The Future of the Corporation: The Avenues for Legal Change[1]

DALIA PALOMBO

Abstract: This working paper aims at analysing what could be the legal avenues to frame the future of the corporation. It focuses on fulfilling the Purpose and Do No Harm Objectives. The Purpose Objective should re-connect directors, shareholders and stakeholders in order to ensure that businesses rediscover their original function to serve the needs of society. In order to meet this goal, the working paper proposes changes in the laws regulating corporate governance. The future company would adopt a pluralistic approach, considering stakeholders a fundamental actor, along shareholders and the board, in its corporate governance. The Do No Harm Objective should ensure that businesses are accountable when they damage the stakeholders affected by their activities. In order to meet this goal, the working paper proposes the introduction of enforcement mechanisms that would allow stakeholders to effectively enforce their rights.

Keywords: Corporation, Purpose, Harm, Director's duties, Shareholders, Stakeholders, Enforcement, Control, Accountability

[1] Note that parts of this paper are also partly included in the following article and forthcoming book Dalia Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals' [2019] Business and Human Rights Journal 1; Dalia Palombo, *Business and Human Rights The Obligations of the European Home States* (Hart Publishing 2020).

THE PROBLEMS AND OBJECTIVES

A multinational enterprise could be defined as: '[a] cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy.'(Vernon 1968: 114, Vagts 1970: 740, Bartlett *et al.* 2003: 65). The status of multinational enterprise, being at the same time one economic unit and a conglomerate of separate legal entities, creates a gap between each separate company and the corporate group. While the multinational enterprise is able to use the complex structure of its transnational business to its advantage, the stakeholders affected by its activities have limited opportunities to influence its conduct. This results in two problems that could be defined the accountability and control gap.

The Accountability Gap

From the legal perspective, the activities of multinational enterprises are highly deregulated. Multinationals lack legal personality at both the international and national level. Hard laws are able to regulate only the activities of the single entities that are part of the corporate group. Soft laws recognise the relevance of multinationals but have no prescriptive authority over companies. This creates an accountability gap that has been widely discussed among scholars, businesses as well as international institutions (Jägers 2002: 2011, De Schutter 2005, Enneking 2012, Joint Commitee on Human Rights UK Parliament 2017).

The obligations of a company that is part of a multinational enterprise could be found in domestic laws, international laws, and soft laws. Domestic laws would usually include tort laws, administrative laws, and criminal laws, depending on the various national legal systems. Such rules would typically apply only to single companies that are part of a corporate group and are incorporated in one country (Muchlinski 2007). International laws are traditionally applicable only to States and not to private entities, including companies. However, given the increasing importance of non-state actors in the international arena, a number of scholars have argued that international law, and specifically human rights, could apply also to non-state actors, including corporations. International law has the advantage to be theoretically applicable transnationally. However, the application of international laws to non-state actors is still uncertain and highly debated (Thomas 2000, Knox 2008, Karavias 2015). Soft laws are designed to apply to multinational enterprises, but they are not binding and therefore they do not establish proper obligations, but only non-legal responsibilities for companies (Deva, 2003, Davarnejad 2011, Wettstein 2015).

All of the above laws can be enforced only at the national level. This is apparent given that there is no international court, arbitration tribunal, or any other treaty body that can enforce international law against companies. Therefore, even those who argue for human rights to apply to companies, would need domestic causes of actions to enforce them. There are, however, two main limitations to the implementation of domestic laws to multinational enterprises. First, domestic laws are designed to apply domestically and, therefore, their extraterritorial application is complicated and uncertain (De Schutter 2006, Wouters and Ryngaert 2008, Bright 2013). Second, multinational enterprises include several companies in various relationships with each other. They could be in a relationship of subsidiaries and parent companies or part of supply chains. In both cases, each company is a legal entity separated from the others and no company would be responsible for the actions of other corporations belonging to the same corporate group. This substantially reduces the chances to hold them accountable as each entity may have a different level of involvement and responsibility in the violation of the law (Blumberg 1985, Hansmann and Kraakman 1991, Leebron 1991, Skinner 2015).

The Control Gap

There is a second problem related to the globalisation and size of enterprises. There is an increasing gap between directors, shareholders, and stakeholders. Business and legal academics have widely analysed the separation between ownership and control of the company. In essence, shareholders are increasingly investing in widely held companies of which they own a very small fraction. They are no longer involved in the management of the company, which is instead handled by professionals. This separation generates what has been defined as the first agency problem because the principals and owners of the company (the shareholders) are not capable to properly control the work of the agents (the directors)(Davies and Gower 2008: 365–648, Kershaw 2012: 171–188).

There is also another, less studied aspect, of such separation linked to the transnational nature of businesses in a globalised world: the gap between businesses and society. This has been defined as the third agency problem where the principal (society) loses control of the agent (businesses). In theory, society encourages entrepreneurs to start a business because enterprises are likely to find valuable solutions for people in a competitive market. In this sense, businesses are agents of society and a force for good (Kraakman *et al.*, 2009: 35–63). For example, consider a small village where there is a state monopoly on shoes. The state has no incentive to make particularly cheap, good, stylish or comfortable shoes because nobody would be able to buy better shoes than the one it provides. Instead, if the village is a competitive market, where ten different shoe shop corporations are competing with each other, each of them will strive to offer the best possible shoes at the lowest possible price. Consumers and employees would be better off because each industry would aim at providing the best shoes and, in order to do so, would have to employ villagers. However, if one of these businesses would unreasonably pollute the environment or pay its employees extremely low wages, villagers who are at the same time people living around the shoe industry, working for such factory, consumers and shareholders of such company, would likely react to the pollution or low pay because it would affect them directly. The village would exercise a certain level of control over the activities conducted by the ten shoe shop corporations working there.

However, the situation drastically changes if the shoe shop is a multinational enterprise marketing its goods in one part of the planet (assume Europe), producing in a second one (assume Asia), being widely held by shareholders from all over the world. The management of the group would be inevitably detached from the problems that stakeholders face in various countries where the group operates. Most shareholders would not exercise control over the directors and would focus on the short-term value of their shares; most directors would concentrate on the expected returns that the company would generate; most consumers would be interested in the price and quality of their shoes, rather than in the conditions in which they were made; and most workers and third parties affected by the production would be at the periphery of the group and unable to exercise any control on it. In the long-term, even those companies that are successful in terms of increasing the value of their shares, would often not provide profitable solutions for the society.

Essentially, while business has gone global there is not yet a global society able to exercise effective control over transnational enterprises. One could argue that with globalisation and technological advances, a global society is emerging. NGOs, consumers protection organisations, human rights, and environmental advocacy are increasingly exercising the type of control that is necessary to ensure that multinational enterprises respond to the need of people (Koh 1996, Koh 2006). However, given the current backlash against cosmopolitanism, this aspiration seems, at least for the moment, confined to the dream of internationalists and not yet sufficiently developed to exercise effective control over multinationals. The discrepancy between the freedom multinational enterprises enjoy and the lack of control that society can exercise over them establishes an accountability gap that is increasingly perceived as unacceptable by society and unsustainable to the environment (Deva 2003; Wettstein 2015).

The Future of the Corporation Programme

There are two main problems related to multinational enterprises: an accountability gap and a control gap. It is difficult for society to both hold multinational enterprises accountable for their actions, and exercise control over their activities so that they benefit people.

Against this background, the Future of the Corporation programme aims at understanding how businesses should be structured in the future to meet the needs of an increasingly global society. A fundamental part of such restructuring would be a change in the law that should address the problems identified above. Any proposed change in the law should aim at fulfilling the following two objectives.

1) The Purpose Objective: enterprises should aim at producing profitable solutions to the problems of people or planet;
2) The Do No Harm Objective: Enterprises should not profit from producing problems for people or planet.

The Purpose Objective should re-connect directors, shareholders and stakeholders in order to ensure that businesses rediscover their original function to serve the needs of society. The Do No Harm Objective should ensure that businesses are accountable when they damage the stakeholders affected by their activities.

This working paper aims at analysing what could be the avenues for legal change that would help meet these two objectives. Legal changes alone will not achieve the Purpose and Do No Harm Objectives, as a much broader cultural change is necessary in order to configure the corporations of the future. Nevertheless, law has the fundamental function to demark acceptable and non-acceptable behaviour in society (Hart 2012, Dworkin 1967). Therefore, legal changes would be a fundamental tool to help achieving the Purpose and Do No Harm Objectives. The focus of this working paper is on possible legislative changes of UK law, although other jurisdictions are also taken into account.

PRINCIPLE 1: CORPORATE LAW SHOULD PLACE PURPOSE AT THE HEART OF THE CORPORATION AND REQUIRE DIRECTORS TO STATE THEIR PURPOSES AND DEMONSTRATE COMMITMENT TO THEM

Principle 1 suggests placing purpose at the heart of UK company law, with a particular focus on changing the text of Sec 172 and erasing shareholders primacy. This section of the working paper analyses first what these changes could be, and second if the proposed changes would be sufficient to develop a multi-stakeholder corporate governance model that would appropriately connect shareholders, directors and stakeholders.

Changes to Section 172

The following section compares the current version of Section 172 with a possible new draft that has been taken into account by the Future of the Corporation Programme.

Current Sec 172

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

(a)the likely consequences of any decision in the long term,

(b)the interests of the company's employees,

(c)the need to foster the company's business relationships with suppliers, customers and others,

(d)the impact of the company's operations on the community and the environment,

(e)the desirability of the company maintaining a reputation for high standards of business conduct, and

(f)the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

Obligations

Sec 172 is regarded as part of the duty of loyalty in the UK (Davies and Gower 2008: 506–525). There are two obligations of directors enshrined in current Sec 172: 1) the obligation *to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole* and 2) the obligation to *have regard (amongst other matters) to (a)-(f).* Obligation 1) requires directors to act in the interests of the shareholders. Obligation 2) requires directors to conduct appropriate due diligence in considering the interests of stakeholders while pursuing the benefit of shareholders. For example, if a director finds that the interest of shareholders is contrary to the one of stakeholders, s/he must act in the interest of the shareholders. Instead, if the interest of shareholders could be aligned with the one of stakeholders, then the director should find a synthesis between these various interests.

