stewardship code whose objective is to improve the quality of relations between investors and companies. To this end, a code of “best practices”, this time intended for institutional investors, is published so that the latter are more active in their processing of information relating to corporate governance and that, in return, companies can retrieve information on the expectations of current and potential investors on the market. The idea of the UK stewardship code is thus to strengthen the control of corporate governance by shareholders and major investors. Indeed, as indicated above, one of the significant assumptions underlying the use of governance codes as a mode of regulation of corporate governance is that it is the shareholders who, through their responsiveness, will make the best practices of governance set out in the effective codes (“shareholders will ultimately enforce corporate governance guidance”). However, as the report on the effectiveness of the combined code of 2009 indicates, this assumption seems globally false in practice, the shareholders lacking the power, motivation, or coordination necessary to make the codes truly effective (“misconceived, since shareholders rarely have the power, motivation or coordination to do this”). This observation, made in the homeland of soft law in the field of governance, leads the FRC, in the same report, to wonder whether it would not be a good idea to incorporate specific provisions into the legislative corpus to make it mandatory (“whether it is necessary to make some of the code's provisions mandatory"). Indeed, if, as the FRC fears, shareholders are not able to exercise informed and active control of corporate governance behavior, then this simply risks preventing the proper functioning of this soft law-type regulation. The control (and valuation by the market) of the application of good practices is then too weak, to the point that the question of legislating to regulate corporate governance arises again. Legislating could then be more effective in making specific recommendations effective. The FRC thus underlines that, even if shareholder pressure (even limited) has really had an overall impact on the compliance of companies with the provisions of the code, it has, in any case, not succeeded in sufficiently influencing the behavior of banks, which had to be financially rescued by the state during the last financial crisis. The subprime crisis has contributed to raising the question of the actual effectiveness of the recommendations given, whether they are perhaps applied too superficially or, conversely, whether too indiscriminate application of the latter causes potential perverse effects pushing companies to comply when they have good reasons not to. A company can tick a lot of boxes without necessarily being "well-governed." The effectiveness of the code, that is to say, the compliance of business practices with its precepts, may only be purely formal and superficial. The code is actually inefficient. When there is no real enforcement system, the effectiveness of a soft law relating to corporate governance will depend to a considerable extent on the attitude of shareholders and institutional investors towards the information received, their ability to use the information, but also to accept, when the reasons are serious (detailed explanations), deviations from the code. For, contrary to the lack of responsiveness of economic players (shareholders and investors), the academic literature also underlines the danger of forced compliance which would lead to a certain uniformity, contrary to the spirit of flexibility of codes of governance and soft law. Duhamel and Fasterling (2009) characterize this situation as "conformist transparency." In its 2012 revision, the FRC, therefore, encourages companies to explain, in addition to the context of the company, the reasons for a possible deviation, the actions taken to compensate for the non-compliance, and to respect the spirit of the code (by describing their method/way of proceeding) as well as the duration of the deviation reported (do they expect to comply with the recommendation in the near future?). The explanations given in the event of non-compliance should be detailed.

In such a context, the instruments for measuring effectiveness used to assess a code of governance therefore take on all their importance since they are supposed to generate the incentives leading companies to put in place good governance (before any recourse, by failing that, to hard law). It is, therefore, necessary to analyze in more detail the existing concrete instruments for measuring effectiveness to be able to understand better the incentives that are given, through these, to companies, as well as to other stakeholders (always more encouraged to play a role of control and, if necessary, to sanction recalcitrant companies financially).

The main measuring instrument used to assess the effectiveness of the codes often corresponds to a simple count of the number of companies that claim to comply with the code of governance. The institutions in charge of monitoring generally break down this compliance by major principles or themes (sometimes according to the concerns/scandals of the moment, etc.) or quite simply by using the structure used by the code in question. The most detailed level shows the compliance rate recommendation by recommendation.

Nevertheless, the notion of "compliance" can be variable in geometry. A distinction can be made in particular between "restrictive" compliance, which is limited to observing the application, or not, of the principles and recommendations set out in the code, broken down by theme, and a more "broad" compliance, which includes the first but is also accompanied by explanations provided by companies in the event of non-compliance. In this second case, if explanations of the deviation from one or more principles of the code are given, the company is then considered to comply with the soft law, made up of the code and its principle of application (the comply or explain). In addition, as underlined above, conformity may be of more or less high quality, and the explanations provided may be unsatisfactory (level of generality too high, lack of effort to update the explanations given, etc.). But the work of reviewing and evaluating the satisfactory character of the explanations provided is highly time-consuming, it is more rarely carried out than the simple calculation of the level of compliance, and there are no measuring instruments that would provide effective information on the quality of the explanations given by synthesizing the existing information is generally case by case and counting at best. The measuring instruments are, therefore, often limited to obtaining a level of compliance broken down by theme or by recommendation. Moreover, these measuring instruments say nothing about the real change in behavior in terms of governance—beyond simple declarations by companies—nor the diachronic impact, from one period to another, of governance codes, on the evolution of business practices.

If, as explained above, market players only participate insufficiently in the proper application of the recommendations of the code via reputation mechanisms or foot voting, then other means should be found to promote the application of the good practices recommended by the codes of governance. From the point of view of economists, it seems pretty standard to think that the type of follow-up provided by the institutions in charge and the measuring instruments used to assess the effectiveness of a set of recommendations (such as the code) or a law, main sources of extrinsic incentives, will influence the behavior of economic agents. If market players do not play their role as watchdogs and moderators of corporate governance by seizing the information produced thanks to soft law, it remains up to the public authorities to reflect on the follow-up that must be carried out to provide substitute incentives. Part of the recent legal literature on the subject is precisely interested in the insufficiency of the criterion of the levels of compliance of companies with the code (often the only instrument used) to judge the impact of the latter on real behavior and the business organization itself. Some lawyers separate the two constituent elements of soft law on corporate governance according to the type of regulation to which they fall. On the one hand, the object of the code of governance is qualified as a management-based regulation. This type of regulation requires an effort on the part of companies since we are counting on the latter's commitment (management, strategy) to achieve objectives that are in the general interest: virtuous governance of companies (respect for the rights of shareholders, promotion of women in business, etc. and maintenance of investor confidence. On the other hand, the principle of comply or explain would rather come under principles-based regulation, which has the advantage of filling any legal voids and mitigating unforeseen situations or flaws in the legal system. These two elements then complete the existing (legal) regulation. But is it enough?

3.2. The principle of comply or explain and adhering to codes

This section will deal successively with the principle of comply or explain, highlighting its advantages and limits (3.2.1) and the solutions proposed to limit the risks arising from this principle (3.2.2).

