CONSTITUTING A REASONABLE CORPORATION

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Abstract

The question of the nature and depth of the social obligations of corporations has generated substantial debates over the past decades. One recent conceptualisation of corporate social responsibility holds that the social responsibility of the corporation is to self-regulate if the legal mandatory framework is failing. This view stands in sharp contrast with the consideration that society's requirements of justice are mandated by law, and that corporations hold no other obligations of justice than legal ones. The latter theory of the corporation has generated significant research in corporate governance, the former less so. This article examines the governance implications of the expectation that corporations be able to self-regulation – i.e. act out requirements of justice that are not mandated in law, nor mediated by pressures from third parties. It- sets out the capacities and motivation that self-regulation presupposes, notably a corporate capacity for reasonableness. Drawing on political theory and on an inventory of existing corporate governance arrangements for social responsibility, we hint to the type of governance mechanisms that would be required for corporate reasonableness.

Key words: corporate social responsibility; self-regulation; liberal egalitarianism; institutional arrangements; corporate governance.

Introduction

The nature and depth of the social obligations of corporations has generated much debate over the past decades. One recent conceptualisation of corporate social responsibility (CSR thereafter) holds that the social responsibility of the corporation is to self-regulate if the legal mandatory framework is failing (Heath 2006, Norman 2011; see also O'Neill 2001). This view stands in sharp contrast with the consideration that society's requirements of justice are mandated by law, and corporations hold no other obligations of justice than legal ones. The latter model of the corporation has generated significant research in corporate governance (CG thereafter); the former much less so. This article focuses on the governance implications of the requirement that corporations bear obligations of justice that are not mandated by law nor mediated by non-governmental organisations or investors.

The paper comprises five parts, beginning with an overview of the idea of corporate social responsibility as a form of self-regulation (part I). Next it argues that the ideal of a self-regulatory corporation presupposes a *capacity* for reasonableness at organisational level, and *motivation* to act on this capacity (part II). Drawing on political theory, part III fleshes the organisational capabilities required for reasonableness. Part IV proposes a typology of *existing* models of corporate governance for social responsibility, in light of the corporate capacities and the motivational structure involved. Part V critically assess these models against the ideal of a self-regulatory corporation, discussing the governance mechanisms may best guarantee corporate reasonableness, in ideal and non-ideal circumstances (part V). The article examines these questions within a broadly liberal democratic perspective, as exemplified by Rawls's political conception of justice. In this perspective, justice deals with the way in which the major institutions of society distribute rights, duties, as well as the benefits of social cooperation (1999: 6); it is a characteristic of social institutions. The suggested model of governance would

be compatible with various other theories of justice that support the idea of corporate obligations of justice.

I. Justice and the social obligations of corporations

Corporations as institutions for justice and agents of justice

Liberal democratic theories of justice ask what are the institutions of a just society. While corporations have long been ignored (Anderson 2017), recent contributions have focused on the implications of liberal egalitarian theories of justice for the governance of firms, arguing most notably for employee rights to participate in corporate governance and subsequent changes to corporate law and labour (O'Neill 2008, Hussain 2009, Hussain 2012b, Blanc and Al-Amoudi 2013, Néron 2015; critically, Singer 2015). Given this focus on labour law and corporate law, i.e. the coercive structure of society, the question of *corporate responsibility* for justice has not been a major area of concern.

Discussions regarding the extra-legal social obligations corporations have taken place within the field of normative corporate social responsibility, with a shift from moral to political philosophy (Heath et al. 2010, Heath 2006). One recent noteworthy construal of corporation social responsibility (CSR) argues that the social obligations of corporations are obligations of self-regulation, self-regulation being defined as a corporate behaviour that endorses the aims of justice and acts in accordance with its requirements even in the absence of legal constraints (Heath 2006, Heath 2007, Norman 2011). This echoes Onora O'Neill's claims in her seminal article *Agents of Justice* (O'Neill 2001) that multinational corporations should act as agents of justice in failing states. In her view, firms' responsibilities are best understood as obligations to compensate for a failing or inherently limited legal order. The legal order may fail due to lack

of resources or lack of citizens' compliance (O'Neill 2001); it may also fail as a result of the limitations inherent in all regulations – so-called market failures (Heath 2006, Heath 2007).

An important aspect of corporate social responsibility as a form of self-regulation is the conception of justice that underpins it – namely, the normative principles valid for both self-regulation and the law. Heath takes efficiency and well-functioning markets as the normative grounds for his own understanding of corporate social responsibility, labelled the '*market failures*' approach to business ethics (Heath 2014). Others appeal to different principles, depending on the agents that corporations are obligated to (Martin 2013). Norman (2011) suggests that corporate self-regulation could draw on the principles of justice defended by Rawls for the basic structure of society. This move, he argues, can account for the increasing social legislation we find in business, as well as form a coherent base for establishing corporate social responsibilities. This paper takes as its context the perspective of Rawls's political conception of justice, as one illustration of the requirement of self-regulatory corporations.

Corporate social obligations in ideal and non-ideal theory

Reflections on the legal obligations of firms in political philosophy have been carried in 'ideal theorising': it assumes that citizens support justice; that are motivated motivation to obey the law; and that the material conditions for justice obtain. In the absence of such conditions, the situation pertains to 'non-ideal theorising', which requires further considerations about agents' roles and responsibilities for moving towards a more just situation (Ypi 2010). These are not identical concerns: in this article, the distinction between ideal and non-ideal theorising is interpreted as the distinction between full and partial compliance (Valentini 2012), leaving aside the question of material conditions. Non-ideal theorising is a weak spot in political philosophy research in general (Ypi 2010) and even more so in the field of normative CSR.

In spite of overwhelming concerns with capitalist corporations, the distinction between ideal and non-ideal theorising only surfaces in current normative reflections on corporate social responsibilities. This shows for example in the list of questions that Norman rightly suggests corporations have to answer in order to establish their self-regulatory obligations: several questions pertain to compliance issues (e.g., corporate involvement in legal loopholes); other pertain, under conditions of full compliance, to epistemic issues. The latter include lack of relevant regulation as businesses innovate faster than lawmakers regulate, or uncertainty on complex normative issues that could not result in clear legal guidelines (2011: 53-54). We argue that distinction between ideal and non-ideal circumstances will be key for defining corporate social obligations and the governance structures required to fulfil these obligations.

Corporate social obligations and corporate governance

While the conceptualisation of CSR as self-regulation has gained prominence in recent years, the question of the internal corporate structures required to make a firm capable of self-regulation remains relatively unexplored. For instance Onora O'Neill states that 'the notion of the *responsible company* or *responsible corporation* is no more incoherent than the liberal state' (O'Neill 2001: 192). In her view, corporate obligations towards justice flow from their capacity for the *delivery* of justice. The question of whether and how transnational corporations (TNCs) may be *motivated* to behave as agents of justice is irrelevant:

> It is more important to consider the capabilities rather than the (supposed) motivation of TNCs. Many TNCs are evidently capable of throwing their considerable weight in the direction of greater justice, or of the status quo, or of greater injustice. In many cases it may be a moot point whether their motivation in supporting justice is a concern for justice, a concern to avoid the reputational disadvantage of condoning or inflicting injustice, or a concern for the bottom line simpliciter. However, a lack of clarity about the motivation

> of TNCs does not matter much, given that *we have few practical reasons for trying to assess the quality of TNC motivation*. *What does matter is what TNCs can and cannot do, the capabilities that they can and cannot develop*. (O'Neill 2001, our emphasis)

This approach leaves out the question of the internal structures conducive to or perhaps even necessary for corporations to carry out their social obligations. This includes the structures and processes required to '*choose among a range of policies and actions*,' (2001: 193) on the decision-making side, and those required to develop the *capabilities for delivering justice*. O'Neill's approach also omits the issue of corporate *motivation* to become (or behave as) an agent of justice. She does not, for example, consider whether one particular corporate structure might be more conducive to, or indeed required for, corporate motivation to enact social responsibilities in the absence of mandatory frameworks. O'Neill and other proponents of CSR as self-regulation commonly refer to corporations as entities 'doing' or 'acting' (or not) responsibly, with little consideration for the underpinning structures required to motivate corporations to fulfil such obligations; the inner workings of firms are blackboxed. What lies implicitly in the background is the view of the corporation as a natural person. Yet as a genealogical approach to corporations emphasises (O'Neill 2009) corporations are constituted and authorised by states, hence entertaining the possibility to constitute corporations as reasonable rather than simply rational entities.

