

Hello Platform Governance; But Never Ending Corporate Governance

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Abstract:

Revolutionary and beneficial as it may be, the ever-increasing platform innovation effectuates regulatory issues that constitute a focal concern of the literature on platform governance. This article discusses, for the first time, the instrumental role of corporate governance in underpinning platform governance. Specifically, a stakeholder perspective provides a catalyst for the chemical combination of platform governance and corporate governance. While the stakeholder theory is not without criticism, the characteristics of online platforms lend extra support to the theory in the platform context. The article identifies several major mechanisms for channeling platform governance through corporate governance, i.e. board representation in an information capacity; independent directors; and stakeholder committees. In contrast, an economic analysis suggests that board representation in a voting capacity is not appropriate for the purpose of platform governance.

As an “obiter dictum”, this article also challenges a position that corporate governance, which arose from traditional industrial capitalism, may impede platform innovation, which falls within the paradigm of the modern economy. It is demonstrated that corporate governance even in this traditional, shareholder-oriented formation provides an institutional framework that is conducive to entrepreneurship and innovation. Therefore, the new era of the platform economy highlights, rather than negates, the significance of corporate governance.

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Key words:

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1. Introduction

Recently, Airbnb, the largest home-sharing platform in the world, announced an initiative to establish a stakeholder committee on the board of directors.¹ The company recognizes its stakeholders as including not only investors and employees but also guests, hosts, and communities. In the same year, Facebook, the most high-profile social media platform, established a privacy committee on the board with an aim to “assist the Board with respect to privacy and data use matters”.² By contrast, Uber, the most well-known car-hiring platform, has been under spotlight for its “going wild” corporate governance and the resulting mischief caused to its investors, employees, Uber passengers, and other stakeholders.³

While these stories signify the association between corporate and platform governance in an era of platform economy, theoretical elucidation on this association is rather minimal.⁴ It was not until recently that the stillness was broken by Fenwick et al.’s article entitled *The End of ‘Corporate’ Governance: Hello ‘Platform’ Governance*.⁵ However, as the title suggests, the article casts a rather negative view on the relationship between the two governance types. It is

¹ ‘An Update on Our Work to Serve All Stakeholders’ (*Airbnb Newsroom*, 17 January 2020) <<https://news.airbnb.com/serving-all-stakeholders/>> accessed 10 May 2021.

² ‘Facebook - Leadership & Governance - Privacy Committee Charter’ <<https://investor.fb.com/leadership-and-governance/Privacy-Committee-Charter/default.aspx>> accessed 10 May 2021.

³ David F Larcker and Brian Tayan, ‘Governance Gone Wild: Epic Misbehavior at Uber Technologies’ [2017] Rock Center for Corporate Governance at Stanford University Closer Look Series: Topics, Issues and Controversies in Corporate Governance No. CGRP-70, Stanford University Graduate School of Business Research Paper; Forrester, ‘Uber’ s Uber Breach: A Stunning Failure In Corporate Governance And Culture’ (*Forbes*) <<https://www.forbes.com/sites/forrester/2017/12/05/ubers-uber-breach-a-stunning-failure-in-corporate-governance-and-culture/>> accessed 11 May 2021.

⁴ Although, a few articles that focus on certain online platforms touch the issue of corporate governance, see Lawrence J Trautman, ‘Governance of the Facebook Privacy Crisis’ (2019) 20 Pitt. J. Tech. L. & Pol’y 43; Larcker and Tayan (n 4).

⁵ Mark Fenwick, Joseph A McCahery and Erik PM Vermeulen, ‘The End of ‘Corporate’ Governance: Hello ‘Platform’ Governance’ (2019) 20 European Business Organization Law Review 171.

argued that the long-standing practice of corporate governance does not suit the context of platform innovation. In particular, the philosophy of shareholder primacy creates a corporate environment that motivates centralized authority, hierarchical structure, myopic consideration, and conservative strategies all at the price of long-term innovation.⁶ In this connection, the authors call for a new regulatory environment that would have greater capacity in entertaining platform strategies so that countries can reap the benefits of this wave of digital transformation.⁷

The Fenwick et al. article instigates two immediate questions. First, their vision of platform governance primarily refers to the policy frameworks that may help foster platform innovation, a topic that seems to fall within the ambit of industrial or economic policy. By contrast, the focal concern of platform governance literature is predominately associated with platform ills.⁸ Second, even accepting Fenwick et al.'s construction of platform governance, it would still be difficult to determine how an era of platform innovation would end the time for corporate governance. An apparent conundrum for Fenwick et al. is that almost all well-known platform businesses to date such as Amazon, Apple, Facebook, and Google are public corporations regulated by robust corporate governance rules that are imposed from both public authorities and capital markets.⁹

This article will focus on the relationship between corporate governance and the governance of platform ills. Presumably, the paucity of scholarly attention to this topic reflects an intuition that corporate governance mainly concerns internal governance within a corporation whereas platform governance usually focuses on the interaction between a platform firm and its external users. Section 4 will demonstrate that the line separating internal and external relationships for platform firms has become indistinct due to the characteristics of online platforms.

⁶ *ibid* 172 – 173, 181.

⁷ *ibid* 173, 197.

⁸ Robert Gorwa, 'What Is Platform Governance?' (2019) 22 *Information, Communication & Society* 854, 854 – 855.

⁹ 'Global 2000 - The World's Largest Public Companies 2020' (*Forbes*) <<https://www.forbes.com/global2000/>> accessed 8 May 2021; Annabelle Gawer and Nick Srnicek, 'Online Platforms: Economic and Societal Effects | Panel for the Future of Science and Technology (STOA) | European Parliament' 1 <[https://www.europarl.europa.eu/stoa/en/document/EPRS_STU\(2021\)656336](https://www.europarl.europa.eu/stoa/en/document/EPRS_STU(2021)656336)> accessed 13 May 2021.

