

Unfinished Work in UK Company Law Reforms- A Normative and European Perspective to Addressing the Gaping Holes in Directors' Duties

Roger M Barker* and Iris H-Y Chiu**

Abstract and Introduction

In the face of scandals in the corporate sector, such as the collapse of BHS in 2016 and Carillion in 2018, UK policy-makers are responsive in introducing reforms to company law. Indeed the Business, Energy and Industrial Strategy Department (BEIS) consulted on whether core aspects of company law such as directors' duties ought to be reformed.¹ The responsiveness of policy-makers and adjustments made to company law however obscure a deeper underlying issue, which is the resistance of reform to more fundamental aspects, i.e. the private and shareholder-centred paradigms of company law which arguably underlie the problems and malaises that reform is attempting to address. We critically examine the limitations of recent reforms, viz the introduction of the directors' section 172 statement² and the expectations articulated of directors' behaviour in relation to subsidiaries in distress.³ We suggest that recent corporate malaises reflect more fundamental gaping holes in UK company law, which can beneficially be addressed by reaching into normative thinking, some of which resonates with European developments, in bringing about an economically successful but 'fair' corporate economy.⁴

Section 1 discusses the context and pattern of company law reform in the UK over the last 20 years. Policy-makers from different political parties have consistently been responsive to revelations of corporate malaises and introduced company law reforms to address problems. Reforms included codified directors' duties and clearer shareholder rights and enforcement,⁵ as well as a corporate governance code and shareholder stewardship code that have been the subject of emulation.⁶ However, adjustments in company law are firmly founded upon the private and shareholder-centred paradigms of company law and corporate governance. These foundations are starting to show cracks under new pressures revealed in more recent corporate malaises. Section 2 argues that recent events such as the collapse of BHS, Carillion, the Inquiry into poor employment practices in SportsDirect, and revelations of corruption at Rolls Royce, aggressive tax avoidance at Google, Starbucks and Amazon, reflect problems

* Managing Director, Barker & Associates Ltd.

**Professor of Corporate Law and Financial Regulation, University College London Faculty of Laws. We thank Professor Steef Bartman for very helpful comments and suggestions for this article. All errors and omissions are ours.

¹ BEIS, *Corporate Governance Reform: The Government Response to the Green Paper Consultation* (Aug 2017) at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/640631/corporate-governance-reform-government-response.pdf; BEIS, *Consultation on Insolvency and Corporate Governance: Government Response* (Aug 2018) at

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG - Government response doc - 24 Aug clean version with Minister s photo and signature AC.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version_with_Minister_s_photo_and_signature_AC.pdf).

² S414CZA, Companies Act 2006, amended by The Companies (Miscellaneous Reporting) Regulations 2018.

³ BEIS, *Consultation on Insolvency and Corporate Governance* (2018) above.

⁴ P10, European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross border conversions, mergers and divisions (2018) at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0241&from=EN>.

⁵ S170-177, Companies Act 2006, s260-263 on the shareholders' derivative actions. See critique that clarity on the discharge of duties and the scope of shareholder enforcement remains lacking, see Parker Hood, 'Directors' Duties Under the Companies Act 2006: Clarity or Confusion?' (2013) 13 *Journal of Corporate Law Studies* 1.

⁶ Klaus J Hopt, 'Comparative Corporate Governance: The State of the Art and International Regulation' (2011) 59 *American Journal of Comparative Law* 1; Carsten Gerner-Buerle, 'Diffusion of Regulatory Innovations: The Case of Corporate Governance Codes' (2017) 13 *Journal of Institutional Economics* 271.

that stem from the private and shareholder-centred foundations in company law and corporate governance. Policy-makers have chosen to deal with specific problems via regulation, such as in anti-abuse tax legislation and the prohibition of modern slavery in work and supply chains,⁷ but the achievements in regulatory reform are yet early and mixed.⁸ Recent company law reforms have also been introduced, dealing with the sales of subsidiaries in distress,⁹ as well as companies' stakeholder relations and responsibility profiles.¹⁰ Although it remains a positive trend that UK policy-makers are responsive and willing to reach into the heart of company law, the reforms are limited in nature for remaining within the same foundational paradigms. Section 3 then argues that there is a need for normative rethinking of the limitations of the private and shareholder-centred paradigms underlying UK company law and corporate governance, taking into account of relevant insights from Europe. We sketch the contours for an alternative proposal in directors' duties as a 'UK' solution that will position companies for the modern complexities and challenges they face. Section 4 concludes.

1. Corporate Malaises and Responsiveness in Company Law Reform

Policy-makers from different political parties in the UK have consistently been responsive to revelations of corporate malaises and have introduced company law reforms to address problems. This consistent pattern can be charted since the collapse of the Polly Peck empire and BCCI in the early 1990s. Changes were made to either company law or best practices in corporate governance which have been to an extent legalised as part of capital markets regulation.¹¹

The Table below illustrates key event triggers for company law or corporate governance reforms in the UK. This table illustrates developments up to 2008, regarded as a key date with the onset of the global financial crisis that brought profound changes to law and policy in subsequent years.

Trigger event/Year	Reform
Fall of Polly Peck group, BCCI, 1991- revelations of internal fraud and obscuring the quality of financial reporting to the markets.	Cadbury Code of Corporate Governance 1992 ¹² called for better corporate governance in order to generate financial reporting of greater integrity. Key measures included minimum composition of independent directors and greater shareholder accountability.

⁷ The Finance Act 2013; Modern Slavery Act 2015.

⁸ Iris H-Y Chiu, 'An Institutional Theory of Corporate Regulation' (2018) Current Legal Problems, forthcoming, also ECGI Working Paper 2018, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3122029; unabridged version to be published by Northwestern Journal of International Law and Business, 2018.

⁹ BEIS *Consultation*, above.

¹⁰ The s172 disclosure statement, s414CZA, Companies Act 2006, amended by The Companies (Miscellaneous Reporting) Regulations 2018. Mandatory disclosure of companies' wider environmental, human rights, and anti-corruption footprints is required under EU legislation, the Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, transposed in the UK as s414CA, Companies Act 2006.

¹¹ Listed companies in the UK are required to comply with the Corporate Governance Code or else explain any deviations, Listing Rules, FCA Handbook, LR9.8.6.

¹² Adrian Cadbury, *Report of the Committee on the Financial Aspects of Corporate Governance* (Dec 1992).