A corporation's ability to succeed (or fail) in meeting its responsibilities may be fostered (or hindered) by its specific internal structures and processes. This paper therefore raises the question of which corporate structures are required for corporations to carry out their social obligations, both under full and partial compliance (e.g. ideal and non-ideal conditions). We focus in this paper on governance structures, although a number of other structures, business processes, or choice of persons may also be relevant.

II. Designing reasonable self-regulatory corporations: capacities and motivation

This section offers a conceptual analysis of the idea of a reasonable self-regulatory corporation: a corporation is reasonably self-regulatory ('self-regulatory' thereafter) if it has the capacities the motivation to do so. We consider two questions: first, which *capacities* do firms require to be able live up to their non-legal social obligations? Second, what can *motivate* firms to act on these capacities? We examine each question in turn.

Corporate capacities: rational and reasonable *corporations*

Reasonable self-regulation (simply 'self-regulation' thereafter) requires that we think of corporations as *reasonable*[i] in addition to being *rational*. Corporations are rational insofar as they have the capacity to pursue their own aims as defined in corporate charters - for example, profit-making. This is how we commonly think about firms. Self-regulatory corporations also need a capacity to understand, apply and act from the principles of justice: a capacity for reasonableness, enabling them to determine their obligations absent legal requirements.

Corporate capacities of reasonableness and rationality differ from the same capacities in human beings. A human's rationality and reasonableness is an 'internal' given, that can only be influenced from the outside by surrounding institutions and persons. In contrast, a collection of people qualifies as a rational or reasonable collective through the combination of its own specific internal organisational design and the individuals of the collection. For List and Pettit for example, collections of individuals qualify as group agents (hence rational) if they can form true beliefs about the world, if they are resilient to self-interested individual strategies, and if they respect the individuals' legitimate spheres of control (List and Pettit 2011).

List and Pettit have focused on the design of group agents as rational rather than reasonable. While the concern for respecting members' spheres of control introduces normativity with respect to how group agents ought to relate to their members, just as a state's constitution or

rule of law does, this leave aside the question of the organisational design required for corporations to meet obligations to third parties. List and Pettit suggest that in order to 'perform effectively in the space of obligations' (2011: 173), group agents must have a self-regulative competence; that is, 'generate checks on themselves that are designed to guard against certain failures of rational or normative processing' (ibid.). How normative processing may happen is an open question. More needs to be said about the structures required for a corporate capacity for reasonableness – i.e. corporations' ability to operate in the particular space of obligations of justice.

Motivation for justice: internal, instrumental, developmental or constitutive regulation

The idea of a self-self-regulatory corporation also involves the motivational structure required for acting on the organisational capacity of reasonableness. First, we may conceive of corporations as being organised *internally* to achieve their ends. This is how the 'law and economics' movement conceive of corporate law: as a bottom up construct that allows corporations to efficiently pursue they aim (Easterbrook and Fischel 1991). Similarly reasonableness could be construed as internally constructed: an *internal* motivation for justice.

Next, corporate aims can be shaped from the outside. List and Pettit for example identify two ways in which group agents' actions can be guided from the outside. A first type of regulation forms what they call 'instrumental regulation', that is, 'the imposition of sanctions, whether rewards or penalties, with a view to shaping the choices agents make' (List and Pettit 2011: 156). *Instrumental regulation* does not aim to develop reasonableness within corporations, but rather draws on their rationality, and the fear of sanctions, to get them to behave as if they were reasonable. Motivation for discharging social obligation draws on corporations' rational capacities, in front of a constraining environment, rather than on their capacity for reasonableness.

The second type of regulation to guide corporate action is labelled '*developmental regulation*' and aims to 'induce […] the self-regulation' that fitness for moral responsibility requires (2011: 157). This type of regulation is described by reference to parents' efforts to develop a sense of and a capacity for responsibility in their children, also referred to as their 'practice of responsibilisation'. One example given is that of parents who 'may allow a teenage son to host a party but insist that they will hold him responsible for any damage done by his friends' (2011: 157). Regulation here aims to encourage corporations to develop a capacity of reasonableness. List and Pettit suggest that holding groups responsible, in particular through penal sanctions, 'will encourage members … [to] develop routines for keeping their government in check' (2011: 169). While the motivation for building acapacity is external, it is hoped that the motivation for justice will ultimately set roots within the group agents themselves.

We can illustrate these two types of external regulation – instrumental and developmental – in the domain of corporate tax regulation. Ideally, corporations would be organised internally so as to pay their taxes. An instrumental approach to tax regulation may simply impose fines and penalties on corporations who fail to pay their taxes. A developmental practice might appeal to a practice of naming and shaming corporate tax avoiders, even if the practice is legal, to make corporations internalize tax constraints.

Interestingly, both instrumental and developmental regulation (as construed by Pettit and List) take the capabilities of group agents as something given that can be influenced rather than directly shaped by governments. Both the imposition of sanctions, and practices like shaming or holding penaly responsible may be conducive to changes in the internal structures of corporations, as the latter adapt to their regulatory environment; corporations may strengthen their legal departments and compliance function, and perhaps other committees too, in light of instrumental and developmental regulations. This influence, however, is only indirect.

Yet the corporation is not simply a bottom-up voluntary arrangement, as 'law and economics' theories of the firm suggest, but an institution that is established in corporate and labour law and, as such, is ultimately guaranteed by the state. In addition, privileges like incorporation and shareholder limited liability were originally authorised by the state, in light of corporate contribution to common aims (Orts 2013, O'Neill 2009, Néron 2015, Blanc 2016, Anderson 2017).

We suggest that the instituted nature[1] of the corporation allows for a fourth type of regulation to ensure that group agents fulfil their social obligations; this type of regulation seeks to ensure that these institutional agents are constituted appropriately, so as to be able and willing to self-regulate when appropriate. We label this *constitutive regulation;*[2] it aims to constitute the inner structure of corporations as an instance of procedural justice, designed to set the capacity for reasonableness into motion. Thus, while instrumental and developmental regulations impose or encourage business behaviour on the grounds of justice – and such regulations may be part of corporate law, labour law, competitive law, as well as soft law and social practices and norms – constitutive regulation seeks to shape the corporate form so as to make corporations relevantly self-regulatory, whenever required. Motivation for justice stemming from constitutive regulation is both external and internal. Constitutive regulations may form part of corporate law, as well as other procedures within the firm. With respect to the example of corporate tax

[1] In this paper, we need not take stance on whether the corporate agent is a moral agent that can be praised of blamed. We take the reasonableness of the firm just as Rawls takes justice to be the first 'virtue' of social institutions: the vocabulary of reason or virtue is metaphorical and need not entail construing states or corporations being construed as real agents or persons. For our purposes, we could also discuss the 'just' rather than 'reasonable' corporation.

[2] For a similar notion in the domain of environmental law, see Ort's concept of reflexive regulation. Orts, E. W. 1995. 'A reflexive model of environmental regulation.' *Business Ethics Quarterly,* 5:4, 779-94.

set out above, a constitutive approach will consider whether changes to corporate governance might be conducive to corporations refraining from avoiding taxes. One example here would be involving public servants in firms' accountancy processes.

