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Ownership (Lost) and Corporate Control: An Enterprise Entity Perspective

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Abstract: In recent decades, advocates of the shareholder value perspective regarding corporations have depicted the shareholding investor as the owner of the corporation and the entrepreneur proprietor of corporate activity. Political discourse and regulatory frameworks keep imagining that one single subject or legal person holds the whole bundle of rights and responsibilities related to corporate investment, management and control. This subject would be the shareholding investor (acting as the owner of the corporation), while the bundle would be embodied in the one kind of security issued by the corporation, that is, the share.

As a matter of fact, corporate practice shows fundamental disconnection between equity investment, enterprise management and corporate control. Over time, three main legal-economic innovations have featured this disconnection: (i) the very introduction of the corporate legal form; (ii) the working of corporate groups and financial intermediaries; and (iii) the overwhelming web of contractual arrangements and financial derivatives which characterise business affairs of listed companies and equity markets nowadays.

In this context, this article argues that an ownership view of corporate activity misleads understanding and undermines efforts to enforce corporate sustainability, responsibility and accountability. Ownership and market are insufficient to assure this enforcement, while ownership sovereignty is irremediably lost. Insisting on such misunderstanding would result in facilitating if not favouring structuring opportunities to circumvent control and responsibility, including through regulatory avoidance.

Instead, an enterprise entity view may comprehend the corporate activity (of which the corporation is one possible legal form, often embedded in a more complex legal structure involving an enterprise group) as an organisation and an institution which responds to and must submit to a variety of inside and outside checks and balances, with a view to assuring its consistent and continued role in business and society. From this systemic perspective, consolidated accounting and disclosure may represent a fundamental element of the institutional system of protection. In particular, a comprehensive accounting system –

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based upon economic substance (rather than legal form) – may make enterprise groups accountable for their ongoing activities to stakeholders (including shareholders), human community and nature.

Keywords: corporate governance, corporate social responsibility, financial engineering, decoupling, enterprise groups

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1 Introduction

Recent decades have been confronted with the rising role and influence of financial intermediaries, financial motives and financial markets in business affairs, driven by 'financialisation' and 'shareholder value' (Sjåfjell, Johnston, Anker-Sørensen, Millon, & Richardson, 2015). Lynn Stout thoughtfully contributed to research and academic critique of both drivers through her legal-economic

analyses of corporate governance and financial markets (Stout, 2011, 2012 providing further references).

Consequently, corporate governance and regulation were centred on the shareholding investor which came to be depicted as the owner of the corporation, and the entrepreneur proprietor of corporate activity. An ownership view on corporate affairs has emerged (CONVIVIUM, 2012). According to this view, political discourse and regulatory frameworks keep assuming that one single subject or legal person holds the whole bundle of rights and responsibilities related to corporate investment, management and control. This subject would be the shareholding investor (acting as the owner of the corporation), while that bundle would be embodied in the one kind of security issued by the corporation, that is, the share (see Section 2 below).

These rapid and material transformations in governing paradigms were eventually confronted with financial scandals, crises and shortcomings, especially throughout the 2000s. Shareholder value doctrine – with its reliance on ownership and market discipline as key enforcement mechanisms – raised unaddressed issues of stability and fairness (Sjåfjell et al., 2015; Stout, 2012).¹ Concerned with lacks of sustainability, human rights enforcement and environmental protection, some argue for renewed and reinforced corporate social responsibility toward stakeholders (including shareholders), the human community and nature.

This article argues that an ownership view on corporate activity has generated a general misunderstanding of the business firm, undermining possible efforts to make it sustainable, responsible and accountable for business and society. As a matter of fact, corporate practice shows a fundamental disconnection between equity investment, enterprise management and corporate control. Over time, several legal-economic innovations have featured this disconnection: the very introduction of the corporate legal form; the working of corporate groups and financial intermediaries; and a purposefully complex web of contractual arrangements and financial derivatives which characterise business affairs of listed companies and equity markets.

The very introduction of the corporate legal form facilitated a fundamental disconnection between shareholding investors and the legal entity whose issued shares are held by those investors. Corporate structure is then centred on the legal entity exercising its functional autonomy, while the shares are securities that are

¹ Sjåfjell et al. (2015) distinguish between shareholder value as a legal norm, notably in the UK, and shareholder primacy as a non-legal social norm. We denote both legal and social norms enacting shareholder prominence in corporate affairs under the ‘shareholder value doctrine’ label hereafter. Section 2 further explains the relationship between an ownership view of corporate affairs and the notion of ‘shareholder value’.

freely transferable and even tradable on equity markets. In this context, corporate activity has been organised in enterprise groups, while share-holding and trading have been delegated to and performed by financial intermediaries (financial institutions such as banks and funds, often organised in financial conglomerates).

Interestingly enough, while recent decades have contributed to a revival of ownership views on corporate activity, further legal-economic innovations have featured this fundamental disconnection between investors and the business firm. These innovations concern both the corporate group side and the equity market side of the equity investment, adding another layer of disconnection.

Concerning corporate groups, corporate insiders (comprising executive management, controlling shareholders, advisors and consultants) have increasingly been organising corporate affairs through a web of contractual arrangements designed to obtain specific legal-economic results (including regulatory evasion). Often, each contract does not show its purpose and meaning except in connection with all the other contracts that constitute the overarching operation which was purposively intended. In this context, corporate legal entities are deployed as special purpose vehicles lacking economic substance and functional autonomy (see Section 4 below). Only an (almost) empty legal shell remains of the self-contained corporation that should stand alone according to the spirit of corporate law.