<p>Excessive executive remuneration especially in privatised utilities companies, 1990s- 1995</p>	<p>Greenbury Report on Corporate Governance¹³ called for greater shareholder scrutiny of executive pay. This later resulted in reform for a shareholder advisory vote in the Directors Remuneration Report Regulations 2002.</p>
<p>Company Law Review which began in 1999, after the successful election of a Labour government in 1997 that ended two decades of Conservative rule.</p>	<p>A new Companies Act 2006 containing key changes such as codification of directors' duties, to reflect a long-termist approach towards success, but also clarifying and empowering shareholders' rights, especially in accountability through the introduction of an Operating and Financial Review.¹⁴</p> <p>The OFR was however quickly dropped¹⁵ in favour of a directors' business review. S417 contained essentially the same content but appeared to be less demanding than a fully-fledged OFR. Further, the introduction of s172 required directors to take into account stakeholders', the community's and the environment's interests, seen as 'enlightened' and charting a 'third way' towards a responsible but capitalist economy.</p>
<p>Turnbull Review on Internal Control,¹⁶ inspired by the US Enron scandal in 2001 and the Italian Parmalat scandal in 2003. These scandals involved internal fraud and misbehaviour that were obscured in public reporting. Although there was no UK company scandal, global lessons had an impact upon policy-makers.</p>	<p>Corporate Governance Code amendments¹⁷ to reflect the importance of instituting sound internal controls at companies and the Board's responsibility to ensure institution and the review of such systems.</p>

In the years leading up to the global financial crisis, corporate malaises such as the lack of integrity in financial reporting, or corporate excesses such as high executive pay, have consistently been seen as issues that could be addressed within the 'private' and shareholder-centred paradigm of the company. The company as a private commercial organisation has long been recognised since the 1844 Joint Stock Companies Act, and is a reflection of the English conception of the commercial freedoms enjoyed by the economic man.¹⁸ The private nature of the company has also found theoretical backing in the 'contractarian' theory of the

¹³ Richard Greenbury, *Report: Directors' Remuneration* (17 Jul 1995).

¹⁴ Paras 3.1-3.3, DTI, *Company Law Reform White Paper* (2005) at <http://webarchive.nationalarchives.gov.uk/20121101191917/http://www.bis.gov.uk/files/file13958.pdf>.

¹⁵ N Rowbottom & M Schroeder, 'The Rise and Fall of the UK Operating and Financial Review' (2014) 27 *Accounting, Auditing and Accountability Journal* 655-685.

¹⁶ FRC, *Review of the Turnbull Guidance on Internal Control* (2005) at <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Turnbull-review-evidence-paper.pdf>.

¹⁷ <https://www.frc.org.uk/getattachment/fe1ba51a-578d-4467-a00c-f287825aced9/Revised-Turnbull-Guidance-October-2005.pdf>.

¹⁸ Adam Smith, *Wealth of Nations I-III* (Penguin Classics Rep 1982).

firm, which sees a firm as a private organisation set up by constituents that wish to install an organisational structure to efficiently house their repeated contractual transactions with each other.¹⁹ The rise of the ‘agency’ theory from the 1970s²⁰ then sharpened the private organisational governance in companies around shareholders. The agency theory perspective regards company management as ‘agents’ of capital providers for the company. This theory in particular favours equity capital providers as they are committed in an open-ended manner and hence most vulnerable to the risks of misuse of capital by management.²¹ The UK has long upheld the primacy of the ‘internal governance’ of the corporation, relying largely on shareholders’ monitoring and participatory powers to address problems.²² Thus, the confluence of tradition and theory consolidates the ‘private’ and shareholder-centred paradigm of the company. In this paradigm, corporate malaises should be addressed within the corporate fabric, ie by strengthening the organisational governance within the company to gate-keep such malaises, such as by shareholders’ scrutiny and intervention, instead of resorting to external forms of regulation or intervention. The pattern of reforms in company law and corporate governance in the UK has very much been shaped by its domestic embrace of the tenets of ‘privateness’ and ‘shareholder-centredness’ discussed above.

The global financial crisis 2007-9 however introduced a turning point for policy approaches, as the severity of the crisis and magnitude of problems revealed in the nearly-failed banking corporations in the UK demanded a more robust approach, and questions arose as to what shareholders could have done. The crisis provided an opportunity for inflection and besides re-regulating the financial sector, the corporate sector was subject to reforms that were not necessarily domestically originated and had public interest roots. Post-crisis reforms still drew from approaches that continued to rely on the private and shareholder-centred foundations in company law and corporate governance. However, the forces that drove reform became more varied in terms of origin and ideology.²³ The Table below illustrates key reforms and their character.

Post-GFC Reforms focused on shaping corporate behaviour	Nature and Type of Reform
Reform of financial corporate governance and organisational control, led by the Basel Committee, ²⁴ EU legislation ²⁵ and the UK’s	The regulatory approaches function as an extended form of prudential regulation.

¹⁹ Ronald Coase, ‘The Nature of the Firm’ (1937) 4(16) *Economica* 386–405.

²⁰ Michael C Jensen and William H Meckling, ‘Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure’ (1976) 3 *Journal of Financial Economics* 305.

²¹ Investors are characterised as supplying capital in an incomplete contract, hence they are regarded as ‘residual claimants’ to corporate property if the company indeed goes insolvent. See Armen Alchian and Harold Demsetz, ‘Production, Information Costs and Economic Organisation’ (1972) 62 *The American Economic Rev* 777. See also Oliver Williamson, ‘Corporate Governance’ (1984) 93 *Yale Law Journal* 1197. Agency economists see shareholder primacy as the cure to the problem of separation of ownership from control, see Frank H Easterbrook and Daniel R Fischel, ‘The Corporate Contract’ in *The Economic Structure of Corporate Law* (Cambridge Mass: Harvard University Press 1991).

²² *Foss v Harbottle* (1843) 67 ER 189.

²³ Iris H-Y Chiu, ‘An Institutional Theory of Corporate Regulation’ (2018) above.

²⁴ Basel Committee, *Guidelines: Corporate Governance Principles for Banks* (2015); *The Internal Audit Function* (2012).

²⁵ Capital Requirements Directive 2013, 2013/36/EU; European Banking Authority, *Final Guidelines on Internal Governance* (2017) at

<https://www.eba.europa.eu/documents/10180/1972987/Final+Guidelines+on+Internal+Governance+%28EBA-GL-2017-11%29.pdf>.

<p>Walker Review.²⁶ Regulatory standards are seen as necessary for financial corporation corporate governance and internal control as these failings have an adverse impact on public interest.</p>	<p>Board responsibilities²⁷ and composition²⁸ are refined in relation to risk control, internal control organisation has been prescribed to an extent,²⁹ financial sector remuneration is subject to regulatory control³⁰ and individuals especially senior persons in the UK are subject to personal responsibilities and liabilities.³¹</p> <p>The Walker Review also paved the way for the introduction of a UK Stewardship Code which saw more effective shareholder engagement as a necessary check on corporate boards generally.³²</p>
<p>Long-running implementation of Bribery Act in the UK³³ in 2010 after ratifying OECD Convention in 1999. The Act, though subject to intractable debates, was passed, representing greater demands for compliance from the corporate sector, to address long-running problems.</p>	<p>Extended responsibility for corporations to <i>prevent</i> bribery. Corporations are required to put in place appropriate procedures and systems, ie ‘new governance’ approach in regulatory design.³⁴</p>
<p>Introduction of more robust anti-tax avoidance norms³⁵ during period of austerity in the UK</p>	<p>Public interest-oriented regulatory norm³⁶ expanded to combat a long-running problem of aggressive tax avoidance by corporations and wealthy individuals. This is consistent with a global turn of favour against aggressive tax avoidance with the US and EU introducing regimes to combat tax secrecy.³⁷</p>

²⁶ David Walker, A Review of Corporate Governance in Banks and Financial Institutions (Nov 2009).