Despite the focus on platform ills, this article will still devote some ink towards examining Fenwick et al.'s argument that traditional corporate governance may hinder platform innovation. This seeming digression can be justified on two grounds. First, it may be tempting to think that corporate governance will hinder platform innovation – as Fenwick et al. aver, corporate governance was born in the time of industrial capitalism whereas the platform economy represents the “new economy”.¹⁰ These authors insist that this temptation should be resisted. Second, the policy responses to platform ills may produce spill-over effects on platform innovation. Therefore, a holistic approach addressing both sides of the platform economy (i.e. ills and innovation) would be beneficial.

Section 2 provides an overview of online platforms and platform governance. It attempts to elucidate the two concepts in order to inform meaningful debates in this domain. Arguably, Fenwick et al.'s dismissal of corporate governance in platform governance partly results from a different interpretation of platform governance. Part 3 sets out an introduction of corporate governance followed with a critical reflection on the main theme of Fenwick et al. article. Part 4 explores the role of corporate governance in platform governance, drawing on the insights from the stakeholder theory. Section 5 concludes.

2. Online platform and platform governance

2.1 Online platform

While it is not an easy task to provide a satisfactory definition for an online platform,¹¹ gradually, scholars and policymakers have managed to achievement some consensus on the core elements of various online platforms.¹² Specifically, an online platform is a digital service that is usually driven by information and communication technologies (ICT). It

¹⁰ Fenwick, McCahery and Vermeulen (n 5) 174; Matthieu Montalban, Vincent Frigant and Bernard Jullien, ‘Platform Economy as a New Form of Capitalism: A Régulationist Research Programme’ (2019) 43 Cambridge Journal of Economics 805.

¹¹ For the debate of how to define online platform, see Gawer and Srnicek (n 9) 2 – 3; OECD, ‘An Introduction to Online Platforms and Their Role in the Digital Transformation’ 20 – 22 <https://read.oecd-ilibrary.org/science-and-technology/an-introduction-to-online-platforms-and-their-role-in-the-digital-transformation_53e5f593-en> accessed 13 May 2021; Gorwa (n 8) 856; A Gawer, ‘Online Platforms: Contrasting Perceptions of European Stakeholders. A Qualitative Analysis of the European Commission’s Public Consultation on the Regulatory Environment for Platforms’ (European Commission DG Communications Networks, Content & Technology, 2016) 8 – 11.

¹² Gawer and Srnicek (n 9) 2.

facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the Internet. These platforms also aggregate and use data from the interactions occurring on them.¹³ Several other characteristics of online platforms, while relatively less visible, may help to explain their sheer power and the attendant regulatory concerns.

(i) Network effects. A network effect exists when the value that a user can derive from using a product or service increases as more users utilize the product or service.¹⁴ For example, a large user base makes a ride-sharing platform (Uber, for example) which is a valuable marketplace for drivers. In turn, the large number of drivers working on the platform reduces riders' waiting time.¹⁵ Network effects dictate that online platforms benefit from their own growth.¹⁶

(ii) Economies of scale and scope. Economies of scale refer to an effect whereby the average cost per output unit falls as the output rises mostly because the upfront business investments and other fixed costs can be spread among a larger number of the units.¹⁷ While the effect applies to both online and offline businesses, online platforms have greater capability to spread their fixed costs as the use of digital technologies and pervasive connectivity make the marginal costs of admitting an additional user negligible.¹⁸ Online platforms can also reduce their average costs by operating simultaneously across adjacent markets. These economies of scope are due to the fact that different but complementary business lines can share user data, branding, supplier relationships, or technical expertise.¹⁹ Economies of both scale and scope combined with the network effect have contributed to the pervasive connectivity of online platforms yet may also lead to a winner-take-all or winner-take-most market.²⁰ For instance, to date,

¹³ *ibid*; OECD (n 11) 21; Alain Strowel and Wouter Vergote, 'Digital Platforms: To Regulate or Not to Regulate? Message to Regulators: Fix the Economics First, Then Focus on the Right Regulation' 7 - 8.

¹⁴ Gawer and Srnicek (n 9) 12.

¹⁵ *ibid* 13.

¹⁶ *ibid*.

¹⁷ John Sloman, *Economics* (Updated tenth edition, Pearson 2020) 162 - 163.

¹⁸ Gawer and Srnicek (n 9) 12.

¹⁹ *ibid*.

²⁰ *ibid* 25.

the market of digital advertising is dominated by Google and Facebook while social media is dominated by Facebook.²¹

(iii) Lock-in effect. For platforms that occupy dominant market positions, their users may be effectively locked in those platforms due to the limited scope of choices.²² This lock-in effect may also result from specialised investments toward a platform by a user.²³ As an illustration, users of a social media platform set up and personalize their account profiles; upload content including photos, videos, or posts; and develop a community of friends and followers.²⁴ These specialised investments make it expensive for the users to switch to other platforms. Accordingly, users are embedded in their current platforms.

2.2 Economic and social impacts of platform economy

2.2.1 Benefits brought by online platforms

Online platforms have transformed the economy and society significantly due to their key characteristics discussed in the above subsection.²⁵ The most common benefits provided by online platforms are well perceived in society such as broadened access to products and services, increased business opportunities for entrepreneurs, and greater simplicity for human interaction.²⁶ Recently, the influences of online platforms have been further accentuated amid the ongoing Covid-19 pandemic where digital means of shopping, communication, and entertainment have become almost life necessities.²⁷ This largely explains the outstanding performance of big platforms such as Alphabet-Google, Amazon, Apple, and Facebook in defiance of the global recession caused by the pandemic.²⁸

More profoundly, the platform economy fosters disruptive innovation which is a type of

²¹ *ibid.*

²² *ibid* 13.

²³ OECD (n 11) 24.

²⁴ *ibid.*

²⁵ Julie E Cohen, 'Law for the Platform Economy' (2017) 51 *UCDL Rev.* 133, 135 – 137.

²⁶ Gawer and Srnicek (n 9) 18 – 21; OECD (n 11) 28 – 32; 'How Do Online Platforms Shape Our Lives and Businesses? - Brochure | Shaping Europe' s Digital Future' <<https://digital-strategy.ec.europa.eu/en/library/how-do-online-platforms-shape-our-lives-and-businesses-brochure>> accessed 9 September 2021.