Standards

The current standard adopted by Sec 172 in the UK is a mix of objective and subjective. First, as it pertains to obligation 1), the liability of a director should be tested on the basis of whether there was any rational reason to make a certain decision (subjective standard). Second, as it pertains to obligation 2), the liability of a director should be tested against how the average reasonable director would have had regard to the interests of stakeholders (objective standard) (Kershaw 2012: 334–386).

A subjective standard is, generally speaking, regarded as lower than an objective standard. If one applies a subjective standard, it is enough for directors to find one rational reason to justify their actions as aimed at promoting the success of the company for the interest of shareholders.[2] Instead, if one applies an objective standard, it is not sufficient for a director to find one rational

[2] This concept would be referred to as the business judgment rule in the US.

reason that would justify his/her choice. The decision must be compatible with the one that an average director would have made.

At first look, therefore, the standard applicable to directors is lower when shareholders have to impose their rights and higher as it pertains to the directors' obligation to take into consideration also the interests of stakeholders. However, this is only an illusion. In fact, while the directors have a duty to act for the shareholders' benefit (obligation 1), they only have a duty to have regard to other interests (obligation 2). Therefore, the fact that the standard applicable to such an obligation is objective, is of little value because in any case all an average reasonable director needs to do is to take into consideration the costs an activity would have on the stakeholders.

Corporate Groups

Sec 172 is not prescribing the duty of directors in respect of companies that are part of a corporate group. Such a duty is still defined by the common law. A director must act in good faith in the best interest of the company; but given that the company is part of a corporate group, the interest of the group is fundamental to the company's benefit.

The standard is objective: a director must act in accordance with how the average reasonable director would have acted in the best interest of the company within the corporate group. Note that an average reasonable director would typically take into high consideration the interest of the group in determining the best interest of the company. As a result, the obligation of directors in respect of companies that are part of a corporate group is overall not more demanding that the duty to promote the success of the company because various reasons could justify putting aside the interest of the company in favour of the interest of the group.

Therefore, given that Sec 172 has not defined the duty of directors in respect of corporate groups, there is a formal discrepancy between the subjective standard applicable to directors managing a company and the objective standard applicable to directors of a company which is part of a corporate group. Nevertheless, the discrepancy between subjective and objective standards does not result in a practical difference in the treatment of directors because an average director of a company that is part of a corporate group would de facto take the interest of the group into account. Although the standard is objective, it is not more demanding than the subjective standard of Sec 172 (Davies and Gower 2008: 515–516, Kershaw 2012: 348–351).[3]

Draft New Sec 172

A director of a company must act in the way that he considers, in good faith, would be most likely to promote the ~~success~~ purposes of the company. ~~for the benefit of its members as a whole~~. In defining its purposes, a company must have fair regard (amongst other matters) to

(a)the benefits of its members as a whole;

(b) the likely consequences of any decision in the long term,

(c)the interests of the company's employees,

(d)the need to foster the company's business relationships with suppliers, customers and others,

(e)the impact of the company's operations on the community and the environment,

(f)the desirability of the company maintaining a reputation for high standards of business conduct, and

(g)the need to act fairly as between members of the company.

[3] Charterbridge Corporation Ltd v Lloyds Bank Ltd [1969] 2 All ER 1185.

The purposes of the company must represent a variety of interests.

If a company is part of a corporate group, the above obligations apply also in respect of the corporate group.

Obligations

The draft of the new Sec 172 introduces purposes as the company's driver. It establishes two separate obligations:

1) The director's obligation to promote the purposes (instead of the success) of the company;
2) The company's obligation to define purposes having regard to the factors mentioned in (a) to (g).

Obligation 1) would detach the director's obligation from the interest of the shareholders reproducing a logic similar to the one of the laws of other jurisdictions embracing director primacy.[4]

Obligation 2) would introduce an obligation of the company to define purposes taking into account a variety of interests. This would be an innovative step, if compared to other jurisdictions which allow, but do not require, directors to act in the interest of stakeholders.[5] Instead, the new draft of Sec 172 would require the company to define its purposes taking into account the various interests of stakeholders. Therefore, the meaning of the word "regard" would be substantially different from current Sec 172, where directors just have to exercise due diligence. In the new draft of Sec 172, the company would have to define its purposes by representing a variety of interests.

A critical question would be what the duty of directors is in respect of obligation 2). Would directors have a duty to define purposes or would this duty be left to the shareholders? The

[4] See e.g. New York Business Corporation Law Sec 717 or 2005 Connecticut Code Sec 33-756.
[5] ibid.

language of the draft leaves this question open in order to provide different solutions to various companies. While public companies may prefer to have the directors defining the company's purposes, in private companies, shareholders may be those defining purposes. As explained above, according to Model Article 3, shareholders may delegate the power to the board. If they do, it would be for directors to define purposes as they are those representing the company. If they do not, shareholders would define purposes themselves.

A possible critique of this approach could be that shareholders would be able to define the purposes of the company in narrow terms focusing on their self-interest. The alternative could be then to specify in the law that it is for directors to define purposes. This would set up the definition of purposes as part of directors' duties and take the power to define purposes away from the shareholders. While this would limit the opportunities for shareholders to define the purposes of the company in their interests, it would also reduce the flexibility that companies may want in terms of delimitating and defining the respective roles of shareholders and directors.

A recent reform of the UK Corporate Governance Code adopts a similar approach empowering directors to define purposes. The Corporate Governance Code is a comply or explain set of principles. It applies only to companies with a Premium Listing of equity shares. This means that non-premium listed corporations can disregard it without explanation, and premium listed companies may avoid compliance with the Code if they provide for a reason.[6]

Scholars have questioned the effectiveness of such a reform given the current language of Sec 172 of the Companies Act. In fact, current Sec 172 (1) establishes shareholders primacy, while Sec 172 (2) states that a different company purpose could be set. The preferred view is that directors could define the purposes of the company only within shareholders primacy, and

[6] *UK Coporate Governance Code*, 2018, Principle 1.

therefore only if shareholders would allow them to do so. Accordingly, Sec 172(2) restates the common law position that shareholders could agree to establish a different corporate purpose (Kershaw and Schuster 2019: 6–8).

This concern would, however, be resolved by the revised text of Sec 172 which would erase shareholders primacy. Therefore, if such reform would be adopted, unless otherwise decided and motivated, directors of premium listed companies should define the purposes of the company having fair regard to various interests and promote them. If instead the company would provide for an explanation to diverge from the Corporate Governance Code, shareholders could define purposes, but it would still be for directors to promote them.

A related issue is what should be the procedures for a company to define such purposes. This should be left for each company to decide and should not be legally imposed. However, a possibility could be to suggest in the Corporate Governance Code that directors establish a committee in charge of meeting with the various stakeholders that are or could potentially be affected by the activities of a company, as well as with the shareholders, in order to strike a fair balance between various interests.

Corporate Groups

The new draft of Sec 172 should also clarify the directors' duties in respect of companies that are part of a corporate group. The aim of this provision should be to avoid that each company that is part of a corporate group defines its own purposes in narrow terms while disregarding the purposes of the whole group. In this instance, directors could be held to account only against the purposes of a specific company without bearing any responsibility for the overall activities of the group. This would reproduce the accountability gap that is currently one of the main problems in corporate groups. It would be, therefore, commendable to ensure that each company belonging to a corporate group, would have to:

1) define the purposes of the company;
2) define the purposes of the corporate group;
3) ensure that such purposes are consistent with each other; and
4) require the directors to promote both purposes.

Standards

Another fundamental question would be whether the standard applicable to the directors' obligations would be objective or subjective.

As it pertains to obligation 1), the standard would be subjective by analogy to what UK law has already established concerning current Sec 172 duty to promote the success of the company.

As it pertains to obligation 2), unless specified in the new draft of Sec 172, it would be more difficult to assess what kind of standard UK courts would apply. As explained above, an objective standard is currently applicable to the obligation of directors to have regard to the interests of stakeholders. Therefore, one could think that the same standard would apply also to obligation 2) in the new draft of Sec 172. However, the new obligation would be substantially different from the duty of current Sec 172. While the current duty refers to a mere due diligence obligation, the new duty would be an obligation requiring directors not only to take into account other interests, but to define and promote the purposes of the company in the interests of a variety of actors. Therefore, UK courts may no longer apply an objective standard to such a new obligation to define purposes and may opt to apply a subjective standard.

In this analysis of various standards applicable to directors, there is an additional element to take into account. As explained above, the standard currently applicable to directors of companies that are part of a corporate group is objective as defined by the common law.

Against this background, the new Sec 172 should aim at levelling such discrepancies that would require directors to have potentially two different liabilities when promoting the purposes of the company and the group, as well as two different liabilities when defining and promoting the purposes of the company.

Critiques

There are two main critiques that one could raise as it pertains to the proposed changes of Sec 172. First, that such changes would not be enough to overcome shareholders primacy; and second, that overcoming shareholders primacy would not ensure that businesses rediscover their original function to produce profitable solutions to the problems of people or planet.

Not Enough

The proposed changes risk to create just a Sec 172 out of tune with the rest of UK company law, instead of shifting from shareholders primacy to a multi-stakeholders approach, aimed at incorporating a variety of interests in corporate governance. It is sufficient to compare UK company law with the jurisdictions of the United States, to understand that a complete change of paradigm would be required to overcome shareholders primacy. The following table compares the different balance of powers between shareholders and board in the UK and Delaware. This is not a comprehensive analysis of the two corporate laws, but it summarises some of the main differences of the two systems that make the UK a shareholders primacy and Delaware a directors primacy jurisdiction.