Concerning financial intermediaries which are active in equity markets, they have increasingly decoupled the set of risks, returns and rights which relate to an equity position (see Section 4 below). Financial innovation has enabled use of financial instruments that disentangle and recombine that set, hybridizing traditional equity and debt positions. Moreover, derivative contracts, share lending and share sale-and-repurchase (repo) agreements have fundamentally disintegrated the legal equity position which would jointly bear the risks, exercise the rights and get the returns from the committed equity investment into corporate activity over time.

All these layers of decoupling innovations render the alleged ownership sovereignty irremediably lost. Insisting on this limited and narrow understanding would result in facilitating if not favouring structuring opportunities which circumvent control and responsibility, enabling regulatory evasion. Therefore, a different understanding is required to grasp the corporate and the equity market dynamics, to be able to identify what is necessary to achieve corporate sustainability, responsibility and accountability.

The rest of the article is organised as follows. The second section deals with shareholder value, criticising formalistic and reductionist approaches to the business firm as a going concern. The third section reviews the first layers of decoupling operated through corporate groups and financial intermediaries. The fourth section identifies the further layer of decoupling through related parties

contracting and sophisticated financial instruments (including derivatives). The fifth section discusses some responses from an enterprise entity perspective. A sixth section summarises and concludes.

2 Shareholder value and the alleged ownership sovereignty

Some corporate scholars maintain a comfortable presumption that associates one legal form with one enterprise activity (economic substance). This formalistic approach reduces economic substance to its legal form. It involves representing the business firm through the lens of the corporation.² Accordingly, corporate activity is depicted as an association of investors which commit their financial capital as shareholder equity to a joint investment fund. These shareholding investors are expected to run corporate affairs through the corporate Board, and receive the (residual) value that is generated through those affairs. If reductionism is pushed a step further, shareholding investors may be considered as a homogeneous set of interests. They would act then as one solitary entrepreneur-proprietor who undertakes the management and control of the entire enterprise. Its role is mirrored by its share, which couples several entitlements related to risks, returns and rights. According to this view, the share would embody the alleged status of the shareholding investor as the owner of the incorporated legal entity and the entrepreneur proprietor of ongoing corporate affairs. From this perspective, investors' alleged homogeneity may justify the proportionality principle in its strictest form of 'one share, one vote',³ since shareholders are assumed to share common interests in the joint enterprise in proportion to their nominal financial commitments in it.

This ownership view is akin with the revival of ownership sovereignty which has characterised corporate governance since the eighties at least (CONVIVIVUM, 2012 providing further references). The increasing presence and influence of financial intermediaries, financial motives and financial markets in economy and society have prompted this revival. While previous times have argued for 'the euthanasia of the rentier, of the functionless investor' (Keynes, 1936, p. 376), recent times have glorified the investor as the entrepreneur-proprietor which runs its own business through its own invested financial capital, generating an

² According to a cuisine metaphor, a reductionist approach presumes to appreciate the final dish outcome by looking at the single basic ingredients, ignoring the impact and implications of the process of actually prepping ingredients, cooking and serving the food.

³ On the proportionality principle and Control Enhancing Mechanisms (CEM) at the corporate field in the European Union, see Caprasse, Clerc, and Becht (2007).

economic rent by its corporate property. The business firm is then understood as a legal-economic instrument of its owner.

Several variants of such ownership view exist. All imply a peculiar connection between corporate assets and invested shareholder equity, that is, the one kind of liability contributed by investing shareholders. The strongest version assumes that shareholders own corporate assets, which must generate a return on this shareholder capital stock. Corporate return would derive from this stock and belong to shareholders. A weaker version only assumes that shareholders are entitled to receive net residual income to the business firm. In contrast, an enterprise entity perspective distinguishes between shareholders and the firm entity as a going concern: Investing shareholders contribute to corporate resources (providing equity funds) and are remunerated proportionally to their contribution, as are other resource-providing stakeholders.

This ownership representation has been highly influential and widespread in recent decades (Biondi, 2012). Accordingly, corporate scholars, regulators and practitioners refer to shareholders as the ‘owners’ of the corporation and then of the business firm, which is then expected to maximise ‘shareholder value’.

Shareholder value lays at the crossing between corporate performance and equity market pricing. In principle, corporate economic value is generated through ongoing corporate activity and then allocated to various tasks and distributed to stakeholders, including shareholding investors – mainly by dividend distribution and share repurchase. In fact, shares are securities which are freely transferable and possibly regularly priced on financial markets. In the context of listed companies, shareholder value finds therefore another comfortable reduction in the ongoing quote that shares receive on the Share Exchange. From this perspective, share market prices become the best metrics or the sufficient statistics for shareholder value, that is, the barometer of corporate activity and performance.

In sum, corporate activity has come to be represented as a sort of close monetary fund where financial investors put their money at risk in exchange for shares of economic value that is expected to be generated and then split among them, as measured by ongoing share market prices. Further non-financial rights enable shareholding investors to govern and control corporate affairs, in view to keep the latter in line with shareholder vested interests over time and circumstances.