²⁷ For example, see Dain Evans, 'How Zoom Became so Popular during Social Distancing' (*CNBC*, 4 April 2020) <<https://www.cnbc.com/2020/04/03/how-zoom-rose-to-the-top-during-the-coronavirus-pandemic.html>> accessed 19 April 2020.

²⁸ Gawer and Srnicek (n 9) I.

innovation that drastically alters the existing markets.²⁹ Consider how disruptive Uber or Airbnb are for the relevant markets even though the two companies are not so much high-tech firms as, for example, Google and Apple.³⁰ Moreover, large platform firms invest enormous funds in research and development (R&D) activities;³¹ many social media platforms considerably facilitate the dissemination of knowledge and innovative ideas;³² many of them also stimulate third-party innovation by allowing open access to their programming interfaces, software development kits, and/or customer bases.³³

2.2.2 The side effects of online platforms

Notwithstanding the above benefits, online platforms act as ‘double-edged swords’: their complex economic and social impacts have increasingly encountered public scrutiny.³⁴ While many of the regulatory issues do not arise exclusively in the setting of online platforms, they are magnified through that setting. Several key areas in which online platforms prompt the greatest regulatory concerns can be identified in the platform literature. First, as the digital market tips due to the winner-take-all-or-most effects, “platform tycoons” may abuse their dominant position. Second, online platforms’ ability of amassing and monetizing users’ data may bring risk to users’ data privacy.³⁵ Moreover, data mining is generally driven by AI, the misuse of which can be blamed for many other platform ills such as unfair discrimination, automated price collusion, and suppression of free speech.³⁶ Third, many service-sharing platforms also incite labor protection issues.³⁷ On the one hand, they usually function as mere demand-and-supply matchers and thereby eschew their obligations towards service providers as conventional employers towards their employees.³⁸ On the other hand, by using ICT tools, certain platforms are able to impose no less harsh surveillance and control over the

²⁹ OECD (n 11) 24.

³⁰ *ibid.*

³¹ Gawer and Srnicek (n 9) 20 – 21.

³² OECD (n 11) 28.

³³ *ibid.* 28 – 29; Gawer and Srnicek (n 9) 20 – 21.

³⁴ Gawer and Srnicek (n 9) 23.

³⁵ OECD (n 11) 24.

³⁶ *ibid.* 52; see also Camilla Tabarrini, ‘Understanding the Big Mind. Does the GDPR Bridge the Human-Machine Intelligibility Gap?’ [2019] *Does the GDPR Bridge the Human-Machine Intelligibility Gap*.

³⁷ Gawer and Srnicek (n 10) 41.

³⁸ Marco Inglese, *Regulating the Collaborative Economy in the European Union Digital Single Market* (1st ed. 2019., Springer International Publishing 2019) 97.

on-demand workers than do conventional employers to their employees.³⁹ Last but not the least, certain platform ills have wider social impacts. Examples include, inter alia, disinformation and hate speech on social media platforms.⁴⁰

Due to limited space, the above discussion only contains a brief sketch of regulatory issues created by online platforms. However, the complexity of those issues and their sensitivity to specific platform contexts should not be disregarded. It is true that the significance and imminence of platform ills largely arise from the disruptive nature shared by various types of online platforms. Nevertheless, the substantive content of those regulatory issues is significantly shaped by specific business models and scopes of different platforms or types of platform, such as passenger safety in transportation departments, investor protection in financial industries, and hate speech in the social media sector. The lesson of this contextual analysis is that any attempt to launch a holistic overhaul to the existing legal framework for harnessing platform economies should take sufficient account of the complexity involved in the task.

2.3 Platform governance

2.3.1 Definition

As with the concept of online platforms, platform governance is also an ambiguous term partly because it has been approached from different subjects.⁴¹ As was mentioned in Section 1, Fenwick et al. construe platform governance as a regulatory framework that can foster platform successes.⁴² Originally, the term was predominated with management connotations primarily referring to the governance by online platforms – or, more precisely, platform firms – upon their users.⁴³ Examples include defining access to and exclusion from the platform, regulating the ways in which sellers can present their offers, establishing grading systems,

³⁹ Gawer and Srnicek (n 9) 48 – 50.

⁴⁰ OECD (n 11) 44 – 45.

⁴¹ See Brian R Cheffins, ‘The History of Corporate Governance’ in Douglas M Wright and others (eds), *The Oxford handbook of corporate governance*, vol 46 (OUP Oxford 2013); Dima Jamali, Asem M Safieddine and Myriam Rabbath, ‘Corporate Governance and Corporate Social Responsibility Synergies and Interrelationships’ (2008) 16 *Corporate Governance: An International Review* 443, 444 – 445.

⁴² Fenwick, McCahery and Vermeulen (n 5) 187.

⁴³ Gawer and Srnicek (n 9) 16.

imposing standards for delivery and return policies, etc..⁴⁴ Here, platform firms act as private governors or rule-makers.⁴⁵ Gradually, however, discussions about platform governance – at least from within legal and political domains – are more associated with the governance *of* platforms rather than *by* platforms.⁴⁶ The focus is to harness platform economies for the common benefit of human beings.⁴⁷ This shift of emphasis is associated with the increasing public dismay towards the side effects of platform economies that is manifested in a number of scandals related to the most well-known platform companies.⁴⁸

These authors also follow the approach of “governance *of* platform”, not in the least because the word governance intrinsically embraces moral and equitable connotations. For example, the Commission on Global Governance defines governance as “the sum of many ways individuals and institutions, public and private, manage their *common affairs* ... a continuing process through which conflicting or *diverse interests may be accommodated* and co-operative action taken”.⁴⁹ This equitable perspective is also consonant with the nature of legal and political scholarship. While different disciplines may be justified to define platform governance from their own perspective, for ease of reference, this article will refer to governance *by* platform firms as *platform management* and label the platform governance concerned in the Fenwick et al. article as *platform policy*.

2.3.2 Self- or public-regulation?

A basic dichotomy regarding the modes of platform governance can be identified in the platform literature: self-regulation and public regulation (or self-governance and public

⁴⁴ *ibid.*

⁴⁵ Michèle Finck, ‘Digital Co-Regulation: Designing a Supranational Legal Framework for the Platform Economy’ [2018] *European Law Review* 15.