We have established so far that a self-regulatory corporation requires a capacity for reasonableness, and that motivation for discharging corporate obligations of justice may either be the outcome of some given internal organisation, or stem from developmental, instrumental, or constitutive regulations. We now focus on the capacity for reasonableness and the detailed capabilities it requires, drawing on political theory.

III. Corporate reasonableness: legislative and executive capabilities

One further step into this enquiry entails setting out of the desiderata of reasonableness for corporations. We narrow down the general idea of a reasonable corporation into a fleshed out conceptualisation of the specific capabilities required by the general capacity for reasonableness.

As noted above, a self-regulatory firm is one that is able to identify a failure in a legal or regulatory framework, or lack of such a framework, ascertain corporate obligations, and act on them. The conception of a self-regulatory firm and its capacity for reasonableness entails two distinct capabilities, operating as functional equivalents of two state powers: legislative and executive. *Legislative power* characterises a state's ability to issue legitimate laws and regulations; liberal democratic regimes set constraints on the processes required to this end. Second, *executive power* characterises a state's ability to deliver policies through state administration and agencies. We consider each of these functions in turn, setting out their main aims as understood in the broadly construed family of liberal and egalitarian theories of justice.

Legislative power: attention, political equality, epistemic efficiency and political values

Starting with state's *legislative power*, one main requirement is its *legitimacy*, which depends on both procedures and outcomes. In terms of political justice, the central question is that of the allocation of political power, pertaining to the legislative function of the state – the power to issue laws and regulations that must be respected by all (Rosanvallon 2015). It covers issues such as the constitution of the demos (who should be included in the decision-making process); representation and other ways to constitute the will or decisions of the demos, whether directly (as in direct democracy) or indirectly (as in indirect democracy); voting rules (majority vote, and so on); as well as the questions that should be dealt with at a constitutional or legislative level (Rosanvallon 2015: 383).

In the liberal democratic tradition, such as that instantiated in Rawls's political philosophy, legislative procedures are supposed to express citizens' *equal political rights*, regardless of gender, status or other personal characteristics. Citizens should therefore all enjoy an equal share in political power, instantiated as an equal political vote in an election, the use of which is protected from interferences from economic forces through such practices as corporate donations to political parties (O'Neill 2012). Second, in liberal democracies, the democratic will is limited by a political constitution aimed at protecting *fundamental rights*. Third, the democratic processes and discussions that take place at the legislative stage among lawmakers (citizen representatives) are primarily construed as an *epistemically efficient process* drawing on *shared political values*. In this process, disagreement primarily occurs due to variations in the interpretation of the implications of political values rather than disagreement about these values. This is what a liberal would deem to be a justly organised legislative function, or, using the vocabulary of agency instead of that of justice, what a reasonable state should look like.

Executive power: reactivity, readability and accountability

Rosanvallon's recent work on the executive capacities of states (2015), in which he calls for a new development in the democratic political order, provides a useful springboard for the discussion of corporate *executive power*. Historically, the first stage of state democratic development consisted in the creation of parliaments to keep executive power in check. The next stage entailed democratic development to help citizens keeping lawmakers in check. According to Rosanvallon democracies have now reached a third developmental stage in which citizens should be able to keep the executive power directly in check, by getting to know and understand policies and their implications. This is required to sustain citizens' political commitment - a requirement of Republican ideals; we believe this aim is equally relevant for a political philosophy that assumes citizens motivation to act out of a sense of justice.[3]

Rosanvallon sets out four qualities for an adequate executive power in contemporary democracies: readability[4], accountability, reactivity and integrity. *Readability* means that citizens aware of policies, and understand them; this goes beyond merely making information available or being transparent. In the economic sphere, this could entail developing consumer information on product composition and safety, audit certificates, rating systems, transparency on managerial pay, labelling practises, reporting and other measures (Rosanvallon 2015: 243-44). Another requirement is the *accountability* of those implementing policies. Hussain and Moriarty (2016) define democratic accountability as an institutional strategy for ensuring that officials are answerable to citizens. A narrow view of accountability defines it as a combination of reporting, justification and action evaluation (Rosanvallon 2015: 269 sqq.). Additionally,

[3] See Wayne Norman for the view that liberal egalitarianism has neglected to discuss the executive function of the state and has this task at hand.

[4] Translation for 'visibility'.

Hussain and Moriarty suggest that democratic accountability requires the possibility of removing officials in charge. In democratic states, ministries and officials are held accountable by parliaments through procedures like impeachment. In turn, legislative power is held accountable by citizens through the election system. Rosanvallon argues that contemporary democracies should make those responsible for executive power (e.g. ministries) accountable directly to citizens (Rosanvallon 2015: 268); in his view, they should resign in the case of a scandal. Furthermore, executive power should be *reactive*, connecting governors and the governed permanently and in a dynamic way (Rosanvallon 2015: 280), while those governing should display *integrity*. Rosanvallon suggests institutions for democratic executive power: a *high court* to guarantee integrity and readability; specialised *state commissions* to evaluate the democratic quality of policymaking and guarantee accountability; *citizens' organisations* to control the actions and discourses of those in power in terms of reactivity or truth in political speech.

In sum, liberal democratic legislative power has to embody the value of equal citizenship (vote) and other political values, the instrumental values of attention and deliberation. Liberal democratic executive power has to be reactive, readable and accountable and display integrity. At least some of these expectations apply to corporations: whenever they play the functional equivalent of law-making and interpreting, firms have to be attentive to emerging issues and deliberate efficiently drawing on political values. Political equality, even if desirable, seems harder to emulate. Whenever corporations have to execute policies, they should be reactive, readable, accountable, and display integrity in doing so. Turning now to various ways in which corporate social responsibility is actually institutionalised in firms, we propose a typology of the arrangements involved, in light of the criteria of reasonableness and motivation set out above. We will then examine in Section V which among these arrangements make group agents appropriately self-regulatory.

IV. Social responsibility in corporate governance: a typology of existing arrangements

Academics and practitioners in the field of corporate governance alike define CSR as the the voluntary socially responsible activities of firms that go beyond the law (Crane et al., 2008). Corporate governance (CG henceforth), which describes the corporate structures and policies required by corporations to achieve their aims, has gradually responded to the requirements of corporate social responsibility (Bhimani and Soonawalla 2005; Mitchell 2007; Gill 2008). Given the increasing import of firms' extra-legal socially responsible activities for corporate governance (Ryan, Buchholtz, & Kolb, 2010), we start laying out the way in which *theoretical models* of CG have made (or not) room for these activities (Brammer & Pavelin, 2013). We then look at how *existing* CG mechanisms have been structured for extra-legal social responsibility.

CSR in theoretical models of CG

A first theoretical model of CG considers CSR only marginally: is the shareholder-centric model of CG ('shareholder model' for short). It draws on the traditional economic perspective which emphasizes shareholder primacy within CG systems and the status of shareholders as residual claimants (Shleifer & Vishny, 1997). Since the seminal work of Berle and Means (1932) which was seized upon by the agency theory, CG has primarily focused on the rules supervising the relations among owners or shareholders, boards of directors, and managers in order to solve agency conflicts (Jensen & Meckling, 1976; Shleifer & Vishny, 1997). According to the shareholder-centric view of CG which puts the emphasis on economic (financial) efficiency (Gill, 2008), firms' extra-legal activities are only envisaged as a way to increase firms' financial performance. Agency theorists contend that CG arrangements for CSR should be adopted only when bringing about efficiency benefits (McWilliams and Siegel, 2001): 'CSR' is instrumental to efficiency gains. This conclusion is shared by neo-institutional theorists who

argue that, in shareholder-centric CG contexts, proactive "CSR" activities are mainly carried out for the strategic purpose of securing corporations' legitimacy (Matten and Moon, 2008).