United Kingdom	**Delaware**
Art 3 Model Articles: shareholders may delegate the power to the board (if they want to)	Sec 141 Delaware General Corporation Act: The power of the board of directors is undelegated and original
Sec 303-305 Companies Act: Right to Call a General Meeting 1) Minimum 5% of shares request directors to call a meeting 2) Directors are under a duty to call a meeting in 21 days 3) If the directors do not call the meeting the shareholders can call it themselves 4) All expenses are on the company	No such right exists in Delaware
Sec 314 Companies Act: Right to Communicate 1) Minimum 5% of the total voting rights or at least 100 members with voting	No such right exists in Delaware

rights with shares for at least 100 GBP each 2) Statement should be no more than 1000 words 3) Costs are on the company if it is a public company	
Art 4 Model Articles: Instruction Rights shareholders can instruct directors by a special resolution (75%)	No such right exists in Delaware
Sec 21 Companies Act: Change Articles of Association by special resolution (75% of the shareholders)	Sec 242 Delaware General Corporation Act: Change of the Certificate of Incorporation 1) Board must propose the amendment 2) Shareholders vote by the majority of the issued shares
Removal of Directors All directors are appointed for 1 year. Sec 168 Companies Act: To remove a director it is necessary an ordinary resolution (50%+1 votes).	Sec 141 (k) Delaware General Corporation Act Removal of Directors: 1) NON-CLASSIFIED BOARD (1 year appointment): To remove a director it is necessary the majority of the vote cast without cause.

	2) CLASSIFIED BOARD (3 years appointment): To remove a director it is necessary the majority of the vote cast with cause. Case Law: cause means “deliberate obstruction of the corporate business”
Non-Frustration Rule (EU Takeover Directive Article 9 and UK City Code on Takeovers Articles 9, 21)	Take Over Defences are allowed within certain limits determined by Delaware case law

As illustrated by this table, in the UK shareholders delegate the power to the board, have numerous rights to intervene in the activities of the board, can change the articles of association with the agreement of 75% of their body, while directors are appointed only for one year and can be removed without cause. Instead, in Delaware, the law empowers the board; shareholders have no rights to instruct the board; in order to change the certificate of incorporation the board must propose an amendment (de facto controlling any change); and most boards would be staggered, where directors are appointed for three years and removable only with cause. In addition, take-over defences are available in the US and not in the UK. Therefore, in order to remove shareholders primacy from UK company law a structural change of paradigm would be required.

Does this Improve the Social Responsibility of Businesses?

There is, however, a more significant concern in respect of the debate on shareholders primacy: the divergent approaches adopted by the UK and the US do not seem to result in practical differences in terms of the social responsibility of companies. This could be better exposed by the comparison between NY and UK law.

New York Business Corporation Law Article 7, Sec 717:

(a) A director shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances.

(…)

(b) In taking action, including, without limitation, action which may involve or relate to a change or potential change in the control of the corporation, a director shall be entitled to consider, without limitation,

(1) both the long-term and the short-term interests of the corporation and its shareholders and

(2) the effects that the corporation's actions may have in the short-term or in the long-term upon any of the following:

(i) the prospects for potential growth, development, productivity and profitability of the corporation;

(ii) the corporation's current employees;

(iii) the corporation's retired employees and other beneficiaries receiving or entitled to receive retirement, welfare or similar benefits from or pursuant to any plan sponsored, or agreement entered into, by the corporation;

(iv) the corporation's customers and creditors; and

(v) the ability of the corporation to provide, as a going concern, goods, services, employment opportunities and employment benefits and otherwise to contribute to the communities in which it does business.

Nothing in this paragraph shall create any duties owed by any director to any person or entity to consider or afford any particular weight to any of the foregoing or abrogate any duty of the directors, either statutory or recognised by common law or court decisions.

It is apparent from the comparison between Sec 717 of the NY Business Corporation Law and Sec 172 of the UK Companies Act, that NY law allows directors to act in the interest of any stakeholders, while UK law requires the board to act in the shareholders' interest. However, there are several practical factors that level the divergent approaches that UK and NY law took.

First, in widely held companies, shareholders are often rationally apathetic. Therefore, although they can theoretically exercise several rights in the UK, in practice they do not. This makes the functioning of UK and NY corporations not that far apart from each other. Furthermore, in both jurisdictions, directors tend to act in their self-interest (instead of in the one of other stakeholders) in cases of rational apathy. Therefore, switching from a shareholders to a directors primacy jurisdiction may simply intensify the first agency problem, without being of particular help to stakeholders (Kershaw 2012: 171–188).

Second, directors owe the duties of care and loyalty to the company. However, in both the UK and NY, the only persons that are entitled to sue directors are shareholders. The ability of shareholders to sue directors is a reason for the board to act primarily in the interest of shareholders in both jurisdictions.[7]

[7] Compare Companies Act Sec 260-269 and NY Business Corporation Law Sec 626.

Third, the only persons who can elect and remove directors are in both jurisdictions the shareholders. This is a sufficient incentive for directors to act primarily in the interest of shareholders.[8]

Fourth, often a part of the directors' compensation is constituted by options to buy shares in the company which they manage. For example, more than 60% of the compensation of the CEOs of S&P 500 companies consists of equity-based compensation (Larcker and Tayan). As a result, directors will have interests that are mostly aligned with those of the shareholders.

Therefore, both in NY and in the UK, boards act primarily in the interest of the shareholders or in their self-interest, often ignoring the interests of third parties because neither NY nor UK laws create appropriate incentives for the directors to care about the interests of stakeholders.

However, there is a critical difference between the UK and NY approaches as it pertains to those directors that want to act in a socially responsible way. In NY, a director who wants to act in the stakeholders' interest, even if this could result in negative externalities for the shareholders, is able to do it. His/Her duty is to the company and if s/he believes that pursuing the stakeholders' interest is also in the interest of the company, s/he can pursue such an interest. Instead, in the UK, directors have to promote the success of the company for the benefit of the shareholders. This means that if a director believes that the interests of the company are aligned with those of stakeholders, but not with the benefit of shareholders, he cannot act in the interest of the former and to the detriment of the latter. Acting to the detriment of shareholders would be a breach of the duty to loyalty as enshrined in Sec 172. A director would, therefore, not act in the stakeholders' interest, unless such an interest would also benefit the shareholders.

[8] Compare Companies Act Sec 157-168 and NY Business Corporation Law Sec 703-706.

PRINCIPLE 2: REGULATION SHOULD EXPECT PARTICULARLY HIGH DUTIES OF ENGAGEMENT, LOYALTY AND CARE ON THE PART OF DIRECTORS OF COMPANIES TO PUBLIC INTERESTS WHERE THEY PERFORM IMPORTANT PUBLIC FUNCTIONS

Principle 2 would ensure that licensed companies, which are deemed to perform a public function, would define their purposes according to their public role. This could be achieved by adding a paragraph in Sec 172.

Draft New Sec 172 (2)

In defining its purposes, a licensed company must reflect its public role.

For example, a bank will have to define its social purposes within its overall license to hold the money of the public. Therefore, the bank would have to define its purposes:

1) Within its function to hold people's money, and therefore it should not invest for example in high risk carrying activities that would result in a potential loss of the public money;
2) Taking into account, like all other companies, the factors included in Sec 172 (1) (a)-(g). For example, by considering whether to invest in the renewable energy sector rather than in coal.

A question arises as to whether the new Sec 172 (2) would truly add anything to businesses that are already highly regulated. For example, the investment policies of banks are already regulated without the need to include such policies into the corporate's purposes. However, there would be at least an advantage to include such considerations into the corporate purposes. The requirements linked to the company's public function would become part of the directors' duties, instead of a regulation applicable to the company. This means that directors could be personally liable if they do not promote the purposes of the company.

In this sense, directors would have duties similar to those prescribed by public benefit corporations in some US States. A public benefit corporation is incorporated by the shareholders with the purpose to produce a public benefit. The incorporation of such a company is a choice that shareholders may make which is unrelated to the license the company may owe. Nevertheless, once a public benefit corporation is incorporated, its directors would have a duty to balance the public benefit defined in the certificate of incorporation with all other interests at stake. For example, Delaware General Corporation Law defines the directors' duties as follow.

> § 362 Public benefit corporation defined; contents of certificate of incorporation.
>
> A "public benefit corporation" is a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation.

The proposed amendment of Sec 172 (2) of the Companies Act in the UK would establish a similar duty for directors to balance the public function of the company with the other interests at stake. However, unlike in Delaware, in the UK such a public function would not be defined by the certificate of incorporation, but by the license the company owes.

It is still doubtful whether this approach would add much to the already regulated sector of licenses because directors already have a duty to follow such regulations as part of their duty of care (Sec 174).[9] Nevertheless, in the context of the legislative amendments proposed to Sec 172 (1), Sec 172(2) would require that the corporate purposes of licensed companies would be centered around the company's license. This approach would certainly ensure consistency between the corporate laws and regulations applicable to companies and the board.

ENFORCEMENT MECHANISMS: DO NO HARM

The new version of Sec 172 would certainly be of help in terms of switching the focus of UK company law from shareholders primacy to a pluralistic approach which would not be based on the primacy of either the shareholders or the directors. It would also go a step further than Sec 717 of NY Law as it would not only allow, but also demand, directors to promote a variety of interests which do not include only those of shareholders. Nevertheless, the proposed changes would not be sufficient to overcome shareholders primacy because, as explained above, the whole structure of UK company law is constructed around shareholders. Furthermore, even if one could potentially achieve a change of paradigm, this would certainly allow the board to make decisions in the interest of stakeholders (pursuing potentially The Purpose Objective), but would not prescribe any obligation towards stakeholders, let alone sanction companies that are not socially responsible (not pursuing the Do No Harm Objective). In order to meet both objectives, it is necessary to take into account further changes that could be combined with new Sec 172.

[9] Sec 174 '(1)A director of a company must exercise reasonable care, skill and diligence. (2)This means the care, skill and diligence that would be exercised by a reasonably diligent person with—(a)the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and (b)the general knowledge, skill and experience that the director has.'

The following propositions are by no way comprehensive. A legislator could take into consideration a number of other avenues to ensure the Do No Harm Objective. However, these are a few possibilities that the Future of the Corporation Programme has taken into account in order to achieve the Do No Harm Objective.

Control Approach: Internalising Stakeholders Interests

A possible avenue to enforce the proposed new draft of Sec 172 in the interest of all stakeholders, could be to internalise their concerns in the corporate governance of the company. If stakeholders become, alongside directors and shareholders, part of the company, then directors will have to take their interests into account in their decision-making process.

