

OpenAI – A Case of Corporate Governance Deviance

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Abstract

Artificial Intelligence (AI) has emerged as a transformative force across industries, yet concerns regarding its ethical implications and long-term societal impact remain prevalent. OpenAI, a leading AI research entity, sought to balance profit motives with public welfare by adopting a unique corporate governance model—a hybrid structure that combines elements of a non-profit and a capped-profit entity. However, recent events, including the abrupt removal and subsequent reinstatement of CEO Sam Altman, have exposed significant flaws in this governance framework. This paper critically examines OpenAI's corporate governance model against conventional U.S. corporate governance norms and the principles outlined in the Indian Companies Act, 2013. It evaluates the structural motivations behind OpenAI's governance experiment, identifies the shortcomings that led to internal instability, and discusses potential remedies. Key criticisms include the unchecked power of independent directors, the failure to adequately safeguard investor interests, and the inability to prevent informal corporate power from influencing decision-making. Furthermore, the study explores the feasibility of replicating OpenAI's governance model within the Indian legal landscape, analysing its compatibility with Section 8 companies and fiduciary obligations under Indian corporate law. By applying a pragmatist paradigm and leveraging qualitative analysis, this paper argues that OpenAI's governance structure, while innovative, ultimately failed to insulate the organization from external pressures or ensure AI safety. The findings suggest that sustainable AI governance requires a more balanced approach—one that integrates investor accountability, external scrutiny, and legally enforceable commitments to ethical AI development.

Introduction

Artificial intelligence (AI), is an important development of the 21st century that has found its place in many downstream sectors, enabling innovations in rapidly growing number of products, services and processes. AI is infiltrating all sectors including that using digital technology like Amazon (e.g. in supply chain solutions - Kiva robot automation in retail logistics), Netflix (e.g. in recommendation systems that target individual customers) and Google (e.g. in autonomous cars) to those manufacturing oil and gas, and number of other

ustries with heavy machinery promising to benefit their operations.¹ However these companies do not shy away from accepting that AI could be extremely destructive in nature. A recent survey of chief executive officers who attended a Yale Summit reveals that 42% of them believe that AI has the potential to destroy humanity within the next decade.² Thus, it is not uncommon when companies dealing with AI are being mindful of its potential dangers while designing their governance structure. OpenAI is one such example where they sought to balance its profit motive with an ethical imperative – making Artificial Intelligence safe.

OpenAI is now making headlines for their non-conventional corporate governance structure that stirred up chaos following a conflict between the board of directors and their CEO, investors and other employees. Corporate governance is concerned with the direction and control of corporate bodies and lays the framework that ensures accountability.³ This paper attempts to critique the corporate governance model that was used in Open AI, in the backdrop of corporate governance models of US that outline the requirements which should be maintained by any corporate. The primary objective of the paper is to analyze the corporate structure of the OpenAI and critique the novel corporate governance system devised by them by identifying the flaws that lead to the current predicament while discussing the possible recourses. To achieve the primary objective the paper addresses the following- the structuring of the OpenAI as a business entity, the motive for devising the structure in this manner and visible distinction between the Open AI model of corporate governance and the traditional corporate governance system in US. In the end the paper, attempts to juxtapose the Open AI model of corporate governance in the Indian scenario, and try to draw a comparative analysis between the same. To achieve the objectives a pragmatist paradigm is applied. Qualitative information about OpenAI was gathered for the study and is critically analyzed from the framework of existing corporate governance practices in US and Indian Companies Act, 2013 in India. Through the analysis the paper argues that the concept of a non-profit board of independent directors with absolute control and no fiduciary obligations towards the investors does not satisfy the objective of insulating the company from investor pressure or ensuring public good and AI safety.

¹ Zeljko Tekic, Ilija Cosic and Branko Katalinic, 'Manufacturing and the Rise of Artificial Intelligence: Innovation Challenges' (30th DAAAM International Symposium, Vienna) pp.0192-0196 <10.2507/30th.daaam.proceedings.025> accessed on 22 December 2023

² Matt Egan, 'Exclusive: 42% of CEOs say AI could destroy humanity in five to ten years' CNN (New York, June 14 2023)

³ Vasudha Joshi, 'Corporate Governance: Placing the issues', *Corporate governance Indian Scenario* (Foundation Books Pvt. Ltd, 2004)

