Promoting Corporate Governance for Sustainability through Shareholder Stewardship

A Critical Analysis of the UK's Shareholder Stewardship Regulatory Regime

by

Rafael Savva

LL.M. (Commercial Law) University of Edinburgh, UK 2016

LL.B. (Hons) Lancaster University, UK 2015

A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY (PH.D) IN LAW

LANCASTER UNIVERSITY LAW SCHOOL, UK

(April 2021)

© Rafael Savva

Lancaster University
Law School

Promoting Corporate Governance for Sustainability through Shareholder Stewardship: A Critical Analysis of the UK's Shareholder Stewardship Regulatory Regime

Rafael Savva

Abstract

The Thesis is concerned with the regulatory concept of shareholder stewardship in the UK and the extent to which it provides the normative premises required through the legal instruments adopted to achieve its objectives to promote the development of corporate governance for sustainability. The Thesis examines this primarily from the perspective of regulating shareholder engagement. It will furthermore consider shareholder stewardship through viewing corporate governance for sustainability as an effort to ensure that companies adopt practices that can lead economies in aggregate to facilitate sustainable development through conforming to the economic paradigm of strong sustainability.

Following the consideration of the ways shareholder engagement can be undertaken and its possible effect on corporate governance, the Thesis justifies the existence of shareholder stewardship as a means of ensuring that shareholders and the intermediaries acting on their behalf will promote or contribute to the development of corporate governance for sustainability. Such justification though is supported solely on the basis that shareholder stewardship will seek to attribute the responsibility on shareholders and their intermediaries to engage in a way that promotes or contributes to the development of corporate governance for sustainability.

For this to be achieved effectively, the Thesis argues that shareholder stewardship through the regulatory instruments adopted to implement its objectives must be able to address several issues arising from the current standard of shareholder engagement. Policymakers are aware of most of these issues, and expect that the regulation of shareholder engagement through the 2020 Stewardship Code as well as the transposition of the provisions of the Second Shareholder Rights Directive (SRD II) will be able to address these effectively.

The Thesis questions the extent to which these will be adequate measures to achieve this, especially when corporate governance for sustainability is seen through the context of adopting practices that can lead economies in aggregate to facilitate sustainable development through conforming to the paradigm of strong sustainability. This argument is made in light of the means by which policymakers endeavour to regulate shareholder engagement through the Stewardship Code and the rules that transposed SRD II, and the objective that is expected from shareholders and their intermediaries to pursue in compliance with them.

Having the foregoing in mind, the Thesis argues that the time is ripe to appreciate how the regulation of shareholder engagement by the law will ensure that it meaningfully leads to governing companies in a more sustainable manner. While critical of the way shareholder engagement is regulated, the Thesis argues that shareholder stewardship has the potential to act as a regulatory concept that will be able to achieve this. But for this to be made possible, the Thesis argues that shareholder stewardship's objectives and rationale must be reconceptualised.

The Thesis suggests to understand shareholder stewardship as a regulatory concept that should approach the regulation of shareholder engagement as an aspect of

corporate governance that must promote or contribute to corporate governance for sustainability as this is informed by the parameters in need to be in place for economies to conform to the paradigm of strong sustainability. This is suggested by conceptualising the normative account for the corporate objective as an effort to adopt all such practices that would cultivate corporate governance for sustainability for the sake of companies as legal persons within a context that is informed by the parameters that can lead economies to conform to strong sustainability.

Future research will shed light on the means by which this suggestion can materialise in terms of regulating shareholder engagement. Regardless, the Thesis considers that the upholding of shareholder stewardship’s objectives relative to the suggestion made above will be achieved only when the regulation of shareholder engagement is made on a multi-purpose, multi-modal and multi-dimensional basis. While this includes the regulation of shareholder engagement at a soft-law level through the Stewardship Code as well as several disclosure rules, the Thesis argues that shareholder engagement must be regulated more readily and clearly by various areas of law at a hard-law level as well. This includes, among other areas, the regulation of the collective exercise of shareholders’ voting rights as a form of authority that discharges the will of the company as a legal person on its own behalf.

Acknowledgments

This Thesis would not have been completed without the help and support of various people.

First, I would like to thank Professor David Milman and Mr Philip Lawton for agreeing to be my supervisors, and for providing all their help and support throughout the research, writing and editing process of this Thesis. Their wisdom, eye for detail, and mentoring to steer my research in the right direction were only matched by their kindness and eagerness to provide all their help and support.

Special thanks should go to my parents, Andreas and Louisa, for their continuous moral and emotional support. Their kindness and patience in my moments of confusion, despair, and constant questioning of oneself that form part of the process of completing a Thesis have taught me the best lesson they could ever teach me: degrees and academic achievements mean nothing if first and foremost you are not a compassionate and civil person.

I would also like to thank all my friends for all their support during the completion of this Thesis. Their offering to listen about my research and its progress was as welcome as listening to my random puns, parody videos and recordings.

Finally, I would like to thank Lancaster University Law School and all of its members of staff that I have the privilege to call them now colleagues. Finalising the writing-up for this Thesis amidst a global pandemic was not an easy endeavour, and I would not have done it without their help and support.

Contents

Abstract ... 1

Acknowledgments ... 4

1: Introduction ... 8

1.1. Thesis Research Question and Objectives ... 8
1.2. The Need for Corporate Governance for Sustainability ... 11
1.3. Shareholder Stewardship as a Vehicle for Facilitating Corporate Governance for Sustainability? ... 16
1.4. Key Arguments, Methodology, and Chapter Breakdown ... 21

2: Cultivating Corporate Governance for Sustainability: A Call for Reconceptualising the Normative Account for the Corporate Objective ... 28

2.1. Introduction ... 28
2.2. Shareholder Primacy ... 31
2.3. Shareholder Primacy and Company Law ... 36
2.4. Shareholder Primacy as the Foundation to Facilitate Corporate Governance for Sustainability? ... 43
2.5. Companies' Sustainable Development as the Corporate Objective ... 53
2.5.1. The Company as a Legal Person ... 56
2.5.2. Companies' Sustainable Development ... 68
2.5.3. Strong Sustainability, Companies' Sustainable Development and Corporate Governance for Sustainability ... 79
2.6. Conclusion ... 93

3: Shareholder Stewardship, Corporate Governance for Sustainability, and the Scope of Shareholder Power ... 97

3.1. Introduction ... 97
3.2. The Ambivalent Views on Shareholder Engagement ... 100
3.3. The Introduction and development of Shareholder Stewardship ... 109
3.5. Shareholders' Capacity to Engage in Corporate Governance ... 127
3.5.1. Formal Shareholder Rights and Power ... 131
3.5.2. Informal Shareholder Meetings and Communications ... 138
3.5.3. Capacity and Ways to Showcase Engagement ... 141
3.6. Shareholders' Breadth of Power and Shareholder Stewardship ... 147

3.7. Conclusion....157
4: The Challenges to Ensuring the Undertaking of Shareholder Engagement for the Promotion of Companies' Sustainable Development....161
4.1. Introduction....161
4.2. Shareholders' Current Standard of Engagement....164
4.3. Factors Affecting the Standard of Shareholder Engagement....174
4.3.1. The Normative Effect of Shareholder Primacy....177
4.3.2. Current Capital Market Practices....184
4.3.3. The Law Governing the Institutional Investment Community....192
4.4. Collective Action and Shareholder Engagement....198
4.4.1. The Number of Participants and Dispersion of Shareholding Ownership 202
4.4.2. Enormity of Costs and Availability of Information....206
4.4.3. Intermediation, Diversification of Investment, and Competition....211
4.5. Conclusion....216
5: The Effect of the Shareholder Stewardship's Current Legal Regime and a Call for its Reconceptualization....219
5.1. Introduction....219
5.2. The Potentially Limited Effect of Shareholder Stewardship's Current Legal Regime....222
5.2.1. Attribution of Responsibility and Enforcement....225
5.2.2. The Orientation of the Objective Set by SRDII and the Stewardship Code 240
5.3. A Call to Re-Consider Shareholder Stewardship....253
5.3.1. Shareholder Engagement for Upholding Companies' Sustainable Development....256
5.3.2. The Role of Shareholder Stewardship....269
5.3.3. The Potential Contribution of Company Law....280
5.3.3.1. Scope and Interpretation....284
5.3.3.2. Implementation and Enforcement....292
5.4. Conclusion....300
6: Conclusion....303
6.1. Synopsis....303
6.2. Calling for a New Normative Account for the Corporate Objective....304

6.3. Shareholder Stewardship as a Means of Promoting Companies' Sustainable Development? 307
6.4. The Challenges Shareholder Stewardship Must Address 310
6.5. The Potential Effect of the 2020 Stewardship Code and a Call to Reconceptualise Shareholder Stewardship 313
6.6. Time for a (Necessary) Systemic Debate? 316
Bibliography, Table Of Legislation, And Table Of Cases 320
Table of Legislation and Codes of Good Practices 320
Table of Cases 325
Articles 334
Reports, Consultation Papers and Law Commission Reports 365

1: Introduction

1.1. Thesis Research Question and Objectives

The economic, social and environmental challenges humanity faces that are caused partly by business activity have led policy-makers to intensify their efforts to consider the ways by which companies will be regulated by the law to ensure that they adopt practices that align with the facilitation of aggregate sustainable development. The configuration of regulatory frameworks that seek to achieve this has led to the generation of several debates in political and academic circles about the breadth of their scope and the methods of their potential enforcement.[1] Notwithstanding, it is now evident that the legal regulation of companies is fusing with regulatory frameworks that seek to promote corporate governance that can make companies more environmentally, socially and economically sustainable to achieve this objective.[2] This has led to postulates for the adoption of what is now termed as 'corporate governance for sustainability', with the introduction of several regulatory frameworks, policies and concepts tasked with encouraging it acting as evidence of policymakers' commitment to see it materialised as the standard way of managing companies.[3]

---

[1] Colin Mayer, 'The Future of the Corporation: Towards Humane Business' (2018) 6(s1) Journal of the British Academy 1 https://doi.org/10.5871/jba/006s1.001 accessed 02 September 2019, 2.

[2] See, for example, UNGA Res 70/1, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (25 September 2015) A/RES/70/1 www.undocs.org/A/RES/70/1 accessed 10 September 2019; European Commission, EY, Study on directors' duties and sustainable corporate governance (Final Report, 2020) https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en accessed 10 November 2020.

[3] Several academics have made calls to reform company law to achieve this goal. See, for example, Andrew Johnston et al, 'Corporate Governance for Sustainability' (2019) https://ssrn.com/abstract=3502101 accessed 02 February 2020.