3 The irremediably lost ownership sovereignty

Shareholder value relies on a wrongful understanding of share-holding and trading. In virtually all jurisdictions, a share factually is a security that provides

its holder with a standardised set of financial and non-financial entitlements.⁴ Concerning the financial subset, a share corresponds to a part of shareholder equity, as reported by the corporate accounting system. Shareholder equity is modified by retained earnings accrued from business income, various revaluations and provisions, and transactions with shareholders, including equity provision or share repurchase. Concerning the non-financial subset, a share grants various rights concerning governance and control of ongoing corporate affairs. The share couples together all these entitlements. If the share is listed, its set of entitlements is jointly traded and priced in Share Exchanges.

This legal configuration does not imply that shareholding investors are the owners of either the corporation or corporate activity. A.A. Berle has been a forerunning scholar in the critique of such ownership view, and a leading developer of an enterprise entity view on corporate affairs (Weinstein, 2012). Accordingly, the ownership view had perhaps some empirical heuristic content in the context of the British first industrial revolution, before the second half of the nineteenth century (Berle, 1965). However, it was overcome by the ‘corporate revolution’ (in Berle’s words) that occurred thereafter and became dominant in the twentieth century (Berle, 1947, 1959).

In particular, Berle pointed out the separation of share ownership from both management and control. Considering a shareholding investor as the corporate owner involves a distinctive individualistic vein that neglects collective and dynamic dimensions which feature ongoing corporate affairs through time and circumstances. As a matter of law, a shareholder does not hold anything but its share. It has some ownership capacity only in relation to its security, but not in relation to the related legal entity (the corporation) or the ongoing corporate affairs to be managed and controlled (the business firm). Due to the ‘corporate revolution’, management is delegated to corporate personnel and the business organisation, while control is formally exercised through specific institutional devices, including the Corporate Board, the General Shareholder Meeting, and outside regulatory authorities. Informal control may be achieved in various ways, including direct engagement with executive management and pressure over them by media.

An ownership view presumes that investment, management and control are united into the shareholding position. However, a fundamental decoupling

⁴ Generally speaking, financial entitlements include receiving dividends when proposed by the Corporate Board and approved by the General Shareholder Meeting, participating in share awards and buyback programs, receiving a residual capital share at liquidation, and deciding whether to sell or lend-out a share. Non-financial entitlements include administrative and dispositive rights such as voting, suggesting topics to be addressed by the General Shareholder Meeting, and being informed about corporate affairs. These entitlements are granted and regulated by corporate founding documents, including statutes, charters and bylaws (private ordering), as well as corporate law and regulation (public ordering).

transformation occurs through the corporate form and the financial market. Two major phenomena feature this transformation while contradicting an ownership understanding of it: one concerns the corporate structure; the second one concerns the equity market structure.

The corporation itself (as a legal form) enables organisation of functional autonomy of business activity as distinct from its shareholding investors. This is because the corporation is characterised by legal personality, indefinite existence and asset segregation (see Appendix, illustrative case A). The corporate legal structure in this case comprises one single corporation whose shares are held by one single investor (labelled Investor A for convenience). This simple structure is sufficient to generate the first fundamental layer of disconnection between that investor and the ongoing corporate activity. On the equity market side, the investor(s) benefits from limited shareholder liability and free transferability of their shares. On the corporate side, the legal entity acquires legal-economic autonomy from the investor(s). In particular, the corporate legal entity enters into contracts and obligations; it owns, holds and possesses resources; and it has priority in controlling cash and material flows, as well as corporate incomes and results. This entity holds shareholder equity as a kind of financial liability (Biondi, 2008). Blair and Stout (1999) build their influential team production theory of corporate law on this functional and institutional autonomy between the corporate organisation and the shareholding investors. Not only ownership and control are separated, but corporate management is separated from shareholding and control (Biondi, 2013).

In this context, a further decoupling transformation is generated by corporate groups (Strasser & Blumberg, 2011) and financial intermediation. The appendix (case B) provides an illustrative case of this disconnection. The corporate legal structure in this case comprises one parent company holding majority positions in two affiliated entities while share-blockholders (investors A, B, D and E) hold minority positions in respectively the parent company (investors A and B), and the subsidiaries (investors D and E). Further dispersed investors (C) hold the residual part of the shares issued by the parent company, possibly listed on a regulated Exchange.

On the corporate side, decoupling between investors and the corporate activity has been further enabled by allowing corporations to establish and hold positions, including equity positions, in other corporations. This innovation constitutes the basis of the corporate group (that is, a corporation of corporations).⁵ Corporate groups have been the typical reality for listed companies, which are the main focus of shareholder value doctrine.

⁵ In a first approximation, a corporate group can be represented as a corporation of corporations, but it usually involves a whole set of activities that are better represented as an enterprise group, see P. Blumberg, 'National Law and Transnational Groups and Transactions: Survey of

On the equity market side, decoupling between investors and ownership was generated by intermediation and delegated management of share-holding and trading. In this context, shares are no longer held and managed by the individual investor which could hold the coupled set of risks, returns and rights. Shares are held and managed by financial intermediaries on behalf of ‘beneficial’ holders.⁶ Indeed, a fundamental disconnection occurs between the ultimate investor and the share management, depending on legal-economic arrangements with some financial intermediary.