The Structure of OpenAI

OpenAI is an AI research and deployment company whose mission was to ensure that artificial general intelligence benefits all humanity. The company whose headquarters is in San Francisco was founded in as non-profit 2015. The founders of the OpenAI acknowledged the fact that AI though could benefit the society, it has also the potential to damage the society if built or used incorrectly, Hence they came to the conclusion that it was important to have a leading research institution which can prioritize a good outcome for all over its own self-interest. This should be the possible reason why OpenAI was founded as a non-profit under 501(c) (3)⁴. t whose aim was to build value for everyone rather than the shareholders. OpenAI's research director was Ilya Sutskever, one of the world experts in machine learning and CTO was Greg Brockman, formerly the CTO of Stripe. Other founding members included world-class research engineers and scientists like Trevor Blackwell, Vicki Cheung, Andrej Karpathy, Durk Kingma, John Schulman, Pamela Vagata, and Wojciech Zaremba. Pieter Abbeel, Yoshua Bengio, Alan Kay, Sergey Levine, and Vishal Sikka are advisors to the group. OpenAI's co-chairs are Sam Altman and Elon Musk. Sam, Greg, Elon, Reid Hoffman, Jessica Livingston, Peter Thiel, Amazon Web Services (AWS), Infosys, and YC Research donated to support OpenAI. The group collectively pledged \$1bn towards OpenAI's goal of building artificial general intelligence, which would outperform humans on most intellectual tasks.⁵

OpenAI was originally focused on developing AI and machine learning tools for video games and other recreational purposes. But on 11th December 2015, it released its first AI offering, which was an open source toolkit for developing reinforcement learning (RL) algorithms called OpenAI Gym. Over the next two years, OpenAI shifted its focus on more general AI development and AI research.⁶

After a few years OpenAI realised that in order to attain its goal, it needed to invest billions of dollars in upcoming years into large scale cloud computing, attracting and retaining talented people and building AI supercomputers. So in 2019 it created a for-profit subsidiary. The idea was to increase the ability to raise capital while still serving their mission and no pre-existing legal structure served them the right balance they wanted. This led to the creation of OpenAI LP as a hybrid of a for-profit and non-profit-which were called a "capped-profit" company. The motive behind OpenAI LP was that investors and employees can get a capped return if they succeed at their mission, which allows them to raise investment capital and attract employees with start-up-like equity. But any returns beyond that amount will be owned by the original OpenAI Non-

⁴ Section 501(c) (3) of U.S. Internal Revenue Code (IRC)

⁵ Greg Brockman and Ilya Sutskever, 'Introducing OpenAI' (OpenAI, 11 December 2015) < <https://openai.com/blog/introducing-openai> > Accessed on 21 December 2023

⁶ George Lawton, 'What is generative AI? Everything you need to know'

(*TechTarget*) < <https://www.techtarget.com/searchenterpriseai/definition/OpenAI> > Accesed on 21 December 2023

profit entity. OpenAI LP's primary fiduciary obligation is to advance the aims of the OpenAI Charter, and the company is controlled by OpenAI Non-profit's board. All investors and employees sign agreements that OpenAI LP's obligation to the Charter always comes first, even at the expense of some or all of their financial stake. Only a minority of board members were allowed to hold financial stakes in the partnership at one time. Furthermore, only board members without such stakes can vote on decisions where the interests of limited partners and OpenAI Non-profit's mission may conflict—including any decisions about making pay-outs to investors and employees.⁷

Shortly after announcing the OpenAI capped profit structure in 2019, they entered into a strategic partnership with Microsoft.⁸ Microsoft's \$10 billion investment is capped at 75% of the profits after which an ownership structure — that places Microsoft with a 49% stake in the subsidiary of the non-profit parent — will take over. It must be noted that a lot of this capital infusion is not entirely cash but split into additional tranches of Azure (Microsoft's compute platform for cloud services) credits to host OpenAI services like ChatGPT. Despite the 49% stake, Microsoft does not have any board seats or special governance rights. Investors are typically distributed two kinds of rights, i.e., governance and investment protection rights. Governance rights concern board representation, quorum rights and information rights. Investment protections are predicated on pre-emptive rights, participation in future fundraising and exit preferences for certain investors. As far as public knowledge is concerned, Microsoft does not hold any of these key rights in the OpenAI for-profit subsidiary. OpenAI remains an entirely independent company governed by the OpenAI Non-profit. Microsoft is a non-voting board observer and has no control. From the beginning, they accepted the capped equity offer and their request to leave AGI technologies and governance for the Non-profit and the rest of humanity.⁹

A critique on the OpenAI governance model

Historically from 1850-1970, the American corporate governance system has been characterized by organization control perspective, since then there has been a shift towards capital market control perspective.