²⁷ Art 88, Capital Requirements Directive 2013, 2013/36/EU.

²⁸ Above.

²⁹ European Banking Authority, *Final Guidelines on Internal Governance* (2017) at <https://www.eba.europa.eu/documents/10180/1972987/Final+Guidelines+on+Internal+Governance+%28EBA-GL-2017-11%29.pdf>, also Iris H-Y Chiu, *Regulating (from) the Inside: The Legal Framework for Internal Control in Banks and Financial Institutions* (Oxford: Hart 2015).

³⁰ Art 90, Capital Requirements Directive 2013; Material Risk-takers Regulations 2015.

³¹ S59 (6) for certified persons and s59ZA for senior managers, Financial Services and Markets Act 2000 as amended by the Financial Services (Banking Reform) Act 2013. PRA and FCA, *Strengthening Accountability in Banking and Insurance* (Feb 2016) at <https://www.fca.org.uk/news/ps16-05-accountability-implementation-and-regulatory-references>.

³² UK Stewardship Code, 2012, amended 2016.

³³ Bribery Act 2010.

³⁴ ‘New governance’ methodologies are based on multi-stakeholder governance to change corporate behaviour. The corporation would be subject to regulatory principles that incorporate more procedural flexibility, and work with a variety of ‘governance’ actors including regulators, markets and stakeholders in securing compliance, Christine Parker, *The Open Corporation* (Cambridge: Cambridge University Press 2002).

³⁵ Finance Act 2013 introducing an anti-abuse provision.

³⁶ See also EU Anti-Tax Avoidance Directive yet to come into force in the UK.

³⁷ Iris H-Y Chiu, ‘From Multilateral to Unilateral Lines of Attack: The Sustainability of Offshore Tax Havens and Financial Centres in the International Legal Order’ (2016) 31 Connecticut Journal of International Law 177.

	Followed by a ‘new governance’ approach to require corporations to <i>prevent</i> tax evasion by instituting adequate systems and procedures. ³⁸
Marked policy interest in improving companies’ stakeholder relations and social responsibility profile	EU legislation on non-financial disclosures in annual corporate reporting, ³⁹ and the UK’s introduction of the directors’ statement to explain how directors’ discharge their duties under s172 to take into account of stakeholders in order to ‘promote the success of the company in the long term’. ⁴⁰ These reforms are more ‘company law’ in nature as disclosure is intended to stimulate shareholders’ responses.
Policy intervention into how companies manage their supply chains	Reforms are of a mixed nature. In relation to modern slavery and human trafficking, although criminal enforcement powers are increased, companies’ responsibilities lie in public disclosure and conducting due diligence. ⁴¹ This approach is more akin to ‘new governance’, allowing companies to ultimately determine the implementation of their due diligence and supplier policies. In relation to importation of minerals from conflict-ridden zones such as the Democratic Republic of Congo, EU legislation requires importers to make annual reports and third-party verification that importers have conducted appropriate due diligence to certify the sources of their minerals. ⁴²
Policy interest in encouraging ‘sustainable finance’	Proposals have been made at the EU level to encourage financing of long-term, sustainable and socially useful projects, ⁴³ these include giving incentives and introducing legal duties for fund managers and insurance companies, but also include proposals to improve corporate disclosure in sustainability and managing climate change, so that companies may shift towards more

³⁸ Criminal Finances Act 2017.

³⁹ Art 19a, EU Non-financial Disclosure Directive 2014/95/EU.

⁴⁰ S414CZA, Companies Act 2006.

⁴¹ S54, Modern Slavery Act 2015.

⁴² EU Conflict Minerals Regulation (EU) 2017/821 which will come into force on 1 Jan 2021.

⁴³ EU High Level Expert Group on Sustainable Finance (HLEG), *Financing a Sustainable European Economy* (2018) at https://ec.europa.eu/info/sites/info/files/180131-sustainable-finance-final-report_en.pdf.

The most significant inroad into corporate behaviour post-crisis is the upscaling of certain norms of conduct in anti-corruption and tax evasion. The post-crisis era provided an opportunity for long-forged international developments and obligations to be ultimately implemented in the UK. However, despite new rhetoric and policy resolve, reforms introduced to affect the corporate sector were limited in two ways. First, the most intrusive forms of regulation into the internal governance of corporations only applied to financial sector firms. Such regulation was justified as an extended form of prudential regulation (i.e to introduce controls on excessive risk-taking by banks and financial institutions), and argued by many to be unsuitable for general extension to the corporate sector.⁴⁵ Regulatory reach into financial corporations, such as regulating bankers' remuneration, the institution of internal control below senior management level, and the introduction of personal responsibility over defined areas, were confined to the financial sector.

Second, although certain norms of corporate conduct such as anti-corruption and tax evasion were enhanced, these developments were not commensurate with vaguer positions in combatting malpractices in supply chains, protecting human rights, sustainability issues and improving stakeholder relations.⁴⁶ In these areas, regulatory reforms require corporations to put in place procedures such as due diligence to improve self-awareness, and to make disclosure, either to capital markets or publicly. This approach was both pursued by the UK in its introduction of the Modern Slavery Statement for corporations as well as the harmonised EU requirement of mandatory disclosure of non-financial matters for publicly-traded companies. The focus on procedural requirements for corporations, as well as potential 'discipline' from the markets on the basis of disclosure, do not make articulation on expected standards of behaviour. Optimal behaviour is determined 'privately', either by internal organisation or within the fabric of the corporation's relations with their shareholders.⁴⁷ Such regulatory designs do not sufficiently bring home to corporations the normative nature of their socially-facing responsibilities and good citizenship.⁴⁸ Further, the harmonised EU requirements centre upon mandatory disclosure, settling at relatively low common denominator of reform pitched for capital markets regulation, which does not intrude excessively into national company laws that remain un-harmonised.

The reliance on disclosure regulation and 'new governance', which allows self-determination of appropriate procedural changes in corporations, has quietly dovetailed with the private and shareholder-centred nature of company law and corporate governance in the UK, cleaving to

⁴⁴ Iris H-Y Chiu, 'Editorial: Regulatory Reforms towards Promoting Sustainable Finance' (2018) Company Lawyer, forthcoming.

⁴⁵ Peter O Mülbart, 'Corporate Governance of Banks after the Financial Crisis - Theory, Evidence, Reforms' (April 2010) ECGI Law Working Paper No 130/2009 <http://ssrn.com/abstract=1448118>; Klaus Hopt, 'Better Governance of Financial Institutions' (2012) at <http://ssrn.com/abstract=2212198>.

⁴⁶ Iris H-Y Chiu, 'An Institutional Theory of Corporate Regulation' (2018) above.

⁴⁷ It may be argued that command and control regulation is outdated. But regulatory reforms that do not articulate clear changes in norms, such as joint liability for companies for human rights abuses in their supply chain, would fall back on relying on corporations' self-motivations to change behaviour. Procedural and disclosure-based regulation can only be meaningful and not become box-ticking exercises if corporations are genuinely spirited in pursuing behavioural change.