There could be numerous avenues to achieve such a result because stakeholders are currently not controlling any aspect of the company's life. The control of corporations is divided between the shareholders and the board. These two groups are traditionally perceived as the two components of a company. They must, on the one hand, cooperate to achieve the success of the company, but are, on the other hand, in a potential conflict of interest (first agency problem). A much wider range of stakeholders that are also contributing to the existence and functioning of the company are kept at its margins and exercise no control over it (Veldman and Willmott 2016). Against this background, any change in the law that would allow some form of control of the stakeholders over the board, would represent a step forward.

Three mechanisms which could have a relevant impact in terms of stakeholders' control, are: the possibility for stakeholders to file lawsuits against directors on behalf of the company (derivative actions), or on their own behalf (oppression remedy), and the appointment of some members of the board by stakeholders (co-determination).

Derivative Actions

Managing a company also includes deciding when and under which circumstances such a company may file a lawsuit against third parties. Directors, therefore, typically make such an assessment and are able to file suits on behalf of the company. However, a problem arises as to how a company may sue the directors for breach of their duties. In fact, directors owe their duties of loyalty and care to the company. If they breach such duties, they would first of all damage the company and only indirectly damage the shareholders. In this scenario, when a company may need to sue the board, it is apparent that the directors will not sue themselves. It may be possible that some directors may sue others, but this is an unlikely scenario because they would have to sue their colleagues for breach of duties. For this reason, despite filing a lawsuit on behalf of the company is a business decision, UK law exceptionally allows any shareholder to sue the directors on behalf of the company for breach of duties. It is evident, however, that by empowering any shareholder with a right to bring derivative suits, nuisance lawsuits could occur. To minimise the likelihood of abuse, UK law establishes a judicial check on any lawsuit a shareholder may want to file on behalf of the company. This mechanism is regulated by the Companies Act in detail and aims at balancing, on the one hand, the control that shareholders should exercise over the directors and, on the other, the inexperience or bad faith that such shareholders may have. There are still some concerns that one could have on the ability of the judicial branch to make a business decision, such as whether or not a company should file a lawsuit against its own directors, but at large this is believed to be a reasonable compromise to allow companies to file suits against directors (Reisberg 2005: 606–628, Davies and Gower 2008: 605–627, Kershaw 2012: 606–628).

Against this background, one of the problems that could make inefficient any change of Sec 172, is the lack of accountability mechanisms. Even assuming Sec 172 would require directors to act in the interest of society, why would they comply with such a law if no stakeholder could ever hold them to account? Shareholders may sue directors who run a company against their interests. However, shareholders would have little incentive to sue a director for not taking into account the interests of employees, the environment or the community living nearby an industry the company owns. To the contrary, often the interests of such stakeholders would be opposed to the one of shareholders (Keay 2016, Veldman and Willmott 2016). In widely held companies shareholders, who are increasingly detached from the management of the company and rationally apathetic, have little incentive to sue directors even when this could be in their self-interest, let alone suing directors to fulfil the interests of third parties. As a result, any change of Sec 172 could end up being ineffective in terms of achieving the Do No Harm Objective, because de facto the directors would have no incentive to take into account any interest other than its own and the one of the shareholders.

Therefore, a possible avenue for ensuring the enforcement of the new draft of Sec 172, would be to allow stakeholders to file derivative lawsuits on behalf of the company. Stakeholders could, like shareholders, sue directors who do not fulfil the purposes of the company or who define the purposes of the company without taking into account the interests (a)-(g) (which would be considered as a breach of their duty of loyalty); or for breach of their duty of care. In fact, according to Sec 174, "a director must exercise reasonable care, skill and diligence" in any of its decision-making processes. This would include also those decisions that a director would make to promote the company's purposes.

<u>Stakeholders as Shareholders</u>

Theoretically, any stakeholder could become a shareholder in a widely held company and sue a director for breach of duties. Therefore, provided that Sec 172 would change, including the Purpose Objective, stakeholders could simply be encouraged to pursue such a creative litigation strategy.

This is not simply a theoretical example. In a Polish case *ClientEarth v Enea*, ClientEarth, an NGO, bought some shares in the company Enea to challenge the construction of a coal power station as it would cause environmental risks with financial repercussions on the company and the shareholders. The NGO won the case in its capacity of shareholder.[10]

Although this root is possible, it would be commendable to establish a specific mechanism for stakeholders to file suits on behalf of the company to avoid some undesired outcomes. As explained above, in the UK it is for the judicial branch to assess whether a derivative lawsuit filed by shareholders is worth pursuing. If stakeholders would instrumentally buy shares in a company to file a derivative lawsuit, judges could accommodate such strategic litigation or close the door to it.

<u>The Canadian Example</u>

Canada and Singapore allow derivative actions from any person who is identified as "proper" at the court's discretion. Potentially, any stakeholders can sue the directors for breach of duties

[10] *Client Earth v Enea* [2019] Regional Court in Poznań.

(Calkoen, Koh 2001, Ben-Ishai 2007). Some academics praised this approach as a possible avenue to ameliorate the mechanism of derivative actions in the UK. In fact, although shareholders can file derivative actions on behalf of the company, they rarely exercise such a right. This is due to a number of reasons, including the cost of litigation, rational apathy, and the fact that shareholders have alternative means to exercise control over the board or can simply exit the company by selling their shares in the market. Therefore, it is believed that allowing any person to sue the directors could reduce the agency problem and ensure that the board would act in the company's interest, instead of in its own (Keay 2016).

Canada is often defined as the pioneer jurisdiction in terms of establishing a stakeholders-friendly corporate governance regime (Vasudev 2015). Importantly, the Canada Business Corporation Act allows any "proper person" to file a complaint on behalf not only of the company but of any of its subsidiaries, enabling a potential influence of stakeholders also on corporate groups. However, in Canada, the judicial approach has been to carefully assess whether to permit stakeholders to file a lawsuit on behalf of the company: courts limited the number of persons who could be identified as "proper" to file a complaint and focused on the business judgment rule (Ben-Ishai 2007). As a result, stakeholders filed a limited number of derivative actions in Canada. Some scholars have criticised such an approach, arguing that it is insufficient to ensure that stakeholders could exercise control over the board (Ben-Ishai 2006, Sarra 2006, Vasudev 2015). Against this background, an important issue to consider in establishing derivative actions for stakeholders in the UK would be whether the law should define a list of stakeholders that are entitled to file a lawsuit, instead of leaving such a definition for courts to decide on a case by case basis. Stakeholders include a wide variety of actors, from creditors, previous shareholders, previous directors to NGOs and employees. It would be, therefore, commendable to take these different roles into account and structure stakeholders' derivative lawsuits accordingly.

It should be noticed in this regard, that in Canada derivative lawsuits filed by stakeholders are not connected with a duty of directors to promote the company's purposes, but instead with more general duties of loyalty to act in the corporation's best interest and of care.[11] However, if the UK were to adopt the new draft of Sec 172, and the duty imposed on directors would be to promote the purposes of the company and to define such purposes in the interests of various groups, this proposed legislation would be a step forward, if compared to Canadian law, in terms of ensuring that stakeholders would have an impact on the company's conduct.

Furthermore, Canada adopts an approach, similar to the one of US jurisdictions such as NY and Delaware, in contrast with the shareholder primacy approach currently enshrined by UK legislation (Ben-Ishai 2006, Vasudev 2015). This approach limits the possibility for shareholders to sue directors in order to allow the board to exercise more flexibility in the management of the company. Therefore, generally speaking, UK law establishes a higher standard of review of the directors' actions if compared with jurisdictions such as the US or Canada. This is because, being a shareholder primacy jurisdiction, the UK aims at reducing the first agency problem and at establishing more effective enforceability mechanisms available to shareholders. If such a standard would be also applicable to cases filed by stakeholders, the control exercise on directors would be more stringent than the one currently provided by Canadian law. This is especially true if the applicable standard would be objective instead of the subjective standard often adopted in Canada (business judgment rule). As explained above, in the UK both objective and subjective standards

[11] Sec 122(1) Canada Business Corporations Act.

are currently applicable to directors depending on the duty that they are accused to breach.[12] Therefore, the introduction of derivative lawsuits for stakeholders would arguably be more effective in the UK.

Sec 263

It would be fundamental to take into account Sec 263 of the Companies Act which is regulating how judges should assess whether to grant shareholders permission to file a derivative lawsuit on behalf of the company.

> 263 Whether permission to be given
>
> (1)The following provisions have effect where a member of a company applies for permission (in Northern Ireland, leave) under section 261 or 262.
>
> (2)Permission (or leave) must be refused if the court is satisfied—
>
> (a)that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or
>
> (b)where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or
>
> (c)where the cause of action arises from an act or omission that has already occurred, that the act or omission—
>
> (i)was authorised by the company before it occurred, or
>
> (ii)has been ratified by the company since it occurred.

[12] In the UK the standards applicable to the duty of care (Sec 174) are typically higher than the one analyzed above as it pertains to the duty of loyalty (Sec 172).

(3)In considering whether to give permission (or leave) the court must take into account, in particular—

(a)whether the member is acting in good faith in seeking to continue the claim;

(b)the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;

(c)where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—

(i)authorised by the company before it occurs, or

(ii)ratified by the company after it occurs;

(d)where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;

(e)whether the company has decided not to pursue the claim;

(f)whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company.

(4)In considering whether to give permission (or leave) the court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter.

In drafting a parallel article to Sec 263 allowing stakeholders to file a derivative lawsuit, there are a number of issues one could take into account.

First, it would be commendable to delete any language referring to the company's decision to authorise the directors' conduct. This reference is made to ensure that one shareholder would not be able to file a derivative suit on behalf of the company when the majority of the shareholders, or disinterested directors, approve the conduct of the board (Davies and Gower 2008: 617–621, Kershaw 2012: 606–628). This rationale would not be valid in a lawsuit brought by stakeholders, as they may have a different point of view from the one of the shareholders' body and may want to file a lawsuit despite the shareholders agreeing with the directors. This consideration, although intuitive, would, however, substantially modify the nature of the company's ownership and control. If stakeholders would be able to file a lawsuit on behalf of the company even against the will of both shareholders and directors, it would mean that the control of the company belongs to society, instead of the shareholders. This would represent, by itself, a revolutionary change in UK corporate law. However, Canada has already adopted a similar approach as shareholders' approval is not a determinative factor for courts to decide whether to allow stakeholders to file a derivative lawsuit (Ben-Ishai 2006).