⁷ Greg Brockman and Ilya Sutskever, 'OpenAI LP' (OpenAI, 11 March 2019) < <https://openai.com/blog/openai-lp> > Accessed on 21 December 2023

⁸ Greg Brockman, 'Microsoft invests in and partners with OpenAI to support us building beneficial AGI' (OpenAI, 22 July 2019) < <https://openai.com/blog/microsoft-invests-in-and-partners-with-openai> > Accessed on 21 December 2023

⁹ 'OpenAI and Microsoft extend partnership' (OpenAI, 23 January 2023) < <https://openai.com/blog/openai-and-microsoft-extend-partnership> > Accessed on 21 December 2023

In this system it was the, shareholders as providers of the risk capital should have a fine control over resource allocation decision.¹⁰

The novel governance structure was designed for OpenAI to ensure that OpenAI could resist the pressure from the investors who might prefer a quick profit now than the safety of the Artificial General Intelligence and the general public good. But the existing notions of the usefulness of the system was toppled over when on November 17 2023, the board of directors fired co-founder and CEO Sam Altman on the grounds that “he was consistently candid with the board.” Investors protested, but the board stood by its decision. On November 20, Microsoft one of the investors of OpenAI announced that it had hired Altman and Greg Brockman another co-founder to continue their work on AI development within Microsoft. Following which hundreds of OpenAI employees threatened to join Microsoft as well. On November 22, less than a week after his ousting, Sam Altman was back as CEO of OpenAI and all but one directors of OpenAI resigned.

The major criticisms of the structure are as follows:

1. The notion that traditional corporate governance structure cannot be relied to protect social good is flawed.

The particular model of the corporate governance structure employed by OpenAI is very different from the traditional Shareholder model. The Company’s mission and principles advanced in the Charter takes precedence over any obligation to generate a profit. The main intention of such a system was to isolate corporate governance from the pressure of profit maximisation and to constrain the power of the CEO. If the company chooses safety over profits, investors and executives can protest but they cannot compel the board to make a difference. Unlike in a conventional corporation, investors cannot hire or fire the board members, and neither the investors nor the CEO can control the board.¹¹

This novel governance structure can be compared to the idea of stakeholder governance. In the 2019, Business Roundtable, a prominent association of CEO’s of leading companies issued a statement in which many of its members pledged to deliver value not only to shareholder’s but also to employees, customers and society at large. Similar stakeholder governance manifestos by the World Economic Forum insist on the need for corporations to consider social goals alongside profit maximization. However, it is also important to note that both the Business Roundtable and other vocal supporters of stakeholder governance have argued

¹⁰ Joshi (n 3)

¹¹ Roberto Tallarita, ‘AI is testing the limits of Corporate Governance’(2023) Harvard Business Review

that there are no significant tradeoffs between profit maximization and social purpose.¹² There are successful startups who have maintained a balance between the profit maximization and social purpose even within the traditional structure. So if a company wants to incorporate social purpose and stakeholder welfare, it can rely on the traditional corporate governance but it must constrain the power of both investors and executives.

2. In the current OpenAI model of corporate governance directors of the non-profit board are given unchecked power which might turn hazardous.

The OpenAI board was answerable only to itself and its subjective interpretation of the non-profit's mission, leading to the chaos and failed coup against Altman. This is to say not an improvement of corporate governance. It's a hollowing out of it. The creators of the OpenAI model were reportedly worried about the effects of unrestrained AI development and how it might play out under the classic model of start-up growth. But leaving billions of dollars of investors at the hands of a board who refuses to take in their interests or clearly hold any obligations towards them is also dangerous. Planners must set up mechanisms through which will allow outside scrutiny of the board of directors, with incentives for socially-oriented decision-making, and hold them under some forms of accountability.

3. The novelty of the OpenAI model of corporate governance may hinder the success of it.

Another problem is that a novel governance model like the one they adopted is inherently less predictable. If Ai safety was the goal, adopting a unique corporate structure that is far less well understood constitutes a major gamble, imperilling the existence of a momentous stat-up like OpenAI.¹³

4. The OpenAI model of corporate governance failed to consider the informal corporate power that exists in the hands of the investors..