⁴⁸ David Bilchitz and Laura Ausserladscheider Jonas, 'Proportionality, Fundamental Rights and the Duties of Directors' (2016) 36 OJLS 828.

the ideological myopia that companies can be internally disciplined by shareholders.⁴⁹ This model, whether in the EU or UK, which has largely devolved to private implementation, does not arguably achieve an efficient mix of private implementation with public accountability.⁵⁰ In sum, although regulation is seen to address corporations from an *external* standpoint, corporate behaviour is ultimately shaped by an *internal* modus comprising of internal governance, implementation and accountability. Despite the upheaval during the global financial crisis favouring policy disruption, there is little paradigm shift in the governance of corporate behaviour in the UK, a trend that continues in the most recent round of reforms proposed in the UK to address current malaises.

2. Context for Recent Corporate Law Reforms in the UK

Several recent corporate collapses in the UK have sparked calls for reform. The Table below sets out the key events, mapped against recent reforms/proposals. These feature again a mixture of regulatory scrutiny (eg the pensions regulator) with reliance on the internal governance and accountability of companies, especially shareholder scrutiny. The pattern of company law reform in the UK has firmly settled back into being domestically originated (a trend that will be exacerbated by Brexit) and wedded to the private and contractarian foundations of company law and corporate governance.

Event/trigger for Reform	Nature and type of Reform
Collapse of BHS and ensuing parliamentary inquiry. ⁵¹ BHS was a large private company owned by Philip Green before being disposed of for £1 to Dominic Chappell in 2015. Chappell was a thrice-bankrupt with no retail experience. He ran BHS aground in April 2016 leaving behind a pension deficit of £571m and 11,000 stranded jobs.	Regulatory reforms in response were both specific and broad-based in nature. In particular, the government proposes to clarify directors' duties when selling distressed companies and subsidiaries, ⁵² increased powers for the pensions regulator to be notified of events that may imperil a defined-benefit pension scheme, and pursuit of directors who have committed wilful or grossly negligent behaviour in relation to the pension scheme. ⁵³ Further, the government commissioned a private-sector led review to introduce a set of six Principles of Corporate Governance for large private companies. ⁵⁴

⁴⁹ Shareholders are the constituents to enforce the importance of a company's ESG performance or their conduct of stakeholder relations under s172 of the Companies Act 2006, see Section 2.

⁵⁰ Critical discussions see Cristie Ford, 'New Governance, Compliance, and Principles-Based Securities Regulation' (2008) 45 American Business Law Journal 1; Robert F Weber, 'New Governance, Financial Regulation, and Challenges to Legitimacy: The Example of the Internal Models Approach to Capital Adequacy Regulation' (2010) 62 Administrative Law Review 783.

⁵¹ House of Commons

Work and Pensions and Business, Innovation and Skills Committees, *BHS Inquiry* (June 2016) at https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/54/54.pdf?utm_source=54&utm_medium=module&utm_campaign=modulereports.

⁵² BEIS, *Consultation*, above.

⁵³ Department of Work and Pensions, *Protecting Defined Benefit Schemes* (Policy Paper March 2018) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/693655/protecting-defined-benefit-pension-schemes.pdf.

⁵⁴ *The Wates Corporate Governance Principles for Large Private Companies* (Consultation Paper June 2018) at <https://www.frc.org.uk/getattachment/48653f86-92c3-4cd6-8465-da4b7cac0034/;.aspx>.

<p>Formation of May government and pledge to bring about more responsible capitalism</p>	<p>Parliamentary Committee Inquiry into reforms in corporate governance⁵⁵ subsequently undertaken by BEIS.⁵⁶ BEIS sought to address rising discontent against the corporate sector, eg corporations' management of stakeholder relations. Directors need to now specifically report in a 's172 statement' annually.⁵⁷ The Corporate Governance Code requires Boards to show engagement with stakeholders, and to enrol employee participation in a more significant manner.⁵⁸ Companies to report in its annual remuneration report of pay ratios, comparing the CEO's annual pay to employees on the 25th, 50th and 75th percentile of the company's pay.⁵⁹ Pay policies overall to be scrutinised by the Remuneration Committee of the Board.⁶⁰</p>
<p>Collapse of Carillion in 2018.⁶¹ Carillion was a significant government contractor who was outsourced to manage many public services including schools and hospitals. However it had expanded aggressively and sustained severe losses and incurred excessive debt. Carillion's financial mismanagement had shown cracks but shareholders were content as dividends were regularly paid. Suppliers were however put on extended payment terms such as 120 days.</p>	<p>Carillion's collapse raised questions regarding the so-far impotence of s172 in ensuring that directors took into account of stakeholders' interests. However, the government takes the view that shareholders should engage more critically.⁶² Issues regarding audit quality⁶³ and the supervision of auditors by the Financial Reporting Council were flagged up.⁶⁴</p>

⁵⁵ Department of Business, Skills and Innovation, *Corporate Governance Inquiry* (2016) at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/business-innovation-and-skills/inquiries/parliament-2015/corporate-governance-inquiry/>.

⁵⁶ Department for Business, Energy and Industrial Strategy, *Corporate Governance Reform: The Government's Response* (August 2017) at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/640631/corporate-governance-reform-government-response.pdf.

⁵⁷ S414CZA, Companies Act 2006.

⁵⁸ Corporate Governance Code 2018 Provisions 5-6.

⁵⁹ New s19C, Schedule 8, Companies Act 2006 as amended by The Companies (Miscellaneous Reporting) Regulations 2018.

⁶⁰ Corporate Governance Code 2018.

⁶¹ Houses of Parliament Business, Energy and Industrial Strategy and Work and Pensions Joint Committee, *Carillion Inquiry* (2018) at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/inquiries/parliament-2017/carillion-inquiry-17-19/>.

⁶² Houses of Parliament Business, Energy and Industrial Strategy and Work and Pensions Joint Committee, *Carillion Inquiry: The Government Response* (2018) at <https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/1456/1456.pdf>.

⁶³ Above. The Competition and Markets Authority is going to probe the issue of the big-four dominance of auditor firms and firms being too close to their clients.

⁶⁴ Review of the FRC is led by Sir John Kingman, see <https://www.gov.uk/government/news/independent-review-of-the-financial-reporting-council-frc-launches-call-for-evidence>.

From 2006 when the Companies Act enshrined the ‘enlightened shareholder value’ in s172, promising to oblige directors to make long-termist decisions, to the recent rupture of corporate malaises, it would seem that s172 has not prevented corporate malaises that are short-termist and neglectful of stakeholder needs.