Second, in order to avoid nuisance lawsuits filed by any person, one could imagine that only certain groups of stakeholders could be entitled to file such derivative lawsuits. This could include, for example, trade unions, consumer associations, NGOs, or a substantially large group of individuals that are affected by the activities of the company. Therefore, stakeholders that pursue a public interest would be entitled by law to file a derivative lawsuit on behalf of the company, while the others would not. This approach would also avoid the problem scholars have identified in Canada, where courts decide on a case by case basis who the proper person to file a derivative action is (Sarra 2006). In addition, one could also entitle to derivative lawsuits those groups or individuals that have a real interest in the company's conduct or have been impacted negatively by it. In this sense, the logic is opposite to the one currently adopted for shareholders. Sec 263 sets out that judges should have high regard for the evidence brought by those shareholders that have no interest in the matter. It also lists as one of the reasons to dismiss a lawsuit, the fact that a shareholder could pursue an action on its own. The purpose of these limitations is to avoid enabling a shareholder who has a personal interest in a matter to use the company to pursue an action that he could pursue on its own (Davies and Gower 2008: 617–621, Kershaw 2012: 606–628). In the case of stakeholders, however, one could accept an opposite logic, requiring an interest in the matter before pursuing it, in order to avoid nuisance lawsuits brought by a person who has no particular reason to sue the directors.

Third, should the derivative lawsuit be successful, any damage or reparation cost would belong to the company as the stakeholders would file a lawsuit on behalf of the company. This alone would be a strong disincentive for stakeholders to file nuisance lawsuits because they will not be able to benefit directly from such litigation. However, this opens a number of questions in terms of the costs that such a lawsuit would have. A fundamental question in this regard is whether, subject to a court prima facie analysis of the claim, the company should bear the costs of lawsuits filed by stakeholders, who often have no means to litigate a case on their own behalf. This and other related questions should be taken into careful consideration in drafting a legislative proposal.

The Oppression Remedy

One of the reasons why shareholders rarely file derivative actions is that in a number of common law jurisdictions they can file an action on their own behalf against directors (Keay 2016). This action, defined as oppression remedy, substantially differs from derivative actions, for the following reasons.

First, the oppression remedy is a personal action that shareholders can use against directors that unfairly prejudice their interests (instead of the success of the company). This means that the interests of the shareholders and the one of the company may potentially diverge. For example, if directors act in the interest of the company but, by doing so, prejudice the interest of a shareholder, s/he can sue the board. Often majority shareholder(s) control the board and, therefore, it is for minority shareholder(s) to use the oppression remedy. Sometimes, the board breaches its duties of care and/or loyalty to the company and this also results in unfair prejudice to the shareholders. In this case, the derivative action and the oppression remedy may conflate, and a shareholder could sue the board on both grounds (Sarra 2006, Keay 2016).

Second, because it is a personal action both the costs and the prospective compensation arising from the lawsuit are due by/to the shareholders. The company is neither the claimant nor the receiver of any damages gained as a result of the litigation. It is, therefore, a remedy that would be typically preferred by shareholders vis-à-vis derivative actions because, if successful, they would directly benefit from the litigation (Davies and Gower 2008: 681–708, Kershaw 2012: 690–705, Keay 2016).

Third, while a derivative action can be initiated for breach of duties, given that the directors owe the duties of loyalty and care to the company, the oppression remedy can be used any time a mere interest of the shareholders is unfairly prejudiced (Sarra, 2006).

In the UK, the Companies Act 1948 used to set up the oppression remedy, which the Companies Act 2006 then re-framed as unfair prejudice remedy. In both Acts, the remedy is actionable by shareholders but not by stakeholders (Davies and Gower 2008: 681–708, Kershaw 2012: 690–705).

The Canadian Example

Canada is the only jurisdiction that entitles stakeholders with the oppression remedy. The Canada Business Corporation Act adopted one definition of stakeholders for both the derivative action and oppression remedy: any person considered as "proper" at the discretion of the court.[13] However, the grounds to file oppression claims are more restrictive than those of derivative actions.

> Sec 241
>
> Grounds
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> > that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

The Canadian judiciary clarified the meaning of such grounds and interpreted Sec 241 in a conservative way.

[13] Canada Business Corporation Act Sec 238.

First, the oppression remedy at the common law has been developed for the benefit of minority shareholders and, therefore, in order to be a “proper person” to file an oppression remedy a stakeholder must resemble a minority shareholder. Courts have validated such resemblance in cases of creditors in insolvency proceedings but have so far not admitted that employees could qualify (Sarra 2006).

Second, when a stakeholder uses the oppression remedy, it protects mere interests, which may conflate with the rights of shareholders. In this competition between stakeholders’ interests and shareholders’ rights, Canadian courts have often preferred shareholders’ rights (Ben-Ishai 2006, Sarra 2006).

Third, Canadian courts clarified that, differently from a derivative action, the oppression remedy is a personal action, which is not based on a breach of the duties of loyalty and care to the company, but rather on an unfair prejudice of the shareholders/stakeholders’ interests. Therefore, shareholders/stakeholders cannot sue the board for a breach of the duty of loyalty, because directors have no duty of loyalty towards either shareholders or stakeholders but only towards the company. Stakeholders/shareholders can instead file an oppression claim for breach of a duty of care which any person, including a director, could owe towards any other person, including a stakeholder or a shareholder. Nevertheless, the standard adopted by Canadian law as it pertains to the duty of care is often based on the concept of the business judgment rule, leaving directors with broad liberty as to how to manage the company (Vasudev 2015).

Prospective Oppression Remedy for Stakeholders in the UK

Given the Canadian approach allowing stakeholders to file oppression claims, a possibility for the UK legislator to enhance the accountability of the board could be to also adopt a stakeholders’ oppression remedy. A possible proposal in this direction would, however, trigger several important questions.

First, it would be commendable in such a proposal to define appropriately the class of stakeholders that can file an oppressive remedy, in order to avoid the reduction of such class to creditors in insolvency proceedings. As already discussed for the derivative actions, such a class of stakeholders should arguably include trade unions, consumers associations, NGOs, or a substantially large group of individuals that are affected by the activities of the company.

Second, an oppression remedy would not be the proper remedy to enforce the duty of loyalty including the proposed amended Sec 172, because directors owe the duty of loyalty only to the company and not to shareholders or stakeholders. Therefore, a prospective oppression remedy could be used only in the circumstances in which the directors would violate a duty of care towards stakeholders detrimentally affected by the company's conduct.[14]

These considerations are not to say that a stakeholders' oppression remedy would be useless or not worth adopting. There are a number of arguments in favor of the adoption of a stakeholders' oppression remedy.

First, the oppression remedy would allow stakeholders to file lawsuits for breach of a duty of care not only against companies, as they currently do,[15] but also against directors. This could be a powerful tool in terms of ensuring that the board does not harm stakeholders.

Second, any compensation arising from such a lawsuit would be for the stakeholders, instead than for the company. This would incentivise stakeholders to file lawsuits against directors but

[14] Although the distinction between duties owed to the company and interests of the shareholders is formally correct, note that UK courts have often received unfair prejudice claims for breach of duties. See Keay, 2016.
[15] See below section Liability in Tort Law.

could also result in the filing of nuisance lawsuits against the board. It would be therefore commendable to set up a judicial check similar to the one established for derivative lawsuits.

Third, from a pluralistic corporate governance perspective, it may be arguable that if shareholders have the opportunity to file both derivative and unfair prejudice actions, stakeholders should as well be entitled to both remedies in order to ensure that the board would balance all interests at stake while managing the company. This would avoid the board preferring shareholders' over the company's interests.

The drafting of a legislative proposal should take into account all of the above considerations.

Co-Determination

Co-determination allows directors and workers to cooperate in managing the company. It is a possible avenue to ensure that the board would make decisions not only in the interests of shareholders or of its own, but also in the interests of employees. A number of countries that follow the German legal tradition of corporate governance adopt such a model, which is typically coupled with a two-tier board (including a management board and a supervisory board). The employees' representatives and trade unions are usually part of the supervisory board and together with other non-executive directors, control the actions of the management board. Whether or not co-determination is successful is part of a complex debate that academics and the business community have engaged in for decades and which is not for this paper to repeat (Fauver and Fuerst 2006, Blair and Roe 1999, McGaughey 2015). Nevertheless, no matter the view one could adopt, co-determination could represent a possible avenue for at least some stakeholders to exercise a certain level of control over the board. This could be, however, a sub-optimal solution because it would allow only employees to take part in the life of the enterprise, while excluding other stakeholders, such as communities affected by the industrial activities or NGOs representing environmental concerns.

In 2018, the newly revised Corporate Governance Code has taken co-determination into account by introducing Principle 1E) and Provisions 5 and 6.

Principle 1 E): Board Leadership and Company Purpose

> The board should ensure that workforce policies and practices are consistent with the company’s values and support its long-term sustainable success. The workforce should be able to raise any matters of concern.

Provision 5:

> The board should understand the views of the company’s other key stakeholders and describe in the annual report how their interests and the matters set out in section 172 of the Companies Act 2006 have been considered in board discussions and decision-making. The board should keep engagement mechanisms under review so that they remain effective.
>
> For engagement with the workforce, one or a combination of the following methods should be used:
>
> • a director appointed from the workforce;
>
> • a formal workforce advisory panel;
>
> • a designated non-executive director.
>
> If the board has not chosen one or more of these methods, it should explain what alternative arrangements are in place and why it considers that they are effective.

Provision 6:

> There should be a means for the workforce to raise concerns in confidence and –if they wish– anonymously. The board should routinely review this and the reports arising from its operation. It should ensure that arrangements are in place for the proportionate and independent investigation of such matters and follow-up action.

First, it is important to recall that the Corporate Governance Code is a comply or explain set of principles which applies to companies with a Premium Listing of equity shares. It aims at providing guidance, rather than prescribing a conduct for companies. Furthermore, given the current structure of UK company law being a shareholders primacy jurisdiction, any change in the way the directors manage the company is currently subjected to the shareholders' approval and control. This includes also the possibility for directors to engage with stakeholders, including the workforce.