Confronted with the corporate revolution and these two decoupling transformations, Berle and others argue for considering the business firm and its corporate structure as an organisation and an institution which constitutes an autonomous *object* of governance and regulation (Biondi, 2013). The business firm is then understood as a system of collective and continued activity governed by fiduciary representatives who run and supervise it on behalf of its constituencies, including shareholders in case of corporate law. In particular, this delegated decision-making responds and is subject to a variety of inside and outside checks and balances to assure its consistent and continued role in business and society.

4 Financial engineering and the third wave of decoupling innovations

Already in the Fifties, Berle (1959) foreshadowed the emergence of institutional investors, wondering whether their coordinating action would lead to a recoupling of investment, management and control. Certainly, through financialisation and shareholder value, institutional investors have been acquiring an

the American Experience’, Australian Journal of Corporate Law, 1995, p. 295 (identifying six control parameters as relevant to determine group relations: (1) control within the business, (2) economic integration, (3) financial relations between the business, (4) sharing of administrative responsibilities; (5) interrelated employee programs, (6) asking the question: do they have a common public persona?); and P. Blumberg, *The Multinational Challenge to Corporate Law: The Search for a new Corporate Personality* (OUP, 1993), p. 116 (noting that the concept of ‘control’ in veil-piercing cases has not necessarily been limited to a requirement of a majority of voting rights or a controlling equity interest).

⁶ According to Ringe (2013, 1039), the ‘beneficial’ holder is: “the person bearing the consequences of the share price development and the actor economically interested in the share”. In fact, the possible economic interest sharing depends on the arrangement between the individual investor and the financial intermediary.

increasing influence on corporate affairs in recent decades. This influence has grown along with the revival of ownership views on corporate activity.

However, from a legal-economic perspective, recent business practice has factually renewed and reshaped equity decoupling in both the corporate activity and the equity market (Anker-Sorensen, 2016).

Concerning the corporate structure, business practice has deployed an additional layer of contractual arrangements to structure business activities. The appendix (case C) summarises this further transformation of corporate activities. The legal structure in this illustrative case reshapes the legal structure of case B by introducing an on-balance sheet special purpose entity which reshapes the position of investors D and E relative to the remaining stakeholders, including investors A and B, while financial intermediaries manage shares on behalf of dispersed investors (C).

In this context, along with the well-established organisation in corporate groups, corporate activity has been deployed through a web of transactions, often among related parties, including the affiliated entities of the corporate group itself. For instance, US bank holding companies comprise thousands of subsidiaries (Avraham, Selvaggi, & Vickery, 2012) as reported according to the supervisory definition of control (more than 25 % of the voting stock). This reporting standard differs from the accounting definition pursuant US Financial Accounting Standards Board (FASB) regulation. According to the Financial Stability Oversight Council – FSOC (2016, p. 51) Annual Report, as of March 2015, a substantial amount of bilateral repo segment activity captured by this data collection pilot survey (estimated to account for slightly more than half of total bilateral repo segment trading) was conducted among affiliated entities. Inter-affiliate trades made up 25 % of traded volume in reverse repo (USD 3.2 trillion – securities in and cash out for dealers) and 41 % of traded volume in repo (USD 1.9 trillion – securities out and cash in for dealers). This evidence shows the material impact of intra-group transactions in financial conglomerates.

Special purpose entities are incorporated – that is, established in corporate legal form – as convenient devices to hold some specific set of contractual arrangements, but lacking economic substance as autonomous parties. The distance between the legal form and the business firm is then magnified: the incorporated entity is an (almost) empty shell, while the ongoing business activity is organised through the whole set of arrangements overarching that shell. A legal entity is then exploited as a convenient instrument enabling independent legal personality and limited liability. Its other legal-economic features appear to be quite neglected, including the injection and maintenance of financial equity capital. This instrumental use of corporate form may shift risk toward creditors and undermine the entity capacity to cope with social and environmental

responsibilities and liabilities over time and circumstances (Biondi, 2014). In fact, by exploiting the legal autonomy of incorporated entities, virtually every regulation affords the hazard to be opportunistically circumvented and eluded by corporate insiders. Tax avoidance (CONVIVUM, 2017) and shadow banking schemes (Thiemann, 2012) are the most striking illustrative cases currently at issue.⁷

Concerning the equity market, financial intermediaries are using derivatives and other contractual agreements which split the set of risks, returns and rights that were coupled into a share under corporate law. Derivatives and share lending constitute the most typical instruments to perform this decoupling split (Ringe, 2013; Hu & Black, 2006; Christoffersen, Geczy, Musto, & Reed Adam, 2007. On shareholder activism, see also Briggs, 2007; Anabtawi and Stout, 2008; Santos and Rumble, 2006).

In principle, a shareholder is expected to hold a certain economic interest corresponding to the size of its stake in the corporation. In fact, decoupling practice does sever the link between equity investment, risk and return, and rights. For instance, one party may hold the economic consequences of shareholding while another one may exercise the voting rights at the General Meeting (so-called ‘empty voting’). Or one share-holder may reshape its exposure to risks and returns through derivative contracts such as equity swaps, forwards, futures, puts and calls. Or non-shareholding parties may bet on share prices without holding shares, at least at the time when the contract is formalised. Among others, share lending and share sale-and-repurchase are widespread practices that enable actors to acquire shares temporarily, often along with related voting rights.