3.2.1. The comply or explain principle: Advantages and limitations

Appearing for the first time in the Cadbury report in 1992, in Great Britain, the principle of comply or explain (comply or explain) also facilitates the adhesion of firms to the principles of corporate governance established in the codes. Unlike prescriptive regulations, such as those provided for in the Sarbanes-Oxley Act in the United States, it allows companies to deviate from the principles contained in the code, provided that they explain the reasons for this non-compliance. Based on a declaration obligation for firms, the principle of comply or explain thus obliges listed companies to declare to what extent they apply the recommendations of the codes of good governance and to report on their deviations from the provisions of the latter. This principle can also be transposed to unlisted companies. The principle of comply or explain is, therefore part of the voluntary and flexible approach characterizing corporate governance codes. It is indeed more accessible and less costly to get firms to accept certain principles of governance, as long as they only have an optional scope and derogations are authorized. From this perspective, the principle of comply or explain minimizes the costs of compliance from the point of view of companies. In particular, it allows firms to avoid bearing the costs of implementing a rule, when the latter seems to them to be unsuited to their particular situation. At the same time, it allows them to retain, among all the governance recommendations specified in the codes, only those which seem to them effective in their particular case. Arising from the idea that it is not possible, in terms of governance, to do "ready-to-wear," even if, at the same time, it is essential that the collective good " code of governance" is used to make stock exchanges and large national companies attractive to investors, and to guarantee transparency within unlisted companies, the principle of comply or explain thus makes it possible to take into account specific sectoral needs or size of companies, as well as their different specificities, whatever their origin (Macneil, 2006).

Ultimately, the principle of comply or explain must be understood as a pragmatic response to the lack of consensus on the definition of optimal governance and the coexistence of heterogeneous needs of firms in this area. It legally organizes the flexibility required, for these two reasons, in business practice: thanks to it, it thus becomes possible to identify in the code a certain number of principles of governance—recognized as good practices—while simultaneously authorizing firms that deem it necessary to apply these principles only optionally. In practice, the principle of comply or explain therefore organizes the necessary reconciliation between antagonistic or, at the very least, divergent conceptions of corporate governance, at the same time as it recognizes the diversity of the needs of firms in the field. In other words, it therefore comes down to recognizing that a single model of governance cannot apply to all particular situations in terms of governance (Macneil and Esser, 2022).

Despite its advantages in terms of minimizing the costs of enforcing codes from the point of view of companies, the principle of comply or explain suffers from several limits. Firstly, because the principle of comply or explain is based on the voluntary adherence of companies, the involvement in the process of producing governance rules of a sufficient number of parties concerned by the codes is essential. In particular, it is necessary that these parties are not only legitimate but also representative of the users of the codes to increase the adherence of the latter to the rules of governance and "good practices" identified as such. The transparency of the processes, the association of stakeholders in their diversity, and the legitimacy of the producers of the code appear to be decisive for the degree of adoption of the rules. Indeed, it is to be feared that if the users of the code do not recognize themselves sufficiently in the principles of governance set out in the code, their propensity to adopt them will be reduced since the principle of comply or explain explicitly authorizes them to apply the principle of optionality. The involvement of a sufficient number of stakeholders representative of the diversity of situations appears necessary since there is no consensus on the definition of optimal corporate governance. The competition between the different paradigms of governance, coupled with the heterogeneity of the needs of agents in the field, thus underlines that the principle of comply or explain only makes sense insofar as the rules contained in the codes have a meaning for their users. In other words, if it should only be used, in a quasi-cosmetic way, to organize and legally authorize the exit of a category of companies for the simple reason that they are not found in the rules of governance and that the latter fails to minimally reflect the reality of the environment and the constraints in which these companies operate, then the use of the principle of comply or explain by companies can only be interpreted as a sign of the inadequacy of the principles of governance set out by the code to the needs of companies.

Secondly, beyond the problems of considering the different conceptions of governance by the codes, which can affect the meaning of the principle of comply or explain, the latter also suffers from problems of direct implementation. Indeed, the interested group(s) at the origin of the code, or associated with its production, control neither the identity of the users choosing to adhere to the code nor, in theory, the behavior of the companies adhering—for example, the authority issuing the code does not carry out systematic verifications of the information declared by the companies, nor does it exercise formal sanctions on them in the event of non-compliance with the recommendations of the code or erroneous declarations. This situation causes two problems. On the one hand, a problem of adverse selection (or anti-selection) may appear. In this case, there is a risk of membership of the "less good elements": given the low cost of membership, reinforced by the optionality associated with the principle of comply or explain, one can think that companies characterized by a low-quality governance will nevertheless choose to adhere to the code and promote this adherence to investors and stakeholders, without however implementing the good practices contained in the code. In the absence of means of exclusion available to issuers of the code and, therefore, of selection, any company can refer to the code and apply it in a more or less piecemeal way. Moreover, in the absence of effective and/or systematic control of their declarations or the quality of the explanations they offer, companies may seek to benefit from the positive signal effect procured by the reference to the code without bearing the costs of implementing its provisions. The related risk is then a loss of credibility of the code, thus dissuading the adherence of companies characterized by high-quality governance. As soon as adherence to the code no longer fulfills its role as an informative signal of the quality of governance, market equilibrium is defined as a pooling (or mixing) equilibrium and not as a separating equilibrium: all companies, whatever their type, send an identical signal to investors, for whom this signal is therefore no longer informative; the interest in adhering to the code for "good companies" therefore disappears and adhering to the code loses all informative value. On the other hand, there is also a problem of moral hazard, a classic of principal-agent situations. In general, economic analysis considers that an agency problem arises when one of the parties to a relationship (participant) can behave opportunistically by using the existing information asymmetries to his advantage, to the detriment interest of other stakeholders. The term agency is linked to the terminology used, which means that the relationships described by this theory link a principal (the principal in general) and an agent (the performer), knowing that the principal and agent generally pursue different interests. In this analytical framework, the problems of moral hazard refer to the possibility for the agent to behave opportunistically once the relationship with the principal has been established. These problems therefore relate to the opportunistic behavior of agents when their actions are not directly observable by the principal. In this case, in the context of the relationship between the issuer of the code and the companies, the efforts made by the latter in terms of adherence to the code are most often not directly observable by the former. The principle of comply or explain appears in particular, to be insufficient in terms of the establishment of means for the proper execution of the recommendations published. Thus, the choice and justification of the compliance does not require detailing the means implemented and does not give rise to any control a priori. Moreover, the information collected is uncertified and quantitatively too large to be effectively exploited by investors. In particular, the information produced by companies on the recommendations they choose (or not) to follow remains purely declarative and is, therefore, difficult to verify. There is, therefore no control or formal sanctions in the event of an erroneous declaration. Consequently, nothing prevents companies from declaring a facade of compliance with the recommendations of the code (the tick-the-boxes strategy) and not explaining their deviations from the recommendations proposed in the codes (following the principle of never comply, never explain). This results in an agency cost associated with possible free-riding behavior on the part of at least some companies, with the consequence of a loss of credibility of the code vis-à-vis investors in particular. This situation therefore raises the question of the effectiveness of the codes.