Second, although Provision 5 refers to the engagement with stakeholders other than the workforce, it is unclear how such an engagement should happen. While as to the workforce there is an indication that it should participate in the management of the company (through either a designated non-executive director, an advisory panel, or a member of the board appointed by workers); as it pertains to other stakeholders there is no recommendation as to how the board should engage with them.

A number of avenues could be explored. Certainly, the possibility to have only one member of the board coming from the workforce, would not be enough to represent the wide variety of interests of the stakeholders. One could imagine an advisory panel including not only employees, but other stakeholders, or the introduction of a supervisory board with representatives from a wide variety of stakeholders. A board including not only employee representatives, but also those of other stakeholders, would be an important step forward because, as demonstrated by some scholars (Gelter, 2016), the interests of employees may not necessarily be aligned with that of the environment or other stakeholders affected by the activities of corporations. Like shareholders, also stakeholders are a diverse group including people that have sometimes divergent interests. The role of the board would be in this sense to balance such competing interests in order for the company to provide the most profitable solutions to society.

An important issue in this regard is how stakeholders' participation should happen on a global scale. For instance, if a UK company is the head of a corporate group making clothes in India, the employees and the communities affected by such activities would likely be in India. Certainly, the decision of the board in London would have a direct effect on the lives of stakeholders in India. It would make, therefore, sense to consider in which capacity these people could contribute to the governance of the corporate group. How to ensure, for instance, that an advisory panel would reflect the interests of those stakeholders affected by the group?

A legislative reform should take all of these considerations into careful account in order to ensure that various interests are represented in the board of directors.

The Accountability Approach: Externalising Stakeholders' Interests

A different avenue to enforce the proposed new draft of Sec 172 could be to hold the company to account when stakeholders are detrimentally affected by its activities. This avenue transforms the concerns of stakeholders as external liabilities for the company. Stakeholders would not exercise control over the board. However, the board would have to take their concerns into account to avoid liabilities for the company. There are various sanctioning mechanisms that one could implement to enforce stakeholders' rights against the company. This working paper will briefly analyse two mechanisms that have become increasingly relevant in a number of jurisdictions. The first one is to introduce reporting obligations and corresponding penalties for companies that do not comply with certain standards; the second one is to allow stakeholders to file civil liability complaints against parent companies for the extraterritorial conduct of their foreign subsidiaries or supply chains.

Reporting Obligations and Penalties

The proposed changes of Sec 172 could be strengthened by some reporting obligations on purposes and corresponding penalties for those companies that do not fulfil their purposes.

This approach, introducing reporting obligations, is not new. For instance, the UK Modern Slavery Act requires holding companies to report on modern slavery and human trafficking within their supply chains[16] (Fasciglione 2016). The Corporate Governance Code itself prescribes companies to report as to whether or not they comply with it. Most specifically, according to Provision 5 (see above) the board should report on the way it took into account the interests of stakeholders in its decision-making. However, such laws have not established penalties for companies that fail to comply with the suggested best practices. For this reason, scholars often criticise reporting obligations as they do not ensure proper enforcement of the conduct they prescribe (Broad and Turnbull, North, 2018).

The Netherlands adopted a recent piece of legislation, the Child Labour Due Diligence Law. The law establishes a due diligence obligation for companies selling their products in the Netherlands (including both Dutch and foreign companies) to prevent child labour across their

[16] *Modern Slavery Act 2015*: chap. 30, part 6, s. 54 Transparency in supply chains etc.

supply chain, in connection with reporting obligations. It is the first concrete example of a sanctioning regime applicable to companies that fail to comply with due diligence and reporting obligations. It empowers an officer to receive complaints from victims and to assess the due diligence plan companies put in place and/or the accuracy of their reports. The sanctions include fines on the company and criminal liability on the directors (Hoff 2019).

Against this background, one could imagine introducing a similar penalty regime (not necessarily extended to criminal liability), for companies that fail to meet their reporting obligations on purpose in connection with an authority that is able to hear victims' complaints and assess the reports filed by companies.

This could be achieved by changing Secs 9-16 of the Companies Act to ensure that companies registered in the UK would:

1) State their purposes at the time of incorporation;
2) Publicly report on the positive and negative externalities of such purposes on an annual basis;
3) If a company owes a subsidiary or is part of a supply chain, it must also state the purposes of the corporate group and report on such purposes.

The law should also introduce a set of penalties and fines for those companies that do not comply with their purposes.

First, the registrar office would have to check that the purposes of the company have been appropriately defined, taking into fair regard various interests and not only the one of the shareholders. If the company does not appropriately define its purposes, the registrar could refuse to register it in the UK.

Second, the company would have to publicly report on the positive and negative externalities of such purposes, in order to increase the public pressure on companies to pursue their purposes.

Finally, if a company does not pursue its purposes, it should be subjected to penalties and fines. One could imagine an authority, such as the Financial Conduct Authority, to be in charge of reading the reports filed by companies and overseeing whether their conduct meet their purposes. Such an authority could also receive stakeholders' complaints in order to get informed as to the negative externalities of companies.

This approach would be in continuity with already existing reporting obligations but would make such obligations more effective by introducing sanctions for companies that fail to comply.

Liability in Tort Law

Another possibility to prevent multinational enterprises from harming others is to hold parent companies accountable when the group damages third parties. This is a possibility that has been explored by litigators in various jurisdictions.

In common law jurisdictions, and specifically in the US, the UK and Canada, litigators have increasingly argued for a progressive interpretation of tort laws in order to hold parent companies accountable for negligence resulting in their foreign subsidiaries violating either international or tort law. For instance, in the US, litigators have interpreted in a progressive way the Alien Tort Statute, a peculiar piece of legislation connecting common law causes of actions in tort with a violation of the Law of Nations (which could be interpreted as international law) (Enneking 2008, Giannini Farbstein and Arend 2011). This approach, which has been initially successful, is now of limited application after recent US Supreme Court's decisions.[17] In Canada, litigators have

[17] *Kiobel v Royal Dutch Petroleum Co.*, 2013; *Jesner v. Arab Bank, PLC*, 2018.

recently attempted to follow a similar path by combining causes of actions in torts with the violation of international law by multinational enterprises.[18] UK litigators have instead pioneered a different approach focused on the concept of a duty of care in tort law and without referring to human rights and international law. This strategy seems increasingly successful after the recent UK Supreme Court decision *Lungowe v Vedanta*.[19]

A different approach has been to adopt mandatory due diligence laws that would require companies incorporated in a certain jurisdiction to oversee the activities of their affiliates worldwide. In case of breach of such obligation, the holding company would be accountable for the damages suffered by third parties.

France passed the first law ever to establish an extraterritorial due diligence obligation for French companies with over 5,000 or over 10,000 employees (depending on whether the corporate group includes only French or also foreign companies) to set up a monitoring plan overseeing the activities of its corporate groups worldwide. The monitoring plan shall prevent threats to human rights, environment, health or security. The parent company's monitoring obligation includes both subsidiaries and companies with which it has an established commercial relationship (supply chain). This obligation is connected to a tort law cause of action that allows victims to file a complaint against French parent companies. The burden of proof on the victim is, however, high: a victim has to prove, first, that the affiliate violated human rights, environmental standards or laws protecting health or security; second, that the parent company violated its due diligence obligation (i.e. did not set up a monitoring plan); third, that the affiliate would not have violated such laws if the parent company fulfilled its due diligence obligation; and, finally, that such abuses

[18] *Araya v. Nevsun Resources Ltd.*, 2016; *Araya v. Nevsun Resources Ltd.*, 2017.
[19] *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)*, 2019.

resulted in damage (Périn Pierre-Louis 2015, Cuzacq 2016, Cossart Chaplier and Beau de Lomenie 2017, Pataut 2017).[20]

Switzerland is attempting to introduce a similar, but more advanced, piece of legislation on business and human rights. The Swiss Parliament is considering two alternative proposals: a progressive proposal to change the Swiss Constitution by a referendum; and a watered-down counter-proposal for the Swiss Parliament to pass as a regular law. Similar to the French law, both proposals introduce a due diligence obligation for Swiss parent companies to oversee the activities of their corporate group in order to prevent the violation of human rights and environmental laws. In addition, both proposals include a clause reversing the burden of proof from the victim to the parent company. Essentially, the victim would have to prove that an affiliate violated human rights or environmental abuses, but it would be for the holding company to prove that despite meeting its due diligence obligation, its affiliates managed to violate human rights and/or environmental laws. The proposal would apply to supply chains, whereas the counter-proposal would apply only to subsidiaries.[21]

Against this background, the Joint Committee on Human Rights of the UK Parliament called in 2017 for the Government to adopt a due diligence obligation law.[22] A possibility, to ensure accountability of UK corporations, could be to draft a proposal for a mandatory due diligence law, taking into account two elements: the harm such a law should prevent and the liability regime that it should impose on corporate groups.

[20] *Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* 2017.
[21] Commission des affaires juridiques du Conseil national, 2018; *RK-N: Eidgenössische Volksinitiative 'Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt' Indirekter Gegenentwurf*, 2018, https://www.parlament.ch/centers/documents/de/dok-gegenentwurf-mm-rk-n-2018-05-04.pdf; 'Responsible Business Initiative – The initiative' , http://konzern- initiative.ch/initiativtext/?lang=en, accessed 26 April 2018; Commission des affaires juridiques du Conseil des Etats, 2019.
[22] Joint Commitee on Human Rights UK Parliament, 2017.

Harm

In order to draft such a law, one of the fundamental questions to address would be what kind of harm should a corporate group prevent? The answer to this question is not straightforward as there are different levels of harm one could take into account going from gross human rights abuses to any monetary damage inflicted on third parties.