An alternative view on CG and CSR is offered by the stakeholder theory [reference]. The shareholder and stakeholder models of CG appear as opposite theoretical models of governance (Blair, 2003; Yoshikawa & Rasheed, 2009). In contrast to the shareholder-centric perspective, the stakeholder-centric perspective of CG draws on the idea that a firm has relationships with a broad set of stakeholders, including, along with shareholders, managers, employees, consumers, suppliers, societal communities and others (Freeman, 1984). Stakeholder theorists argue that the shareholder primacy does not allocate appropriately the benefits of the corporation: CG systems should instead be shaped so as to ensure that firms are led for the benefit of all of their stakeholders. This duty toward all stakeholders forms the social responsibility of a corporation. The stakeholder model of CG reflects upon the allocation of the benefits among all firms' stakeholders, hence taking questions of organisational justice seriously (Freeman 2010).

The team production theory of CG forms a third model of social responsibility (Blair and Stout, 1999). It holds a view of CSR similar to that of the stakeholder model of governance insofar as it argues that value ought to be shared among stakeholders, yet differs in the justification provided for it. It claims that directors have to be trustees of the firm as a whole and maximize "the joint welfare of the team as a whole" (Blair and Stout, 1999, p. 767). This is because employees, shareholders and managers all contribute to value creation, not shareholders only. According to the team production theory of CG, CG arrangements for CSR should be designed as specific mechanisms for defending the interests of all stakeholders and not only that of shareholders (Blair, 1995; Blair and Stout, 1999). Now that we have covered the theoretical models of CG and their take on CSR, we turn to an inventory of existing CG arrangements for social responsibility.

Inventory of existing CG arrangements and actors for social responsibility

We inventory *existing* CG arrangements for social responsibility, including actors and procedures, as a preliminary step to setting out the organisational design required for reasonable group agents. This is surprisingly overlooked in CG and CSR literatures as well as in business ethics, but in the work of Albareda (2008) who has looked at the CSR mechanisms adopted by corporations via self-regulation and co-regulation processes. We classify existing CSR-oriented CG mechanisms in light of 1) the corporate capacities and 2) the motivational structure involved (see the two axes on the left-side of Table 1). As seen above, relevant corporate capacities entail *rationality* (i.e. their capacity to form views on the world, aims and strategies to pursue these aims) and *reasonableness*, i.e. their capacity to understand, apply and act from the principles of justice, hence determine their obligations absent legal requirements. The motivational structure corresponds to the combination of internal structures and external regulations that make corporations meet their social obligations.

First we classify CG arrangements dealing with society's interests in light of whether and how they support or facilitate the corporate capacities of rationality and reasonableness. These capacities are associated to four corporate capabilities: a *strategic* capability and an *operational* capability which both form corporate rationality, i.e. its ability to pursue its own aims; a *legislative capability* and an *executive capability which form* corporate reasonableness. A corporation *strategic capability* includes the functions, structures and processes at play in firm strategic decision-making, and we focus in this article on the dimensions of this capability through which firms integrate social aims into their strategy, for instrumental reasons (cf. table 1). The *operational* capability is the corporate capability for executing strategic decisions. We focus in the paper on those aspects of this capability which reflect CSR considerations, adopted for instrumental reasons. Taken together, the strategic and operational capabilities form a corporation's *rational capacity* (or rationality). As noted above, the *legislative capability* of a

reasonable corporation represents its ability to elaborate just rules and aims having society's interests in view. The *executive capability* of a corporation is its ability to enact and deliver reasonable decisions. Taken together, the legislative and executive capabilities form a corporation *reasonable capacity* (or reasonableness).

The second analytical axis is the corporate motivational structure for social purposes. It refers to the fours ways identified in section IV in which firms may be motivated to live up to their social responsibility: 1) internally; through 2) developmental, 3) instrumental, or 4) constitutive regulations. As seen above, an internal motivation structure relies on bottom-up internal arrangement. Developmental and instrumental regulations influence corporation "from the outside". Finally, constitutive regulations mandates processes that emulate reasonableness.

Building on this inventory and classification, we lay out several ideal types of regulation models for SR, in the Weberian sense of ideal types (Weber, 1949: 90) – a heuristic device by which researchers seek to create a comparative framework (Caldwell, 2002: 33). Ideal types of regulation models for CSR are established by identifying and accenting distinctive traits into different unified analytical constructs (Meyer, Tsui & Hinings, 1993). These traits correspond to the classifying criteria presented above clustered in distinctive analytical constructs unified under the notion of regulation (the right-side of Table 1). We propose as a result a typology of three ideal-type models of the way in which CG addresses SR: a *legal-compliance model*; a *self-regulation model*; and a *constitutive regulation* model, which we present in turn.

Two main ideal-types of CG for social responsibility: legal compliance and self-regulation

Two main ideal-types of CG for social responsibility (SR henceforth) emerge from this inventory: a legal compliance model, and a self-regulation one. According to the Weberian framework, these ideal-typical models serve to compare and classify the existing CG arrangements that deal with CSR, according to the four following capabilities of the firm (see

Table 1). They differ from the two theoretical models of CG developed in management and organisation studies, *viz.* the CG model of shareholder value, and the stakeholder model of CG, on the fact that they are induced from real practices but also because they strictly reflect how SR is addressed by regulation arrangements.

We observe two principal ways in which CG addresses (and organises) the extra-legal social responsibility of corporations: one that results from the mandatory and incentivising powers of governments (for example employee representation on the board, non-financial reporting and ombudsmen); and another that is designed and implemented by business corporations voluntarily or in response to stakeholder pressures (for example codes of conduct, ethical charters and labels). We label the former the *legal-compliance model* of SR: corporations do not explicitly aim at fulfilling extra-legal social duties and their social responsibility is rather conceived and organised as meeting legal obligations. CSR as the extra-legal obligation of corporation is to some extent absent from the model legal-compliance model of SR. We label the latter the *self-regulation model* of SR. These are the two most prevalent CG existing models of governance considering the CSR question. They are of course many variations and that is the reason why here we offer an ideal-type of an array of practices.

Insert Table 1 about here

The *legal-compliance model* of SR is composed of CG arrangements that allow efficient and strict compliance with the law. This set of arrangements has expanded in parallel with the growth of CSR regulation. Bondy et al. (2012: 283) have outlined the fact that the rising regulatory trend of CSR is a sign of its institutionalisation: "The codification of CSR into law is dramatically increasing with a number of countries putting in relevant legislation. Examples include the UK Companies Act (2006) and the Climate Change Act (2008), the Canadian

Sustainable Development Act (2008), the US Sarbanes-Oxley Act (2002) […]. Clearly, these practices demonstrate the institutionalisation or "almost truism" (Johnson 2006) of CSR within society". As a result, one can observe that different configurations of governance and actors support different aspects of corporate capacity-building.

In this model, social responsibility is addressed rationally: CEOs and chairmen and legal directors and disclosure policies underpin the strategic capability to deal with society's interests. Legal departments, compliance policies, reporting and internal auditing activities form the operational capability to deal strategically with society's interests. Corporate reasonableness by contrast is nascent. The legislative capability may be embodied not only by individual shareholder's voice, as well as board members, employee representatives on the board, employee ownership (O'Sullivan, 2003), but also by executives, and employees individually. For instance, in Germany, board level employee representation was introduced as a practice in 1951 then ratified in the Codetermination Act of 1976. This CG mechanism for CSR is not restricted to Germany or Sweden, however. According to Conchon (2011: 11), in "17 out of the 27 European Member States plus Norway, employees are granted the right to be represented on the board of directors or the supervisory board with decision making powers."

Yet the legislative capacity supported by legal compliance is still barely operationalised within corporations. Empirical studies have shown that the level of employee participation in board decisions is very weak (O'Sullivan, 2003). For instance, under the Swedish Codetermination Act, employees have the right to appoint employee representatives to the board of directors. Let consider for example the case of H&M whose board of directors welcomes two members appointed by the trade unions and two employee representatives. This right, granted by law, it is not exercised by employees in a majority of listed Swedish firms (Berglund & Holmén, 2016).