The economic approach is matched by a legal analysis of the difficulties encountered in implementing the principle of comply or explain. More specifically, the difficulties stem from the existence of a double level of implementation: a declaratory level on the one hand, and the adoption of methods of corporate governance that comply with the requirements of the code on the other. As market discipline is based on company declarations, the declaratory dimension is of great importance. It has two parts. First, while some companies are required to refer to a governance code, they remain free to choose their reference code. Thus, the implementation of a code of governance assumes, in the first place, that companies declare to choose this code as a reference code. This first level, although necessary, in no way guarantees that the company complies with the provisions of the chosen code. It is, therefore, necessary to distinguish the distribution of a code from its effectiveness. The first is necessary for the second, but it cannot suffice. The second declaratory part takes place in the implementation of the principle of comply or explain. In their report, companies must account for the methods of corporate governance chosen and possibly justify the fact of not applying specific provisions of the code. The reports produced by the company are subject to control without consistently verifying the correspondence with the methods adopted. The same is true for investors. Consequently, the declaratory dimension of the implementation of corporate governance codes produces effects even though the reality of corporate governance does not correspond to it. One of the risks associated with this situation is notably conformist transparency. Investors have a preference for companies that declare compliance with the reference code of governance. Companies tend to declare a behavior of compliance, or conformity, even if it does not correspond to the practical methods of their governance. Pillars of market discipline, our analysis shows that transparency obligations thus present a pitfall: the creation of a "bubble" within which the code and the reports respond to each other, without the link with reality being considered.

3.2.2. The suggested solutions

However, some solutions can be considered to limit the above risks. Thus, firstly, the producers of the code may have to strengthen their control over the companies declaring that they adhere to the code. They must then invest resources to control at least the steps followed by the member companies to bring themselves into compliance. The efforts made not being all directly observable; it is, in fact, necessary to at least process the information published—when it is. Such costs of control and informal sanctions are of the same type as those found when dealing with implicit contracts.

A second solution is, therefore, contemplated, according to economic terminology, to make the commitment (of companies to respect the code at least partially) self-executing. An arrangement is considered to be self-executing when it is in the interest of each of the participants to enforce their part of the agreement without explicit intervention by the courts. Different means can then be mobilized to reinforce the self-executing nature of the commitment. Thus, on the one hand, it is possible to increase the rents perceived by the companies using the code—it is then a question of increasing the gains that they derive from using the code and implementing the recommendations. On the other hand, it is possible to emphasize the benefits of the arrangement in question (for example, to raise the threat of public regulation—i.e., legislative or regulatory—in the event of failure of regulation by the business community itself is part of this logic). Finally, it is possible to make any deviation costly (certain types of sanctions mentioned above, such as peer pressure, “name and shame,” and threats of consumer boycotts, are thus based on such a mechanism). In this sense, the combination of the code and the principle of comply or explain constitutes a form of weak self-regulation since the producers of the code do not control either adherence to it (the identity of the users) or the behavior of the companies that adhere to it (in particular, no systematic verification of the information declared by the companies is carried out by the producers of the code, and no formal sanction is similarly applied in the event of deviation from the recommendations of the code).

A number of authors are beginning to take a position in favor of a more binding legal technology in the form of laws, to compensate for the shortcomings of the legal system, in particular for countries that place a high priority on the interests of shareholders. Rather than a model based on the development of optional good governance codes, these authors recommend using the law or formal market control mechanisms or even regulating governance on the model of financial services regulation Other regulatory avenues also need to be studied. Indeed, the cost-benefit analysis is made in comparison with a state regulation in order to analyze the costs, and in particular, the opportunity costs compared to the “best” alternative to the code. With regard to the benefits, ideally, it would be necessary to estimate the willingness to pay private and/or public actors for regulation in the form of the combination of a code and the principle of comply or explain rather than for hard law regulation. However, in general, the monetary value associated with a change of this type is difficult to estimate. More generally, the economic calculation of benefits is linked to the notion of well-being; it is, therefore, an assessment of the overall economic and social benefits that must be made, broader than the sole willingness to pay off investors and managers-administrators (via support for code production costs). However, estimates of benefits and costs are even more challenging to make from the point of view of the public interest. Indeed, no figures exist on the cost of producing a code for the State or a professional association. On the other hand, there are estimates of the benefits derived from better overall corporate governance for a country via a reduction in aggregate fluctuations. But these elements make it difficult to distinguish between a set of well-governed companies thanks to technology combining code and the principle of comply or explain and another that would fall under state regulation. The efficiency of the legal technology carried by the codes must therefore be questioned to have a more complete picture of its advantages and disadvantages. Indeed, the objective pursued within the framework of a cost-benefit analysis exercise, with a positive aim, is to answer the question: does the technology combining code and the principle of comply or explain make it possible to organize the economic system? so that actors make decisions that come as close as possible to effective decisions? We therefore come back to the question of the effectiveness and purposes of these codes. The objective is to improve the quality of corporate governance. However, the quality of governance is difficult to understand and define in terms other than general (existence of checks and balances, quality of information transmitted to the decision-making parties, etc.), not only because of the different competing paradigms in corporate governance but also with regard to the substantial heterogeneity characterizing companies. This difficulty explains the use of flexible legal technology in the production of codes and in its application (comply or explain). The use of this legal technology therefore makes it possible to redefine what is meant by quality governance. A company has good governance if:

1) it refers to a code and follows its recommendations;

2) it is at the same time able to adapt the recommendations to the operations of the company if necessary and to justify the modifications/deviations so as to have adequate governance.

The judgment then bears, ultimately, on the quality of the information provided relating to compliance with the reference framework and the quality of the adaptation when necessary. The quality of reporting replaces or encompasses the quality of governance. Corporate governance codes are a double-edged sword, offering benefits such as transparency, accountability, and stakeholder confidence but also facing criticisms related to enforcement, a box-ticking mentality, and a one-size-fits-all approach. Striking the right balance between regulation and flexibility is crucial for ensuring the efficiency and effectiveness of corporate governance codes. As organizations continue to evolve, ongoing research and discourse are essential to refine and improve these codes to meet the dynamic needs of the business environment.