In this regard, it could be of help to consider an old proposal rejected by the UK Parliament in 2002 for a Corporate Responsibility Bill. According to Article 6:

> (1) A parent company of a corporate group shall be liable to pay compensation in respect of the classes of damage set out in subsections (1)(c)(i) to (iii) below where—
>
> (a) the manner in which the group's activities are organised managed or undertaken falls below the standards that can reasonably be expected of the group in all the circumstances of the given case; and
>
> *(b) the manner in which the group's activities are organised managed or undertaken fails to ensure—(i) the health and safety of persons working in or affected by those activities; (ii) the protection of the environment; and*
>
> *(c) such a failure may be regarded as a cause of—(i) serious physical or mental injury to persons working in or affected by those activities; (ii) serious harm to the environment; or (iii) both.*
>
> (2) For the purposes of this section it shall be immaterial whether the injury to persons or harm to the environment occurred within the United Kingdom.
>
> (3) It shall be the duty of a company to which subsection (1)(a) applies to ensure that—(a) any other entity which is under that company's operational control wherever registered or

> domiciled complies with sections 3, 4, 5, 7 and this section; and (b) any subsidiary undertaking of that company wherever located complies with sections 3, 4 and 5.[23]

Sections (b) and (c) of the Corporate Responsibility Bill established the harms that corporations should be liable for. It included the failure to ensure the health and safety of workers or the protection of the environment in combination with a serious injury to person or harm to the environment. This is quite a limited list of harms and injuries which would, however, cover the most outrageous abuses. It is also a list of harms which does not refer to any internationally recognised standard such as human rights or environmental laws.

The French law refers to *any serious threat to human or environmental rights, health or security* which seem to include a wider range of harms affecting not only workers or the environment, but also, for example, human rights defenders abused by corporations.[24]

The Swiss proposal for a constitutional referendum goes a step forward as it refers to *the violation of internationally recognised human rights or international environmental standards*, a broad understanding of harms that would include damages affecting any person.[25] The counter-proposal is instead similar to the French law as it restricts the application of human rights and environmental standards only when a violation of such rules would cause bodily harm or damage to property.[26]

A drafting committee would have to consider these different approaches to define what level of harm a future law should prevent.

[23] *Corporate Responsibility Bill*, 2002, para. 6.
[24] *Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, 2017.
[25] 'Responsible Business Initiative – The initiative' , http://konzern- initiative.ch/initiativtext/?lang=en, accessed 26 April 2018.
[26] *RK-N: Eidgenössische Volksinitiative 'Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt' Indirekter Gegenentwurf*, 2018, https://www.parlament.ch/centers/documents/de/dok-gegenentwurf-mm-rk-n-2018-05-04.pdf.

Liability

As mentioned above, UK courts have already developed quite complex jurisprudence on the parent company's liability for the damages committed by its subsidiaries. This caselaw is based on the parent company's breach of a duty of care owed to victims for the activities of its corporate group. It would, therefore, be commendable to develop a liability regime on the basis of such an established concept of the duty of care.

Essentially, under UK tort law, a parent company could potentially owe a duty of care towards third parties affected by the activities conducted by its subsidiaries (McCorquodale, Enneking 2012, Sanger 2012, Baughen 2013, Petrin 2013, Palombo 2015). The question UK courts have left unanswered is under which circumstances would such duty of care be established. It is complicated to provide an answer as UK courts have delivered various cases on the duty of care but have only recently applied such concepts to parental liability in corporate groups. For the moment, there are two particularly significant cases: *Chandler v Cape plc*, a case recognising the existence of a parent company's duty of care for the damages committed by its subsidiaries;[27] and the recent Supreme Court case *Lungowe v Vedanta*.[28] However, *Chandler v Cape plc* is a purely domestic case concerning a high level of interference of a parent company in the management of its subsidiary. *Lungowe v Vedanta* promisingly opens up to a wider application of the duty of care to multinational enterprises, but is a case decided on the issue of jurisdiction only. It is therefore unclear under which circumstances and conditions a parent company would owe a duty of care towards third parties for the damages committed by its subsidiary.

[27] *Chandler v Cape Plc*, 2012.
[28] *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)*, 2019.

Therefore, it would be commendable for a mandatory due diligence law to detail the conditions under which a parent company owes a duty of care towards third parties for the harm committed by its subsidiaries. Specifically, the committee drafting a legislative proposal could take into consideration the following questions:

1) What relationship would be required between a parent company, a subsidiary and a victim for the parent to owe a duty of care towards the victim damaged by its subsidiary?
2) How should the burden of proof be split in between a parent company, a subsidiary and a victim? Should the burden of proof be all on the victim (as in France)? Or should it be divided between the victim and the parent company (as in Switzerland: for example, the victim could have the burden to prove that the subsidiary violated the law, and the parent company could have the burden to prove that it met its duty of care)?

ASSESSMENT

The Purpose and the Do No Harm Objectives are fundamental goals for future corporations. The legal framework should regulate the conduct of corporations having such two goals in mind.

The Purpose Objective is achievable by modifying Sec 172 and re-focusing UK company law to follow a pluralistic, rather than a shareholders primacy, approach. This change seems achievable and not far away from the experience of other countries where corporate governance follows a pluralistic approach, not focused on the sole interests of the shareholders. While this approach would open the doors to entrepreneurs that are interested in offering solutions for people or planet, it would not be sufficient to ensure that those companies that have a narrow focus on profit do not harm third parties.

The Do No Harm Objective is achievable only by establishing enforcement mechanisms that would ensure the accountability of the board and/or the company when stakeholders are negatively impacted by its activities. There are a variety of approaches that one could take in order to ensure enforcement.

A first avenue, that one could label as *control*, would be to allow stakeholders to exercise some control over the directors. This could be achieved either by allowing stakeholders, like shareholders, to elect directors (co-determination), or by allowing stakeholders, like shareholders, to sue directors (derivative lawsuits and/or oppression remedy).

There are a number of jurisdictions that have already experienced co-determination, even if in such models the stakeholders participating in the board are typically employees and/or trade union representatives. The recent Corporate Governance Code has also taken an approach moving towards this direction.

The derivative and oppression remedy approach has also been implemented by a few jurisdictions, such as Canada. However, there is no country which established a mechanism specifically designed for stakeholders to file actions against the board. Such a mechanism could create a preferred litigation root for those stakeholders that represent the interest of numerous people or a significant public interest, such as NGOs representing environmental concerns or trade unions representing employees.

A second avenue, that one could label as *accountability*, would be instead to allow stakeholders to file complaints against multinational enterprises. This could be achieved by either establishing new mandatory obligations for parent companies in connection with a liability for damages in tort law, or, in the alternative, by penalising companies that do not take into proper consideration the interests of stakeholders.

France adopted a mandatory due diligence law. Other countries, such as Switzerland, have already started a similar legislative reform. The Joint Committee on Human Rights of the UK Parliament also suggested a similar approach and the UK Supreme Court opened the door to tort claims filed against parent companies for the extraterritorial harms committed by their subsidiaries. It seems that this legislative reform could represent a reasonable step forward for the UK legislator.

Penalising companies that do not take into sufficient consideration the interest of stakeholders has never been proposed in these general terms. However, such a proposal would be in continuity with already existing reporting obligations that companies must fulfil at various level and with recent Dutch law.

The two avenues of *control* and *accountability* present different challenges.

The *control* avenue internalises the problems that stakeholders face within the companies by providing them a certain level of control over the board. Such internalisation process has the advantage to combine the Purpose and the Do No Harm Objectives because the impact that stakeholders would have on the board could help both in terms of companies providing profitable solutions for people or planet, and in terms of ensuring that businesses do no harm to others.

However, the level of accountability that such a solution would entail is dubious. For example, if only one member of the board would represent stakeholders, its power would be limited as it could always be outnumbered by the other directors. Also, if derivative actions by stakeholders would be allowed only in relation to purposes entirely defined by the shareholders, then the impact of these lawsuits would also be limited. Imagine, for example, a company defining its purpose as "to find profitable solutions for our clients worldwide". Such a purpose would address both shareholders' and customers' interests, but it would say nothing about the environment. A community affected by environmental degradation committed by the company is unlikely to be able to sue the directors for breach of duties, even if allowed to file a derivative lawsuit, as such legal action could be brought only in connection with the directors' failure to promote a purpose drafted in the shareholders' interest. The oppression remedy could fill this gap, but it would have to clarify what class of stakeholders and interests should be detrimentally affected in order to file an oppression claim. Therefore, the *control* avenue may not necessarily achieve the Do No Harm Objective.

The *accountability* avenue externalises the problems stakeholders have by providing them with a root to sanction businesses that detrimentally affect them. The externalisation process has the advantage of setting up a benchmark as to the companies conduct (being either an administrative authority or the stakeholders affected by the activities of businesses). Such an external benchmark could arguably ensure a higher level of accountability, and therefore better fulfil the Do No Harm Objective.

However, this approach does not incorporate the Purpose Objective. First, stakeholders would not impact the board's decisions directly as directors would not be accountable to them. However, the fact that they could sue the company may have an indirect impact on the board's conduct, which would take the threat of possible lawsuits into consideration when managing the company. Second, even if the lawsuits brought by stakeholders would have an impact on the board's decision-making, this would be limited to the board avoiding possible liabilities for the company, rather than managing the company to positively impact the society. Arguably, for the board to find solutions for people or planet, stakeholders should be members of the board, or able to hold the board to account, or both. Nevertheless, the failure to incorporate the Purpose Objective may not represent such a problem, if the Purpose Objective would be already achieved by the proposed changes of Sec 172. In this case, Sec 172 would aim at Purpose, while the *accountability* approach would focus on achieving Do No Harm.

The UK legislator could also opt for a synthesis between these legislative proposals, combining, on the one hand, the ability for stakeholders to control the board, and on the other, the accountability of multinational enterprises for extraterritorial damages.

REFERENCES

Bartlett, C. A. *et al.* (2003) *Transnational Management: Text and Cases* (4th ed. Boston, McGraw-Hill/Irwin).

Baughen, S. (2013) ‘Holding Corporations to Account: Crafting ATS Suits in the UK’, *British Journal of American Legal Studies*, 2: 533-577.

Ben-Ishai, S. (2006) ‘A Team Production Theory of Canadian Corporate Law’, *Alberta Law Review*, 44(2): 299-322.

Ben-Ishai, S. (2007) ‘Corporate Gatekeeper Liability in Canada’, *Texas International Law Journal*, 42(3): 441-473.

Blair, M. M. and Roe, M. J. (1999) *Employees and Corporate Governance*. Brookings Institution Press.