The second ideal-type of CG for SR is *self-regulation.* It corresponds to internal decisions and/or external pressures leading corporations to self-regulate some aspect of their behaviour which may affect societal interest. Three different types of agents are involved in corporate self-regulation: states facilitate or incentivise socially responsible behaviours; corporations internally adapt their structures and policies to meet their social obligations; and third parties, comprising individuals and groups of stakeholders, acting as self-regulating sub-systems involving NGOs, associations and para-governmental actors (Dubbink et al. 2008), with the underlying collusion from, or handling by, the government.

While states have endorsed a regulatory and incentivising role, corporations have reacted by implementing self-regulation; third parties meanwhile have entered the stage, playing the role of norm-markers and infomediaries (Dubbink et al. 2008), as well as endorsing a meta-regulation function (Gill 2008) more akin to what Albareda (2008) labels as co-regulation. Co-regulation corresponds to the process through which hybrid mechanisms for CSR are created "by civil society organisations and business organisations and, at times, also include participation by other actors such as intergovernmental organisations, trade unions, and governmental agencies. These multistakeholder instruments can be seen as public-private or civic-private co-regulation mechanisms" (Albareda, 2008: 436).

By contrast with the *legal-compliance model* of SR, the representation of societal interests in corporations has mainly been ensured by self-regulation (Buchholtz et al. 2008): the *self-regulation model* of SR has gradually overridden in practice the *legal-compliance model* for either instrumental or voluntary reasons. We label the first approach '*defensive CSR'*: CSR-oriented mechanisms of CG are designed and/or implemented on instrumental and strategic grounds to respond to pressures from civil society and other stakeholders, as outlined in neo-institutional works (McWilliams & Siegel, 2001; Matten & Moon, 2008). Doing this, corporations hope to gain access to strategic resources located in their environment, secure

corporate legitimacy or to avoid stricter state regulations. We label the second '*positive CSR'*, i.e. the voluntary integration of public interest in corporate governance structures and practices. Specifically, positive CSR is self-regulation undertaken deliberately on justice grounds.

Defensive CSR is the result of corporations' deliberate actions to endorse CSR practices in order to ensure their legitimacy in the eyes of their stakeholders. This was mostly to respond to lobbying by external actors: their influence has positively transformed corporations' capacities to self-regulate. Thence over the last two decades or so a growing set of institutional arrangements for CSR in response to the influence of NGOs, intergovernmental organisations, governmental agencies and the like. The impressive array of codes of the strategic capability of corporate rationality to self-regulate. Codes have also become supported and been supplemented by the strategic decisions of CEOs and chairmen, the presence of independent board members, transparency policies, and by the discretionary space of CSR directors. In terms of operational capability, standardisation or certification schemes (e.g. ISO 26000, SA 8000, AA 1000), labelling schemes (e.g. Rugmark, Max Havelaar, Forest Stewardship Council), reporting activities (Global Reporting Initiative criteria, UN Global Compact guidance, European Commission reporting guidelines), environmental, social and sustainable management systems, and CEO compensation policies make the corporate rationality of self-regulation effective.

Positive CSR requires CG arrangements support a corporation's reasonableness capacity to self-regulate on the grounds of justice. A large range of CG arrangements support a legislative capability for self-regulation. These comprise recourse to boards with significant size and gender diversity, internally instilled CSR values, voluntary stakeholder dialogue, CSR committees, ethics committees and outside directors representing stakeholders' interests, such as employees, in order to reflect all the expectations of the firms' various constituencies (Jones & Goldberg, 1982). For instance, in alignment with the social responsibility policy of the luxury

group, Kering's board of directors consists of 10 members, six women and four men. The proportion of women amongst the board of directors amounts to 60%, a ratio which exceeds the ratio required under French Law and the one recommended by the French Afep-Medef Code of Corporate Governance. Whereas the board of directors of the Coca-Cola group includes a public and diversity review committee and the Danone' one a social responsibility committee.

In light of this inventory, it becomes clear that the legislative capability of corporations for self-regulation is fairly widespread and advanced in comparison to other corporate capabilities, especially in contrast with executive capability. Indeed, the corporate executive capability for self-regulation is comparatively neglected by CG arrangements: it is a striking observation. Measures toward this aim principally consist of the dismantling of CEO duality (where the CEO is also the chair of the board of directors), and in few firms the presence of a system for stakeholder relationship management. This gap certainly represents an obstacle in the fulfilment of the reasonableness capacity of the corporation to self-regulate.

A constitutive regulation model of SR

A third model of SR CSR arrangements emerges, which goes further in making firms meet more closely the demands of justice. Outside directors encourage engagement in social issues and the people dimension of CSR (Johnson and Greening 1999; Harjoto and Jo 2011). Other studies show that women and minority representation on the board is positively related to corporate philanthropy (Wang and Coffey 1992). Furthermore, in order to promote and ensure corporate democracy, some authors working in business ethics and CG strongly recommend the inclusion of an ombudsperson on the board or the adoption of the (Germanic) model of co-determination, which guarantees that corporations have direct employee representation on the board (Ray 2005). Lastly, authors such as Mallin and Michelon (2011), Huse, Nielsen and Hagen (2009) and Jones and Goldberg (1982) have shown that democratic representation on the board (stakeholders; employee-elected board members; community presence) increases the

effectiveness of the board in terms of corporate decision-making, while preserving the expressed expectations of stakeholders.

Building on these findings, we propose a third model of SR: the *constitutive regulation model*. It differs from the two ideal-typical models above as it primarily seeks to institutionalise a corporate capacity for reasonableness. This requires a CG mechanism that constrains the corporation 'from the outside'; that is, brings in strategic decision-making reasonable considerations and constraints. This requires a law *mandating the constitution* of a legislative and an executive capability in the corporation. This law has to make sure it requires the setting up of structures responding to the main functions expected from a corporations' legislative capability: attention, efficient deliberation based on political values, as well as responding the main function expected from corporations' executive capability – readability, reactivity and accountability. While *constitutive regulation* typically mandates the setting up of the legislative and executive capabilities, it is their functioning that emulates corporate reasonableness.

A far as we know, several isolated cases of *constitutive regulation* have contributed to the institutional integration of public interest in CG structures. These comprise the specific cases of flexible purpose corporations and social purpose corporations (Bromberg, 2016, Levillain, Segrestin and Hatchuel 2016, Levillain 2017). In these structures, legal departments, CSR directors, CEO compensation policies, reporting and internal auditing activities operate as part of the strategic and operational capabilities of corporate rationality. Besides, the representation of public interest on the boards, flexible purpose corporations (previously mentioned), benefit corporations, the ombudsmen solution, the protection of whistle-blowers, CEO pay policy, board diversity, the dismantling of CEO duality, deliberation in CSR and ethical committees, deliberation in diverse boards including members representing the employees or other stakeholders' interests, all fall under the *constitutive regulation* framework. They all contribute

to the *legislative* capability of a reasonable corporation. We notice by contract a lack of structures to sustain the executive capability of corporations to implement CSR.

Let us note to conclude that all three ideal-types of regulation for SR involve a different institutional division of labour for justice between the macro-level (state regulation), the meso-level (third parties), and the micro-level (firms). In the *legal-compliance model*, the state mandates laws and regulations (concerning health, safety, the environment and so on) required by justice, whereas corporations simply comply with these laws and regulations. Although shareholders are legally entitled to endorse further responsibilities, we do not observe that shareholders compliant firms fulfil further social obligations beyond legal ones. Partially based on co-regulation procedures (between corporations, NGOs, intergovernmental organisations, trade unions, etc.), the *self-regulation model* combines pressures from civil society and self-regulatory measures, possibly aimed at avoiding stricter state regulations, and deployed on a voluntary basis (*viz.* defensive CSR and positive CSR). Finally, the *constitutive regulation model* of SR combines actions of states as agents issuing constitutive regulation that applies at the corporate level, and partial self-regulatory activities of corporations.