4. Corporate governance: Futuristic approach and recommendations

4.1. The evolving landscape: Ongoing updates and revisions to corporate governance codes

4.1.1. United States

Fueled by the accounting scandals of the early 2000s, the 2008–2010 financial crisis, and the ongoing challenges of the COVID-19 pandemic, there persists a robust interest in corporate governance within both the political and public spheres in the United States. Recent developments, however, have brought attention to the heightened influence of short-term pressures in financial markets and their impact on boards of directors responsible for guiding a company’s strategy for sustainable long-term value creation.

The Business Roundtable’s assertion regarding the purpose of corporations reflects a widespread acknowledgment among companies and institutional shareholders that corporate interests must extend beyond shareholders to include employees, customers, suppliers, the environment, communities, and other vital stakeholders. The evolving perspective recognizes that corporate governance is not solely about the distribution of decision-making authority and accountability between corporations and shareholders. Instead, it involves reimagining corporate governance in light of broader corporate roles as economic engines, facilitators of socioeconomic mobility, drivers of technological innovation, and integral contributors to environmental sustainability.

The landscape of shareholder engagement has undergone significant transformation, marked by increased frequency and depth of engagement. This shift accompanies a fundamental reassessment of the nature of relationships with shareholders and their role in either supporting or undermining the board's efforts to adopt a long-term perspective. A central theme in ongoing debates revolves around whether governance reforms, while styled as initiatives, might alter the locus of control over corporate enterprises from those with direct knowledge, involvement, and fiduciary responsibilities to entities lacking these attributes. The question arises as to whether imposing duties, regulations, or mandated best practices on these entities is necessary.

In the United States, the relentless pursuit of corporate governance mandates appears to have plateaued, with virtually all prescribed best practices, such as say-on-pay, the dismantling of takeover defenses, majority voting in director elections, and declassification of board structures, already codified or voluntarily adopted by a majority of S&P 500 companies. This development prompts contemplation on whether it signals a new era of more nuanced corporate governance debates. The focus may shift from mere adherence to 'check the box' policies to addressing complex questions, including striking the right balance in recruiting directors with complementary skill sets and diverse perspectives and tailoring the board's role in overseeing risk management to meet the specific needs of each company.

4.1.2. United Kingdom

The new amendment shows that the UK corporate governance code alone cannot prevent the prevalence of boilerplate reporting. Instead of mere repetition of generic language, authentic insights are crucial for effectively implementing the principles-based system of the code. Genuine good governance extends beyond merely ticking boxes and involves instilling the right behaviors and culture. Directors play a crucial role in taking the lead and ensuring that the company reports on its governance arrangements in a manner that is pertinent and advantageous to the users of the reports. Directors should prioritize practices over policies and procedures to showcase that the company is well-governed, sustainable, and capable of generating investment, growth, and competitiveness (Nordberg, 2020). The FRC consistently highlights instances of boilerplate reporting in our annual review of corporate governance reporting and encourages companies to provide high-quality and informative reports.

Furthermore, the FRC promotes the provision of high-quality explanations showcasing effective governance practices. The 'comply or explain' regime provides companies with the flexibility to convey relevant and significant information to stakeholders, acknowledging that a uniform approach may not be suitable for all companies reporting on their governance. There are situations where a rigid adherence to the detailed provisions of the Code might not be the most appropriate course for a company. According to the FRC's Annual Review of Corporate Governance Reporting in 2023, over 50% of companies deviated from one or more provisions of the code (UK Corporate Governance Code 2024 mythbuster (Financial Reporting Council, 2024b)).

4.1.3. European Union

A significant portion of EU company law is consolidated within a singular directive, namely Directive 2017/1132 addressing specific aspects of company law.

The commission, on 29 March 2023, approved a proposal for a directive that seeks to expand and enhance the utilization of digital tools and processes in company law. The primary goal is to enhance transparency and trust within the single market's business environment. This will be achieved by increasing the accessibility of company-related information to the public, ensuring the reliability and currency of company data in business registers, and easing administrative burdens when companies utilize information from business registers in cross-border scenarios. The European Parliament and the Council will now engage in negotiations regarding the proposal.

Directive 2019/1151 of 20 June 2019 covers provisions on the use of digital tools and processes in company law. The transposition deadline for most provisions expired in August 2022 but Member States had till August 2023 to transpose certain Articles.

Directive (EU) 2019/2121 of 27 November 2019 lays down new rules on cross-border conversions and divisions and amends the rules on cross-border mergers. Its transposition deadline expired in January 2023. This new set of rules will enable companies to use digital tools in company law procedures and to restructure and move cross-border, while providing strong safeguards against fraud and to protect stakeholders.

The 2023 proposal and the 2019 directives revise and complement directive 2017/1132.

4.1.4. OECD

Concerning sustainability and the green transition, it has been observed that the corporate sector plays a central role in advancing the transition to a sustainable, low-carbon economy. In fact, climate change is a financially material risk for listed companies representing two-thirds of global market capitalization.

Disclosure of sustainability-related information is increasing, but the number of listed companies disclosing this information globally remains low. Almost 8000 companies listed in 73 markets globally disclosed information on their sustainability performance in 2021. These companies represent only 19% of all listed companies globally, ranging from 17% in China to 34% in Europe.

Boards also play a stronger role in sustainability matters in many markets, but not everywhere. In half of the jurisdictions surveyed, boards are explicitly required or recommended to approve policies on sustainability-related matters such as sustainability plans and targets, as well as internal control policies and management of sustainability (OECD Corporate Governance Factbook 2023).

4.1.5. France

The landscape of corporate governance in France has recently undergone substantial changes (Corporate Governance, 2023) and will witness further significant evolution due to:

1) The increasing prominence of environmental, social, and governance (ESG) considerations, brings forth more detailed and stringent obligations for French companies. This is accompanied by the implementation of a new European ESG reporting framework.

   The European Green Deal has led to the adoption and ongoing development of new ESG-related regulations. The strategic plan aims for a detailed, standardized, and structured framework for ESG reporting to ensure clarity, reliability, and comparability of information across companies and industries, elevating ESG information to the same level as financial information. Key components of this plan include EU Directive No 2022/2464 on corporate sustainability reporting (CSRD), EU Regulation No 2020/852 on the Taxonomy Regulation, EU Regulation No 2019/2088 on sustainable finance disclosure (SFDR), and the proposed corporate sustainability due diligence directive (CSDD).

The CSRD enhances existing rules, requiring in-scope companies to disclose information based on a double materiality principle, addressing both the company's impact on sustainability matters and sustainability matters affecting the company. European Sustainability Reporting Standards (ESRS) will be applied to improve the quality and comparability of disclosed information. The CSRD will gradually extend sustainability reporting requirements to large EU companies, most EU-listed companies, and certain non-EU companies, expanding the scope from approximately 11,000 entities to about 49,000 entities.