Concerning equity share lending, the Financial Stability Oversight Board Annual Report (FSOC – Financial Stability Oversight Council, 2016, p. 54) estimates that the value of securities on loan continued to hover between \$1.8 trillion and \$2.1 trillion between 2011 and 2016, the share represented by equities being approximately 49 % in 2016. Rectifying the lack of data about securities lending activity was identified as a priority for this newly established regulatory body in the USA. A recent pilot survey was indeed conducted by staff from the Office of Financial Research (OFR), the Federal Reserve System, and the Securities and Exchange Commission (SEC). This voluntary pilot data collection survey included end-of-day loan-level data for three non-consecutive business days from seven securities lending agents at the end of 2015. Most but not all

⁷ According to the joint FATF Egmont Group Report (2018, p. 5), “legal persons, principally shell companies, are a key feature in schemes designed to disguise beneficial ownership”, occasionally employed to help criminals concealing wealth and illicit assets.

participating lending agents were subsidiaries of banks (Baklanova, Caglio, Keane, & Porter, 2016), covering a substantial share of US securities lending segment. According to this survey, the size of lendable equities was material: USD 3,173 billion of US equity and USD 2,138 billion of foreign equity, at current market values; they were actually lent out at 10 % and 7 % of the lendable amount respectively, against both cash and non-cash collaterals (Table 1). More than 50 % of these equities were lent for more than one month; more than 25 % of them were lent for more than three months, while 2–3 % for more than one year; less than 9 % was lent overnight (Baklanova et al., 2016, Table 7, our computation). While share lending against cash collateral for short time periods may relate to market-making (facilitating trade settlement and short selling) and refinancing activities (generating a source of funding for the share lender which receives the cash), share lending for longer periods and against non-cash collateral may serve different purposes.

Table 1: Corporate securities lending activity by agents (weighted average of the three reporting dates, USD billions).

Security Type	Lendable Assets	On Loan vs. Cash Collateral	On Loan vs. Noncash Collateral	Total on Loan	Total on Loan Relative to Lendable Assets (percent)
U.S. Equity	3,173	222	94	315	10 %
Foreign Equity	2,138	55	101	156	7 %
U.S. Corporate Bonds	1,450	50	12	62	4 %
Foreign Corporate Bonds	285	9	8	17	6 %

Source: Excerpt from Baklanova et al. (2016), Table 5.

More generally speaking, already the size of financial intermediaries and their portfolio management reveal their distance from each single corporation whose shares they hold, as well as a material concentration of corporate entitlements whose impact on business and society may be of concern. For instance, in the second quarter of 2016, Blackrock held USD 4,890,121 mill under management, of which USD 2,432,558 mill in the equity segment. In that quarter, this latter segment generated USD 1,236 mill of base fees including investment advisory, administration fees and securities lending revenue.

This disconnection between financial intermediaries and the destiny of each investee does not imply that they do not hold and will not exert some significant

influence or control over those investees, including through equity holdings on their own account or on behalf of their customers. According to Fichtner, Heemskerk, and Garcia-Bernardo (2017), the fifteen largest global equity blockholders in publicly listed corporations are all financials and all from the USA and the UK. Combined, the first three (BlackRock, Vanguard and Fidelity) constitute the largest equity stockholder in 438 of the 500 US corporations included in the S&P stock index, and in 40 % of all listed companies in the USA.⁸

This concentration of corporate control raises concerns that a formalistic approach to corporate law is unable to address. An ownership approach does actually scope out the very immanent conflicts of interest that such situation may be confronted with. In this context, Stout (2012) properly argued that even investors are not all equals when dealing with corporate affairs. Diverse investors may express a variety of conflicting interests and divergent preferences over time and circumstances, while asymmetry of information and control may occur across them, including the well-known one between minority and majority shareholders. Therefore, a different comprehensive perspective may be required to take these concerns into consideration.

5 An enterprise entity perspective

A formalistic approach takes corporate law as given, that is, as a static framework where share-holding implies committing equity, bearing risks, getting returns and exercising rights in a *coupled* way which remains stable over time and circumstances.

As a matter of fact, *decoupling* innovations have been purposively appropriating and transforming this legal form through historical time, involving layers of corporate disconnection between shareholding investors and the enterprise group (Table 2).

Here governance (private ordering) and regulation (public ordering) are confronted with the same challenge. The original legal form was intended to respect some fundamental principles deserving protection. It was also intended to assure some functional effects to sustain the business process over time and circumstances. Are these innovations threatening its functional effectiveness? Are they undermining the protection of those fundamental principles?

⁸ See also Santos and Rumble (2006) on corporate control by US bank holding companies, and Holderness (2009) on minority control in US.

Table 2: Layers of corporate disconnection between shareholding investors and the enterprise group.

Layers of corporate disconnection	Enterprise group side	Financial intermediaries side
Incorporated enterprise group	Incorporated legal entity	Transferrable equity shares, enabling market trading
Divisional enterprise group	Corporation of corporations	Institutional investors Delegated management Portfolio management
Contractualising enterprise group	Contractual arrangements among related parties (affiliated entities) Special purpose entities	Financial derivatives Special purpose entities

Overwhelming evidence from recent judicial cases and regulatory investigations shows that these decoupling innovations have been deployed to obtain specific regulatory results. By playing regulatory games through webs of formally independent legal entities, virtually every regulation may be opportunistically circumvented and eluded by corporate insiders. In the following, shareholder voting and corporate accounting provide two significant and illustrative cases on the matter.