This Thesis focuses on an aspect of the efforts to regulate corporate governance which policymakers aspire that it can contribute to promoting corporate governance for sustainability, that of shareholder stewardship. Shareholder stewardship can be defined as a regulatory concept that seeks to steer shareholders towards adopting practices that ensure the prosperity of end investors (that is, the beneficiaries of shareholders or the intermediaries that act on their behalf) and investee companies.[4] While its milieu now extends to investment management, shareholder stewardship endeavours to primarily ensure that shareholder engagement, namely, the way which shareholders express their 'voice' for issues related in the corporate governance of investee companies, is undertaken responsibly and in line with its objectives.[5]

The Thesis considers whether, and if not so, how, shareholder stewardship can introduce regulatory frameworks which can seek to ensure that shareholder engagement can promote or contribute to the development of corporate governance for sustainability to become a means of securing companies' sustainable development. This will be undertaken in light of the functional and legal capacity of shareholders and the intermediaries acting on their behalf to undertake any practices conducive to this end as well as the effect that shareholder engagement can have on corporate governance. The Thesis will furthermore consider the potential effectiveness of policymakers' current efforts to materialise shareholder stewardship's objectives via the regulation of shareholder engagement. This relates to the

[4] A similar term will be found in Dionysia Katelouzou, *Institutional Shareholders and Corporate Governance: The Path to Enlightened Stewardship* (CUP, 2021 forthcoming).
[5] ibid.

introduction and updating of the Stewardship Code as well as the transposition of the rules contained in the Second Shareholder Rights Directive (henceforth, SRDII).[6]

Throughout the Thesis, and unless stated otherwise, 'corporate governance for sustainability' will be considered as an endeavour to manage companies in a way that can secure their sustainable development, which can act as a means that can lead economies to facilitate aggregate sustainable development that conforms to the economic paradigm of strong sustainability.[7] Strong sustainability considers the economy as a subsystem that exists within the Earth's capacity to sustain human activities, which should operate in a way that will contribute to societies' prosperity within the limits of the capacity of Earth to accommodate them.[8] Corporate governance for sustainability that is informed by strong sustainability's parameters, therefore, can be seen as being reflective of the need to adopt practices that will further companies' profitability now and in the future, but in a way that will not distort the environment or the society adversely in the process.[9]

[6] FRC, The UK Stewardship Code 2020, https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf accessed 02 February 2020 (2020 Stewardship Code); Directive of the European Parliament and of the Council 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L132.

[7] On the merits of strong sustainability see, in general, Eric Neumeyer, *Weak Versus Strong Sustainability: Exploring the Limits of two Opposing Paradigms* (3rd edn, EE, 2013).

[8] See on this, in general, Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist* (Penguin Random House, 2017).

[9] Beate Sjåfjell, Christopher M. Bruner, 'Corporations and Sustainability' in Beate Sjåfjell, Christopher M. Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019), 3, 7-10.

1.2. The Need for Corporate Governance for Sustainability

Companies have often been cited as playing a key role in economic and social prosperity due to their ability to amplify people's capacity to commit to profitable business relationships.[10] However, companies are simultaneously noted as contributors to the convergence of crises that humanity currently faces.[11] Companies' executives and various constituents, such as shareholders and creditors, have showcased their proneness to adopting behaviours that expose companies to excessive risks that often lead to tremendous economic failures when taken in aggregate.[12] In addition to contributing to various human rights' violations and the generation of social inequalities, there is also evidence to suggest that companies degradingly disregard the interests of a number of its stakeholders in the process as well.[13] Among these are employees, creditors, community groups affected by

---

[10] Colin Mayer, *Firm Commitment: Why the Corporation is Failing Us and How to Restore Trust in it* (OUP, 2013), 1-4.

[11] See, in general, Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable, 2004). See also, BIS, 'The Kay Review of UK Equity Markets and Long-Term Decision Making' (Final Report, 2012) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf accessed 13 March 2018.

[12] The best example is found in the 2008 financial crisis. See, Paul Moxey and Adrian Berendt, 'Corporate Governance and the Credit Crunch' (2008) ACCA Discussion Paper http://www.accaglobal.com/content/dam/acca/global/PDF-technical/corporate-governance/cg_cc.pdf accessed 10 September 2017. The economic effects of the Covid-19 pandemic have showcased weaknesses in companies' ability to implement strategies that can secure their resilience during adverse times. See on this, Sudha Mathew, Sheeja Sivaprasad, 'Corporate Governance Practices in the Context of the Pandemic Crisis' (2020), https://ssrn.com/abstract=3590253 accessed 18 November 2020; Luca Enriques, 'Pandemic-Resistant Corporate Law: How to Help Companies Cope with Existential Threats and Extreme Uncertainty During the Covid-19 Crisis' (2020) ECGI Law Working Paper No.530/2020, https://ssrn.com/abstract=3641505 accessed 23 November 2020.

[13] See, by reference to the garment industry, Mark Brewer, 'Slow Fashion in a Fast Fashion World: Promoting Sustainability and Responsibility' (2019) 8(4) Laws 24.

companies' activities, and even ultimately, shareholders, who strive through investing to receive a return from companies' profits.[14]

Companies have furthermore showcased that their practices affect detrimentally the environment that accommodates them.[15] Even though business depends on the ecosystem's ability to provide resources and space to support commercial activities, companies degradingly consume and degrade them respectively at a rate that exceeds the ecosystem's capacity to sustain corporate activities and regenerate itself to keep doing that in perpetuity.[16] This however causes severe and pervasive damage to the environment, which will consequently affect the quality of life and social standards in the present as well as in the coming years. Such damage will proportionately affect companies' interests as well.[17] The increasing scarcity of resources and the instability of the environment can develop several implications in the governance of companies to remain profitable. This is either because of their inability to conduct business effectively, or because the management of such resources at a macro level will require an increasing micro-management of economic activities, to the point of generating pervasive inefficiencies.[18]

[14] Mayer, *Firm Commitment* (n 10) 4. See also, in general, Beate Sjåfjell, 'Why Law Matters: Corporate Social Irresponsibility and the Futility of Voluntary Climate Change Mitigation' (2011) 8(2) European Company Law 56.

[15] See, generally, John Cook et al, 'Consensus on Consensus: A Synthesis of Consensus Estimates on Human-Caused Global Warming' (2016) 11(4) Environmental Research Letters 1.

[16] UNEP, *Global Environment Outlook GEO-6* (CUP, 2019), Chapter 1.

[17] Mark Carney, 'Breaking the tragedy of the horizon - climate change and financial stability' (Bank of England, 29 September 2015) https://www.bankofengland.co.uk/speech/2015/breaking-the-tragedy-of-the-horizon-climate-change-and-financial-stability accessed 20 October 2019.

[18] Herman Daly, *From Uneconomic Growth to a Steady State Economy* (EE, 2015), Chapter 2.

Of course, the company as a form of business organisation has not been inherently geared towards adopting this standard of practices, and never was intended to be.[19] Yet there are too many challenges in need to be overcome for companies to secure their profitability without being an undue impediment on the society and the environment that accommodates them.[20] The Thesis suggests that these challenges can be addressed through adopting corporate governance for sustainability.

As mentioned above, corporate governance for sustainability is seen as an effort from companies to adopt practices to secure their sustainable development in a way that can lead economies to facilitate aggregate sustainable development that conforms to the paradigm of strong sustainability.[21] Strong sustainability considers that the interrelations formed between social, economic and environmental capital have fundamental differences both in terms of quantifying them, and in terms of configuring their significance, maintenance and use to facilitate profitable economic transactions.[22] Strong sustainability posits that social welfare should be advanced while being mindful of these differences, and by acknowledging that natural capital cannot be substitutable in the course of undertaking economic transactions due to the critical elements it provides for human existence.[23] At the same time, it calls to uphold the social foundation that supports economies to function as an important component which equally cannot be prejudiced, for if this is the case, the economies will not be able to actually promote social welfare, let alone function efficiently and properly.[24]

[19] Sjåfjell, Bruner (n 9), 6.

[20] ibid.

[21] ibid.

[22] Neumayer (n 7) 20-40.

[23] ibid.

[24] ibid.

Raworth's economic model for achieving a sustainable economy provides a useful starting point in theorising on the ways companies can adopt practices that can lead economies in aggregate to facilitate sustainable development on the basis of strong sustainability's mandate.[25] Economic activities are assumed first and foremost as in need to be undertaken within the capacity of the planet to accommodate them to ensure humanity's prosperity.[26] This imposition of 'planetary boundaries' seek to determine the limits of such economic activity to ensure Earth's capacity to keep providing 'a safe and operable space for humanity', which will allow economies to thrive.[27] This endeavour is complemented by the need for the economy to function in a way that human rights and the satisfaction of fundamental social needs are secured as the pinnacle of ensuring society's foundation for its proper functioning, which is integral for the economy to operate properly.[28]

Corporate governance for sustainability that is informed by the parameters in need to be place for economies to conform to strong sustainability's paradigm, therefore, underlines the development of practices that facilitate companies' economic prosperity now and in the future, but without distorting the stability and resilience of the environment, or tamper social progress in the process.[29] Traditionally, the addressment of wider environmental and social issues in the corporate context formed

[25] Raworth (n 8), Chapter 2.

[26] Johan Rockström et al., 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) 14(2) Ecology and Society 31; David Griggs et al, 'Policy: Sustainable Development Goals for People and Planet' (2013) 495 Nature 305.

[27] ibid.

[28] Melissa Leach et al., 'Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity', in World Social Science Report 2013: Changing Global Environments (Paris: OECD Publishing, 2013), 86.

[29] Sjåfjell, Bruner (n 9), 7-10.

part of the understanding that companies must become more socially responsible.[30] But while this is well-mannered, this orientation is of limited assistance, especially when one factors the challenges looming from ensuring the successful undertaking of profitable business endeavours.[31] As companies rely fundamentally on the preservation of environmental and social values to keep operating successfully, it is important to address any implications arising from their practices, and adopt governance that is informed by these as the basis of their profit-making endeavours to secure their longevity and resilience in light of them.[32]

The development of corporate governance for sustainability undernotes managing several issues from across a number of perspectives to inform the calibration and deployment of companies' organisation and management.[33] This presupposes the need for directors and the board as the main controllers of companies to be able to identify all processes, strategies and information required to ensure that companies adopt practices that facilitate effectively this end.[34] However, their endeavour to adopt these practices will not be possible without ensuring simultaneously that the companies' constituents who are also capable of influencing corporate governance or exercise powers in corporate decision-making promote or contribute to the facilitation

---

[30] John Elkington, 'Accounting for the Triple Bottom Line' (1998) 2 Measuring Business Excellence 18, 20.