Companies within the CSRD scope must also comply with the Taxonomy Regulation, effective since 2022. In 2023, non-financial companies must publish full reporting on the alignment of their activities with the Taxonomy, while financial companies have until 2024. The Taxonomy Regulation will evolve, initially focusing on climate-related objectives and progressively extending to cover a broader range of economic activities and define sustainability criteria for other environmental objectives.

Moreover, the strengthening of ESG (environmental, social, and governance) obligations in France has led to significant changes in the organization of boards of directors. As of 2023, nearly 75% of the SBF 120, which represents the 120 largest companies listed on Euronext Paris, have established a dedicated ESG committee—a substantial increase from 50% in 2019. In addition to the traditional specialized committees, such as audit, compensation, nomination, and/or investment committees, the ESG committee plays a crucial role in developing and evaluating the company's ESG strategy. This role has gained prominence following the revision of the AFEP-MEDEF code in December 2022, which expressly recommends that French listed companies adopt a long-term ESG strategy, including specific climate objectives for different time horizons. The 2022 AMF annual corporate governance report highlights the growing focus on board members' competence in ESG matters, emphasizing the establishment of specific competence criteria and regular training. The report also suggests the appointment of a lead board member specializing in ESG matters as a good practice.

2) The sustained influence of shareholder activism, where recent campaigns have resulted in noteworthy alterations in certain French listed companies, sparking legal debates, and fostering the emergence of "say-on-climate" resolutions.

In 2022, shareholder activism in France was not unusually high, but it is anticipated to increase following a slowdown after the pandemic. Over the past three years, notable companies like Danone, Lagardère, Saint-Gobain, Atos, and Ipsos have been targets, leading to significant changes such as executive officer replacements and corporate form conversions. Recent activism campaigns have sparked public and legal debates, particularly concerning information accuracy, companies' right to respond, the need for board-shareholder dialogue, risks of massive short-selling, and potential infringements on board authority, especially in determining ESG strategy.

Several organizations and think tanks have issued reports and recommendations on shareholder activism, debating the need for increased regulations or additional soft law recommendations. The French financial regulatory authority, AMF, supports shareholder activism but emphasizes setting limits to control excesses. In 2020, the AMF proposed enhancing transparency in stake-building by lowering the initial threshold to 3% and fostering open dialogue between companies and shareholders. The dynamism of shareholder activism is fueled by growing ESG impact, with activist campaigns increasingly focused on ESG issues presented by diverse actors, including NGOs and specialized funds.

Say-on-climate resolutions, addressing a company's environmental strategy or policy, are increasing in frequency. Institutional investors and proxy advisers, like ISS and Proxinvest, have incorporated them into their 2022 French voting policies. Some boards proactively propose such resolutions to preempt potential activist attempts. In 2022, 11 SBF 120 companies, including TotalEnergies, EDF, Engie, Amundi, and Carrefour, had general meetings with say-on-climate resolutions submitted by their boards.

Activists also use legal means to influence company strategies by submitting their own say-on-climate resolutions, leading to tensions with boards and management. In 2023, Engie shareholders sought a climate resolution, which was defeated after the board's opposition. TotalEnergies' board submitted its own climate-related resolution in 2022, rejecting an activist proposal to align activities with Paris Agreement objectives, sparking legal debates on the hierarchy of decision-making bodies in French companies.

Calls for a legal say-on-climate regime have emerged, similar to say-on-pay, with the French Treasury forming a working group. In January 2023, the Haut Comité Juridique de la Place Financière de Paris suggested no legislative changes but encouraged soft law recommendations for climate-related resolutions. In March 2023, the AMF urged listed companies to enhance climate strategy communication to shareholders, potentially seeking formal approval, similar to annual financial statements, under future legal conditions.

3) The notable and consistent rise in the compensations of senior executive officers in listed companies. This trend is closely monitored by investors and proxy advisers, prompting ongoing discussions within the economic and legal community.

Listed companies face increasing mandatory obligations and soft law recommendations regarding the compensation of board members and senior executive officers. Say-on-pay rules require annual shareholder approval of the compensation policy ("ex ante vote") and presentation of detailed information on individual and collective compensations to the following annual shareholder meeting ("ex post vote"). If not approved, the current fiscal year's board compensation may be delayed until a revised policy is approved. Companies must publicly disclose compensation policies, attributions, and shareholder votes, including certain comparisons between executive and employee compensation.

Despite a well-implemented legal framework, executive compensation draws close scrutiny, sparking regular debates. In 2022, the remuneration package of Stellantis CEO Carlos Tavares generated public debates, leading President Emmanuel Macron to label it “excessive” and advocate for new European regulations on large companies’ executive compensation. Proxinvest reports an 83.8% increase in senior executive officers’ compensation from 2014 to 2021.

ESG performance criteria are increasingly integrated into executive compensation. The AMF notes this trend in its 2022 Corporate Governance report, and the November 2022 AFEP-MEDEF code requires French-listed companies to base the variable compensation of their CEOs on various ESG performance criteria, including at least one climate-related criterion. According to the IFA’s November 2022 barometer, 95% of CAC 40 companies have incorporated at least one climate criterion into senior executive officers’ annual variable compensation.

4.1.6. Belgium

The 2020 Code places emphasis on sustainable value creation. This involves an explicit focus on the long term, on responsible behaviour at all levels of the company and on the permanent consideration of the legitimate interests of stakeholders. More explicit expectations are also formulated in terms of diversity, talent development and succession planning, and in relation to the company’s annual reporting on non-financial matters.

In order to help listed companies implement this important principle of the 2020 Code, the Committee has published the following explanatory note, describing some of the elements which are conducive to sustainable value creation (Explanatory Note on Sustainable Value Creation, 2020):

1) Prioritising the long term: Sustainable value creation recognizes the significance of both short-term and medium-term objectives, emphasizing that periodic financial metrics should not be overlooked. Nevertheless, in cases where conflicts arise between a corporation’s short-term targets and long-term interests, precedence should be accorded to the latter. Effectively managing potential trade-offs between short and long-term goals demands foresight and courage. It is essential for companies to avoid making unrealistic promises regarding short and medium-term financial performance and to meticulously establish their long-term objectives.
2) Appropriately defining corporate purpose: Companies derive significant advantages by articulating purposes that extend beyond mere financial success. These purposes should encompass a commitment to contribute, through technology, products, services, and ethical behaviors, to broader societal goals. When these purposes are thoughtfully defined and aligned with the company’s bylaws, they not only provide a clear direction for executive management and the entire workforce but also serve as guiding principles for the board in strategic decision-making. Additionally, well-defined purposes enhance the company’s legitimacy in the eyes of all stakeholders.
3) Integrating sustainability into corporate strategy: The world is struggling with various issues and transformative changes that pose significant threats to our

planet and society. Urgent course corrections are imperative to avoid major crises. The United Nations Sustainability Goals provide a valuable framework for addressing these challenges. It becomes the responsibility of a company's board and executive management to proactively address these issues. This involves anticipating emerging risks and constraints to the current business model and strategic portfolio. Simultaneously, and with equal importance, the company should strive to identify opportunities for innovation and develop new solutions to address the challenges posed by sustainable development.