Concerning shareholder voting, shareholders are entitled to vote at the General Meeting due to the economic interest they hold – that is, the risks they bear and the returns they expect on their financial commitment. Decoupling – through share lending or financial derivatives – may enable ‘empty voting’, that is, the vote exercise by an actor who does not bear – entirely and indefinitely – the underlying investment commitment. Is this vote exercise legitimate and consistent with the constitutional principles that govern corporate affairs? Is this vote exercise functional to ongoing governance and performance of corporate affairs?

In the aftermath of the North-Atlantic Financial Crisis of 2007–2008, some regulatory provisions were recommended concerning shareholder voting rules, such as: empty voting ban and voting right withdraw for shareholders without risk exposure; compulsory disclosure on decoupled positions; favour to long-term shareholders through additional voting rights; and issuance of separated legal entitlements on either voting rights or economic interests. For instance, since 2014, France adopted the so-called Florange law to grant double voting rights for shareholders that have been continuously registered for two years at least, unless the corporate statutes forbid it (see also Ringe, 2013, p. 1075–1076 for the British case).

Concerning corporate accounting, special purpose corporate entities and financial derivatives have generated a significant and material share of business activities that remain outside the scope of corporate accounting reporting and disclosure (so-called off-balance sheet entities and over-the-counter derivatives).

As a field of corporate law and regulation, accounting has been the forerunner of recognition of corporate groups through adoption and enforcement of consolidated accounts. Consolidation has been the accounting response to make corporate groups represented and then accountable, responding to control and supervisory needs by governing and regulatory bodies.

It is not by hazard therefore that financialisation and shareholder value have been influencing accounting standards-making. An ‘accounting revolution’ has been fostered to make national accounting regulations more akin with the presumed needs of trans-national financial investors (CONVIVIAM, 2013).

From an enterprise entity perspective (Berle, 1938; Biondi, 2011, 2012), accounting is expected to make ongoing corporate activity traceable and accountable. Recent trends in accounting regulation seek to account for this activity as a kind of financial investment generating value for its investors. Accounting numbers are then deemed to measure this value, or at least to provide useful information on it, at a certain point of time.

In fact, shareholder value points to the market value of the share as reference for both management and investment purposes. “But what happens when shares, acquired at a definite price in a given circumstance, relate to the enterprise congeries of legal and economic systems involving flows and immobilizations that require an accounting system to explicate them?” (Biondi, 2013, p. 393).

From a market valuation viewpoint, it is well known that share blocks can be and are generally transferred at a premium over the single share market price. This premium does surely point to insider benefits of corporate influence. How does the legal-economic core of the business firm acquire firm-specific value before share market trader eyes?

Share blockholders get access, significant influence and possibly factual control over ongoing corporate activities, making them able to frame and shape its strategic management, allocation of resources, and distribution of earnings over time and circumstances. This status put them in a privileged position relative to other stakeholders, including outside financial investors who do not get those insider privilege.

In this context, even under complete absence of markets and ownership (and their alleged discipline over management), accounting systems assume an active role in representing, organising and governing the ongoing activities of corporate affairs. The accounting system enters the corporate field fraught with hazard and disguise, to represent and control the ongoing corporate process. This process exists independently from share-holding and trading; it is unfolding and undetermined. Confronted with this process, the institutional system of protection, including the accounting system, contributes to mediate immanent

conflicts of interests among various stakeholders (including shareholders) through time and circumstances.

In this context, distinctive functional representations of the ongoing corporate process (going concern) may operate (Table 3). An ownership view would ask the accounting system to assess the investment value creation. Accordingly, the shareholding investor commits equity to the corporation. This equity is expected to generate net value to be shared among investors after having satisfied other stakeholders, including creditors.

Table 3: Functional representations of the business firm as a going concern.

Ownership view
Investor → which holds share → committing corporate equity → which generates (net) value → to be shared among investors
Enterprise entity view
Ongoing corporate activity → which requires financing, including equity → to generate income → to be shared between tasks (such as precautionary provisions) and stakeholders, including shareholders

In contrast, from an enterprise entity perspective (Biondi, 2005, p. 22, 2008), the corporate activity is certainly active and productive, but it is so because it is managed and organised, not because it is owned. Its value does not depend on stock of resources passively held, but on their deployment throughout the flow of relationships, that is, through dynamics and process. Stop the dynamics, and its value as an entity disappears.

According to an enterprise entity perspective, accounting reporting and disclosure may address the actual economic substance of corporate affairs beyond the thin legal form provided by ownership frontiers. Off-balance sheet elements are not off the flow of relationships and interdependencies which constitute the ongoing corporate activity. In order to cope with this flow, accounting cannot follow an elusive notion of (market) value, but it may track economic and financial corporate flows through time and circumstances, with the overarching purpose to determine traceable records of corporate incomes and stakes, including appropriations by corporate insiders such as executive management and controlling shareholders.⁹

As a matter of fact, recent trends in international accounting regulation undermine this accounting purpose to make reporting entities accountable and responsible. Not only are conceptual weaknesses and regulatory loopholes enabled to keep

⁹ From this perspective, Biondi and Graeff (2017) develop an innovative accounting method to report on the relationship between shareholders and the bank entity.

material share of corporate affairs off-balance sheet; but accounting standards for consolidation purpose have established scope exceptions for investment entities, both in the USA and the EU (Biondi, 2017). Furthermore, the definition of business (a key concept in accounting for business combinations) has been narrowed, enabling business units to be acquired as assets rather than business entities (International Accounting Standards Board – IASB, “Definition of a Business (Amendments to IFRS 3)”, issued on October 22, 2018).¹⁰ This implies that those business units do not have to be consolidated through aggregation of their resources by classes and writing-off of cross-transactions with other consolidated business entities. Opacity of corporate investment and operational processes may then result from this accounting choice.