V. Structures and governance for a self-regulatory corporation

In this section, we assess which of the regulation models of SR presented above are most likely to meet the expectations of CSR as a form of reasonable self-regulation.

Limits of the legal-compliance model of social responsibility

We start by assessing whether the *legal-compliance model* of SR is compatible with the requirement that corporations operate as agents of justice. This model combines a legal and regulatory framework, and shareholder governance. As canonically defined by Friedman

(1970), shareholder governance requires that managers serve the desires of shareholders - most commonly profit - while conforming to the law. As a practice, and an academic discipline, CG has focused primarily on agency issues involved in the shareholder-manager relationship - the worry that managers may act in their own interest rather than follow the desire of shareholders.

Some may think that shareholder governance allows corporations to fulfil their obligations of justice and self-regulate whenever required. Onora O'Neill for example examines whether shareholder governance can hold back multinational corporations from acting as what she calls 'primary agents of justice' – that is, making up for failed or ill-states. She rejects the view that shareholder governance hinders corporations from acting as primary agents of justice. She argues that corporations do not 'have constitutive aims that prevent them from being agents of justice at all' (O'Neill 2001: 192). Believing that the aim of serving shareholders forms a limit is 'sociologically simplistic'. She sees, rather, multinational corporations are as 'economically and socially complex institutions (…); their specific capabilities and constitutive aims are typically diverse and multiple' (2001: 192) While important, shareholder interests 'underdetermine both what a given TNC can and what it will do' (O'Neill 2001: 193). She pursues that 'although TNCs may be ill constructed to substitute for the full range of contributions that states can (but often fail to) make to justice, there are many contributions that they can make' (2001: 193).

We share Onora O'Neill's assessment that it is no more a category mistake to think of a 'responsible' or; as we call it, 'reasonable' corporation as is to think of a liberal state. We also share her view that corporations are complex institutions and multinational corporations even more so. Yet corporations need not to be taken as a given. The way in which corporations are 'constructed', or as we propose is this paper, 'constituted' is relevant for their ability to be agents of justice. It is important for the delivery of justice - i.e. knowing what justice requires and how to proceed - as well as for corporate motivation to do so. Specifically, we suggest that

current shareholder governance is not fully compatible with the requirement that corporations behave as self-regulatory agents able to pursue non-legally mandated aims of justice. This is the case under ideal circumstances (assuming full compliance), and even more so under non-ideal circumstances (assuming partial compliance). Part of the problem is *epistemic*, and part of it is *motivational*.

Under ideal circumstances, Friedman's view on corporate governance is in principle compatible with self-regulation. Managers are supposed to serve the desires of shareholders, who we assume have and act from a sense of justice, just like everyone else in society. It should be possible to organise corporations with the defining purpose of serving shareholders so that they can fulfil those obligations of justice not mandated by law. Yet *existing forms of shareholder governance* fall short of this outcome, even assuming full compliance. Procedures are lacking for shareholders to form views about corporate obligations. Shareholders lack detailed knowledge of business operations, and, unless suitably informed, engaged and organised, cannot be the source of self-regulation in the firm. While managers serve the interests of shareholders, including in discharging their obligations of justice, they may not know how to best achieve these aims, unless corporations are suitably organised. Concern for justice cannot inform decisions unless integrated in the strategic decision-making processes of the company. Besides, just like any strategic goal, self-regulation has to be operationalised; this involves information-gathering, reflection, deliberation, integration into business processes (including innovative ones), supervision of execution, reporting, and so on. Even in ideal circumstances, shareholder governance has to include the legislative and executive capabilities required to enable the firm to act as an effective agent of justice. Some degree of coordination, or perhaps also external incentives, might help to set these mechanisms in place. The problem here is primarily *epistemic*. It has to do with collective action problems and moving from the individual to the collective level in creating a corporate capability for reasonableness.

Another reason why existing shareholder governance may fall short of providing an adequate structure for corporations to behave as agents of justice is that, even though most agents in society are motivated by justice, *a few* might not be – some individuals holding executive positions at a competitor, for example, or some investors or a few shareholders. One unjust competitor may outperform justly organised ones. Unjust investors might prey on economic agents of justice and turn them into more profitable organisations at the expense of justice. The judiciary system might also fail to protect just corporations. In the US for example, the judiciary understanding of the fiduciary duties of corporations' managers is such that managers can be sued if they pursue other aims than profit maximisation, within the bounds of the law; one shareholder unmoved by justice would be able to sue the management of a self-regulatory firm, unless the pursuit of non legally mandated social goals are formally protected in governance and in courts. Even in ideal theory, corporations should be 'protected' as agents of justice, for example by constituting just aims within the corporation (as in the flexible-purpose of benefit-corporations in the US), as well as offering some protection in case of a takeover.

These difficulties are magnified once we drop the assumption of full compliance. In non-ideal circumstances, we assume a general lack of support for justice. The regulatory context becomes all the more important as a minority of managers or stakeholders supporting justice aims is unlikely to succeed in changing corporate behaviour. Resolutions submitted by minority shareholders – for example, keeping the business plan compatible with a two degree increase in temperature – tend to be rejected and outvoted.

In sum, under current shareholder governance structures in ideal circumstances, both corporate legislative and executive capabilities are weak, due to inertia and coordination issues in setting up relevant processes. On the legislative side, corporations *lack the attention and epistemic efficiency* required to identify issues and make appropriate decisions; they may also lack, as a consequence, *reactivity and accountability* on the executive side. This model, however,

assumes executive *integrity*. Some initial external regulatory push may get the internal organising process started. Yet the worry remains that a few isolated individuals might be able to sue just managers, outcompete, or prey on just firms: further regulation is required to protect economic agents of justice from such free riding. Under the perhaps more realistic assumption of partial compliance (non-ideal circumstances) a corporation will lack the *motivation* required for acting as a reasonable agent of justice. Absent external legal pressures to constitute a reasonable capacity within the firm, shareholder governance is unlikely to demonstrate appropriate self-regulatory behaviour.

Limits of the of self-regulation model

If current shareholder governance fails to make firms behave as agents of justice, does the existing self-regulation model fare any better? As noted above, we find two distinct existing models of self-regulation for SR: the most frequent model of *defensive self-regulation* and the less common one of *positive self-regulation*. How do both models fare with respect to corporate obligations of justice? Again, we distinguish between ideal and non-ideal circumstances.

Under non-ideal circumstances, the main issue for the *self-regulation model* is firms' lack of *motivation* for justice. As a result, corporate social obligations are only partially met. If compliance is partial, managers, shareholders and those in power in the firm may not support nor act from justice principles, but rather pursue their own interests: self-regulation for justice is unlikely. Assuming that governance mechanisms succeed in aligning managers' interests with those of the shareholders, corporate decisions will serve shareholders' interests, with little concern for justice. This model departs from the legal compliance one only insofar as the corporation explicitly takes stock of pressures from investors, consumers, civil society, NGOs or global agencies, and responds through reporting, labelling or communication. Firms self- or co-regulate *defensively*, integrating the demands of justice which are mediated by pressures

from third parties, either positively by turning pressures into a business case, or negatively, to avoid reputational damages. Thus understood, self-regulation draws on the rational capacity of the firm: social aims matter insofar as they represent a strategic risk or a business opportunity; no reasonable capacity gets involved.