4) Integrating sustainability into corporate operations: The company must align its operations with the imperatives of sustainable development. To achieve this, it should establish both attainable and sufficiently ambitious improvement targets across environmental, social, and governance (ESG) domains. The formulation of these targets should engage executive and operational management, incorporating a thorough evaluation of external stakeholder expectations and an assessment of the material impact of externalities generated by the company.
5) Structured and verified reporting on ESG matters: Ensuring transparent external reporting on ESG targets and the company's annual performance regarding these parameters induces discipline throughout the organization in pursuit of these objectives. This reporting should undergo independent verification. Adhering to established or emerging ESG reporting standards helps the company in setting comprehensive targets and enhances its credibility. In this context, the committee also cites Euronext's "ESG Guidelines for listed companies" as a valuable reference.
6) Structured engagement by the board: The Belgian Code on Corporate Governance (provision 2.1.) positions the board with the pivotal responsibility of championing sustainable value creation. Consequently, the board must actively contemplate each pertinent element and engage in regular discussions about them. Offering explicit guidance and unwavering support to the executive management during decisions involving potential trade-offs and sustainability issues is imperative. Moreover, the board should consistently monitor ESG performance and incorporate this aspect into the evaluation of executive management's overall performance.

4.1.7. Kingdom of Saudi Arabia

Until the mid-1980s, Saudi Arabia lacked a well-established corporate governance system, leading to weak regulations in the stock exchange and limited attraction for global investors. Despite economic growth, the stock market remained inactive until 1985 when the Saudi Arabian Monetary Agency (SAMA) took charge, later joined by the Capital Market Authority (CMA) in 2003. While the Saudi Companies Act of 1965 addressed some aspects of corporate governance, a broader review was needed. By the early 2000s, calls for reform intensified due to the discrepancy between economic significance and market representation. Consequently, the Saudi government initiated governance improvements in the mid-2000s, forming institutions like the Supreme Economic Council and introducing the Saudi Stock Exchange (Tadawul). The establishment of the CMA in 2003 marked a significant step towards re-regulating the stock exchange and enhancing corporate governance. This initiative contributed to substantial economic growth. However, the stock market experienced a sharp decline in 2006, prompting the CMA to introduce the Saudi Corporate Governance Code (SCGC) in November 2006. The SCGC aimed to restore market trust and protect investors in the aftermath of the market crash (Parveen, 2021).

On Tuesday 28 June 2022, the Council of Ministers has approved the long-awaited new companies' law ("new law"). The new law was enacted by Cabinet Resolution No. 678, dated 29/11/1443H (corresponding to 28 June 2022) and ratified by Royal Decree No. (M/132), dated 01/12/1443H (corresponding to 30 June 2022), and consists of (281) articles. The new law, which is in line with the Kingdom's 2030 vision, introduces new changes, allows greater flexibility, safeguards businesses' interests, empowers the private sector and follows the best international practices.

The companies law of 1437H (2015) and the Professional Companies Law of 1441H (2019) have been repealed, and any other provisions (in any other law in force) which are in conflict with the new law will be overridden by the new law, once it comes into effect, (180) days following its publication in the Official Gazette.

The new law regulates commercial companies, non-profit companies and professional companies, and it enables investors to incorporate any of the following types of companies: (1) joint liability company (2) limited partnership company (3) joint stock company (4) simple joint stock company and (5) limited liability company.

The new law has specifically introduced a novel type of company known as the "Simple Joint Stock Company" ("SJSC"). This corporate entity, designed to meet the increasing demands of entrepreneurship and venture capital, is flexible and can be established by one or more individuals. It has the ability to issue multiple classes of shares, be managed by one or more managers or a board of directors, and can serve as a vehicle for investments, enabling non-profit companies to enter the private sector.

Furthermore, under article 11 of the new law, there is provision for the inclusion of binding joint venture agreements and family charters in the company's articles of association. These agreements aim to regulate family-owned businesses, addressing aspects such as governance and administration policies, the employment of family members, and the distribution of profits, provided they do not conflict with existing laws, articles, or bylaws.

In summary, the new law increases business sustainability, encourages investments in small and micro companies, simplifies procedures and regulatory requirements, increases market diversity by introducing new company types, protects shareholders and reduces potential disputes.

The Saudi Capital Markey Authority has defined corporate governance as 'The framework that determines the rights and responsibilities among various parties, such as the manager, board of directors, shareholders and other stakeholders in the company'. The Saudi Central Bank did not issue its definition of corporate governance but did nevertheless define some main principles for an effective governance system: the importance of having independence and separation between the chairman of the Board of Directors positions and the CEO (this requires clear powers and responsibilities among stakeholders), as well as effective organizational and administrative structures, in addition to establishing an effective internal control system by having a risk management framework, internal audit, compliance division, internal control procedures, and an external auditor (Alsunaidi and Albakjaji, 2023).

4.1.8. Kingdom of Bahrain

Implemented through Ministerial Decree (19) of 2018, the Corporate Governance Code of Bahrain (referred to as the Code) underwent modifications with Resolution No. (91) of 2022, published in the Official Gazette on 19 September 2022. Effective from the day following its publication, the code, now renamed "the management and corporate governance code," continues to complement the Bahrain Commercial Companies Law (CCL). It establishes minimum corporate governance principles deemed best practice for companies within its scope, aiming to enhance understanding, compliance, performance monitoring, and fair disclosure under the CCL.

Applicable to all joint-stock companies registered in accordance with the CCL in the Kingdom of Bahrain, the Code excludes WLLs from its compliance requirements. The "comply or explain" principle governs the code's application, necessitating companies to either adhere to its provisions or provide reasons for non-compliance. Acceptable reasons for non-compliance, outlined in the code, include considerations related to market size. The code comprises mandatory rules aligning with the CCL provisions and additional best practice guidelines. While companies may explain non-compliance with the guidelines, the expectation is for gradual increased adherence to achieve good governance.

The notable amendments to the Code encompass various aspects:

Record keeping: Section 2, chapter 1, paragraph 9 now mandates companies to retain records, minutes, paper and electronic documents, and reports at their head office for at least 10 years.