It can be argued that this is because s172 firmly endorses the primacy of shareholders as corporate governance actors and what they value.⁶⁵ Shareholder primacy allows the skewed incentives of shareholders to become paramount in corporate strategy. Shareholders, especially institutions who owe regular financial performance reporting obligations to their beneficiaries are focused on short-termist corporate performance⁶⁶ and drive corporations towards short-termist strategies and financially-focused behaviour myopic to the neglect of companies’ wider social and stakeholder fabric.⁶⁷ S172’s approach of integrating stakeholders, the environment and community into directors’ commercially-focused duty is arguably an illusion as shareholder interests remain paramount. The normative nature of the company’s relationships with stakeholders and their responsibilities in the social fabric⁶⁸ have indeed been weakened.

A number of commentators call for explicit moves away from shareholder primacy in company law, to reinstate the directors’ holistic duty to the company as a whole,⁶⁹ including the ‘team’ that makes up the company (including *both* shareholders and stakeholders).⁷⁰ Commentators have also voiced the view that directors should owe specific duties to companies in relation to normative matters such as the protection of human rights or the environment in setting out corporate strategy. These should be *per se* obligations not tied to the shareholder-oriented business case.⁷¹

In the next Section we argue for reforming the company law on directors’ duties to introduce normative duties alongside duties which focus on the interests of shareholders. These normative duties will be based on companies’ legal *and* citizenship obligations as well as emerging norms in such obligations. A sharper focus on such normative duties will be argued to be necessary in view of the limitations of extant reforms.

⁶⁵ Sarah Worthington, ‘Reforming Directors’ Duties’ (2001) 64 Mod. L. Rev. 439 who criticises s172 as being distinctly pluralist in objective yet avowedly traditionalist in substance.

⁶⁶ BIS, *The Kay Review of UK Equity Markets and Long-Term Decision Making* (Final Report, 23 July 2012).

⁶⁷ Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (NY: Free Press 2003); critical chapters in Grietje Baars (ed), *The Corporation* (Cambridge: Cambridge University Press 2017).

⁶⁸ The normative duties are pointed out in Bilchitz and Jonas (2016).

⁶⁹ Eg Andrew Keay, ‘Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model’ (2008) 71 Mod. L. Rev. 663; ‘Ultimate Objective of the Company and the Enforcement of the Entity Maximisation and Sustainability Model’ (2010) 10 J. Corp. L. Stud. 35; Benedict Sheehy; Donald Feaver, ‘Anglo-American Directors’ Legal Duties and CSR: Prohibited, Permitted or Prescribed’ (2014) 37 Dalhousie L.J. 345.

⁷⁰ Gregory Scott Crespi, ‘Redefining the Fiduciary Duties of Corporate Directors in Accordance with the Team Production Model of Corporate Governance’ (2003) 36 Creighton L. Rev. 623; Margaret Blair, ‘Directors’ Duties in a Post-Enron World: Why Language Matters’ (2003) 38 Wake Forest L. Rev. 885; Thomas Clarke, ‘The Long Road to Reformulating the Understanding of Directors’ Duties: Legalizing Team Production Theory’ (2015) 38 Seattle U. L. Rev. 433.

⁷¹ Bilchitz and Jonas (2016) above on a duty to protect human rights; James McConville; Martin Joy, ‘The Interaction of Directors’ Duties and Sustainable Development in Australia: Setting off on the Uncharted Road’ (2003) 27 Melb. U. L. Rev. 116 on a duty to make sustainable decisions; Minh Nguyet Dang; Barbara Mescher, ‘Directors and the Ethics Components of Their Duties’ (2010) 7 Macquarie J. Bus. L. 1 and Tara J. Radin, ‘Stakeholders and Sustainability: An Argument for Responsible Corporate Decision-Making’ (2007) 31 Wm. & Mary Envtl. L. & Pol’y Rev. 363 on ethical duties.

Although directors are now asked to explain how they discharge their duties under s172,⁷² the nature of the duty remains shareholder-centred. Shareholders are the intended audience for the statement, and it remains unclear how they would be interested in stakeholders' points of view *as such*, but perhaps only where those matter for the 'success' of the company, i.e. the business case. We are sceptical as to how this would improve corporate awareness of stakeholder interests for the purposes of moderating egregious behaviour such as Carillion's 'robbing' of suppliers while maintaining dividend levels.

Shareholders continue to be seen as reliable monitors and checks for potential corporate ills such as highlighted in Carillion and an amended Stewardship Code is underway.⁷³ However, as demonstrated in BHS, how could shareholders who enjoy dividends declared by the company, albeit at stakeholders' (such as pension schemes') expense, be relied on to check against financial mismanagement that is biased towards their interests? Further, in the spirit of 'responsible capitalism', it is odd that pay ratio reporting, which highlights pay inequalities and employees' interests, is primarily targeted at shareholders. Would shareholders have a marked interest in such socially-facing issues, especially if they have cost implications and affect profitability? Reforms that directly benefit or empower stakeholders in non-conventional ways remain in soft law, such as stakeholder engagement best practices and employee voice in corporate governance.⁷⁴

It may be argued that our critique against current reforms are overstated, and that paradigm shift is not needed. It can be argued that directors' duties cannot be overprescribed and s172 strikes a balance well-accepted in capital markets.⁷⁵ The key to improvement possibly lies in enhancing enforcement, perhaps by vesting a right of enforcement in a regulator, such as the listing authority, like in the case of the Australian Securities and Investments Commission.⁷⁶ It may also be argued that shareholders, especially institutions, have become more educated under initiatives such as the Stewardship Code and are willing to play a monitoring role as representatives of ordinary savers.⁷⁷

We are however of the view that a paradigm shift is needed. Focussing on shareholder engagement to redress corporate malaises that damage stakeholders' interests and social goodwill may be ineffectual. Although employees and stakeholders will be engaged with more intensely, there is no framework for resolving conflicts between shareholders' and stakeholder interests; the former still likely would be paramount. We advocate a tectonic shift away from agency-and-shareholder centred paradigms in company law and corporate governance, and considering relevant and more pluralistic insights from European developments. In that spirit, we propose to re-frame directors' duties in UK company law. Our proposals would more effectively reflect a 'responsible capitalism' vision the UK government set out, and are being similarly championed in the US as 'accountable capitalism'.⁷⁸ Senator Warren's proposed Accountable Capitalism Bill intends to impose a

⁷² The s172 Statement.

⁷³ *Carillion Inquiry: The Government Response* (2018) above.

⁷⁴ Corporate Governance Code 2018.

⁷⁵ Shelley Marshall; Ian Ramsay, 'Stakeholders and Directors' Duties: Law, Theory and Evidence' (2012) 35 U.N.S.W.L.J. 291.

⁷⁶ Andrew Keay, 'The Public Enforcement of Directors' Duties: A Normative Inquiry' (2014) 43 *Comm. L. World Rev.* 89.

⁷⁷ such as Shareaction's focus on employees, funds' commitment to the UNPRI, establishment of the Investor Forum.