As motivation for behaving justly lacks, the capabilities to do so are insufficiently developed. Epistemic limitations go along with motivational weakness. Firms shaped to self-regulate defensively tend to lack a complete and well-formed legislative capability. They lack *attention* and *epistemic efficiency* as they primarily focus on issues raised by third parties. One illustration is that of Mazda Europe who has appointed an ethics committee which handles "reports on unethical, illegal or unsafe activity in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime." Third parties (customers, suppliers, civil society, NGOs, etc.) are largely invited to contact the Mazda ethics committee to report incidents. Their crucial role in raising societal issues in relation to justice points out the lack of epistemic efficiency of this CG arrangement. However, a few individuals motivated by just aims might still set up expert committees emulating a better-functioning legislative capability. The firms that have adopted 'a defensive approach to social responsibility' as labelled by Matten and Moon (2008) draw on a number of arrangements that perform as functional equivalents of the legislative competency of the state: stakeholder or society's representation on the board of directors meant to show to their environment that they have espoused the CSR principles in fact bring in a legislative capability in the firm. These arrangements comprise various committees such as CSR or ethical committees. But this, as we will see next, does no translate into actual policies.

The executive capability of self-defensively organised firms is primarily shaped for reacting to pressures from third parties: seemingly just policies will be operationalised in reply to external pressures rather than out of concern for justice. This is indeed the function of several of the

mechanisms and governance structures for social responsibility identified above: codes of conduct, international standards, 'comply or explain' devices, labels, non-financial reporting, CSR units and more. These, however, fall short of fully-formed executive capability for justice. *Defensive self-regulation* lacks *reactivity* to justice concerns. The model displays some *readability* and *accountability*, as firms have an interest in letting third parties hear about their actions, through reporting and communication, but this also falls short of full accountability, as CEO and executives are unlikely to be dismissed for failure to achieve corporate social obligations. Only external pressures might achieve this result as in the case of gross, well-publicised business failures to meet social obligations. This again, in non-ideal circumstances, depends on the weight and organisation of those supporting justice within the corporation. Even in those defensively self-regulated firms that have an ethics committee effectively emulating a legislative capability, recommendations are unlikely to be operationalised as long as a majority of shareholders, clients and competitors do not support justice ideals. Thus, even a well-developed legislative capability may not result in a corresponding effective executive capability. In sum, under non-ideal circumstances, while reactivity and accountability (as transparency) form an increasing part of corporate strategy, this does not amount to a fully formed and developed executive capability. The issue here is primarily *motivational*.

Under ideal conditions by contrast, we may think that the *self-regulatory model* will come closer to a just corporation (*positive self-regulation*), as several of the limits of the *legal-compliance model* and *defensive self-regulation* get addressed. Motivation for justice forms no deep issues, as nearly all are assumed to support justice. The problem of the few unjust taking advantages of just firms (e.g. hostile takeovers) might be better addressed, as co-regulation involving industry players might be more effective than shareholder governance for controlling the possible unjust behaviour of competitors, or of investors, as co-regulation involves different actors of the same eco-system.

This model typically presents a more fully developed capacity for reasonableness, and subsequent legislative and executive capabilities. Co-regulation processes and global standards like those of the Global Reporting Initiative or the United Nations Global Compact can provide willing corporations with tools and procedures to attend social and environmental issues in their industry, and report on it. Under self-regulatory governance within a co-regulated environment, corporations may develop better *attention and epistemic efficiency* on the legislative side; they may also be *more reactive and accountable* on the executive side. Thus, if compliance is full or close to full, self-regulation and co-regulation represent a more relevant model than that of *legal compliance* (and associated shareholder governance) to allow corporations to meet their non-legal social obligations: its better developed capacity for reasonableness addresses some epistemic and coordination issues and it also better controls the behaviour of even scarce unjust actors. However, a look at the inventory of current practices set out above shows that these organisations are uncommon. This suggests that prevalent existing conditions are non-ideal, rather than ideal.

Constituting reasonable corporations: constitutive regulation and the reasonable corporation

We suggest that, under non-ideal circumstances, a *constitutive regulatory* model offers a more effective model of governance for reasonable corporations than both *legal-compliance* and *self-regulation* models: it is better insofar as it makes firms meet their non-legal obligations of justice more extensively. This model seeks to constitute a corporate capacity for reasonableness and motivates corporations to act on this capacity.

With respect to the problem of firm's *motivation*, this model forms a realistic compromise between *legal compliance* and *self-regulation*: it includes a mandatory component forcing particular governance structures upon firms, the operation of which adequately embeds a

capacity for reasonableness and associated legislative and executive capabilities. Legally mandated governance mechanisms constrain the corporation from 'the outside', for example through corporate law, with requirements on board structures (e.g. independent board members, greater diversity), the requirement for an independent ethics committee with voting or veto rights, stakeholder engagement and so on. CG aims at granting more power to those representing society's interests in various committees (ethics committee, remuneration committee) or better still in boards. These structures are legally required; it is therefore rational for firms to adopt them. Once these structures are in place, their operation bring reasonable considerations and constraints within strategic decision-making processes. Overall, these governance mechanisms make corporations effectively willing to meet their social obligations. This forms the motivational structure of the *constitutive regulatory model*: motivation is split between the pressure from mandatory external regulation and the working of internal governance, and is close in spirit to Orts' early proposed model reflexive model of environmental regulation (Orts 1995).

We should like to deflect one concern at this point, before we move to considering into more details the governance mechanisms of a reasonably constituted corporation. If we assume non-compliance in non-ideal circumstances, why should citizens be willing to mandate those changes in corporate law that they are not ready to implement voluntarily as managers, shareholders, or those in power in firms. Here, we rely on one further assumption: we assume that individuals are closer to supporting justice as citizens, for example as they vote, than in their various economic roles, especially as shareholders, investors or managers. This assumption makes our proposal of the *constitutive model* for SR more realistic – a 'realist utopia' – as Rawls has it, in terms of human motivation.

We now turn to the mechanisms required for firm reasonableness, and how they overcome the *epistemic* limitations of *legal compliance* and *self-regulation* under non-ideal circumstances,

first looking at the legislative capability. This is a limited sketch, as a fully-fledged model would require further empirical research on the impact of various arrangements for *epistemic efficiency* and accountability in firms (blinded for review).

As mentioned above, a fully formed *legislative capability* involves *attention* to questions of justice, an ability to deliberate efficiently and to elaborate norms by reference to public values. This requires attention mechanisms to instil the ability to identify, understand, and anticipate issues related to justice, which are possibly eclipsed or nascent. Such mechanisms may include staff and management training, the possibility for employees and managers alike to raise an issue of justice with a non-executive director for justice or with an ombudsman; formalised mechanisms for corporate engagement with civil society; the inclusion of independent board members experts on particular social and environmental issues; and the protection of whistle-blowers (Dozier and Micheli 1985). Some countries have already adopted a legal framework which ensures the protection of whistle-blowers, such as the USA who promulgated the The Whistleblower Protection Act in 1989, or such as the UK who provided protection for whistleblowers under the Public Interest Disclosure Act 1998.

The legislative capability also entails an *ability to deliberate* and establish its own rules of action. Deliberation mechanisms should be *efficient and draw on political values*. This may be achieved by some of the aforementioned mechanisms and others, e.g. independent board members, board members representing society or stakeholders, a stakeholder committee or an ethics committee. In France, for instance, the draft of Pacte Law provides for an amendment to Article 1833 of the Civil Code in order to strengthen the consideration of the voice of stakeholders within the board, and to assign the company a social purpose extended to social and environmental issues. One of the other Pacte Law's goals is to promote employee share ownership by making the procedures used by simplified joint-stock companies more flexible to supply their employees with shares, and by allowing employers to contribute unilaterally to

employee share ownership funds. As for the UK, English law has recently been marked by" (...) a major redesign of [company] decision-making structures to permit participation by the relevant stakeholder groups', such as employees" (Parkinson, 2003, p. 499; cited by Tchotourian et al. 2013), and has ensured the employee representation on the Board of Directors (Davies, 2003). In addition, English company law has required managers since 1985 (Article 312 amended in 2006 to become section 172 of the Companies Act 2006) to take into account the interest of employees.