Female representation on boards: Public joint stock companies are formally required to consider women's representation on the board. These companies must disclose gender statistics within their annual corporate governance report.

Conflicts of interest: Principle 2 of paragraph 4, section 2, chapter 2 now necessitates disclosure of conflicts of interest by directors and officers. Conflicted individuals are prohibited from participating in relevant decisions.

Audit committee composition: Amendments differentiate the composition of the Audit committee for public and closed joint stock companies, allowing private joint stock companies to appoint external members if there is an insufficient number of independent board members.

Director nominations: Board nominations must now be accompanied by a Board recommendation and a summary of the nomination committee's report. The recommendation should disclose details of the nominee's involvement in other companies and potential competition with the company.

Shareholders' meetings: The code acknowledges the use of electronic voting systems for all shareholders in general meetings.

External auditors: Private joint stock companies are now obligated to appoint external auditors for up to five consecutive fiscal years, aligning with the previous requirement for public joint stock companies.

Remuneration disclosure: Amendments in Appendix 5 necessitate the disclosure of total remuneration, fees, and privileges paid to the Chairman and Board members in the annual corporate governance report.

Penalties: Penalties for code violations, detailed in article 362-bis of the CCL, have been introduced, while sections deemed best practice remain subject to the comply or explain principle.

Shareholders' rights: Paragraph 5 of principle 7, section 7, chapter 2 now explicitly incorporates shareholders' rights, including the right to inspect the company's books, records, and documents.

Environmental, social, and governance (ESG) considerations also occupy an important place in the code. Companies engaged in environmental activities must adhere to the regulations governing this sector, complying with the laws on environment and public health, along with the standards set by the supreme council for environment. It is an essential aspect of good governance for companies to ensure strict adherence to these legal requirements, a responsibility vested in both the company and its board of directors.

Within the framework of corporate governance, social responsibility is outlined as one of the fundamental principles, as detailed in 1.2 sources of corporate governance requirements. Companies are acknowledged to bear social responsibility, and the board of directors is anticipated to establish a code delineating the company's social responsibility requirements. A comprehensive report on the activities undertaken in this regard is a requisite inclusion in the company's annual report.

Typically, companies voluntarily contribute to environmental causes as part of their social responsibility initiatives.

The ESG reporting landscape is in a state of constant change, as companies now face mounting pressure from investors, regulators, and other stakeholders to disclose information relating to their stance on climate change, social issues, and governance factors. This heightened interest has led to a surge in sustainable investments such as ESG funds and Green Bonds, as more and more investors recognise the significance of taking into account the financial and economic ramifications of environmental, social and governance ("ESG") issues when making investment decisions (CBB Rulebook, Common Volume Part A Environmental, Social and Governance Requirements ESG-A: Introduction ESG-A.1 Introduction and Scope ESG-A.1.1.).

ESG factors also have an influence on a company's capacity to execute its business plan and produce value in the long run. ESG refers to the following:

a) Environmental: This factor includes a company's impact on the natural environment, such as its carbon emissions, energy use, waste management, and water usage.
b) Social: This factor encompasses a company's impact on society, including its treatment of employees, customer relations, community engagement, and human rights policies.
c) Governance: This factor relates to a company's internal management and oversight, including issues such as executive compensation, board diversity, and transparency.

4.2. Recommendations

4.2.1. Co-regulation: A promising framework for CSR

The concept of co-regulation stems from a critical examination of the state's exclusive control over regulatory standards. It acknowledges the significant role played by private actors in the regulatory landscape. Co-regulation, essentially a fusion of regulatory models, delves into the analysis of mechanisms generating regulatory impacts. It challenges conventional legal distinctions, disregarding boundaries between legal branches and orders.

In essence, co-regulation shifts the focus from categorizing technologies within specific legal domains to scrutinizing the relationship between a legal system and its impact on behavior. The attention is directed towards diverse technologies, irrespective of their legal classification, involved in regulating various fields. State regulations dictate behavior through sanctions and economic instruments, such as incentives. Additionally, self-regulatory mechanisms, where regulation is entrusted to an entity adhered to by the actors, and voluntarist devices, allowing actors to establish their own rules, are considered. Information instruments also play a crucial role.

The regulatory effects are then understood through the interconnectedness of these diverse instruments, emphasizing the intricate web formed by state regulations, economic incentives, self-regulatory entities, voluntarist frameworks, and information instruments in guiding behavior within a given legal system.

The co-regulation hypothesis presents a promising framework for scrutinizing social responsibility systems. Recent developments offer valuable insights for a forward-looking assessment of the efficacy of governance codes. In response to the limitations of corporate social responsibility (CSR) instruments, the French legislator introduced a bill to establish a duty of vigilance for parent or donor companies concerning the fundamental rights of workers in subsidiary or subcontracting entities.

Enacted on 27 March 2017, the law mandates companies of a certain size to formulate a vigilance plan, with potential state sanctions for non-compliance. The unique aspect lies in the integration of a vigilance plan designed by companies into a network of rules, some of which enforce state sanctions. The system incorporates two distinct approaches to implementing the vigilance plan: one emphasizing the autonomy of actors and the other subjecting them to public authority judgment.

These modes are not mutually exclusive; instead, they can be interconnected. The first method involves compelling influential companies to publish their vigilance plans as part of non-financial reporting, where the legal rule focuses on reporting actions rather than prescribing specific behaviors. This approach empowers multinational companies by providing them with the means for autonomous regulation. Managers and companies appreciate the effectiveness of soft law, producing effects without overly restricting their operations.

However, recognizing the shortcomings of certain CSR instruments, particularly market discipline, the legislator aimed to involve public authorities in overseeing the duty of vigilance. Consequently, non-compliance with this duty triggers the civil liability of the company, adhering to traditional fault or negligence principles. The choice of this foundation may be subject to debate. Currently, the assessment of due diligence measures, based on the term "reasonable," implies a dual evaluation: the rationality of the means in achieving objectives and their proportionality relative to the resources available to the company.

Various modalities are available to enhance practices within an organizational framework. These include the adoption of a code of good conduct, the implementation of an alert system, the establishment of internal procedures for identifying and evaluating risk-bearing situations, reinforcement of actor capabilities through training programs, the establishment of an internal company sanction regime, and the application of state sanctions. These components collectively constitute a comprehensive approach aimed at instilling new practices, all while acknowledging the enduring relevance of the traditional tool of state sanctions.

In the context of assessing the efficacy of governance codes, the co-regulation hypothesis offers valuable insights and lessons. Descriptively, this hypothesis allows us to comprehend how governance codes intersect with reporting and justification obligations. It also provides interpretative tools for understanding the diverse nature of governance codes, including the varied authors behind them.