[31] David Millon, 'Corporate Social Responsibility and Environmental Sustainability' in Beate Sjåfjell, Benjamin J. Richardson (eds) *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP, 2015), 37-38, 40-41, 69-76.

[32] Mayer, 'The Future of the Corporation' (n 1), 7-11.

[33] See on this, Tobias Hahn et al, 'Tensions in Corporate Sustainability: Towards an Integrative Framework' (2015) 127 Journal of Business Ethics 297.

[34] Sjåfjell, Bruner (n 9), 11.

of this goal as well.[35] This of course draws the attention to shareholders and the intermediaries that act on their behalf, the effect of shareholder engagement on corporate governance, and the efforts to regulate it through upholding the objectives of shareholder stewardship.

1.3. Shareholder Stewardship as a Vehicle for Facilitating Corporate Governance for Sustainability?

Current regulatory endeavours that seek to promote sustainable business practices consider shareholder engagement as an integral aspect of the means by which this goal will be facilitated.[36] The introduction and update of the objectives of shareholder stewardship is the manifestation of this belief. Initially, policymakers attempted to materialise shareholder stewardship's objectives by postulating that shareholder engagement should ensure companies' long-term financial performance, with the creation of long term shareholder value being assumed as a proxy for achieving this while simultaneously ensuring overall economic and social prosperity.[37]

The main regulatory instrument adopted to achieve shareholder stewardship's objectives was the Stewardship Code in 2010, which was updated in 2012.[38] The

---

[35] Dionysia Katelouzou, 'Shareholder Stewardship: A Case of (Re)Embedding Institutional Investors and the Corporation?' in Beate Sjåfjell, Christopher M. Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019), 590.

[36] FRC, FCA, 'Building a Regulatory Framework for Effective Stewardship, (Discussion Paper DP 19/1, January 2019) https://www.fca.org.uk/publication/discussion/dp19-01.pdf accessed 10 January 2020.

[37] David Walker, 'A Review of Corporate Governance in UK Banks and Other Financial Industry Entities: Final Recommendations' (26 November 2009) https://ecgi.global/sites/default/files/codes/documents/walker_review_261109.pdf accessed 01 March 2021, 17, 71-73.

[38] FRC, The UK Stewardship Code 2010, https://www.frc.org.uk/getattachment/e223e152-5515-4cdc-a951-da33e093eb28/UK-Stewardship-Code-July-2010.pdf accessed 02 February 2020; FRC, The UK

Stewardship Code sought to impose on shareholders and asset managers several self-regulatory, soft-law disclosure requirements relevant to shareholder engagement and investment management practices. Through them, policymakers aspired to ensure that shareholder engagement would be undertaken in a way that aligns with the objectives of shareholder stewardship in terms of promoting the long-term financial performance of the company.[39]

The overall effect of the early versions of the Stewardship Code was, admittedly, quite modest.[40] Regardless, shareholder stewardship continues to be supported, albeit on a basis that sees shareholder engagement as key to ensuring that companies will adopt practices that are more environmentally, socially and economically sustainable. Following the introduction of several mandatory disclosure rules following the transposition of SRD II as well as the update of the Stewardship Code in 2020 (henceforth, the '2020 Stewardship Code'), shareholders and their intermediaries are now expected to adopt practices that integrate wider economic, social and environmental considerations (henceforth, 'ESG criteria' or 'ESG considerations') in the course of showcasing engagement.[41] It is furthermore expected that shareholders

---

Stewardship Code 2012, https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf accessed 02 February 2020.

[39] ibid

[40] John Kingman, 'Independent Review of the Financial Reporting Council' (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767387/frc-independent-review-final-report.pdf accessed 10 January 2020.

[41] FRC, '2020 Stewardship Code' (n 6); SRD II (n 6). SRD II is now transposed in the UK through various regulations undertaken by the relevant regulatory authorities that amend rules applicable to the regulates of the SRD II, namely, pension funds, asset managers, insurers and proxy advisors. See, in relation to insurers, Senior Management Arrangements, Systems and Controls Sourcebook (SYSC), 3.4. (SRD Requirements). For Asset managers, see, Conduct of Business Sourcebook (COBS), 2.2B (SRD requirements). For pension funds, see Occupational Pension Schemes (Investment and

and their intermediaries will identify through disclosure the ways by which they have done so as well as the outcomes of shareholder engagement.[42]

The pursuit of securing the long-term financial performance of companies with long-term shareholder value being the proxy for achieving it remains the main objective upon which shareholder engagement is encouraged to be undertaken. Regardless, it is now expected that that its pursuit will be achieved by focusing explicitly on creating long-term value for shareholders' and intermediaries' beneficiaries. It furthermore expects that such pursuit should lead to the creation of sustainable outcomes for the economy, the society and the environment as well, or at least deem the integration of ESG criteria as material in the calibration of shareholder engagement.[43]

Despite its increasing support, the effort to materialise shareholder stewardship's objectives has not been accompanied with a credible account of what should be expected from shareholder engagement relative to the legal capacity borne by shareholders and their intermediaries to undertake it in the first place.[44] Regardless, it must be acknowledged that shareholder engagement is possible to materialise in different ways. Principally, shareholder engagement can take place at a formal level in the general meeting. This can be done through the exercise of shareholders' voting rights in the general meeting, which provides shareholders with the capacity to act collectively as decision-makers in the company. Alternatively, shareholders or their

---

Disclosure) (Amendment) Regulations 2019. For proxy advisors, see, The Proxy Advisors (Shareholders' Rights) Regulations 2019.

[42] Ibid.

[43] Ibid.

[44] For a critique of shareholder stewardship and shareholders' practices see, Beate Sjåfjell, 'Achieving Corporate Sustainability: What is the Role of the Shareholder?' in Hanne S. Birkmose (ed), *Shareholders' Duties in Europe* (Kluwer Law International, 2017).

intermediaries when acting on their behalf can undertake discussions in the general meeting to raise their concerns about the way companies are managed to secure their interests as investors.[45] Shareholders and their intermediaries can additionally undertake informally such discussions with directors or fellow shareholders to signal any issues or causes for concern about the quality of corporate governance in the investee company.[46]

The formal effect of the exercise of shareholders' voting rights and the expression of shareholders' voice on various occasions can be considerably influential, to the point of having a tremendous effect on corporate governance. Coupled with the efforts to promote more sustainable business practices, the effect of shareholder engagement can be argued that it justifies the existence of shareholder stewardship. Nevertheless, such justification is seen by this Thesis as being founded on acknowledging that shareholder stewardship must seek to attribute the responsibility for the undertaking of shareholder engagement that promotes or contributes to ensuring companies' sustainable development, preferably through promoting corporate governance for sustainability as outlined above.

For this to be made possible, shareholder stewardship must provide the regulatory framework required to ensure that shareholders and their intermediaries will adopt practices that are conducive to achieving this end.[47] Shareholder stewardship must

---

[45] Beate Sjåfjell et al. 'Shareholder Primacy: The Main Barrier to Sustainable Companies' in Beate Sjåfjell, Benjamin J. Richardson (eds) *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP, 2015), 130.

[46] ibid. For a law-and-economics analysis of shareholder engagement through the context of 'shareholder activism', see, Brian R. Cheffins, John Armour, 'The Past, Present, and Future of Shareholder Activism by Hedge Funds' (2011) 37 Journal of Corporate Law 51.

[47] Katelouzou, 'Shareholder Stewardship' (n 35), 590.

first be able to address the objectives animating the current standard of shareholder engagement. Shareholders' tendency to prioritise the creation of shareholder value regardless of the effects on corporate governance in the process;[48] the intermediation involved with shareholder engagement;[49] and the fierce competition in the market for attracting beneficiaries[50] are all factors that generate little incentives for the undertaking of shareholder engagement that may promote or contribute to the development of corporate governance for sustainability.[51]

Shareholder stewardship must also be able to address several issues that may affect shareholders' and their intermediaries' ability to overcome their collective action problems to engage effectively with a view to promote or contribute to the development of corporate governance for sustainability.[52] Several factors exacerbate the severity of several collective action problems shareholders face, which generally relate to the number of shareholders required to facilitate an action and the enormity of its costs.[53] But in addition to these, several other factors can affect shareholders' or their intermediaries' ability to engage effectively to this end. While these relate to the incentives of shareholders to adopt any engagement practices, it is also possible to see the availability and quality of information proving considerably important as well.[54]

[48] Iris H-Y Chiu, Dionysia Katelouzou, 'Making a Case for Regulating Institutional Shareholders' Corporate Governance Roles' (2018) (1) Journal of Business Law 67.

[49] Ronald J. Gilson, Jeffrey N. Gordon, 'The Agency Costs of Agency Capitalism': Activist Investors and the Reevaluation of Governance Rights' (2013) 113 Columbia Law Review 863.

[50] Chiu, Katelouzou (n 48).

[51] Katelouzou, 'Shareholder Stewardship' (n 35), 590.

[52] Rafael Savva, 'Shareholder Power As An Accountability Mechanism: The 2017 Shareholder Rights Directive And The Challenges Towards Enhancing Shareholder Rights' (2018) 5(2) Journal for the International and European Law, Economics and Market Integrations 277.

[53] ibid, 284-294.

[54] Gilson, Gordon (n 49).