Blumberg, P. I. (1985) ‘Limited liability and corporate groups’, *J. Corp. L.*, 11: 573-631.

Bright, C. (2013) *L’accès à la justice civile en cas de violations des droits de l’homme par des entreprises multinationales*. http://cadmus.eui.eu/handle/1814/29602 [accessed 15 April 2016].

Broad, R. and Turnbull, N. *UK modern slavery policy: the structure of the problem and government commitment*. http://blog.policy.manchester.ac.uk/growth_inclusion/2018/06/uk-modern-slavery-policy-the-structure-of-the-problem-and-government-commitment/ [Accessed: 4 October 2019].

Calkoen, W. (2019) *The Corporate Governance Review* (9th ed. The Law Reviews).

Cossart, S., Chaplier, J. and Beau de Lomenie, T. (2017) ‘The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All’, *Business and Human Rights Journal*, 2(2): 317–323. doi: 10.1017/bhj.2017.14.

Cuzacq, N. (2016) ‘Le devoir de vigilance des sociétés mères et des donneurs d’ordre’, in *La RSE saisi par le droit: perspectives interne et internationale* (Paris, Pedone: 453–467).

Davarnejad, L. (2011) ‘In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes under the OECD Guidelines for Multinational Enterprises’, *Journal of Dispute Resolution* 2011(2): 351-385.

Davies, P. L., Worthington S. and Micheler E. (2008) *Gower and Davies: principles of modern company law* (8th ed. London: Sweet & Maxwell).

De Schutter, O. (2005) ‘The Accountability of Multinationals for Human Rights Violations in European Law’, in *Non-state actors and human rights* (Oxford University Press, Collected courses of the Academy of European Law: 227–314).

De Schutter, O. (2006) ‘Extraterritorial Jurisdiction as a tool for improving Human Rights Accountability for Transnational Corporations’, *Business and Human Rights Resource Centre*.

Deva, S. (2003) ‘Human Rights Violations by Multinational Corporations and International Law: Where from Here?’, *Connecticut Journal of International Law*, 19(1):1–58.

Dworkin, R. M. (1967) 'The Model of Rules', The University of Chicago Law Review 35(1): 14-46.

Enneking, L. (2008) ‘Crossing the Atlantic - The Political and Legal Feasibility of European Foreign Direct Liability Cases’, *The George Washington International Law Review*, 40: 903-938.

Enneking, L.F.H. (2012) *Foreign Direct Liability and Beyond. Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (The Hague, The Netherlands: Eleven International Publishing).

Fasciglione, M. (2016) ‘Corporate Human Rights Responsibility, States’ Duty to Protect and UN GPS’ National Action Plans: Some Thoughts after the UK 2016 NAP Update’, *European Papers*, 1(2): 621-635.

Fauver, L. and Fuerst, M. E. (2006) ‘Does good corporate governance include employee representation? Evidence from German corporate boards’, *Journal of Financial Economics*, 82(3): 673–710.

Gelter, M. (2016) ‘Employee participation in corporate governance and corporate social responsibility’, *Handbook on the Economics of Social Responsibility: Individuals, Corporations and Institutions (Lorenzo Sacconi and Giacomo Degli Antoni eds.)*, ECGI Law Working Paper: 322.

Giannini, T., Farbstein, S. and Arend, A. C. (2011) ‘The Alien Tort Statute and Corporate Liability’, *U. Pa. L. Rev. PENNumbra*, 160: 99-112.

Hansmann, H. and Kraakman, R. (1991) ‘Toward Unlimited Shareholder Liability for Corporate Torts’, *The Yale Law Journal*, 100: 1879–1934. doi: 10.2307/796812.

Hart, H. L. A. (2012) *The Concept of Law* (3rd ed. Oxford University Press).

Hoff, A. (2019) *Dutch child labour due diligence law: a step towards mandatory human rights due diligence | OHRH*. https://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/ [accessed: 5 October 2019].

Jägers, N. (2002) *Corporate human rights obligations: in search of accountability* (Antwerpen New York, Intersentia School of Human Rights Research series, 17).

Jägers, N. (2011) 'UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability', *Netherlands Quarterly of Human Rights*, 29(2):159-163.

Karavias, M. (2015) 'Shared Responsibility and Multinational Enterprises', *Netherlands International Law Review*, 62(1): 91–117. doi: 10.1007/s40802-015-0008-z.

Keay, A. (2016) 'Assessing and rethinking the statutory scheme for derivative actions under the Companies Act 2006', *Journal of corporate law studies*, 16(1): 39–68. doi: 10.1080/14735970.2015.1090140.

Kershaw, D. (2012) *Company law in context: text and materials* (2nd ed. Oxford University Press).

Kershaw, D. and Schuster, E. (2019) 'The Purposive Transofrmation of Company Law', *LSE Law, Society and Economy Working Papers*, 4.

Knox, J. H. (2008) 'Horizontal human rights law', *American Journal of International Law*: 1–47.

Koh, H. H. (1996) 'Trasnational Legal Process', *Nebraska Law Review*, 75: 181-207.

Koh, H. H. (2006) 'Why Transnational Law Matters', *Penn State International Law Review*, 24: 745.

Koh, P. (2001) 'The Statutory Derivative Action in Singapore: A Critical and Comparative Examination', *Bond Law Review*, 13: 64-94.

Kraakman, R. *et al.* (2017) *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd ed. Oxford University Press).

Larcker, D. and Tayan, B. 'CEO Compensation Data Spotlight'. Stanford Business. https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-quick-guide-17-ceo-compensation-data.pdf.

Leebron, D. W. (1991) ‘Limited Liability, Tort Victims, and Creditors’, *Columbia Law Review*, 91:1565-1650.

McCorquodale, R. *Parent Companies can have a Duty of Care for Environmental and Human Rights Impacts: Vedanta v Lungowe « Law « Cambridge Core Blog*. http://blog.journals.cambridge.org/2019/04/11/parent-companies-can-have-a-duty-of-care-for-environmental-and-human-rights-impacts-vedanta-v-lungowe/ [accessed: 29 April 2019].

McGaughey, E. (2015) ‘The Codetermination Bargains: The History of German Corporate and Labour Law’, *LSE Law, Society and Economy Working Papers*, 10.

Muchlinski, P. (2007) *Multinational enterprises and the law* (2nd ed. Oxford University Press).

North, G. (2018) ‘Are Corporate Governance Code Disclosure and Engagement Principles Effective Vehicles for Corporate Accountability? The United Kingdom as a Case Study’, *Deakin Law Review*, 23: 177–208. doi: 10.21153/dlr2018vol23no0art810.

Palombo, D. 2019 ‘The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals’, *Business and Human Rights Journal*, 4(2): 265-286. doi: 10.1017/bhj.2019.15.

Palombo, D. (2015) ‘Chandler v. Cape: An Alternative to Piercing the Corporate Veil beyond Kiobel v. Royal Dutch Shell’, *British Journal of American Legal Studies*, 4(1): 453-471.

Palombo, D. (2020) *Business and Human Rights The Obligations of the European Home States*, Hart Publishing.

Pataut, É. (2017) ‘Le devoir de vigilance - Aspects de droit international privé’, *Droit social*: 833-839.

Périn Pierre-Louis (2015) ‘Devoir de vigilance et responsabilité illimitée: qui trop embrasse mal étreint’, *Revue trimestrielle de droit commercial et de droit économique*: 215-224.

Petrin, M. (2013) ‘Assumption of Responsibility in Corporate Groups: Chandler v Cape plc’, *The Modern Law Review*, 76(3): 603–619. doi: 10.1111/1468-2230.12026.

Reisberg, A. (2005) ‘Shareholders’ Remedies: The Choice of Objectives and the Social Meaning of Derivative Actions’, *European Business Organization Law Review*, 6(2): 227–268. doi: 10.1017/S1566752905002272.

Sanger, A. (2012) ‘Crossing the corporate veil: the duty of care owed by a parent company to the employees of its subsidiary’, *The Cambridge Law Journal*, 71(3): 478–481. doi: 10.1017/S0008197312000724.

Sarra, J. (2006) ‘Canada’s Supreme Court rules no fiduciary obligation towards creditors on insolvency—Peoples Department Stores v. Wise’, *International Insolvency Review*, 15: 1–15. doi: 10.1002/iir.134.

Skinner, G. (2015) ‘Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law’, *Washington and Lee Law Review*, 72(4):1769.

Thomas, R. (2000) ‘The problem of horizontal effect’, *European Human Rights Law Review.*, 5: 493–511.

Vagts, D. F. (1970) ‘The Multinational Enterprise: A New Challenge for Transnational Law’, *Harvard Law Review*, 83(4): 739–792. doi: 10.2307/1339838.

Vasudev, P. (2015) ‘Corporate Stakeholders in Canada—An Overview and a Proposal’, *Revue de Dorit d’Ottawa | Ottawa Law Review*, 45(1): 137.

Veldman, J. and Willmott, H. (2016) ‘The cultural grammar of governance: The UK Code of Corporate Governance, reflexivity, and the limits of “soft” regulation’, *Human Relations*, 69(3): 581–603. doi: 10.1177/0018726715593160.

Vernon, R. (1968) ‘Economic Sovereignty at Bay’, *Foreign Affairs*.

Wettstein, F. (2015) ‘Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment’, *Journal of Human Rights*, 14(2):162–182. doi: 10.1080/14754835.2015.1005733.

Wouters, J. and Ryngaert, C. (2008) ‘Litigation for Overseas Corporate Human Rights Abuse in the European Union: The Challenge of Jurisdiction’, *Geo. Wash. Int’l L. Rev.*, 40: 939.

Acknowledgments Note:

I would like to thank Daniela Weber Rey, Claire Russell, Luke Fletcher, David Kershaw, Daniel Leader and Bill Clark for their extremely useful insights. However, please note that the views of the author are her own.

Notes on Author:

Dalia Palombo is a Senior Research Fellow at the Institute for Business Ethics at the University of St. Gallen. She holds an LLM from Harvard Law School and a Ph.D. from Maastricht University. Her research focuses on business and human rights. She is the author of *Business and Human Rights The Obligations of the European Home State* (Hart Publishing, 2020).