From an enterprise entity perspective, comprehensive compulsory disclosure may be established – at the level of the corporate activity, the regulated Exchanges and depository institutions, or the regulatory authorities – concerning holding and exercise of equity entitlements which comprise financial and non-financial dimensions, including voting rights. This disclosure system may be based upon and expand on regimes that do already exist. For instance, some jurisdictions do (or use to) require nominal registration of equity positions, which are anyway tracked through depository intermediaries. Often, minority shareholders in listed companies having equity positions above a certain threshold must disclose these positions to security exchange commissions and the issuers. In the USA, shareholders use to receive certificates, their names being individually recorded on the corporate shareholder book (Zweig, 2016). In the European Union, the Transparency Directive issued in 2004 and revised in 2013 (2013/34/EU of June 26, 2013) requires disclosure for issuers of securities on regulated markets on major holdings of voting rights and all financial instruments that could be used to acquire economic interest in listed companies.¹¹ Since 2010, France has introduced compulsory disclosure by the borrower of borrowed voting rights to both the issuer (which has to publish the information) and the security exchange commission (AMF), enforced through drastic sanctions including losing those vote entitlements at the General Meeting for up to five years (by court order asked by the corporation, another shareholder, or the security exchange commission), and invalidation by court action of involved shareholder resolutions (Code de Commerce, art. L225-126).¹² Concerning the corporate group structure, the German

10 Baker, Biondi, and Zhang (2008) provide a theoretical analysis on accounting and economics for business combinations.

11 Further regulated information consists of financial reports, and information disclosed pursuant to the Market Abuse Directive (2003/6/EC).

12 This legislative provision applies both to one or several temporary share transfer operations, and to every operation conferring the right or the obligation to resell or return shares to the

Stock Corporation Act (art. 312) requires a mandatory report by the management board of the subsidiary concerning relationships with the parent and other affiliated companies. This report is expected to require awareness and improve control over intra-group relationships. It must be audited by both the supervisory board and the external auditor, but it is not disclosed to the public or the shareholders. The latter may ask the court for a special investigation if the auditor granted a qualified certification or denied it.¹³

6 Concluding remarks

In recent decades, financialisation and focus on shareholder value maximization have involved a revival of ownership views on corporate affairs. This revival is consistent with increased influence by institutional investors and financial intermediaries over these affairs. However, although endorsed and even adopted by laws and regulations, such view goes against business reality and has factually raised overwhelming concerns of sustainability, responsibility and accountability.

This article argues that a theoretical flaw prevents an ownership view being compatible with governance and regulation of corporate affairs. For an ownership view adopts a formalistic approach which reduces the corporate activity to its legal form, aligning its legal-economic organisation with the *coupled* set of entitlements that are embedded into a share. As a matter of empirical evidence, several layers of legal-economic innovations have factually *decoupled* this set in ways that make ownership sovereignty irremediably lost. These innovations include the very introduction of the corporation as an autonomous legal entity; the working of corporate groups and financial intermediaries; and the recent web of contractual arrangements and financial derivatives that feature respectively the business affairs of corporate groups and financial intermediaries (often organised in financial conglomerates).

These decoupling innovations have highlighted the fundamental disconnection between equity investment, enterprise management and corporate control. As a consequence, governance (private ordering) and regulation (public ordering), which jointly constitute the corporate system of protection, can no longer

transferring person ('une ou plusieurs opérations de cession temporaire portant sur ces actions ou de toute opération lui donnant le droit ou lui faisant obligation de revendre ou de restituer ces actions au cédant').

¹³ See Hopt (2015, p. 12–13).

rely on ownership and market as key enforcement devices. Instead, the enterprise entity shall be understood and addressed as an organisation and an institution that responds and is subjected to a variety of inside and outside checks and balances to assure its consistent and continued role in business and society, including to fulfil corporate sustainability, responsibility and accountability.

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Appendix – Layers of corporate disconnection: An illustration

This appendix provides a didactic example to illustrate the three layers of disconnection between shareholding investors and the business firm, pointing especially to its legal structure and related shareholding links, with no pretence to generality.

Before disconnection, we posit a solitary investor proprietor which personally holds all the resources and runs the business. No incorporation occurs but the legal person of the investor itself.

Illustrative case A – Incorporated Enterprise Group

The first layer of disconnection is introduced by establishing an autonomous corporate legal form. Table 4 provides an illustrative case. Even though full shareholding is retained, all the stakeholders of the corporate activity (including creditors) do not have recourse to the shareholding investor, as the corporation

Table 4: First disconnection layer: Incorporated enterprise group.