⁴⁶ Gorwa (n 8) 854 – 855.

⁴⁷ see Nicolas Suzor, Tess Van Geelen and Sarah Myers West, ‘Evaluating the Legitimacy of Platform Governance: A Review of Research and a Shared Research Agenda’ (2018) 80 *International Communication Gazette* 385.

⁴⁸ Gorwa (n 8) 854.

⁴⁹ Barbara Holland-Cunz and Uta Ruppert, ‘Our Global Neighbourhood: The Report of the Commission on Global Governance’ in Barbara Holland-Cunz and Uta Ruppert (eds), *Frauenpolitische Chancen globaler Politik: Verhandlungserfahrungen im internationalen Kontext* (VS Verlag für Sozialwissenschaften 2002) 20 <https://doi.org/10.1007/978-3-663-10102-4_2> accessed 13 June 2021; see also Thomas G Weiss, ‘Governance, Good Governance and Global Governance: Conceptual and Actual Challenges’ (2000) 21 *Third world quarterly* 795, 795 – 796.

governance).⁵⁰ Self-governance relies on platform firms to voluntarily implement good governance principles in their platform management.⁵¹ For example, online marketplaces such as Amazon and Alibaba-Taobao discipline the sellers operating on their platform through the use of consumer ratings and review systems even without any governmental interference.⁵² In contrast, public regulation models resort to governmental intervention in solving platform ills.⁵³ For example, Germany adopted rules requiring platforms to eliminate or block fake news that are manifestly illegal, hate crimes, and certain other unlawful contents within 24 hours of receiving a complaint. The rules are supplemented with the threat of possible sanctions.⁵⁴

The literature of platform governance has identified neither self- nor public-regulation as an ideal governance model. On the one hand, the prevalence of platform ills demonstrates that platform firms do not always align their interests with that of platform users and the general public.⁵⁵ On the other hand, total public regulation may bring greater harms. Specifically, governmental processes are intrinsically subject to the problem of bureaucracy and lack of information.⁵⁶ The point made in Section 2.2.2 that specific business scopes and models shape the kaleidoscope of platform ills is also relevant: How can legislators and law enforcers understand these business details without incurring considerable or even formidable information costs? In addition, the disruptive nature also indicates the fast pace and deep unpredictability of platform evolution.⁵⁷ It follows that platform businesses may always be ahead of the law possibly by many steps. While, theoretically, governments can take an aggressive and preventive stance towards online platforms, there may be a price of stifling

⁵⁰ Christoph Busch, 'Self-Regulation and Regulatory Intermediation in the Platform Economy', *The Role of the EU in Transnational Legal Ordering* (Edward Elgar Publishing 2020); see Gorwa (n 8) 862 – 865; Hannah Bloch-Wehba, 'Global Platform Governance: Private Power in the Shadow of the State' (2019) 72 SMU L. Rev. 27; Finck (n 45).

⁵¹ Gorwa (n 8) 862 – 863.

⁵² see Susan M Mudambi and David Schuff, 'Research Note: What Makes a Helpful Online Review? A Study of Customer Reviews on Amazon. Com' [2010] MIS quarterly 185.

⁵³ Finck (n 45) 863 – 864.

⁵⁴ OECD (n 11) 40; see also Bloch-Wehba (n 50) 28.

⁵⁵ Inglese (n 38) 149; Finck (n 45) 13.

⁵⁶ Finck (n 45) 5.

⁵⁷ Alexandre de Streel and Pierre Larouche, 'The European Digital Markets Act: A Revolution Grounded on Traditions' [2021] *Journal of European Competition Law & Practice* 10; Filomena Chirico, 'Digital Markets Act: A Regulatory Perspective' [2021] *Journal of European Competition Law & Practice* 497.

platform innovation. For example, there have already been concerns that the recent policy entrepreneurship manifested in the European Commission's legislative reform may impede entrepreneurial innovation in digital industries.⁵⁸

2.3.3 Co-regulation

Given the deficiencies of self- and public-regulation, a middle ground known as co-regulation (or co-governance) has been favored by many scholars, policymakers, and industries. This governance model recognizes the “benefits to including a broader pool of stakeholders and decision makers in the articulation, execution and evolution of policy, law, norms development, oversight and regulation”.⁵⁹ As the European Commission recognized in a 2018 report on platform governance, co-regulation “has the advantage of guaranteeing a predictable legal framework while simultaneously giving sufficient flexibility to industry to shape and decide on their voluntary commitments, respecting the speed of innovation”.⁶⁰ Indeed, a recent legislative proposal issued by the commission – the Digital Service Act – has incorporated this governance approach.⁶¹ The detail in this regard will be elaborated on in Section 4.4.

3. Corporate governance: Is it an obstacle for platform innovation?

3.1 Corporate governance

The definition of corporate governance is also fluid.⁶² While the OCED broadly defined the term in 1999 as internal means by which corporations are operated and controlled, it is widely agreed that corporate governance has a distinctive focus on the relationships between a

⁵⁸ ‘EU Proposals to Regulate AI Are Only Going to Hinder Innovation | Financial Times’ <<https://www.ft.com/content/a5970b6c-e731-45a7-b75b-721e90e32e1c>> accessed 13 September 2021; ‘5 Challenges to the New EU Digital Rulebook – POLITICO’ <<https://www.politico.eu/article/5-challenges-to-the-new-eu-digital-rulebook/>> accessed 13 September 2021.

⁵⁹ Raymond H Brescia, ‘Regulating the Sharing Economy: New and Old Insights into an Oversight Regime for the Peer-to-Peer Economy’ (2016) 95 Neb. L. Rev. 87, 134; see also Finck (n 45) 15.

⁶⁰ EU Commission, ‘Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Promoting Fairness and Transparency for Business Users of Online Intermediation Services’ SWD(2018) 138 final 45 <<https://ec.europa.eu/digital-single-market/en/news/impact-assessment-proposal--promoting-fairness-transparency-online-platforms>>.