The aforementioned mechanisms can provide corporate boards with relevant information instrumental to efficient deliberation as well as bring in public values in board deliberations. Ethical or stakeholders committees may be granted rights to veto strategic decisions on grounds of justice, or to propose measures required by justice, yet not necessarily rights to participate in those strategic decisions that are unrelated to, or underdetermined by, matters of justice. They may be granted a veto right on business strategies that are not compatible with the requirements of justice, yet not full voting rights on matters unrelated to justice. In fact, the legislative capability of employees requires on the one hand, its prior information, and on the other hand, the possibility for them to be represented in decision-making bodies. The dissemination of information to employees is the first step towards an active participation of the latter firm’s decisions. Considering the assumption that shareholders, managers and employees do not have access to the same information, this gap which is referred to as "information asymmetry" must then be reduced so that all these stakeholders have a complete vision of the firm (Tchotourian et al., 2010). For instance, within the European legal framework, the Directive 2002/14/EC of 23 March 2002 and the Directive 2003/72/EC of 22 July 2003 on employee involvement in the company European cooperative have considered the rights to information and communication consultation from which employees must benefit.

In addition, considerations of justice should also be introduced at the operational level to inform production and innovation processes. This may be part of management procedures and industrial design, achieved by reforming higher education in business and engineering. We agree with Luoma and Goodstein (1999: 554) that three constitutive requirements of board structure and composition are decisive in ensuring that society and/or stakeholder interests are integrated in corporate decision-making: 1) the presence of stakeholder directors on corporate boards as 'one of the most direct means through which firms can reflect stakeholder interests'; 2) the appointment of stakeholder directors to monitor or oversight board committees, 'such as the audit, compensation, executive, and nominating committees'; and 3) the adoption of a committee that comprises mainly stakeholders or those specialising in CSR.

A fully formed *executive capability* aims to operationalise the corporate self-constituted rules of action, shaped in part by public values. As mentioned above, a fully formed reasonable executive capability has to be reactive, accountable, readable and sustained by the integrity of those in charge. Common 'transparency' meets these requirements only insofar as it includes direct information disclosure, such as reporting or labelling, possibly facilitated by states or mediated by rating agencies or NGOs able to pass this information onto consumers (Dubbink et al. 2008). An *executive capability* for reasonableness would also entails the adoption of voluntary codes of conduct, and guidance principles for CSR (e.g. ISO norms, UN Global Compact, and such). Yet accountability could be reinforced by making CEOs and managers accountable on matters of justice, for example instance by linking systematically CEO pay to corporation social performance.

This type of governance combined with co-regulation may overcome some of the limits of the *self-regulatory model*. It suggests mechanisms to overcome the epistemic limitations of both the legal compliance model and the *self-regulatory model*. Most importantly, it tries to overcome the motivational limitation of the *self-regulatory model* in non-ideal circumstances

by bringing society's interests into corporate structures (possibly against the individual interests of shareholders or even employees), and by imposing this in all firms simultaneously, thereby diminishing the threat of being outrun by unreasonable competitors. *Constitutive regulation* can be thought as a supplement, rather than a replacement, for co-regulation.

Conclusion

This article has offered a normative conception of the corporation as a self-regulatory institution, as required by a complete theory of justice that would takes stock of the limits of the law. It has hinted to organisational designs for corporations to actually meet their extra-legal social obligations, attending to the distinction between ideal and non-ideal circumstances.

Under ideal circumstances, corporate motivation for justice is a not a major issue, as (nearly) all of those inside and outside the firms are assumed to be ready to act out of a sense of justice. The main challenge for corporate design is epistemic and lies in the efficiency of the mechanisms and procedures in place for firms to effectively play out the functional equivalent of the legislative and executive functions of the state. This includes, on the legislative side, the development of a corporate capacity for attention, and of a corporate capability of reasonable deliberation (dedicating time in board meetings to matters of justice, ensuring that deliberation appeals to public values rather than corporate aims, setting up ethical committees or engaging with local communities). This may also involve some effort in moving debate and deliberation towards legitimate political representation - legislative assemblies - whenever possible. The second change concerns corporation executive capability. While accountability and transparency have long been a central focus of the study of CSR mechanism in firms, reasonable corporations require structures reflecting a fuller understanding of accountability, involving a

stronger readability of corporate actions and policies, and increased accountability (for example, CEO accountability about matters of justice in front of shareholders and beyond). Some may argue that this is indeed what positive self-regulation achieves. We may agree and still observe this model however is not well disseminated, suggesting that full compliance is not realised.

While all of the above remains true in situations of non-compliance, the additional question of corporate motivation comes to the fore. Addressing this issue requires that states mandate a corporate capacity of reasonableness as an independent corporate function, rather than relying on the aggregation of the rationality and reasonableness of the individuals involved, as implicit in the *legal-compliance* or *defensive self-regulation* models. The point is to bring public aims and values in the corporation. Various legally mandated mechanisms can be considered, including the presence of board members that represent the interests of society on the board, or a supervisory board the specifically represents the interests of society, with a veto right. The organisational capacity for attention to justice may also have to be protected for example via the legal protection of whistle-blowers. While these mechanisms are mandated in law, and thereby adopted out of rational motives by firms, their actual functioning emulates reasonableness, thereby forming the legislative capacity of the firm. The executive capability as the operationalisation of the decisions of boards and various committees has to be further developed. Thus, assuming non-compliance, effective self-regulation is tied to the legal requirements of *constitutive regulation*, the aim of which is to constitute the legislative and executives capabilities involved in corporate reasonableness.

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[i] This vocabulary of corporations as reasonable agents does not preclude considering they are institutions. We may equally say that corporations as just institutions need to have internal structure that are just. In addition, the vocabulary of corporations as agents does not imply that corporations ought to have rights similar the rights of human beings.

Table 1: CG Models considering CSR: A typology of CG arrangements and actors representing societal interests

REGULATION & CORPORATE CAPACITIES		**CG MODELS CONSIDERING CSR**		
		Legal Compliance	**Self-Regulation (& Co-Regulation)**	**Constitutive Regulation**
		Hard Law: National Law International Law Human Rights	*Soft Law* (and influence of third parties): Businesses UN Global Compact Global Reporting Initiative (GRI) Ethical Trading Initiative (ETI) The European Alliance for CSR …	*Constituting Law* (national and international): Mandatory independent board members Mandatory board diversity Mandatory ombudsmen Flexible purpose corporation Benefit corporation Legal protection of whistleblowers
CORPORATE CAPACITIES	**RATIONALITY**		*Defensive CSR*	
	Strategic capability	CEO and Chairman Legal director Disclosure policies Comply or explain	CEO and chairman Board members Executive directors Codes of conduct Transparency policies	Legal director CSR director
	Operational capability	Legal departments Compliance policies Reporting Internal auditing	Standard or certification schemes Labelling schemes Reporting activities CSR departments Environmental, social and sustainable management systems	Legal departments CEO compensation policies (viz. social performance) Reporting and internal auditing activities
	REASONABLENESS		*Positive CSR*	
	Legislative capability	Individual shareholders CEO Chairman Directors as individuals Board level employee representation	Voluntary board diversity CSR values Voluntary CSR committees Voluntary ethical committees Voluntary stakeholder dialogue Voluntary external directors representing society's interests	Deliberation in diverse boards including independent board members/members representing society's interests Social purpose of flexible purpose corporation and benefit corporation Ombudsmen's involvement Protected whistle-blowing Say on pay policy Deliberation in ethical & CSR committees CEO duality (dismantling)
	Executive capability	No set procedures	In most firms: no set procedures In few firms: CEO duality (dismantling of) Systems of stakeholder relationship management	No set procedures