Investors	Financial Shareholding	Corporate Group
Investor A	100 %	Parent Corporation (100 % Business Assets)

has legal personality while the investor benefits from limited liability and free transferability of shares. The legal structure of the enterprise group now comprises a parent company which holds the business assets and is held by one shareholding investor A.

Illustrative case B – Divisional Enterprise Group

The second layer is added when multiple investors are present and the business firm is legally structured through a corporate group (corporation of corporations). Tables 5 and 6 provide an illustrative case.

The corporate group now comprises a parent company holding two business entities. Each entity is legally organised through a corporation controlled through 55 % share-holding by the parent company. While investors A, B and C continue to hold the same quotas in the parent company, additional investors D and E were added through the affiliated entities. The latter hold 22.5 % each of the consolidated corporate group. However, the latter investors do not hold control in proportion to their quotas, since the legal structure does still grant control (in terms of voting rights) to the parent company in both subsidiaries.

Concerning control over the parent company, investor A holds relevant minority share-block, granting factual control in most circumstances. Moreover, a coalition of share block-holding investors A and B may fully control the corporate group.

Table 5: Second disconnection layer: Divisional enterprise group.

Investors	Financial Shareholding	Corporate Group	Corporate Shareholding	Corporate Group (Affiliated entities)	Financial shareholding	Investors
Investor A	45 %	Parent Corporation	55 % shareholding	Entity I (50 % business assets)	45 %	Investor D
Investor B	10 %		55 % shareholding	Entity II (50 % business assets)	45 %	Investor E
Dispersed investors (C)	45 %					

Table 6: Divisional enterprise group consolidated report.

	Enterprise Group Balance Sheet	
	Equity	Assets
Investor A	$24.75\% = 45\% \cdot 55\% \cdot (50\%) + 45\% \cdot 55\% \cdot (50\%)$ shareholding	Entity I Business Assets (50 %) + Entity II Business Assets (50 %)
Investor B	$5.5\% = 10\% \cdot 55\% \cdot (50\%) + 45\% \cdot 55\% \cdot (50\%)$ shareholding	
Dispersed investors (C)	$24.75\% = 45\% \cdot 55\% \cdot (50\%) + 45\% \cdot 55\% \cdot (50\%)$ shareholding	
Investor D	$22.5\% = 45\% \cdot (50\%)$ shareholding	
Investor E	$22.5\% = 45\% \cdot (50\%)$ shareholding	

Illustrative case C – Contractualising Enterprise Group

The third layer is added when financial intermediaries coordinate dispersed investors, while the business firm is legally structured through a corporate group which deploys special purpose entities (SPEs) and contractual arrangements among affiliated entities within the enterprise group. Tables 7 and 8 provide an illustrative case.

Table 7: Third disconnection layer: Contractualising enterprise group.

Investors	Financial Shareholding	Corporate Group	Corporate Shareholding	Corporate Group (Affiliated entities)	Financial shareholding	Investors	
Investor A	45 %	Parent Corporation	100 % (by the SPE)	Entity I (50 % business assets)	0 %		
Investor B	10 %		100 % (by the SPE)	Entity II (50 % business assets)	0 %		
Financial intermediaries managing dispersed shares (on behalf of investors C)	45 %		55 %	Special Purpose Entity – SPE (0 % business assets)	22.25 %	Investor D	
						22.25 %	Investor E

Table 8: Contractualising enterprise group consolidated report.

	Enterprise Group Balance Sheet	
	Equity	Assets
Investor A	24.75 % = 45 % · 55 % shareholding	Entity I Business Assets (50 %) + Entity II Business Assets (50 %)
Investor B	5.5 % = 10 % · 55 % shareholding	
Dispersed investors (C)	24.75 % = 45 % · 55 % shareholding	
Investor D	22.5 % shareholding	
Investor E	22.5 % shareholding	

The corporate group is split into a parent corporation holding two business entities and one special purpose entity (SPE). For sake of simplicity, the SPE in this case is consolidated (*on-balance-sheet*). Each business entity manages one half of the joint business enterprise (as before), while the special purpose entity enters contractual arrangements with affiliated entities in the enterprise group for access to and deployment of business assets, and is controlled through 55 % shareholding by the parent company. While investors A, B and C continue to hold the same quotas in the parent company, investors D and E are now involved in the enterprise group through the SPE. The SPE investors still hold 22.5 % each of the consolidated corporate group.¹⁴ However, the SPE investors are deprived of control over the parent company, and they do not face the affiliated entities (containing business assets) in case of legally relevant actions, but the SPE.

At the same time, control over the parent company has evolved, since one or several financial intermediaries – in turn possibly controlled by one or several financial conglomerates – now manage the shares on behalf of dispersed investors C, including their voting rights. If shareholding financial intermediaries act as active shareholders, they may hold relevant blocks of voting rights on behalf of dispersed beneficial investors. Moreover, investor B may borrow shares from them (or enter derivative positions with them) at the time of the General Meeting, in view to challenge minority control held by investor A.

¹⁴ For sake of simplicity, we posit the SPE as a veil which holds the business entities. In another illustrative case, the SPE may be an autonomous entity valued for its expected future performance by investors D and E in a public or private offering. The SPE's performance is then generated through the contractual arrangements with the business entities whose shares are held directly by the parent company.

Current consolidation techniques are unable to represent these changes. Consolidated group balance sheet in Table 8 shows the same situation as in the previous illustrative case B (Table 6).

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