⁷⁸ 'We must hold capitalism accountable. Elizabeth Warren shows how', *The Guardian* (18 Aug 2018).

federal charter upon large companies and to oblige companies to take into account stakeholders' and communities' interests in decision-making and to allow employee representation in corporate governance. These moves reflect a need to address social discontent with the corporate sector, seen increasingly to reward the few and neglect the many.⁷⁹

3. Proposal to Introduce Normative Duties for Directors in Keeping with Corporate Citizenship

We propose that more radical reforms are needed in place of the minor and ideologically path-dependent adjustments made to company law and corporate governance under recent reforms, which risk being theoretically anaemic and practically ineffective. In this Section, we argue for the need to develop 'normative' duties for directors, especially where corporations have significant social or global footprints and impact on stakeholders. Such duties are able to complement the existing duties for directors which have developed over the years focusing on the company's 'commercially' sensible expectations in relation to protecting its equity capital.⁸⁰ The introduction of 'normative' duties would support the range of modern responsibilities that directors of large and complex companies ought to engage with. Bilchitz and Jonas argue, in view of the UN Guiding Principles on Business and Human Rights⁸¹ that directors in companies should owe a duty to give effect to the 'respect, protect and remedy' framework in the Guiding Principles.⁸² The development of the Principles is a culmination of long-running efforts to hold corporations to impacts and responsibilities commensurate with their economic profiles and power. With the development of such normative obligations *for corporations*, the reform of directors' duties is arguably necessary to uphold these obligations so that 'respecting, protecting and remedying' human rights issues can hopefully cascade from leadership to the corporate frontlines. The advent of the Guiding Principles is but a start of the articulation of corporations' *legal* and citizenship obligations, and emerging norms are appearing in areas of sustainability, supply chain management, stakeholder engagement and managing group structures.

We argue for an extended view of directors' duties from Bilchitz and Jonas' argument, so that directors' 'normative' duties can be introduced to support companies' increasingly emerging obligations as responsible economic citizens. We identify four groups of emerging norms for corporations of this nature: corporate conduct in stakeholder contexts, the environment, supply chains, and group structuring.

⁷⁹ For example, the creation of corporate wealth does not seem to benefit employees much, wage stagnation is discussed in Institute for Public Policy Research Commission on Economic Justice, *Time for Change: A New Vision for the British Economy* (Sep 2017) at <https://www.ippr.org/files/2017-09/cej-interim-report.pdf>.

⁸⁰ Sections 170-177, Companies Act 2006 that codify directors' duties are arguably 'protective' in nature as they ensure that directors are loyal to companies, do not misuse corporate assets, opportunities or profit from their positions, do not accept bribes or indulge in undeclared conflicts of interest. These duties are developed from fiduciary law, stated in *Bristol and West Building Society v Mothew* [1996] EWCA Civ 533, viz 'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.' Further, directors' duties include exercising powers with care, for a proper purpose and in an unfettered manner, all in the best interest of the company, these duties although not 'equitable' such as the fiduciary duty in nature, they also reflect the need to secure conduct not to adversely affect the companies directors manage. See Michelle M. Harner, 'A More Realistic Approach to Directors' Duties' (2013) 15 *Transactions: Tenn. J. Bus. L.* 15 on a nuanced account of what directors' duties can achieve today.

⁸¹ https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

⁸² Bilchitz and Jonas (2016) above.

First, in relation to companies' conduct in their stakeholder contexts, the relevance of stakeholders is already identified under s172. However, by meshing stakeholder interests within the overriding business case of 'promoting the success of the company for its members as a whole', stakeholders' interests are fed through that key filter and have been relegated if not relevant to the business case. The EU's introduction of mandatory non-financial reporting of social and stakeholder-related matters by companies to shareholders also puts in doubt the real salience of stakeholder matters. In view of the potentially myopic nature of the treatment of stakeholder-related issues, reform ought to address the social discontent over the neglect of stakeholders. We propose that stakeholder engagement should be promoted to a normative instead of an instrumental aspect of corporate management.

Hence, s172 should be clarified as two duties. One relates to stakeholder engagement *per se*, and the other should not refer to the director's duty to promote the success of the company 'for the benefit of the members of the company as a whole' but to 'promote the success of the company', as it is a separate legal person as such.⁸³ 'Success' should be defined as a complex and not simple metric, especially for companies with social, community, global and stakeholder footprints.⁸⁴ Such success should be defined as referring to the company's reputation, stakeholder regard and social citizenship. The expanded definition of success would focus directors on a holistic notion of corporate success, capturing the real complexity of companies as teams of production⁸⁵ as well as citizens within their community and social fabric.⁸⁶

Second, in view of the potential reforms that will emanate from the EU following the report by the High Level Group on Sustainable Finance,⁸⁷ companies may be asked to more explicitly consider and report on their sustainability profiles and footprints. Again we note the limitation of a duty to disclose, which is presumably shareholder-facing, in relation to a public good such as sustainability. There is scope for the development of a normative duty for companies in sustainable conduct and practices, and we propose that directors should have a normative duty to support sustainability in corporate strategies and operations. This galvanises leadership to ensure that corporations respond to the heightened policy call to become more sustainable. As there are 27 sustainability goals adopted by the UN, companies could explicitly set out those that are most relevant to their business model. The director's duty should support and promote the pursuit of the company's relevant sustainability goals. Commentators⁸⁸ have called for the internalisation of sustainable goals within the core of

⁸³ Argued in Andrew Keay, *The Corporate Objective* (Cheltenham: Edward Elgar, 2010); 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' (2008) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889236.

⁸⁴ Yvan Allaire; Stephane Rousseau, 'To Govern in the Interest of the Corporation: What Is the Board's Responsibility to Stakeholders other than Shareholders' (2015) 5 J. Mgmt. & Sustainability 1; Thomas Clarke, 'The Widening Scope of Directors' Duties: The Increasing Impact of Corporate Social and Environmental Responsibility' (2016) 39 Seattle U. L. Rev. 531.

⁸⁵ Margaret M Blair and Lynn A Stout, 'A Team Production Theory of Corporate Law' (1999) 85 Virginia Law Review 248, and Crespi (2003) above; Clarke, (2015) above.

⁸⁶ Donna J. Wood and Jeanne M. Logsdon, 'Business Citizenship as Metaphor and Reality' (2008) 18 Business Ethics Quarterly 51; Andrew Crane and Dirk Matten, 'Corporations and Citizenship in New Institutions of Global Governance' in Colin Crouch and C Maclean (eds.), *The Responsible Corporation in a Global Economy* (Oxford: Oxford University Press, 2011), pp. 203-224; Peter Edward and Hugh Willmott, 'Corporate Citizenship: Rise or Demise of a Myth?' (2008) 33 The Academy of Management Review 771.

⁸⁷ HLEG report (2018) above.

⁸⁸ eg Jeffrey Bone, 'The Consideration of Sustainability by Corporate Directors' (2014) 26 Journal of Environmental Law and Practice 1; McConvill and Joy (2003) above; Julia Maskill, Extending 'Directors'

company law and corporate governance frameworks, and our proposed directors' duty could facilitate the pursuit of these goals.