⁶¹ 2020/0361 (COD), p3, 35. see also Caroline CAUFFMAN and Catalina GOANTA, ‘A New Order: The Digital Services Act and Consumer Protection’ [2021] European Journal of Risk Regulation 1, 10.

⁶² See Cheffins (n 41); Jamali, Safieddine and Rabbath (n 41) 444 – 445.

company's management, its board, its shareholders, and other stakeholders.⁶³ Corporate governance results from the use of the corporate form of which the defining characteristics include limited liability and corporate personality.⁶⁴ Limited liability refers to a general rule that satisfaction of the claims of a company's creditors is confined to the assets of the company and cannot be asserted against the personal assets of the shareholders who are said to enjoy a limited liability.⁶⁵ Corporate personality denotes a company's legal capacity that is separated from its owners.⁶⁶ A natural corollary of limited liability and corporate personality is the separation of ownership and management. Specifically, a corporation can actually exercise its legal capacity only through delegated managers; and limited liability makes it feasible for shareholders to retreat from corporate businesses and diversify their holdings as their downside loss has been capped.⁶⁷

The separation of ownership and management discussed above gives rise to a typical principal-agency relationship with the shareholders being the principal and the managers the agent.⁶⁸ The central problem of this relationship is that the agent may pursue its own interests instead of being loyal to the principal. Accordingly, a core task of corporate governance is to hold the managers accountable to the owners' interests.⁶⁹ For instance, company laws in various jurisdictions generally mandate a certain level of shareholder control over fundamental corporate affairs such as the appointment of directors, mergers, and charter amendments.⁷⁰ That being stated, Fenwick et al.'s general assertion of shareholder primacy is, at best, an inaccurate description of the relationship between management and ownership since the degree of shareholder control varies from company to company.⁷¹ Even back in the 1930s, Berle and Means observed in the seminal book *The Modern Corporation and Private Property* that corporations at their time had evolved in such a way that managers tended to be

⁶³ OECD, 'OECD Principles of Corporate Governance' (OECD Publishing 1999) 5, 9.

⁶⁴ Eilis Ferran, *Principles of Corporate Finance Law*. (2nd edition / Eilis Ferran and Look Chan Ho., University Press 2014) 12; Paul Davies, *Introduction to Company Law* (Oxford University Press 2020) 6.

⁶⁵ Davies (n 64) 6 - 7.

⁶⁶ Reinier H Kraakman, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Third edition, University Press 2017) 5 - 8.

⁶⁷ *ibid* 5, 9.

⁶⁸ Davies (n 64) 10.

⁶⁹ Kraakman (n 66) 29 - 30, 49.

⁷⁰ *ibid* 72.

⁷¹ *ibid* 49 - 77.

their own master.⁷² For example, the traditional principle that shareholders had the right to remove directors at will had been increasingly restricted by the law and, consequently, “Directors are thus supreme during their time”.⁷³

Even in private companies that often feature higher levels of shareholder control, company laws still allow considerable autonomy for companies to design their own power structure via corporate constitutions.⁷⁴ Indeed, shareholder primacy (or shareholder supremacy) is mostly used as a target of criticism in the literature of the stakeholder theory which primarily concerns the balance between shareholder interests and the interests of non-shareholder constituencies.⁷⁵ The stakeholder theory will be elaborated on in Section 4.

3.2 Corporate governance and platform innovation

The major grounds for Fenwick et al. to predict the end of corporate governance in the era of platform economy is that shareholder primacy may lead to a hierarchical corporate structure that is unsuited for platform innovation. An immediate response to this argument is that modern corporate governance has already neutralized, at least partially, the shareholder primacy by incorporating a stakeholder perspective, as will be explained in Section 4. Therefore, abandoning corporate governance in its entirety for the good of platform innovation would amount to throwing the baby out with the bathwater. Going further, even leaving aside the stakeholder perspective and focusing on the traditional model of corporate governance, Fenwick et al.’s line of reasoning is still open to challenge. First, it is questionable to entirely discredit the role of hierarchies in platform innovation. In management literature, instead of dichotomizing authorities and empowerment, scholars endeavour to work out a balanced approach that obtains the best of both worlds.⁷⁶ In a recent article motivated by the disconnection between the conventional rhetoric regarding the

⁷² Adolf A. Berle (Adolf Augustus), *The Modern Corporation and Private Property* (Legal Classics Library 1993) 138 – 139.

⁷³ *ibid* 139.

⁷⁴ Kraakman (n 66) 50.

⁷⁵ Andrew Keay, ‘Stakeholder Theory in Corporate Law: Has It Got What It Takes’ (2010) 9 *Rich. J. Global L. & Bus.* 249, 249, 255, 264.

⁷⁶ Nicolai J Foss and Peter G Klein, ‘Why Managers Still Matter’ (2014) 56 *MIT Sloan Management Review* 73, 77.

inadequacies of hierarchy, on the one hand, and business reality, on the other hand, Sanner and Bunderson contend that hierarchies indeed assist teams of people to innovate much the same way as they help animals survive in the wild.⁷⁷ While this is not to downplay the advantages of a flattened management style in fostering entrepreneurship and innovation, embracing innovation does not necessarily entail the waiver of the benefits of hierarchies.

Secondly, even assuming hierarchies are detrimental to innovation; it is still unclear how traditional corporate governance which predominantly concerns the relationship between ownership and management would necessarily lead to a hierarchical structure that involves the distribution of decision-making authorities at every level of corporate management.⁷⁸ Given the separation of ownership and control, managers have a broad margin of freedom for deciding their business structures and management styles. Fenwick et al. claim that shareholders stand at the top of the hierarchy in which the centralized authorities are imposed top down.⁷⁹ This claim, as was explained in Section 2.3, contradicts the corporate reality for which ownership and control is separated and, indeed, at least in public corporations, primacy is frequently vested with the board and senior managers. It is true that corporate governance by all means aims to hold managers accountable to shareholders. Nevertheless, it is difficult to determine why shareholders seeking to maximize stock values would prefer a hierarchical management model if a flattened approach proves to be more productive. These arguments are not to deny that corporate governance may have an impact on corporate performance. Indeed, numerous empirical studies have been launched examining the relationship between shareholding concentration that presumably dictates the degree of ownership control and corporate innovation. Nevertheless, the studies only produce mixed results.⁸⁰ On the one hand, owners or managers become more risk averse as their shares in the company capital increase since concentrated ownership makes it more difficult for them to diversify their

⁷⁷ Bret Sanner and J Stuart Bunderson, 'The Truth about Hierarchy' (2018) 59 MIT Sloan Management Review 49, 50.