The spectrum of governance codes is wide-ranging, with some falling under self-regulation, where representatives of companies (as seen in France) craft the code. Others are formulated by representatives of financial market players, including companies, investors, and market entities. Codes may also be generated by commissions designated by a state body (as seen in Belgium) or by the regulator itself (as practiced in Great Britain). Each developmental method aligns with a specific form of legitimacy and distinctive approaches to implementing the codes.

Looking forward, the co-regulation hypothesis prompts a fresh examination of the role of state regulations in ensuring the effectiveness of governance codes. This inquiry encompasses the models of corporate governance that the State can advocate and, simultaneously, the influence of state sanctions. This dual perspective underscores the complex interplay between the state's role in shaping corporate governance models and the use of sanctions to enforce adherence to governance codes.

4.2.2. The mission-driven company: An alternative to codes of governance

Faced with the reluctance faced by any attempt to densify the network of rules in which governance codes take place, it is appropriate to question the advisability of introducing alternative corporate governance instruments. This is the meaning of the emergence of mission-driven companies. After briefly exposing the particularities of these companies (1), we will highlight the virtues of this legal innovation. A comparison with the governance codes is enlightening in this regard (2).

(1) Mission-driven companies, a legal innovation

Based on an approach external to the legal framework and the introduction of voluntary charters and standards, Corporate social responsibility (CSR) is the subject of numerous criticisms: it does not re-discuss the theoretical models nor the legal frameworks that position the company as a private, legitimate actor. to pursue only its interests, and operating on a market with the sole aim of making a profit. However, as long as the company is only a lucrative organization, then none of its social or environmental commitments can be credible: it will always be suspected of greenwashing, or be likely to be called into question as soon as it contravenes the economic or financial interest of the company.

Faced with these limits, a new path was recently opened in the United States by the introduction of new legal forms of company, benefit and social purpose corporations. Named “profit-with-purpose companies” or “mission-based companies”, companies that adopt these new statuses commit in their company contract to social, scientific or environmental missions (Prior et al., 2014; Levillain, 2017). From a normative point of view, this path appears particularly original: it is based on a legislative change—the introduction of new legal forms in commercial law—but remains an optional device for business managers; it can, as for a label, require the use of third-party evaluation standards, or on the contrary preserve the freedom of the company to determine its own benchmark; finally, it aims to define a commitment to a collective purpose, but leaves the definition of this purpose in the hands of the shareholders (Hart and Zingales, 2022).

It is acknowledged that the board of directors (BOD) becomes the monitoring mechanism for reviewing corporate policy, and approving strategic plans to achieve financial and social performance (Hassan, Mohd Saleh and Ibrahim, 2020).

Specifications for the mission-driven company

To understand the interest of this original approach, we must return to its initial “specifications”. If more and more entrepreneurs or business leaders wish to get involved in “responsible” or social initiatives as opposed to the usual practices aimed at maximizing the short-term interest of shareholders, many elements make these risky and/or precarious practices. Indeed, the law grants a certain number of specific prerogatives to the shareholder (e.g., appointment and dismissal of directors, access to financial information, right to vote on resolutions at the general meeting, etc.) which can strongly constrain the action of managers, and call these initiatives into question at any time, particularly if the shareholders themselves change. However, shareholders are not held responsible for the impacts of the activities of the companies in which they invest, even though in certain American states, managers can be convicted of fault (breach of fiduciary duty) if they make decisions that are not appropriate, not in the sense of maximizing shareholder value. Extra-legal charters therefore resemble in a certain number of cases a contradictory injunction for managers, stuck between a requirement for profitability on the one hand, and a societal commitment on the other.

The first element of a “specification” for an alternative model was, therefore, to first require the legal commitment of the partners themselves, to protect the latitude of the managers involved in the pursuit of a societal objective. However, this commitment should not call into question the company’s ability to distribute the profits made to capital investors.

Mission-driven business model

To meet these ambitions, the legal forms introduced into law have therefore made explicit a purpose of the company beyond “profitability”. They can be schematized in the form of three necessary elements:

a) The definition of an explicit and public purpose, or mission, not reducible to profit (but not exclusive of profit), which can be imposed by law or left free to define to society;

b) A commitment from the company, to stabilizing the corporate purpose beyond changes in shareholding and making public any change of direction desired by the general meeting of partners, in particular by including the mission in the statutes and the requirement of a qualified majority of shareholders to modify it;

c) Accountability and control mechanisms adapted to the chosen mission, including reports detailing the strategy adopted to pursue this purpose or even a governance committee dedicated to evaluating these strategies.

In doing so, the mission operates as an interface between shareholder control and managerial latitude, making it possible to guarantee the latter without giving managers a blank check in the company's strategic choices. The control systems ensure that managers pursue the mission set out in the statutes.

(2) The contribution of a mission-driven company model in improving corporate governance practices

A model that renews the alternative between "hard" and "soft" law

The first effect of this model: it moves away from the usual alternative between restrictive legal measures on the one hand, and voluntary standards or charters with little control and uncertain legal effects on the other. On the one hand, it allows us to recognize the essential nature of a legal commitment from the partners to make the wishes expressed in such extra-legal documents lasting and enforceable. Anchoring in the statutes offers it medium-term stability and enforceability which contrasts with the flexibility of a "comply or explain" type rule offering considerable room for maneuver in the application of governance codes.

On the other hand, it does not sacrifice freedom in the definition of the goals pursued for each of the companies as well as the appropriate means of evaluation for this need for commitment. In this sense, it avoids the criticism of "one size fits all" which tends to standardize governance models in the face of the diversity of economic contexts and the challenges posed to each company.

A better match between legal categories and collective action

But above all, this model leads to building a model of governance that is in line with the regime of collective action which takes place in companies. Indeed, the limits of traditional approaches to governance are partly because we have not considered the generative power of the company, that is to say, its vocation to develop new capacities for collective action. By reducing the representation of the company to its profit-making objective, the classic governance variables often boil down to concerns far removed from the innovative activity necessary for the creation of wealth: distribution of property rights, distribution of dividends, independence of administrators, valuation techniques, etc. The economic and financial language has thus led to the standardization of the content of governance codes, disregarding the specificity of the dynamics of collective creation to be regulated.

On the contrary, the model of mission-driven companies offers a framework more suited to this regime of action—without requiring shareholders to give up the liquidity of their shares—to organize the construction of a creative capacity while inserting it in society, making it legitimate and sustainable. Very interestingly, the model of mission-driven companies does not define a priori what is in the common interest but asks companies to explain how they build the common interest and how they respond to it. It thus goes beyond the opposition between private and public, by showing that companies, because of their capacity for innovation, contribute to the collective interest (Thakathi et al., 2021).

Conflict of interest: The author declares no conflict of interest.

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