Third, in view of existing reporting obligations for companies pertaining to their due diligence in their supply chains, such as in relation to preventing modern slavery, the sourcing of conflict minerals⁸⁹ and more generally, to improving large corporations' awareness of their impact on non-financial matters,⁹⁰ we argue for a supporting directors' normative duty to ensure that their companies facilitate optimal and compliant practices in companies' supply chains. We note that mandatory disclosure for corporations has extended from being shareholder-centred (EU Directive's non-financial statement) to being publicly exposed, ie the Modern Slavery Statement and conflict minerals reporting.⁹¹ This is not an insignificant development as an augmentation of the company's public-facing orientation and accountability,⁹² and helps overcome information asymmetries with stakeholders, civil society, and of course, securities markets.⁹³ However, the publicly-facing disclosure does not attract any particular enforcement or discipline, and we are defaulted to market discipline by shareholders,⁹⁴ if relevant. Disclosure-based duties also do not make any pronounced strides towards articulating desirable norms for corporate behaviour. If markets are left to send price signals on the basis of such disclosure, we are again left to an instrumental framing for corporate behaviour. Hence, we argue for a need to reframe the normative nature of corporate responsibility towards their supply chains, and that directors should take leadership to ensure that corporations conduct effective due diligence, implement sound policies in their supply chains and make genuinely reasonable efforts to combat the malaises of evil and exploitative practices in supply chains.⁹⁵

Finally, although the UK government has recently clarified⁹⁶ that directors of parent companies should take care that selling distressed subsidiaries should be based on a reasonable belief that the subsidiary's stakeholders would be no worse off than under the liquidation or administration of the subsidiary, and that such conduct is currently expected within the terms of directors' duties,⁹⁷ we argue that such an approach is too limited and non-disruptive, and unlikely addresses the corporate malaises that companies perpetuate through group structures. Corporate groups take advantage of the separate legal personality of each

Duties to the Natural Environment: Perfect Timing for Greener Companies in Aotearoa New Zealand' (2016) 22 Auckland U. L. Rev. 281.

⁸⁹ S54, Modern Slavery Act 2015, EU Conflict Minerals Regulation, above.

⁹⁰ EU Non-financial Disclosure Directive Art 19a, above.

⁹¹ Iris H-Y Chiu, "Disclosure Regulation in Corporate Social Responsibility- (New) Legalisation and New Governance Implications" in Christopher Bruner and Beate Sjafell (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge: CUP, 2018, forthcoming).

⁹² Stephen Kim Park, 'Targeted Social Transparency as Global Corporate Strategy' (2014) 35 *Northwestern Journal of International Law and Business* 87.

⁹³ John Parkinson, 'Disclosure and Corporate Social and Environmental Performance: Competitiveness and Enterprise in a Broader Social Frame' (2003) 3 *J. Corp. L. Stud.* 3; Björn Fasterling, 'Development of Norms Through Compliance Disclosure' (2012) 106 *Journal of Business Ethics* 73 doubts that compelling disclosure causes companies to change from within.

⁹⁴ Genevieve LeBaron and Andreas Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8 *Global Policy* 15.

⁹⁵ Kate Manzo, 'Modern Slavery, Global Capitalism & Deproletarianisation in West Africa' (2005) 32 *Review of African Political Economy* 521; Kevin Bales, *Disposable People: New Slavery in the Global Economy* (California: Berkeley University Press, 1999); Elif Härkönen, 'Conflict Minerals in the Corporate Supply Chain' (2018) 29 *European Business Law Review* 691.

⁹⁶ BEIS, *Consultation*, above.

⁹⁷ s174, the duty of care, skill and diligence.

subsidiary,⁹⁸ and pursue corporate structuring strategies in the vein of ‘asset partitioning’,⁹⁹ allowing groups to manage their risks and carry out regulatory arbitrage between the jurisdictions of their operations.¹⁰⁰ The use of asset partitioning to minimise tax liabilities,¹⁰¹ tort liabilities,¹⁰² evade compliance and regulations¹⁰³ is well-canvassed. In comparison with developments in other European jurisdictions that recognise the economic realities of corporate groups and are willing to both enable their efficiencies¹⁰⁴ while controlling their excesses,¹⁰⁵ the recent clarification by the UK government is not a radical move at all. This nascent willingness to scrutinise sharp behaviour by corporate groups, in the specific instance of selling distressed subsidiaries, is due to the public pressure that has arisen after the fall of BHS.

The malaises indulged in by corporate groups extend beyond lessons derived from BHS, and there is a broader need to ensure that the privilege of incorporation is not merely assumed to be a licence for pushing boundaries in ways that fail to respect both law and responsibility. Although more reformist steps are not taken by the government, we are sceptical that the current duty of care for directors would meet the needs for ensuring that stakeholders affected by the sale of distressed subsidiaries would be no worse off than the liquidation or administration of the subsidiary. This is because the duty of care is owed to the company in the traditionalist vein of serving the company’s commercial purposes, i.e. to prevent financial loss to the company,¹⁰⁶ and to ensure that wrongful trading does not adversely affect creditors’ interests in the company during the company’s twilight zone.¹⁰⁷ Such a duty of care would not necessarily extend to protecting impacted stakeholders.

⁹⁸ ‘Each company in a group of companies ... is a separate legal entity..’ *The Albazero* [1977] AC 774, 807 (Roskill LJ).

⁹⁹ Henry Hansmann and Reinier Kraakman, ‘Organizational Law as Asset Partitioning’ (2000) 44 *European Economic Review* 807.

¹⁰⁰ Often transnational corporations use thinly capitalised subsidiaries to undertake risky overseas operations so that other corporate members of the group will be immune from the losses suffered by that subsidiary. The shifting of liability onto the parent company, ie ‘lifting of the corporate veil’ is highly difficult to achieve in UK civil litigation, *Adams v Cape Industries* [1990] Ch 433; 2 WLR 657; [1991] 1 All ER, 929; *Prest v Petrodel Resources Ltd* [2013] UKSC 34. There is no doctrine of ‘enterprise liability’ in the UK for corporate groups although some extent of such liability is recognised in the US and Germany. See Meredith Dearborn, ‘Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups’ (2009) 97 *California Law Review* 195.

¹⁰¹ Don R. Hansen, Rick L. Crosser and Doug Laufer, ‘Moral Ethics v. Tax Ethics: The Case of Transfer Pricing among Multinational Corporations’ (1992) 9 *Journal of Business Ethics* 679; Steven A Bank, ‘The Globalization of Corporate Tax Law Reform’ (2013) 40 *Pepperdine Law Review* 1307; Lutz-Christian Wolff, ‘Offshore Holdings For Global Investments of Multinational Enterprises: Just Evil?’ (2015) *Journal of Business Law* 445.

¹⁰² *Adams v Cape Industries* [1990] above.

¹⁰³ Janet Dine, ‘Transnationals out of Control’ (2006) above.

¹⁰⁴ Such as the French Rozenblum doctrine that recognises the economic realities relating to use of corporate assets within groups, also Pierre Henri-Conac, ‘Director’s Duties in Groups of Companies – Legalizing the Interest of the Group at the European Level’ (2013) *European Company and Financial Law Review* 194. Also the discussion on Dutch law’s recognition of ‘concurrence of interests’ within groups, Steef Bartman, ‘From Autonomy of Interests to Concurrence of Interest in Dutch Group Company Law’ (2007) 4 *European Company Law* 207.