1.4. Key Arguments, Methodology, and Chapter Breakdown

Policymakers appear to be informed by the severity of most of the issues outlined above, and expect through the 2020 Stewardship Code and the transposition of the rules contained in SRDII to regulate shareholders' and their intermediaries' practices in a way that can alleviate them. While it is too early to deduct their effectiveness, this Thesis argues that there are reasons to believe that the 2020 Stewardship Code and the rules that transposed SRDII may prove an inadequate, and, to a certain extent, improper, means of addressing these effectively, let alone act as the basis for ensuring that shareholder engagement will lead to promoting corporate governance for sustainability. Several practical and notional considerations surrounding disclosure rules and enforcement of soft law norms showcase that the Stewardship Code as well as the rules that transposed SRDII may be quite deficient on their own to curb shareholder behaviour. This may be the case especially when one factors that compliance with these disclosure rules rely too much on self-regulation by shareholders, who may a priori calibrate their behaviour towards ensuring their interests in creating shareholder value as a priority through shareholder engagement regardless of the effects of this precondition on corporate governance.[55]

Moreover, the Thesis questions the extent to which the orientation of the objectives set by the 2020 Stewardship Code and the rules that transposed SRDII for shareholders and their intermediaries to pursue can promote or contribute to the

[55] On the relative merits of disclosure rules see, Andrew Johnston, 'Market-Led Sustainability through Information Disclosure' in Beate Sjåfjell, Christopher M. Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019).

development of corporate governance for sustainability.[56] The objectives are not prohibitive of the adoption of practices that can promote companies' sustainable development. Nevertheless, they are prone to giving shareholders and their intermediaries considerable interpretive room to adopt practices that secure their financial interests as a priority, irrespective of the extent to which companies' sustainable development is facilitated following such engagement, at least from the perspective of facilitating this through promoting corporate governance for sustainability. But because of this, it is possible that shareholder engagement may be undertaken in a way that may, at best, postulates for the facilitation of companies' sustainable development that can lead economies towards facilitating aggregate sustainable development that conforms to the paradigm of 'weak sustainability'. The extent to which this is desirable is questionable, since conforming to weak sustainability's paradigm may prove deficient in terms of providing responses to the challenges humanity currently faces, and the ways that companies contribute to their addressment or their amplification.[57]

Such criticism can be contextualised as an indication that shareholder engagement is detrimental to achieving corporate governance for sustainability, with shareholder stewardship having minimal, if any, effect to change this. Given though the scope and effect of shareholder engagement, the time is ripe to consider how regulation by the law will ensure that shareholder engagement is undertaken responsibly to this end. The Thesis argues that shareholder stewardship can potentially act as the regulatory

[56] An argument proximate to this was outlined by reference to the objective set by SRDII. See, Rafael Savva, 'Regulating Institutional Shareholders in the Medium to the Long-term: An Analysis of the 2017 Shareholder Rights Directive's Shareholders' Duties' (2020) 14 (1) International Company and Commercial Law Review 1.

[57] Neumeyer (n 7), Chapter 2.

concept that can achieve this. But for this to be made possible, the Thesis argues that shareholder stewardship's normative basis and means of regulating shareholders' and their intermediaries' practices to uphold its objectives must be reconceptualised. This extends to the expectations set on shareholders and their intermediaries related to the effect of shareholder engagement, the objectives that are being upheld in the process, and the way regulation of shareholders' and their intermediaries' practices by the law endeavours to achieve them.

The Thesis argues that shareholder stewardship should go beyond the upholding its objectives through self-regulatory and market-driven frameworks that expect that shareholder engagement should prioritise the creation of shareholder value as a proxy for ensuring companies' sustainable development.[58] Instead, shareholder stewardship is argued to be understood as a concept that should approach the regulation of shareholder engagement as an aspect of corporate governance that should promote or contribute to companies' sustainable development as an end in itself through promoting corporate governance for sustainability, from which shareholders' interests in profit will be met on a proportionate basis.[59]

The Thesis suggests this by conceptualising the normative account for the corporate objective as an effort to uphold companies' sustainable development to secure their interests as legal persons as an end in itself. This normative account for the corporate objective is suggested within a context that is informed by the parameters that must be in place to ensure that companies adopt practices that can lead economies to facilitate aggregate sustainable development by conforming to the paradigm of strong

[58] Similar arguments were made in Katelouzou, 'Shareholder Stewardship' (n 35).

[59] Sjåfjell, 'Achieving Corporate Sustainability' (n 44).

sustainability. Within this context, the Thesis argues that shareholder engagement should be understood as undertaken in a manner that is conducive to facilitating the foregoing purpose, with shareholder stewardship acting as the regulatory concept that seeks to secure this accordingly through the frameworks introduced to achieve its objectives on a basis that promote the development of corporate governance for sustainability.

Given the multidimensionality of the capacities under which shareholder engagement can be undertaken and the issues identified above, the Thesis argues that the upholding of shareholder stewardship's objectives in the foregoing sense can only materialise on a multi-modal basis in terms of regulation. The upholding of shareholder stewardship's objectives therefore should extend beyond the confines of the regulation of shareholders' and their intermediaries' practices by disclosure rules. This can include, inter alia, the regulation of the collective exercise of shareholders' voting rights by company law through the introduction of a fiduciary duty that is owed by shareholders collectively to the company with regards to the exercise of their voting rights.[60] Suggesting the introduction of such a duty presupposes the consideration of a plethora of issues. Primarily, this includes the consideration of its scope and the implementation of such a duty. In addition, there is a need to consider the means by which such a duty can be enforced relative to specific particularities involved with the introduction of such a duty. The Thesis will consider these issues on a tentative basis, and the ways by which these could be considered by further research in the future.

The Thesis' main arguments are, to a great extent, normative in nature. But to establish their articulation, the Thesis undertakes a doctrinal and economic analysis

[60] Ibid.

of shareholder stewardship and shareholder engagement relative to the efforts to promote corporate governance for sustainability. While reference will be made to other areas of law, the focus of the Thesis will remain on the regulation of shareholder engagement by company law, the rules that transpose SRD II, and the Stewardship Code. The Thesis will consider investment management practices in the process, but solely through considering shareholders' engagement with directors or shareholders.[61] The same applies with regards to addressing other interrelated issues as well, such as issues revolving around executive remuneration and the conceptualisation of the corporate objective through social and legal norms.

The analysis in this Thesis will be made by factoring several types of institutional shareholders without having any specific focus on any of them. The Thesis however acknowledges that different types of shareholders require the consideration of their own specific attributes and the effect they have on their decision to engage in corporate governance.[62] The Thesis will not embark on considering these issues, although it flags their importance to consider them in future studies. Much of the Thesis will furthermore focus on shareholder engagement that can be undertaken in corporate governance solely through the exercise of shareholders' voting rights in the general meeting and their ability to express their voice formally or informally. The Thesis acknowledges that the role of shareholders in corporate governance is material to be considered in other contexts as well, such as the regulation of takeovers and issues

[61] See on this, in general Roger M Barker, Iris H-Y Chiu, *Corporate Governance and Investment Management: The Promises and Limitations of the New Financial Economy* (EE, 2017).

[62] ibid, Chapter 3.

related to executive remuneration.[63] The Thesis is cognisant of these, but it will not consider them in detail, unless they are directly related with the focus of its analysis.

The Thesis' arguments and analysis will spread across the remaining five Chapters. Chapter 2 sets the foundation of the analysis of the Thesis by considering how the normative account for the corporate objective can cultivate the development of corporate governance for sustainability. Chapter 3 provides an account about the introduction of shareholder stewardship, and how it is now gradually considered as having the potential of cultivating the incentives for adopting shareholder engagement that promotes or contributes to the development of corporate governance for sustainability. Chapter 3 furthermore highlights the means by which shareholder engagement can be undertaken in light of shareholders' capacity to undertake it, and the extent to which shareholder stewardship's existence is justified because of it.

Chapter 4 considers the challenges that shareholder stewardship is called to address in light shareholders' current objectives to engage in corporate governance. Chapter 5 considers the extent to which the 2020 Stewardship Code and the rules that transposed SRD II are fit to provide the regulatory framework required respond to the challenges outlined in Chapter 4 so that shareholder stewardship's objectives with regards to encouraging shareholder engagement for the promotion of corporate governance for sustainability can materialise. In arguing that this will probably not be the case, Chapter 5 additionally outlines the Thesis' normative argument about the basis upon which shareholder engagement should be undertaken and regulated, and

[63] See, in general, Christopher M. Bruner, C*orporate Governance in the Common Law World: The Political Foundations of Shareholder Power* (CUP, 2013),

the means shareholder stewardship in light of it can act as a concept that will seek to regulate shareholder behaviour accordingly. Chapter 6 concludes.

2: Cultivating Corporate Governance for Sustainability: A Call for Reconceptualising the Normative Account for the Corporate Objective

2.1. Introduction

Over the years, societies and governments acknowledged that companies can be a prudent form of conducting business by recognising them as entities that should contribute to the advancement of social welfare through their profitable activities.[1] As a result, considerations about conceptualising the corporate objective in a manner that is proximate to advancing social welfare have become much prevalent in the literature of corporate governance. This led to the development of various social norms that endeavour to provide an account about what the corporate objective should be relative to achieving this end. These social norms identify the operating mantras that should animate companies' business behaviour as well as the parameters in need to be taken into account for companies to ensure that their practices indeed contribute to the advancement of social welfare.[2]

Various social norms provided different normative accounts for conceptualising the corporate objective.[3] The most prominent one of them all, however, is shareholder

---

[1] John Micklethwait, Alan Wooldridge, *The Company: A Short History of a Revolutionary Idea* (Phoenix, 2003), 45-61.

[2] Marc T. Moore, Martin Petrin, *Corporate Governance: Law, Regulation and Theory* (Palgrave, 2017) Chapter 2.

[3] Stakeholder Theory is considered to be one of these. See on this, in general, R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (Boston, Pitman, 1984). Space in the Thesis does not allow a careful consideration of stakeholder theory. Regardless, it must be noted that stakeholder theory should be distinguished from studies postulating for the development of corporate governance for

primacy. Shareholder primacy views the corporate objective as being nothing more than an endeavour to undertake the business of the company in such a way that will create shareholder value as a priority.[4] The basis for conceptualising shareholder primacy derives in part from considering shareholders as the legal and economic owners of companies.[5] Since the 1970s though, several financial economic theories were used to support its normative account for the corporate objective by supporting that creating shareholder value as a priority can lead companies towards contributing to the advancement of social welfare in an allocative efficient manner.[6]

The theories used to support shareholder primacy are useful in understanding corporate governance from a financial and economic perspective. Regardless, this Chapter questions the extent to which shareholder primacy can provide the normative premises required to address the detrimental effects accruing from current corporate practices on an environmental, social and economic level, or act as the normative basis for making companies act in a way that can lead economies to facilitate aggregate sustainable development.[7] The Chapter argues that shareholder primacy accounts for a corporate objective that is prone to creating incentives to control companies in a way that they may diverge from finding solutions to these issues,

---

sustainability. For a critique of stakeholder theory, see, Andrew Keay, *The Corporate Objective* (EE, 2011), 114-172.

[4] Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler, 2011), 2.

[5] Judd F. Sneirson, 'The History of Shareholder Primacy, from Adam Smith through the Rise of Financialism' in Beate Sjåfjell, Christopher M. Bruner (eds) T*he Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019), 77-78.

[6] Lorraine E. Talbot, *Progressive Corporate Governance for the 21st century* (Routledge, 2013), 117.