⁷⁸ Mark Hirschey, 'Organization Structure and Corporate Governance: A Survey', *Advances in Financial Economics* (Emerald Group Publishing Limited 2003) 67 - 81.

⁷⁹ Fenwick, McCahery and Vermeulen (n 5) 172, 174.

⁸⁰ Diego Asensio-López, Laura Cabeza-García and Nuria González-Álvarez, 'Corporate Governance and Innovation: A Theoretical Review' [2019] *European Journal of Management and Business Economics* 267 - 269.

risks.⁸¹ On the other hand, a small number of large shareholders may prefer to invest in R&D activities in order to boost the company's long-term value.⁸²

Last but not least, corporate governance is designed to support the corporate form which provides a favourable organizational framework for innovation and capital investment.⁸³ Specifically, limited liability encourages risk taking since the possible loss has been capped.⁸⁴ The separation of ownership and control reduces transaction costs for businesses as, otherwise, it would be prohibitively expensive for investors to conduct day-to-day business collectively. Centralized management also breeds a market for professional managers that are a key element for innovation in a society.⁸⁵ All of these conditions further make it feasible for investors to diversify their holdings rather than being locked in any single invested corporation.⁸⁶ Overall, corporations have played a pivotal role in business and technological innovation. To be sure, certain types of non-profit organizations seem to feature higher levels of openness and inclusiveness that appear conducive to platform design. For example, cooperatives are organized on a principle of one vote per person as opposed to one vote per share, and their proceeds are distributed fairly equally among members.⁸⁷ Nevertheless, such business forms have only played an insignificant role, if any, in the ongoing platform revolution as well as in the past waves of business or technological innovation.⁸⁸ As mentioned in the introduction section, the most well-known platform businesses such as Apple, Amazon, Alibaba, Facebook, and Google are all public corporations.

4. Platform governance via corporate governance

4.1 Overview

While the traditional mode of corporate governance provides an institutional foundation that

⁸¹ *ibid* 267 – 268.

⁸² *ibid* 268.

⁸³ Ferran (n 64) 16 – 18.

⁸⁴ *ibid* 17.

⁸⁵ Davies (n 64) 53.

⁸⁶ Ferran (n 64) 18.

⁸⁷ Tara J Radin, 'Stakeholder Theory and the Law', *Proceedings of the International Association for Business and Society* (1999) 117; Oliver Williamson, 'Corporate Governance' (1984) 93 *The Yale law journal* 1197, 1226 – 1227.

⁸⁸ Oliver Williamson (n 87) 1226 – 1227.

is conducive or at least neutral to platform innovation, as was argued in Section 3, it becomes insufficient to contain the side effects of the platform economy. In economic terms, such platform ills driven by profit maximization constitute a typical scenario of negative externality that can be defined as the costs caused by a producer that are not financially borne by it. In the sense that social costs are not fully borne by the producers, negative externality represents a type of market failure that may cause welfare loss to the society.⁸⁹ While it is true that negative externality may occur to any form of business organization, corporations present a particular challenge in this regard. This is not just because they play a dominant role in economic life but also due to the consideration that shareholder primacy combined with limited liability may encourage managers to take aggressive business strategies at the cost of non-shareholder constituencies.⁹⁰ That being said, modern corporate governance has already evolved in a manner that not only the interests of shareholders but also those of non-shareholding constituencies are required to be taken into account in corporate decisions.

The modern form of the stakeholder theory can be traced to Professor Edward Freeman and his seminal book: *Stakeholder Management: A Stakeholder Approach* (1984).⁹¹ The core statement of the theory is that corporations should work towards the creation of value for all stakeholders instead of narrowly focusing on the interests of shareholders.⁹² Freeman defines a stakeholder as “any group or individual who can affect or is affected by the achievement of the organization’s objectives”.⁹³ A corporation’s customers, suppliers, financiers, creditors, shareholders, employees, and local communities as well as local and national governments are the most typical stakeholders of the company.⁹⁴ In this context, shareholders are simply one group of stakeholders and not superior to other groups. Therefore, the task of the manager is to advance and balance different and usually competing interests of various constituencies.⁹⁵

⁸⁹ Sloman (n 17) 396 – 397.

⁹⁰ Ferran (n 64) 16.

⁹¹ R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge University Press 2010); Keay (n 76) 253 – 254; André O Laplume, Karan Sonpar and Reginald A Litz, ‘Stakeholder Theory: Reviewing a Theory That Moves Us’ (2008) 34 *Journal of management* 1152, 1156 – 1157.

⁹² Keay (n 75) 256.

⁹³ Laplume, Sonpar and Litz (n 91) 1160.

⁹⁴ Keay (n 75) 257.

⁹⁵ *ibid.*

The stakeholder theory is not without criticisms that can be imprecisely categorized into two groups. The first group challenges the desirability of the theory while the second doubts its plausibility. These debates will be assessed below in light of platform governance.

4.2 Desirability of the stakeholder perspective

The argument that stakeholders have a legitimate claim on a corporation has garnered extensive criticisms for its lack of moral foundation.⁹⁶ A particular challenge is that, unlike shareholders, non-shareholding constituencies are adequately protected by contracts and/or statutory provisions. For example, employees are protected by employment contract law and labor law while customers may resort to sales contracts and the production liability law. Therefore, the stakeholder perspective is, at best, redundant, or it will otherwise accord non-shareholder constituencies some preferential treatment to the effect of “having a second bite of the apple”.⁹⁷ This criticism echoes a similar potential challenge to this article: What is the merit of corporate governance in fostering platform governance considering that platform ills can be addressed through contractual/legal frameworks?