Microsoft, one of the investors of the OpenAI because of the specific nature of the governance system did not have the power to fire the board or alter their decisions. But what the system failed to consider was that they could rehire Altman and hundreds of other employees. In a sector like AI, the real asset is the knowledge and the talent of the employees working in their company. Thus by rehiring them Microsoft could essentially buy OpenAI without paying a price to the company's shareholders. The legal entity

¹² ibid

¹³ Noam Wasserman, 'OpenAI's Failed Experiment in Governance'(2023) Harvard Business Review

OpenAI was constrained by its governance structure, but the knowledge developed by the company could be acquired and redeployed.¹⁴

The main intention of the founder while devising such a corporate governance structure was to free the company from prioritizing financial gain. But in the end they eventually capitulated to profit maximizing pressure. Some economists have argued that, according to a phenomenon termed “amoral drift” in an unrestricted market for corporate control, a profit driven buyer can easily hijack the social mission of a firm.¹⁵ Such a corporate takeover can be equated to what had happened in OpenAI. Though the charter and the company have made the investors aware of their commitment towards their public good, the investors were able to make them succumb to their demands. A possible solution may be by making contractual obligations to effectively stop employees including Altman from working in a for-profit organization.

Investors are an important part of the company. Without the investments, the growth of the company is impossible. In this scenario, AI companies with more effective mechanisms to remain committed to AI safety, even at the expense of investors returns might struggle to get funding. Essentially, investors will favour investor friendly companies over socially oriented company and with the current instability it will be even more difficult to convince them

5. Independent nature of the directors does not necessarily ensure that social responsibilities are prioritised.

The directors of the OpenAI non-profit board are independent directors. The intention behind appointing independent directors who are free from the influence of CEOs and pressure of investors will not automatically result in socially desirable decisions. Directors who cannot be removed by the investors may not take decisions under their pressure, but that alone does not ensure that they will chose to abide by their social responsibilities. They can pursue their own interests, or to follow their personal convictions which might be harmful to the other stakeholders. Hence we need mechanisms that encourage directors to pursue the social goal and take them into account.¹⁶

¹⁴ ‘OpenAI and Microsoft extend partnership’(OpenAI, 23 January 2023) < <https://openai.com/blog/openai-and-microsoft-extend-partnership>> Accessed on 21 December 2023

¹⁵ Oliver Hart and Luigi Zingales, ‘Companies Should Maximize Shareholder Welfare Not Market Value’(2017) *Journal of Law, Finance, and Accounting*, pp. 247-274 < https://scholar.harvard.edu/files/hart/files/108.00000022-hart-vol2no2-jlfa-0022_002.pdf> Accessed on 22 December 2023

¹⁶ Tallarita (n 10)

In the Indian scenario

The Indian equivalent of 501(c) (3) under which the non-profit parent of OpenAI was formed is Section 8 of the Companies Act, 2013. A charitable framework similar to 501(c) (3) exists under Section 8, and it requires compliance with other provisions of the Act. A Section 8 Company is a type of corporation established to promote non-profit activities, such as education, social welfare, environment preservation, arts, sports, charity, and more.¹⁷ In the case of *Government E-Marketplace v. Unilex Consultants*¹⁸ a Section 8 company was structured as a special purpose vehicle for a government contract's execution. They are supposed to maintain books of accounts file returns with the Registrar of Companies (ROCs) and comply with the GST and Income-tax Act as well. Similarly for any changes to the charter documents like the Articles of Association and Memorandum of Association takes place with the consent of government through the Registrar of Companies. As in *Sanjeev Mohan Ahluwalia v. Union of India*¹⁹ where an EGM of a Section 8 company had to approve amendments to the MoA and the AoA which would then be uploaded for approval from the Ministry of Corporate Affairs. Section 8 companies mandates at least 2 directors on the board if the section 8 entity intends to operate as a private limited company and if they are functioning as a private limited company, the number of members is capped at 200 by the Ministry of Corporate Affairs (MCA). It also states that the profits of Section 8 entities will not be available to its members in any form. They are similar to other generic companies in so far as their transactions and rights in organisational documents are concerned as explained in *Siddharth Sahib Singh v. Apex Council of DDCA*.²⁰ The only difference is the public purpose of a Section 8 company, which is based on missionaries like progressing science, education etc.

As in the case of OpenAI, a Section 8 company can invest in a for profit subsidiary in India. *CIT v. Ahmedabad Urban Development Authority*²¹, mentions that a Section 8 company may not possess the primary purpose of being a for-profit entity. At the same time, there is seemingly no specific restriction for Section 8 companies to invest in 'for profit' companies.