¹⁰⁵ Such as the German obligation for parent companies to be liable for subsidiaries’ debts if they have long-standing and pervasive control of the subsidiaries. See René Reich-Graefe, ‘The Liability of Corporate Groups in Germany’ (2005) 37 *Connecticut Law Review* 785. The European Commission, in its recent legislative proposal to promote easier conversions by companies from one Member State to another, strikes a balance between facilitating such conversion while ensuring that legitimate stakeholders are protected, see Commission proposal 2018.

¹⁰⁶ *Eg Re D’Jan of London Ltd* [1994] 1 BCLC 561.

¹⁰⁷ *Re Brian D Pierson (Contractors) Ltd* [2001] 1 BCLC 275; *Roberts v Frohlich* [2011] EWHC 257 (Ch)

Lessons from BHS have sparked off a recognition that corporate group structuring and decisions within such groups can adversely affect stakeholders' interests while narrowly serving the interests of the parent company and its shareholders. Such a wider recognition should give rise to more policy resolve to introduce reform for rebalancing corporate decision-making. Although the government wishes to introduce more disclosure for companies within the corporate governance framework to explain their group structures,¹⁰⁸ we are sceptical that disclosure regulation brings about the right incentives for behavioural change. The same critique we raise earlier apply- ie that disclosure regulation as such charts no definite path towards norms of expected behaviour, and relies too heavily on market-based mechanisms to signal and drive preferred behaviour.

We propose a director's duty for directors especially of parent companies to ensure that group structures have a legitimate purpose and do not undermine the discharge of the full suite of directors' commercial and normative duties argued in this Section.¹⁰⁹ As group structuring is essential to corporate strategy, objectives and operations, directors of parent companies are intimately involved in such matters and we see directors as well-placed to discharge a duty in relation to the use and legitimacy of group structures.¹¹⁰ This modest step does not go as far as the comprehensive thinking in European developments in relation to corporate groups and their relations inter se as well as externally.¹¹¹

Given that existing laws are stretching disclosure and procedural obligations in an attempt to chart a course for introducing changes to corporate behaviour without disrupting the ideological paradigms of the company, it is arguably time to recognise the limitations of this approach and what an ideological shift would offer. The introduction of normative duties for directors is more in line with the real complexities and financial and non-financial decisions that directors need to make. The implication of such duties is however that they may need to be enforced differently, as shareholders may not be the most appropriate constituents.

It has been suggested that in the UK context, enforcement by the Listing Authority against listed company directors, may be appropriate, based on the Australian model.¹¹² Further, the company director disqualification regime,¹¹³ which will be expanded by the BEIS to allow directors to be disqualified if they sell a distressed subsidiary which goes insolvent in the next 12 months,¹¹⁴ can be made more comprehensive to pursue directors for breaches of normative duties. Directors who fail to respect normative duties are unlikely to steer their companies towards good citizenship and should be considered for disqualification under this public-interest motivated scheme. Although public interest enforcement is consonant with the nature of normative directors' duties, we also think that there is scope for thinking about

Grant & Tickells (joint liquidators) v Ralls and Hailstones (2016) EWHC 243.

¹⁰⁸ BEIS, *Consultation*, above.

¹⁰⁹ We do not go as far as to require independent assessment of group structure legitimacy, as in proposed Art 86g, Commission proposal at n4. However, we note the importance of this provision in highlighting EU policy concern that corporate freedoms must be exercised in a legitimate manner.

¹¹⁰ Stefan J. Padfield, 'In Search of a Higher Standard: Rethinking Fiduciary Duties of Directors of Wholly-Owned Subsidiaries' (2004) 10 *Fordham J. Corp. & Fin. L.* 79.

¹¹¹ Eg European Model Company Law project (2017) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929348.

¹¹² Keay (2014) at n76.

¹¹³ Company Directors Disqualification Act 1986 amended several times.

¹¹⁴ BEIS, *Consultation*, above.

stakeholder-initiated actions.¹¹⁵ For example, claimants against spent subsidiaries would often find themselves as ‘stakeholders’ of the parent company without a viable cause in English company law, but not always the case in other jurisdictions.¹¹⁶ The Dutch also recognise the right of organised trade unions to initiate an ‘Inquiry’ against corporate management if there are well-founded reasons to doubt the management’s course of action.¹¹⁷ Such a right can be extended to that of a corporate group.¹¹⁸ Although the examples above do not embrace a wide liberalisation towards stakeholder actions, they provide some food for thought in terms of making enforcement more pluralistic in justifiable and practical ways. We can for example consider whether stakeholder groups could make a case to the Listing Authority or Secretary of State to take enforcement against directorial breaches of normative duties.¹¹⁹

4. Conclusion

The UK has had a long history of looking into the private and shareholder-centred foundations of the company to resolve corporate malaises that have surfaced. Shareholders do play a role in monitoring corporate management and ensuring that corporate capital is used in legitimate and appropriate ways. However, shareholders’ incentives and objectives are not necessarily well-suited towards being socially responsible, publicly acceptable and decent in the treatment of stakeholders. It could be misplaced for company law reforms to continue relying on and empowering shareholders to address corporate malaises of a non-commercial nature. As norms are emerging in law and soft law with respect to the conduct of corporations as economic citizens, the recent round of reforms reflect this awareness though not the robustness needed to drive corporate behavioural change. The pattern of company law reform in the UK has been largely domestically-driven and ideologically path dependent, and there is a danger of continued myopia after Brexit. Although European harmonisation has been absorbed within the UK’s ideological path dependence,¹²⁰ the open-ness to external drivers and influences that can enrich thinking in company law policy could be minimised after Brexit. We argue for the seizure of this reform moment, in light of recent revelations of corporate malaises, to consider more radical reforms. We propose transforming directors’ duties so that the leadership of companies are compelled to internalise normative aspects of good corporate behaviour.¹²¹ The application of such duties should be commensurate with the social and stakeholder footprints of companies, reflecting the modern complexities and realities they face.

¹¹⁵ We do not cover shareholder actions as these are already provided for in existing company law.

¹¹⁶ See n105-6.

¹¹⁷ Although Inquiry proceedings are unlikely appropriate for the UK given the adversarial and not inquisitorial nature of judicial proceedings. See discussion in Mieke M Tuijtel, ‘The Dutch Inquiry Proceedings: A Unique Instrument for Minority Protection from a Comparative Law Perspective’ (2005) 3 *European Company Law* 90.

¹¹⁸ Steef Bartman, ‘CHK

¹¹⁹ Such as the recognition of consumer groups to make a complaint for the financial regulator to begin investigations under s234C, Financial Services and Markets Act 2000, called ‘super-complaints’.

¹²⁰ Such as the non-financial report in the 2014 Directive being transposed as clearly part of shareholder-facing reporting in the director’s Strategic Report, c414CA, 414C, Companies Act 2006.

¹²¹ See a full range of implications for such ideological reform in company law, Iris H-Y Chiu, ‘Operationalising A Stakeholder Conception in Company Law (2017) 10 *Law and Financial Markets Review* 173.