The general assertion about the adequacy of contracts and law in protecting stakeholder interests is contended by many stakeholder writers.⁹⁸ It is acknowledged that certain constituencies such as powerful creditors like banks may be able to negotiate customized contracts with corporate debtors to protect the former parties’ interests.⁹⁹ However, most constituencies may not be able to do so for a number of reasons including, inter alia, high transaction costs, the lack of bargaining power, or information asymmetry.¹⁰⁰ In terms of legal protection, stakeholder advocates contend that regulatory rules are usually too general and hence can only provide limited protection to stakeholders.¹⁰¹ It may also be costly for latter to enforce the contracts or law considering, for example, the need to inform regulatory

⁹⁶ *ibid* 270; Antonio Argandoña, ‘The Stakeholder Theory and the Common Good’ (1998) 17 *Journal of business ethics* 1093, 1098; Robert A Phillips, ‘Stakeholder Theory and a Principle of Fairness’ [1997] *Business Ethics Quarterly* 51, 51 – 52.

⁹⁷ *Keay* (n 75) 292.

⁹⁸ *ibid* 292 – 293.

⁹⁹ *ibid*.

¹⁰⁰ *ibid* 293.

¹⁰¹ *ibid*.

authorities or take civil actions by themselves.¹⁰²

The above defense for the stakeholder theory may derive extra strengths from the platform context. First and foremost, the market dominance occupied by many online platforms makes it implausible if not impossible for platform users to bargain for sufficient contractual protection for themselves. Specifically, many platforms impose their transaction terms including data privacy clauses to users on a take-it-or-leave-it basis.¹⁰³ Moreover, the use of new technologies exacerbates the information disadvantages on the part of platform users and other relevant stakeholder groups vis-à-vis platform firms. This increases the difficulties for users to assess, for example, how their data are aggregated and monetized as well as whether they have been discriminated against by opaque platform algorithms.¹⁰⁴ It might be suggested that the above contractual incompleteness regarding the relationship between a platform firm and its users can be remedied by statutory rules. Nevertheless, as was discussed in Section 2.3.2, the regulatory frameworks for online platforms can be as incomplete as contracts. This is not to deny the value of public governance upon online platforms. Rather, the question goes back to the previous discussion as to the optimal matrix of self-, public-, and co-governance in harnessing platform economies.¹⁰⁵

4.3 Plausibility of the stakeholder perspective

In addition to desirability, the issue of plausibility has also been at the core of the debate about the stakeholder theory. The stakeholder perspective requires managers to balance the interests of all constituencies. However, critiques of the theory contend that balancing and integrating multiple relationships and multiple objectives would be an impossible task for managers.¹⁰⁶ It is even unclear what balance means for stakeholder-oriented management. For instance, how should a director decide when several constituencies have legitimate claims on the corporation, but it is impossible to favor them all equally?¹⁰⁷

¹⁰² *ibid.*

¹⁰³ Gawer and Srnicek (n 9) 28.

¹⁰⁴ OECD (n 11) 33; For a critical assessment of algorithm-driven businesses, see Safiya Umoja Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (University Press 2018).

¹⁰⁵ See above Section 2.2.

¹⁰⁶ Keay (n 75) 277.

¹⁰⁷ *ibid* 279.

In this connection, many propose channeling the stakeholder perspective through corporate governance mechanisms in order to at least provide some “procedural justice”.¹⁰⁸ This concept of procedural justice has particular relevance in the debates of platform governance modes: the sheer diversity and fast mutation of online platforms highlights the advantages of a flexible governance model as apposed to a top-down-command approach typified in the public regulation.

Platform governance via corporate governance has already been implemented by several well-known platform companies. For example, on 17 January 2020, Airbnb, the world’s largest home-sharing platform, declared an update on its work to serve all stakeholders including guests, hosts, communities, shareholders, and employees.¹⁰⁹ In particular, the company established an official stakeholder committee on its board of directors. While the declaration appears to make equal references to all the major stakeholder groups, it is widely believed that this corporate governance reform placed the greatest emphasis on guest safety.¹¹⁰ This was partly driven by the public scrutiny over the companies’ safety policies amid the media coverage about numerous shootings at Airbnb rentals including the one causing five deaths in Orinda, California, in October 2019.¹¹¹ In the same year, Facebook, the most high-profile social media platform in the world, established a privacy committee on its board with an intention to “assist the Board with respect to privacy and data use matters”.¹¹² Unlike Uber’s stakeholder committee, which purportedly encompasses all of the major constituencies, the privacy committee on Facebook’s board is purely focused on platform governance issues. Yet, similar to Airbnb, Facebook’s reform was also spurred by the public backlash; this time, against the immoral intrusion of users’ data privacy by Facebook and its related entities. In particular, it has been reported that users’ data were exploited by certain Facebook-related

¹⁰⁸ *ibid* 292; R Edward Freeman, ‘The Politics of Stakeholder Theory: Some Future Directions’ [1994] *Business ethics quarterly* 409, 416; R Edward Freeman and William M Evan, ‘Corporate Governance: A Stakeholder Interpretation’ (1990) 19 *Journal of behavioral economics* 337, 353.

¹⁰⁹ ‘An Update on Our Work to Serve All Stakeholders’ (n 1).

¹¹⁰ *ibid*.

¹¹¹ Olivia Carville, ‘Airbnb Revamps Corporate Governance, Tying Bonuses to Safety - Bloomberg’ <<https://www.bloomberg.com/news/articles/2020-01-17/airbnb-revamps-corporate-governance-tying-bonuses-to-safety>> accessed 10 May 2021.