Another important feature of the OpenAI model was its non-profit board with independent directors with each director required to perform their fiduciary duties in furtherance of its mission—safe AGI that is broadly beneficial. The concept of independent directors is not alien to Indian law. Section 149(6) talks

¹⁷ 'FAQs on Section 8 Companies (The Companies Act, 2013 Series)', (The Institute of companies Secretaries in India, 2016)

<https://www.icsi.edu/media/webmodules/publications/FAQs_on_Section_8_Companies.pdf>

¹⁸ 2020 SCC OnLine Del 681

¹⁹ 2019 SCC OnLine Del 12134

²⁰ 2023 SCC OnLine Del 3967

²¹ (2023) 4 SCC 561

about independent directors. In India, Independent directors gained popularity in the late 1980s and early 1990s as a solution to corporate frauds. In India, independent directors must be appointed to the board of directors of a listed company pursuant to Regulation 17 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. With the 2013 amendments to the Companies Act, the concept of independent directors was incorporated into the statute. The requirements imposed by the Companies Act, 2013 appear to be significantly stricter than those contained in the listing agreement. The major role of independent directors is to guarantee that the firm's assets are utilised in the best interests of the company while also balancing the interests of all stakeholders. A Director's General Duties should be consistent with the company's articles of association.²² Directors have a fiduciary relationship with shareholders as their trustees. As such, directors owe the company fiduciary duties. Section 166 talks about the duties of the directors. Here the OpenAI structure will require the directors to act in furtherance of the mission, of the company. Indian courts have held the directors accountable in events they have slacked in the proper management of the corporation's affairs. *Srikanta Dutta Narasimharaja Wodiyar v. Enforcement Officer, Mysore*²³ is one such case in which companies committed violations of the Employees' State Provident Funds and Miscellaneous Provisions Act, 1952 under Sections 2, 14, 14 (IA), and 14A. The issue was whether the company's director was liable for the company's failure to make contributions. While comparing the role of the independent directors in India and US, we realise that the institution and the role is much more evolved in US than in India. Though the regulatory system for the independent directors have similarities between the two countries, India has a specific requirement of qualifying an online examination to be appointed.²⁴

The Way Forward

In the light of the recent events, the company has claimed to take steps in strengthening their governance by building a qualified diverse Board of exceptional individuals whose collective experience represents the breadth of OpenAI's mission – from technology to safety to policy. To further stabilize the organisation, they are planning on convening an independent committee of the Board to oversee a review of the recent events.²⁵

²² Naman Gupta, 'Comparative Study on Provisions Governing Independent Directors between India and US' (2022) 4 Indian JL & Legal Rsch 1

²³ 1993 AIR 1656

²⁴ Gupta (n 21)

²⁵ Bret Taylor, 'Sam Altman returns as CEO, OpenAI has a new initial board' (OpenAI, 29 November 2023) <<https://openai.com/blog/sam-altman-returns-as-ceo-openai-has-a-new-initial-board>>

It is important that the directors even the ones appointed as a part of non-profit board to have a fiduciary duty to shareholders, and must balance the financial interest of the shareholder's with the interests of those affected by company conduct and its public benefit purpose. It will also help to keep a check on rogue actions of director's like initiating the removal of the CEO without hearing the concerns of shareholders. The director's power to uphold the company's mission should be balanced by failsafe provisions that allow changes to the board and its decisions if sufficiently large majority of the stockholder's agrees. In this way, the investor's unlike the OpenAI predicament will have recourse than the shareholder's and the employees threatening to quit the company. But at the same time there should be some assurance from the side of investor's to uphold their commitment towards the company's mission. Profit motive is a powerful force and it will persuade the managers and the investors from prioritizing safety over profit unless we find ways to make AI safety itself profitable. An alignment between the safety and profit might solve this dilemma.

Designing the company's governance structure is a delicate process that should contemplate the different incentives and motivations of board members and to ensure that these reflected the interests of the investors and the company's mission. It is essential to acknowledge the interplay between the formal corporate power and the informal power in the hands of different shareholders (which includes the risk of the investor's walking away or the employees quitting in mass). It is also necessary to craft mechanisms to resolve potential conflicts in case the board's vision and the shareholder's interest comes into conflict. Such mechanisms are essential to develop a governance structure that balances the public mission and its commercial success since both of them are necessary to ensure the ultimate success of the enterprise.

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