[7] For an account about re-approaching these theories see Beate Sjåfjell, 'Redefining Agency Theory to Internalize Environmental Product Externalities. A Tentative Proposal Based on Life-Cycle Thinking' in Eleonore Maitre-Ekern et al. (eds), *Preventing Environmental Damage from Products: An Analysis of the Policy and Regulatory Framework in Europe* (CUP, 2018).

unless there is first and foremost evidence of creating shareholder value. This may put them and markets in aggregate on course to misappreciate wider systemic risks arising from current environmental, economic and social degradation, which may threaten their ability to contribute ultimately to the advancement of social welfare.[8]

In light of this, the Chapter calls to reconsider the normative account for the corporate objective. The Chapter suggests to understand it as an effort to secure companies' longevity and resilience as legal persons through ensuring their sustainable development as an end in itself. This normative account is postulated within a context that is informed by the parameters in need to be in place for companies to adopt practices that can lead economies towards facilitating aggregate sustainable development that conforms to the paradigm of strong sustainability.[9] This underlines the design and adoption of practices that are integral to ensuring companies' profitability for their own sake, but in a manner that considers all material environmental, social and economic issues arising from corporate activities that their addressment will make them thrive financially without threatening aggregate sustainable development.[10] It furthermore underlines the development of corporate governance for sustainability as the means to ensure that corporate practices are informed by the parameters in need to be in place that can lead to conforming in aggregate to the economic paradigm of strong sustainability.

---

[8] Stout, *The Shareholder Value Myth* (n 4), 95-103. cf Brian R. Cheffins, 'What Jensen and Meckling Really Said About the Public Company' (2020) University of Cambridge Faculty of Law Research Paper No.29/2020, https://ssrn.com/abstract=3679405 accessed 01 September 2020.

[9] A similar argument is made by various authors in the literature. See, for example, Keay (n 3); Colin Mayer, *Prosperity: Better Business Makes the Better Good* (OUP, 2018).For an account about strong sustainability, see, Eric Neumeyer, *Weak Versus Strong Sustainability: Exploring the Limits of two Opposing Paradigms* (3rd edn, EE, 2013). See also, Chapter 1, above.

[10] ibid, 38-45.

2.2. Shareholder Primacy

While its exact origins remain the topic of debate, support for shareholder primacy's normative account for the corporate objective has been apparent from as early as the 19th century.[11] It can be stated that early depictions of shareholder primacy were partly established on the idea that shareholders are entitled to the profits of the company, which correlated with understanding the nature of the company as one that is akin to a form of a partnership.[12] Coupled with the use of the rules of partnership law to establish early corporate legislation, shareholders were understood as the owners of the business of companies in the same manner as partners in partnerships were.[13] Alternatively, and in line with classical economic theory, shareholders were seen as the entrepreneurial founders of companies. This essentially gave them the status of the ultimate economic owners and controllers of companies, whose practices should pursue the of benefit of shareholders' self-interest, subject to the influences and power of the market that dictates which practices can ultimately contribute to the advancement of social welfare through the creation of wealth.[14]

---

[11] Sneirson (n 5) 77-80.

[12] Mickelthwait, Wooldridge (n 1), 55-60.

[13] Paddy Ireland, 'Limited Liability, Shareholder Rights and Corporate Irresponsibility' (2010) 34(5) Cambridge Journal of Economics 837, 847.

[14] See, for reference, Martin Rickets, *the Economics of the Business Enterprise* (EE, 2003), Chapter 5, Eric Orts, *Business Persons: A Legal Theory of the Firm* (OUP, 2013), 30-32; David Schrader, *The Corporation as Anomaly* (CUP, 1993), 11–19. The development of these ideas originate from Adam Smith's work on economic theory. See Adam Smith, *The Wealth of Nations* (first published 1777, Everyman, 1993).

The signification of the separation of shareholding ownership from the control of the company would question both accounts.[15] Regardless, and as a result of the increasing undertaking of law-and-economics analyses to examine corporate governance and its regulation by the law, shareholder primacy gained prominence in recent years.[16] This was made possible by re-establishing its rationale through using several neo-classical economic theories that examined how companies should be managed to achieve allocative efficiency.[17] These theories examined corporate practices through the context of seeing companies and the directors managing them as tasked with minimising transaction costs as efficiently as possible.[18] They furthermore considered companies as an amalgamation, or a 'nexus' of contractual relationships that are formed around ensuring the efficient production of companies, with the market deemed as acting a key driver for dictating how companies should be managed to achieve the most efficient outcome.[19]

Perhaps the most cited theory used to support shareholder primacy is agency theory.[20] By viewing the company as a 'nexus of contracts', agency theory asserts that companies are uniquely characterised by the existence of several residual claimants

---

[15] Adolph A. Berle, Gardiner C. Means, *The Modern Corporation & Private Property* (Reprint, Routledge, 2017).

[16] The pioneer of this view was Milton Friedman. See, Milton Friedman. *Capitalism and Freedom* (40th Anniversary edn, Chicago University Press, 2002), 119-131. See also, Milton Friedman, 'The Social Responsibility of Business Is to Increase Its Profits', N.Y. Times (September 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html accessed 06 March 2018.

[17] Talbot (n 6), 118.

[18] Ronald H. Coase, 'The Nature of the Firm' (1937) 4(16) Economica 386, 388-392, 398-400.

[19] Armen A. Alchian & Harold Demsetz: 'Production, information costs, and economic organization' (1972) 62(5) American Economic Review 777, 778.

[20] Michael Jensen and William Meckling,'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305.

of the profits and value generated from the company's production. Through satisfying their interests through the creation of value for them as a priority, agency theory considers that risks will be managed in such a way that more efficient outcomes can result in the process in terms of ensuring the profitability of the company from its production.[21]

The use of agency theory by supporters of shareholder primacy led to considering shareholders as these residual claimants.[22] Because of this understanding, supporters of shareholder primacy consider shareholders as the 'principals' of 'agent' directors, who should be tasked with running companies as efficiently as possible to create value for shareholders, or 'shareholder value', as a priority.[23] The residual claim from the profits of companies is seen as arising from the risk shareholders are taking to invest in companies.[24] Because of this, their contract with directors is deemed as being 'notionally' incomplete, in the sense that it relies on the extent to which companies are efficient enough to create financial value that will satisfy all liabilities and allow a surplus which will be receivable from shareholders.[25]

---

[21] ibid, 305-310.

[22] This was initially claimed to be the case initially by Fama and Jensen. See Eugene F. Fama, Michael C. Jensen, 'Separation of Ownership and Control' (1983) 26 The Journal of Law & Economics 301, 303, 312. See also, Eugene F. Fama and Michael C. Jensen, 'Agency Problems and Residual Claims' (1983) 26 The Journal of Law & Economics 327. The prominence of this view however in corporate governance, business, and law literature was gained subsequently and through the course of time. See Brian R. Cheffins, 'Stop Blaming Milton Friedman!' (2020) University of Cambridge Faculty of Law Research Paper No 9/2020, 40.

[23] Daniel R. Fischel, "Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers" (1978) 57(1) Texas Law Review 1

[24] See on this, Alchian, Demsetz (n 19), 782-783.

[25] ibid; Jensen, Meckling (n 20), 305-310.

Agency theory does not fail to account for the interests of other stakeholders accruing from the operation of the company. To the contrary, it considers them as being material in the execution of companies' operations and their management. Nevertheless, it considers these interests as in need to be satisfied as efficiently as possible without diverging from prioritising the creation of shareholder value.[26] This is because stakeholders are seen as having a fixed contractual relationship with companies, whose satisfaction of interests is understood as resting materially on the extent to which companies are efficient enough to generate financial value to cover them.[27] Practices that seek to meet shareholders' financial interests in terms of creating value for them as a priority as efficiently as possible are identified as ultimately satisfying stakeholders' interests in the process as well, since their fixed interests will be met accordingly in the process as the best means to manage risk.[28]

Through this lens, companies are understood as being 'owned' by shareholders, in the sense that shareholders enjoy their ultimate control and distribution of its profits as compensation for the satisfaction of their interests on a residual basis.[29] In this context, shareholding ownership denotes shareholders' status as the collective bearers of the residual risk of the failure of the business of the company.[30] This is because shareholders' receipt of profits out of the value created from corporate operations is deemed as indeterminate. This is in turn assumed that it entitles shareholders to some form of control of the company in relation to dictating how directors should manage

[26] Reinier Kraakman et al., *The Anatomy of Corporate Law* (3rd edn, OUP, 2017), 29-31.

[27] Frank H. Easterbrook, Daniel R. Fischel, *The Economic Structure of Corporate Law* (HUP, 1991), 1-40.

[28] ibid.

[29] Henry Hansmann, *The Ownership of the enterprise* (HUP, 1996), 53-65.

[30] Easterbrook, Fischel (n 27), 15.

the company to satisfy their financial interests through the creation of shareholder value as a priority.[31] Following this, agency theory postulates for the development of the most efficient outcome to pursue this end, with the costs generated becoming an issue in need to address to satisfy shareholders' financial interests.[32] Any considerations of other interests in the company are seen in light of creating shareholder value as a priority, and as material solely to the extent they are conducive to achieving this goal.[33]

Deviating from the norm of prioritising the creation of shareholder value is considered as a process that utilises corporate capital inefficiently to the point of ultimately reducing the profitability of companies and thus increase the risk of their failure.[34] This is considered as both detrimental for the interests of the shareholders, the longevity of companies, and the ability of capital markets to dictate the adoption of good corporate governance that will ensure that companies' practices will contribute to the advancement of social welfare through securing allocative efficiency.[35]

The latter forms part of the theoretical tenets promoted by the Efficient Capital Markets Hypothesis (henceforth, 'ECMH'), which has often been used together with agency theory to substantiate the significance of conforming to shareholder primacy's

---

[31] Hansmann (n 29), 53-65.

[32] cf Paddy Ireland, 'Company Law and the Myth of Shareholding Ownership' (1999) 62(1) Modern Law Review 32.

[33] Easterbrook, Fischel (n 27), 68.

[34] ibid.