¹¹² ‘Facebook - Leadership & Governance - Privacy Committee Charter’ (n 2).

entities for the purpose of interfering with the US presidential election in 2016.¹¹³

4.4 How does platform governance via corporate governance fit the co-regulation model?

On the surface, the corporate governance innovations launched by both Airbnb and Facebook seem to only represent a self-regulation model and therefore lack sustainability. Nevertheless, these innovations may be solidified and enhanced through co-regulation mechanisms. Specifically, governments may impose an obligation on large platform companies to establish board committees of platform governance. In this way, platform governance via corporate governance becomes a “regulated self-regulation”.¹¹⁴ The proposed digital service Act envisages another two major mechanisms of co-regulation. First, public authorities may engage platform companies and civil societies to enact various codes of conducts for different types of platform. Specifically, Article 35 stipulates that, when significant systemic risk emerges, the commission “may invite the very large online platforms concerned, other very large online platforms, other online platforms and other providers of intermediary services, as appropriate, as well as civil society organizations and other interested parties, to participate in the drawing up of codes of conduct”.¹¹⁵ The second mechanism of co-regulation involves some type of information disclosure by the platform companies, albeit to the limited scope of audiences.¹¹⁶ Specifically, very large online platforms must inform the European Commission and the European Board for Digital Services about the most prominent and recurrent systemic risks involved in platform businesses including, for example, dissemination of illegal content, discrimination in respect of the access to platform services, etc..¹¹⁷ These very large platforms must also subject their compliance with the obligations set out in the Act to independent audits at their own expense.¹¹⁸

¹¹³ Rosalie Chan, ‘The Cambridge Analytica Whistleblower Explains How the Firm Used Facebook Data to Sway Elections’ (*Business Insider*) <<https://www.businessinsider.com/cambridge-analytica-whistleblower-christopher-wylie-facebook-data-2019-10>> accessed 29 May 2021.

¹¹⁴ This term is cited from Finck (n 45) 16.

¹¹⁵ Art. 35, 2020/0361 (COD), see also CAUFFMAN and GOANTA (n 61) 11.

¹¹⁶ *ibid* 13.

¹¹⁷ Arts 26(1), 27 (2), 2020/0361(COD). see also *ibid*.

¹¹⁸ Art. 28(1), 2020/0361(COD). see also *ibid*.

In a more revolutionary manner, the boards of large platform companies may introduce the voice of their users and thereby democratize their governance. Indeed, company laws of numerous countries have already mandated board representation for labor. For example, Gold and Waddington reveal that legislation in 18 European Union Member States and Norway mandate board-level employee representation.¹¹⁹ As an illustration, Germany established a co-determination system in which companies with between 500 and 2,000 employees must allocate one-third of the seats on the supervisory board of directors to the representatives elected by employees.¹²⁰ For companies with over 2,000 employees, labor representatives occupy half of the seats of the supervisory board.¹²¹ The major argument for this corporate governance arrangement is that employees have developed firm-specific investments in a company such as skills that are specific to its business.¹²² According to the theory of transaction cost economics, transaction-specific investments are the investments that, once committed, cannot be transferred to alternative uses without a loss in value.¹²³ This lock-in effect upon employees makes the latter more vulnerable to the exploitation by their employers. Therefore, employees' interests deserve extra safeguards in addition to the protection provided by employment contracts and labor law.¹²⁴

Based on the above analysis, it seems that at least certain types of platform users are also entitled to have their representatives sitting on the boards of those platform firms. As indicated in Section 2.1, there have already been discussions as to whether service providers registered on certain platforms are employed by those platforms or self-employed. For example, Uber drivers are effectively locked up in Uber due to the market dominance of the platform, and their job performances are closely monitored by the platform using data-driven surveillance technologies.¹²⁵ It is sensible that those drivers deserve protection as much as if

¹¹⁹ Michael Gold and Jeremy Waddington, 'Introduction: Board-Level Employee Representation in Europe: State of Play' (2019) 25 *European Journal of Industrial Relations* 205, 205.

¹²⁰ §§ 1 and 4 *Drittelbeteiligungsgesetz*.

¹²¹ § § 1 and 7 *Mitbestimmungsgesetz*. See also Kraakman (n 66) 90; Eric Engle and Tetiana Danyliuk, 'Emulating the German Two-Tier Board and Worker Participation in US Law: A Stakeholder Theory of the Firm' (2014) 45 *Golden Gate UL Rev.* 69, 110 - 111.

¹²² Kraakman (n 66) 89.

¹²³ Thrainn Eggertsson, *Economic Behavior and Institutions: Principles of Neoinstitutional Economics* (Cambridge University Press 1990) 171=172.

¹²⁴ Kraakman (n 66) 89.

¹²⁵ Gawer and Srnicek (n 9) 39, 48 - 49; Larcker and Tayan (n 3) 2 - 3.

not more than drivers under a standard employment contract in a non-platform context.

It should be noted that board representation does not necessarily appeal to all types of platform users. As an illustration, it would be difficult to determine how consumers who are purchasing from Amazon or rentals transacting on Airbnb are sufficiently incentivized to engage in the corporate governance of the two companies. Accordingly, Airbnb's platform governance committee without direct user participation seems to be a practical direction for such online marketplaces. Matching appropriate corporate governance mechanisms to different types of platforms will certainly not be an easy task and definitely falls beyond the scope of this article. Nevertheless, a general pattern can be inferred in this regard: the intensity of platform governance through corporate governance – whether it is a mere platform-governance committee on the board or such committees seated with user representatives – should be positively correlated with the degree of the users being locked in a platform.

5. Conclusion

The ever-increasing platform innovations support economic and technological development but, at the same time, incite regulatory concerns. This article discussed the role of corporate governance both as a policy tool in fostering platform economies and as a policy response to various types of platform ills. In terms of platform innovation, the authors challenged the position that the traditional model of corporate governance may lead to a hierarchical management style that is ill-suited to platform innovations. The association between corporate governance regime and management style is not straightforward as both have different focuses. Rather, corporate governance provides a legal buttress for corporate institutions that has played a far-reaching role in encouraging entrepreneurship and risk-taking. Regarding the regulatory concerns of online platforms, this article demonstrates that modern corporate governance incorporating a stakeholder perspective provides an effective means to at least mitigate those concerns. While the stakeholder theory is not without criticisms of which a thorough examination is beyond the scope of this article, these authors demonstrated that the defining characteristics of online platforms provide a strong case for channeling platform

governance through corporate governance. This method accords with the co-regulation model which is widely regarded as a favorable mode of platform governance. Moreover, corporate governance as a way of procedural justice provides a rather versatile tool for solving the variety of platform ills. The article discussed two mechanisms of platform governance via corporate governance: platform governance committees on the boards of directors and user participation through board representation. The specific “governance matrix” will be determined by the degree of users being locked in an online platform.