[35] Daniel R. Fischel, 'The Corporate Governance Movement' (1982) 35(6) Vanderbilt Law Review 1259, 1276. See also, Michael Jensen, 'The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems' (1993) 48(3) Journal of Finance 831.

normative account for the corporate objective.[36] ECMH seeks to establish that the market value of shares is reflective of all information about companies' business and the risks inherent in or associated with them.[37] As a result, capital market forces are assumed as capable of dictating based on them the adoption of better corporate governance practices in light of the assumption that the effect of companies' governance is reflected on the market value of shares.[38] This is the case provided that all market actors in pursuit of their self-interest rationally assess all publicly-available information they hold about companies' financial performance and business, which will then give the ability for the market value of shares to act as a metric for considering whether companies are managed in an efficient manner.[39] Deviating from adopting practices that prioritise shareholders' financial interests is assumed as capable of leading in the adoption of less efficient outcomes, which will be both reflected in the market value of shares and seen as threatening the ability of markets in aggregate to promote outcomes that can advance social welfare.[40]

2.3. Shareholder Primacy and Company Law

The prominence of shareholder primacy has led to understanding the pursuit of appropriate business practices as equated with creating shareholder value as a

[36] Eugene F. Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25(2) The Journal of Finance 383.

[37] ibid.

[38] ibid.

[39] ibid.

[40] Easterbrook, Fischel (n 27). cf Talbot (n 6), 124-144.

priority.[41] Nevertheless, shareholder primacy provides a normative account for the corporate objective that often fails to reflect accurately on the nature of the company and its relationship with shareholders as a matter of law.[42] Firstly, it is a long-established principle that shareholders are neither the legal nor the economic owners of the company, but merely the owners of their own shares.[43] As a matter of law, no one is an owner of the company. The company is a legal person that is distinct from shareholders that bears its own legal capacity and standing, with limited liability partitioning shareholders from its activities.[44] This is evident not only from common law precedent that declares the company as an entity distinct from shareholders,[45] but also from accepting that the standard of practices the company adopts are assessed as beneficial or detrimental solely on the extent to which they benefit the company as a distinct legal person.[46]

It is also well-established that the share is a form of private property that is bound to a covenant with the company through the articles of association.[47] The articles as a covenant under law represent shareholders' agreement that the provision of their capital for the purchase of shares is accompanied by a partition of the control of such capital for it to be allocated to the company's control. Such control is furthermore

---

[41] Schrader (n 14), 110-125. See also, Melvin A. Eisenberg, 'The Conception that the corporation is a nexus of contracts and the dual nature of the firm' (1999) 24 Journal of Corporation Law 819. cf Cheffins (n 8).

[42] Lynn A. Stout, 'Bad and Not-so-Bad Arguments for Shareholder Primacy' (2002) 75(5) Southern California Law Review 1189, 1192-1195, 1199-1201.

[43] *Borland's Trustee v Steel Brothers & Co Ltd* [1901] 1 Ch 279 (Ch), 288. See also, Companies Act 2006, s540 (CA 2006).

[44] Orts (n 14), 30-32.

[45] *Salomon v Salomon* [1897] A.C. 22 (HL), 51-53.

[46] ibid. See also, *Lee v Lee's Air Farming Ltd* [1960] UKPC 33; Keay (n 3), 183-189.

[47] CA 2006, s 33. For an in-depth analysis of the legal nature of shares see, David Milman, *The Company Share* (EE, 2018).

agreed through the articles, and regulated as such by company law, to be allocated to the directors of the company.[48] The membership of shareholders as signatories to the notional constitutional contract that the articles comprise may be thought as being the contract that gives hierarchical supremacy over the company's directors.[49] Nevertheless, company law has traditionally outlined that the control of the company rests on directors for the benefit of the company in such a way that the legal relationship that arises from this covenant with shareholders is understood as being a reciprocal one to this end only.[50]

It follows therefore that shareholders are not afforded primacy in this contractual relationship. They are contracting equals with themselves and the company, whereby they agree to the existence of this arrangement of the distribution of power to control the company.[51] Of course, shareholders hold the power to alter the articles through the exercise of their voting rights in the general meeting.[52] However, this does not provide them with the ability to exercise discretion over how directors are undertaking the control of the company.[53] This is a discretion that remains subject to the law through the regulation of directors' duties that are owed to the company, and the extent

[48] See, *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 (CA), 133-135.

[49] Easterbrook, Fischel (n 27), 1-39, 63-89.

[50] Marc T. Moore, 'Understanding the Modern Company through the Lens of Quasi-Public Power' in Barnali Choudhuri, Martin Petrin (eds) *Understanding the Company: Corporate Governance and Theory* (CUP, 2017), 100-106.

[51] ibid.

[52] See Chapter 3, 3.4, below.

[53] It must be noted, however, that shareholder power can prove substantially influential in terms of calibrating directorial behaviour. See, ibid.

to which a derivative action made on behalf of the company by shareholders is set to ensure that.[54]

This resonates with the fact that as a matter of law, shareholders do not have a direct claim of ownership of the assets of the company, nor do they have any sort of control over them to determine their fate or, by extension, the fate of the company.[55] The shares do not reflect ownership of the company's assets, whether physical or equitable, or any sort of entitlement to have interests on them, be it financial or otherwise.[56] Neither do shares manifest any sort of an entitlement of control over the company's assets, irrespective of whether shares are representative of the collective interests of shareholders.[57] If anything, shares provide shareholders with the ability to channel capital in companies, with limited liability allowing them to receive possible returns on their investment or the trading of shares without being exposed to any risks involved with the affairs of the company.[58]

The calls to prioritising the creation of shareholder value based on the idea that shareholders are the residual claimants of the profits of the company is also, to a certain extent, inaccurate.[59] To be clear, the fact that the rate of returns in profits in terms of dividends or that the value shareholders will extract from holding shares is indeterminate is quite a valid observation. Regardless, shareholders are not entitled to the profits of the company unless dividends are declared, for the simple reason that

[54] ibid.

[55] *Bradbury v English Sewing Cotton Co Ltd* [1923] AC 744 (HL), 767.

[56] *Bligh v Brent* (1837) 160 E.R. 397, 401-402.

[57] Moore, 'Understanding the Modern Company' (n 50), 100.

[58] Keay (n 3), 73

[59] Stout, *The Shareholder Value Myth* (n 4), 24-32.

such profits belong to the company, not the shareholders.[60] The claim from the profits of the company that shareholders possess is restricted to the amount of dividends they can get once dividends are declared, which is analogous to the percentage, and often type, of shareholding ownership.[61] Thus, shareholders' right to receive some of the profits of the company is restricted to what the shares themselves provide them in exchange of their investment, provided that there are distributable profits.

An argument can be made that shareholders are entitled to the surplus of the profits of the company due to the risks taken via their investment, and therefore such dividends should be made payable at all times to shareholders and at rates relative to the surplus.[62] While the frequent payment of dividends is customary, the provision of dividends relies too much on the functional discretion of directors.[63] The power to declare dividends rests on shareholders, but any resolution adopted to this end remains contingent on the discretion of directors as controllers of the company to first recommend the amount of dividends that are going to be declared,[64] with shareholders having limited ability to bring an actionable claim against the company or the directors for not doing so.[65] Effectively therefore, shareholders have limited discretion to decide when, or how, the company's profits are going to be distributed to them in dividends.

In addition to the foregoing, directors as a matter of law are not the shareholders' fiduciaries in relation to the control of the company, nor they are appointed as shareholders' agents to create shareholder value as a priority. Even though

[60] Moore, 'Understanding the Modern Company' (n 50), 93-95, 112.

[61] ibid.

[62] Stout, *The Shareholder Value Myth* (n 4), 24-32.

[63] Stout, 'Bad and Not-so-Bad' (n 42), 1192-1195.

[64] The Companies (Model Articles) Regulations 2008 (SI2008/3229), Schedule 3, Art 70(2).

[65] Moore, 'Understanding the Modern Company' (n 50), 113-116. See also, Milman (n 47), 103-135.

shareholders appoint them in position, directors' contract and duty to manage the company lies with the company itself, not the shareholders.[66] Directors retain full control and authority to manage the company in what they think is best for meeting the company's best interests as an entity that is separate from its shareholders.[67] Although the company and the shareholders are bound to each other by the articles of association as a covenant, there is no reference to a duty for prioritising the creation of shareholder value in the sense understood by shareholder primacy.[68] The company through its articles bestows on directors the right to control the company to exercise the company's will on its own behalf and for its best interests only as this is regulated by the law, subject to the discretion directors are afforded in the articles.[69]

The only reference that could be made to support shareholder primacy is by arguing that the best interests of the company as they are assessed by the legal norm of shareholder value manifests legally its rhetoric, and that shareholders possess the power that can effectively keep directors into account to this end.[70] Despite the interpretive room it provides, the legal norm of shareholder value as this is now found in s.172 of the Companies Act 2006 does not evoke that the interests of the company must be interpreted solely within the context of creating shareholder value as

[66] CA 2006, s 33.

[67] Moore, 'Understanding the Modern Company' (n 50), 113-115.

[68] Keay (n 3), 66, 81.

[69] *Percival v Wright* [1902] 2 Ch 401 (Ch), 426. See also, *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34 (CA).

[70] CA 2006, s 172. But see, Marc T. Moore, 'Shareholder Primacy, Labour and the Historic Ambivalence of UK Company Law' in Harwell Wells (ed) *Research Handbook on the History of Corporate and Company Law* (EE, 2018); Shuangge Wen, *Shareholder Primacy and Corporate Governance* (Routledge, 2013), 150-152.

manifested by shareholder primacy's normative account.[71] The courts have clearly stated over the years that directors retain the autonomy and discretion to control the company by considering what is best for the interests of the company as a separate legal person, with the benefit of shareholders as a whole being in need to be taken as a reference point to identify the extent to which the latter is met.[72] Company law has the presumption that directors will act in good faith for ensuring the success of the company and to uphold its best interests when adopting their practices in the foregoing manner.[73] As such, the courts will consider as justiciable and justifiable any practices related to the operation of the company, provided that this is the directors' subjective judgment regarding how to promote the best interests of the company.[74]

In this respect, directors are not considered in breach of their duties when they do not declare more dividends or create shareholder value that would not meet shareholders' interests in the present. Directors are generally free to engage in any practices they consider that they satisfy the interests of the company by reference to what could be in the best interests of all shareholders as a whole.[75] Creating more profits of value for

---

[71] Beate Sjåfjell et al. 'Shareholder Primacy: The Main Barrier to Sustainable Companies' in Beate Sjåfjell, Benjamin J. Richardson (eds) *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP, 2015), 97-101.

[72] See, inter alia, *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50; *CAS (Nominees) Ltd v Nottingham Forest FC plc* [2002] 1 BCLC 613 (Ch); *Lonrho v Shell Petroleum* [1980] 1 WLR 627 (HL). Cf *BTI LLC v Sequana SA and others* [2019] EWCA Civ 112. It is evident that this is the case even by considering policymakers' mindset in the course of undertaking consultations prior to the introduction of the Companies Act 2006. See, for example, DTI, *Consultation: Company Law Reform White Paper* (Cm 6456, 2005), 8: 'The Government is committed to ensuring that the legal and regulatory framework within which business operates promotes enterprise, growth and the right conditions for investment and employment'.

[73] Sjåfjell et al. (n 71), 90-94, 97-101.

[74] *BTI v Sequana* (n 72), [192]-[214]

[75] *CAS (Nominees)* (n 72), 164-168.

shareholders is therefore one of the considerations that directors can and are allowed to take into account as a matter of law.[76] Shareholders cannot legally challenge directors' decisions that do not create adequate value to them, unless this is directly related to directors' breach of duties or it unfairly prejudices their interests.[77] The going concern for directors recognised under law is not to maximise shareholders' profits as a priority, but to do all things necessary to ensure that the company will run profitably and successfully, which will indirectly meet shareholders' interests in maximising their profits.[78]

2.4. Shareholder Primacy as the Foundation to Facilitate Corporate Governance for Sustainability?

The analysis made in the previous section indicates that shareholder primacy's foundation of the normative account for the corporate objective rests on assertions that are not reflective of the nature of the company and the position of shareholders in them as a matter of law. Shareholder primacy, therefore, can only act as a social norm that seeks to dictate how the corporate objective should be observed and understood for companies to develop optimal outcomes that can contribute to the advancement of social welfare. Nevertheless, given the convergence of the wider economic, social and environmental issues societies face and the challenges companies have to address to mitigate their contribution to their amplification, it is questionable if shareholder

[76] See *Hunter v Senate Support Services Ltd* [2004] EWCH 1085 (Ch); *Edge v Pensions Ombudsman* [2000] Ch 602 (CA), 627-628.

[77] ibid.

[78] Sjåfjell et al. (n 71), 90-94, 97-101.

primacy is capable of providing the normative ground that will cultivate the adoption of practices that can effectively address these.

Starting with the nature of shareholders' interests, shareholders in modern public companies are hardly the exclusive risk-bearers for them to be afforded any primacy in terms of the company creating value for them. This is the case even when it is accepted that there is a link between residual risk-bearing and wealth/value creation, regardless of the fact that their claim may be constituted as residual from the perspective that its satisfaction has indeterminate value.[79] Several stakeholders of the company remain as much exposed to the risks the company is exposed, albeit proportionately.[80] When viewing the company as a nexus of contracts or as a set of assets capable of being owned, there is also no notion that signifies which interests are subordinate, let alone saying that shareholders should be afforded any primacy.[81] Only the use of the theory in the corporate context determines this on the basis of viewing shareholders as the residual claimants of the profits of the company.[82] As have been outlined above though, this is an argument that fails to resonate with the legal realities of the company effectively.

An argument can be raised that adopting governance practices that adhere to shareholder primacy's rhetoric can achieve more efficient outcomes, which can then

---

[79] John Kay*, Foundations of Corporate Success: How Business Strategies Add Value* (OUP, 1993).

[80] ibid. On viewing companies as nexus of relationships, see Freeman (n 3); Margaret M. Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (Brookings Institute, 1995); Margaret M. Blair, Lynn A. Stout, 'Trust, Trustworthiness and the Behavioural Foundations of Corporate Law' (2001) 149 University of Pennsylvania Law Review 1735, 1750-1753, 1808.

[81] Keay (n 3) 93-94.

[82] Stout, *The Shareholder Value Myth* (n 4), 24-46.

ensure the effective addressment of other issues in the process.[83] The literature so far however has been unable to reach to any concrete conclusions with empirical evidence that can suggest this with surety.[84] The main reason for this lies to the fact that empirical studies using certain performance metrics of the market value of shares do not reflect effectively on the fact that the facilitation of the business of the company goes beyond financial performance.[85] The availability of space and resources to conduct corporate activities, the existence of appropriate employee conditions, the satisfaction of creditors' interests, and various other issues are elements that are in need to be factored to secure prudent business practices.[86] The development of initiatives that identify solutions to the various detrimental effects accruing from corporate practices are also conducive to ensuring companies' successful operations.[87] This is because they can address how companies manage the risks that accrue from them effectively to ensure that the strategy implemented will lead to their perpetual success without risking the viability of their business or their resilience.[88]

It will be an exaggeration to say that supporters of shareholder primacy disregard these issues as immaterial.[89] On the contrary, supporters of shareholder primacy consider how the company should adopt practices that can actually consider these issues, albeit through the lens of prioritising the creation of shareholder value as a

---

[83] Easterbrook, Fischel (n 27), 8-15, 25-30.

[84] Sanjai Bhagat et al., 'The Promise and Peril of Corporate Governance Indices' (2008) 108(8) Columbia Law Review 1803, 1814.

[85] ibid.

[86] Stout, *The Shareholder Value Myth* (n 4), 48-50.

[87] Mayer, *Prosperity* (n 9), 109-129.

[88] Kay (n 79), 9.

[89] See, for example, Michael Jensen, 'Value Maximisation, Stakeholder Theory, and the Corporate Objective Function' (2002) 7(3) European Financial Management 297).

metric that showcase the ways that such issues can be addressed effectively.[90] Any practices contrary to this end are understood as capable of creating trade-offs that are detrimental to the creation of shareholder value, and, therefore, the business of the company by extension to generate profitable outcomes that are required to advance social welfare.[91]

The problem with this logic is the inability to comprehend that these trade-offs are both ubiquitous and prevalent within the corporate structure based on values that usually go beyond the creation shareholder value .[92] The companies' business structure and production needs calibrate what companies seek to achieve by reference to the use of several values, the processes required to effectuate their business, and the collection and use of resources, labour, and intelligence to facilitate them.[93] Trade-offs are essentially created not just for creating shareholder value, but also for facilitating a significant number of other processes that will assist in the production of the business of the company, from which financial value is aspired to be generated.[94]

The issue therefore is not that these trade-offs exist. Rather, the issue lies with identifying effective ways to manage them relative to the issues, purposes and values that underpin the business of the company to make it thrive now and in the future.[95]

---

[90] ibid. See also, Hansmann (n 29), 53-148; Kraakman et al. (n 26), 23-24, 90-102.

[91] See, Lucian A. Bebchuk, Roberto Tallarita, 'The Illusory Promise of Stakeholder Governance' (2020) 106 Cornell Law Review 91; Stephen N. Bainbridge, 'Corporate Governance in a Populist Era' (2020) UCLA School of Law, Law-Econ Research Paper No. 18-09, https://ssrn.com/abstract=3237107 accessed 01 December 2020.

[92] Colin Mayer, 'Ownership, Agency, and Trusteeship: An Assessment' (2020) 36(2) Oxford Review of Economic Policy 223, 229-230.

[93] Mayer, *Prosperity* (n 9) 112-120.

[94] Mayer, 'Ownership, Agency and Trusteeship' (n 92), 233-236.

[95] ibid.

What shareholder primacy's normative account for the corporate objective endeavours to outline is that these trade-offs should be undertaken solely to the extent that they are beneficial for creating shareholder value as a priority.[96] The contribution of companies to address environmental and social issues generated by themselves outside of this context attracts much scepticism, therefore, simply because they will diverge companies from achieving the aforementioned.[97]

No doubt, such scepticism is valid in cases where companies are called to address issues that essentially seek to provide solutions and responses to the State's or other organisations' failures to address social and environmental considerations.[98] But what is notable is that the reason behind this scepticism is not found in identifying the role of private actors in alleviating these issues in the course of undertaking their profitable endeavours, especially when such issues are generated a priori by them in the course of doing so. Rather, it is found in the understanding that corporate governance is not the right area to address these unless the creation of shareholder value correlates with their addressment.[99] It is evident therefore that this scepticism is much more conducive to upholding the normative basis for establishing shareholder primacy's account for the corporate objective, rather than having a concern about the effective ways by which these issues are addressed by companies.[100] Given that the normative basis of shareholder primacy fails to reflect on the legal nature of companies however, it is very hard to realise any substantive reasons for rejecting to consider these issues besides when their apprehension is conducive to creating shareholder value.

---

[96] Mayer, *Prosperity* (n 9), 33.

[97] Kraakman et al. (n 26), 89-95.

[98] Sjåfjell, 'Redefining Agency Theory' (n 7), 110.

[99] ibid.

[100] ibid.

The only argument that could be made is that shareholder primacy's normative account for the corporate objective is important to be upheld because it cultivates the ability of capital markets to act a driver for promoting corporate governance that will make companies contributory to the advancement of social welfare.[101] However, it is questionable whether the indication of adopting practices that consider these issues solely through the context of creating shareholder value as a priority will effectively address or appreciate their hyper-complex traits.

This argument is cognisant of the limitations of ECMH to provide a normative groundwork for the development of such initiatives based on the strength of its rationale that markets can best dictate practices that effectively address the foregoing by having the market value of shares as a reflector of the likely risks inherent in the taking up of the company's business. Despite the catholic adherence to ECMH and the efforts to increase the flow of publicly-available information,[102] capital markets have been criticised for their inability to address systemic issues effectively.[103] Such criticism does not reject ECMH or the belief in the ability of markets to dictate good corporate governance. Rather, it signifies the ways in which capital markets can deviate from ECMH's norm.[104] Yet the fact remains that the errors that are prone to be made when the risks associated with wider economic, social and environmental

---

[101] But see Talbot (n 6), 129-140.

[102] John Quiggin, *Zombie Economics: How Dead Ideas Still Walk Among Us* (PUP, 2011), 35-78.

[103] See, in general Nicholas Barberis. Richard Thaler, 'A survey of Behavioural Finance' in George M. Konstantinides et al. (eds) *Handbook of the Economics of Finance* (Vol 1A, North Holland: Elsevier, 2003); Andrei Shleifer, *Inefficient Markets: An Introduction to Behavioral Finance* (2000 OUP). See also, Cass R Sunstein et al., 'Behavioural Approach to Law and Economics' (1998) 50 Stanford Law Review 1471, 1477-1478; Lynn A. Stout, *Cultivating Conscience: How Good Laws Make Good People* (PUP, 2010).

[104] Robert Anderson, 'The Long and Short of Corporate Governance' (2015) 23 Georgetown Mason Law Review 19, 33.

degradation are sought to be managed solely by using metrics that are designed to consider financial risks based on the extent to which their factoring is conducive to creating financial value as a priority.[105]

The level of uncertainty that derives from the scale of potential economic harm accruing from these issues, however, is extremely deep, both in terms of understanding their reach, and in terms of configuring their economic effect over specified times.[106] The pressure put on markets to address these issues is enormous, but there is limited information that can be utilised to this end beyond making speculations about the element of risks companies and investments will be exposed to financially that can be reflected on the market value of shares.[107] Even if there is information available about these issues, it will be difficult to aggregate it in a way that will generate a coherent consensus of the probabilities of the damage caused if these issues are left unaddressed; or outline the effect that different methods of addressing them will have on markets and companies by deriving these indications on the potential changes in the market value of the share.[108]

This however undermines the argument to conform to shareholder primacy's normative account for the corporate objective based on the strength of ECMH: its essentiality to promote a corporate objective that will ensure the cultivation of the premises required to promote practices that will assist markets in correctly estimating

---

[105] Jay Cullen, Jukka Mähönen, 'Taming Unsustainable Finance: The Perils of Modern Risk Management' in Beate Sjåfjell, Christopher M. Bruner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019), 107.

[106] ibid.

[107] Jeroen Veldman, Andreas Jansson, 'Planetary Boundaries and Corporate Reporting: The Role of the Conceptual Basis of the Corporation (2020) 10(2) Accounting, Economics, and Law: A Convivium 1, 5-7.

[108] Cullen, Mähönen (n 105), 107-108.

all probabilities and risks so that they can dictate how companies contribute to the advancement of social welfare through prioritising the creation of shareholder value.[109] Market forces are aspired that they will be able through the market value of shares to dictate how companies will adopt optimal corporate practices, which includes appreciating all risks inherent in the operation of companies.[110] At a corporate level, it is assumed that adhering to shareholder primacy's normative account for the corporate objective will lay the foundations for the cultivation of practices that can effectively allow markets to achieve this relative to managing the risks involved with corporate business.[111] Yet the aforementioned indicate that it is possible that markets may fail to lead to pricing shares relative to the risks inherent with these issues based on the information held, either because the information needed is unavailable, or because it is speculating on outcomes that are relatively uncertain.[112]

Supporters of shareholder primacy have championed the use of company law as a facilitator of the rules that can allow the disclosure of information that can effectively allow the markets to discipline and regulate conduct and governance based on the market value of shares.[113] As a result, there has been a consistent call for regulating corporate governance by increasing disclosure requirements, in the hope that more and better information will provide markets with the ability to dictate the adoption of practices that will manage all possible risks that may tamper overall profitability.[114] No

[109] ibid.

[110] ibid.

[111] But see Talbot (n 6), 129-140.

[112] Cullen, Mähönen (n 105), 107-108.

[113] Easterbrook, Fischel (n 27), 35.

[114] But see Andrew Johnston, 'Market-Led Sustainability through Information Disclosure: The UK Approach' in Beate Sjåfjell, Christopher M. Bruner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019).

doubt, increased information may assist in promoting the awareness of the risks associated with social and environmental degradation, in addition to achieving transparency in corporate governance.[115] Regardless, the integration of such information to risk management at a corporate and investment level may still be prone to showcasing unreliable probability estimates of the risk inherent with addressing these issues, simply because it will continue to be rather speculative, or uncertain as to the exact outcomes from exposure to any such risks.[116]

This calls into question the central principles of several tools used to identify the risks associated with investment and corporate endeavours based solely on the market value of shares. This also brings into question the extent to which the latter can in any way reflect on the adoption of good corporate governance practices or the means by which it can act as the metric for considering how companies will adopt practices that can contribute to the advancement of social welfare. These tools are usually used to produce probability estimates of the cost of losses in potential scenarios by relying on information available in the market and sophisticated financial risk modelling.[117] However, these tools often produce results that showcase minimum risk from ESG criteria inherent in current corporate practices.[118]

The addressment of ESG criteria though are usually comprised of an increased amount of costs in need to be made upfront, with small, long-term benefits in the future. When these are discounted at standard rates based on the current flow of information,

[115] Andrew Johnston, Beate Sjåfjell, 'The EU's Approach to Environmentally Sustainable Business: Can Disclosure Overcome the Failings of Shareholder Primacy?' in Marjan Peeters, Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (EE, 2020), 404.

[116] ibid, 404-408.

[117] Cullen, Mähönen (n 105), 107-108.

[118] ibid, 108.

the net value from such investment is prone to vanish, especially when the investment made in shares is for a short amount of time.[119] The pursuit of greater financial value as a priority based on using these tools then may lead to dictating practices that display preferences for corporate strategies that have a lower impact on the market value of the share. When the collective of these decisions is taken in aggregate however, it can lead the market towards indicating the adoption of practices that outright fail to consider effectively the materiality of addressing these issues effectively, regardless of the systemic effects this may have in the future.[120]

A focus on upholding corporate practices based on the market value of shares and the mandate for prioritising the creation of shareholder value therefore is prone to creating a tendency to display preferences for adopting practices that address these issues solely when they act as indicators that they will affect positively the market value of shares.[121] The problem with this logic however is that it cultivates the incentives to address these issues only when there is substantial evidence of threat for the profits of shareholders or the shares' market value over a specified timeframe, even when evidence to the contrary may still lead ultimately in catastrophic losses for everyone in the future.[122] Rather than postulating therefore for the promotion of practices that precautionary ensure that a more sustainable economy in aggregate then, shareholder primacy cultivates the adoption of practices which may in aggregate fail to consider these issues effectively.[123]

---

[119] ibid.

[120] ibid.

[121] Mayer, *Prosperity* (n 9), 35-44.

[122] ibid.

[123] Cullen, Mähönen (n 105), 107-108.

2.5. Companies' Sustainable Development as the Corporate Objective

The analysis made in the Chapter so far is by no means an effort to argue that there is no need to identify the efficient allocation of capital and resources, or that shareholders' satisfaction of financial interests is immaterial.[124] After all, efficiency is important for the development of sustainable outcomes from business activities.[125] Furthermore, the satisfaction of shareholders' financial interests should be one of the issues that must be taken into account in the course of managing companies.[126] What is being questioned is the ability of shareholder primacy to cultivate the normative premises required to develop practices that can identify how companies can address the wider environmental, social and economic issues they generate in the course of their profit-making endeavours that ultimately act against the advancement of social welfare and ultimately, their longevity and resilience.[127]

This leads the Thesis to make a call for conceptualising a normative account for the corporate objective that can achieve this. The Thesis suggests that the normative account for the corporate objective should be conceptualised as an endeavour that seeks to ensure the longevity and resilience of companies, which is pursued as an end in itself for companies' sake as legal persons that are distinct from any stakeholder. This is deemed as in need to be achieved in line with the calls for companies to contribute in the advancement of social welfare. This normative account for the corporate objective considers this as possible to be done through facilitating

---

[124] This includes various types of efficiency besides allocative efficiency. See, Andrew Griffiths, *Contracting with Companies* (Hart, 2005), 38-40.

[125] Schrader (n 14), 126.

[126] See on this, Chapter 5, below, 5.3.

[127] Corporate governance for sustainability is understood herein in the same manner as Chapter 1, above.

companies' sustainable development, which aims to promote the interests of the company as an end in itself through adopting practices that can make companies successful and resilient in the present and in the future without being an undue impediment on societies and the environment. Considering that companies' practices should contribute to the advancement of social welfare, and in light of the wider issues companies are called to address, this corporate objective suggests that companies should secure their sustainable development in accordance with the parameters that must be in place for economies in aggregate to be able to facilitate aggregate sustainable development that conforms to the economic paradigm of strong sustainability.[128]

In comparison with shareholder primacy, this normative account for the corporate objective suggests focusing on the betterment of companies as institutions of their own right, whose recognition of rights in this way derives from the fact that companies are legal persons distinct from their stakeholders. Companies in this sense are deemed as having interests that are independent of any stakeholder who has interests in their operation, be it economic or non-economic.[129] Regardless, it acknowledges that pursuing the satisfaction of companies' interests as an end in itself must be informed and calibrated by the need to uphold, or at least respect, all stakeholders' interests in the process of pursuing their own ends. It furthermore appreciates that the pursuit of the interests of the company must be upheld in a way that companies' practices will not bear an undue impediment on the societies and the environment that

---

[128] See similar calls for this normative account for the corporate objective in Keay (n 3); Mayer, *Prosperity* (n 9).

[129] ibid.

accommodate their practices.[130] This is deemed as integral both for securing companies' longevity and resilience, and for contributing through their practices to the betterment and prosperity of societies.[131]

Understanding the normative account for the corporate objective in this sense entails the materialisation of two complementary endeavours. Principally, this normative account for the corporate objective calls for the adoption of practices that can create wealth for companies, from which both companies' and other stakeholders' financial or economic interests will be met.[132] At the same time, it signifies ensuring that the practices adopted are based on what companies should do to further their existence to keep being profitable. This is informed by an aggregate context that outlines how companies should ensure this without being an impediment on societies and the environment that accommodates them now and in the future so that their practices truly contribute to the advancement of social welfare.[133] This latter end signposts to the need to respect the ability of societies to provide the foundations needed for the operation of companies' activities.[134] It furthermore signifies the need to respect the environment's capacity to accommodate the development of their practices, and

[130] The use of the word societies is an acknowledgment of the effect that companies have across various community groups within and outside the jurisdictional limits of the regulation of companies by the law. See on this, in general, Sally Wheeler, *Corporations and the Third Way* (Hart Pub, 2002).

[131] Keay (n 3), 174-177.

[132] ibid.

[133] Susan M. Watson, 'The Corporate Legal Person' (2019) 19(1) Journal of Corporate Law Studies 137, 140, 165.

[134] Mayer, *Prosperity* (n 9), 110.

provide the resources and capacities that are integral for their accommodation in perpetuity.[135]

It is not the intention of this Thesis to provide a detailed account for this normative account of the corporate objective. Given though that it forms the basis of the main arguments posed by this Thesis about its subject matter, it is integral to examine briefly some of its critical aspects. The remainder of the Chapter will provide an overview of three key related aspects. The first revolves around the nature of companies as legal persons. The second is concerned with the ways companies' sustainable development can be pursued to meet the interests of companies as legal persons to ensure their resilience and longevity as an end in itself. The third concerns the wider context and parameters that should inform the pursuit of companies' sustainable development, which revolves around the way companies should calibrate their practices through the development of corporate governance for sustainability.

2.5.1. The Company as a Legal Person

The normative account for the corporate objective promoted in this Chapter focuses on ensuring the longevity and resilience of companies through their sustainable development to secure their interests for their own sake as an end in itself. In opposition to the pursuit of specific interests, this normative account for the corporate objective is company-focused, and entails the satisfaction of the interests of companies as entities that are distinct from shareholders or any other stakeholders.[136]

---

[135] On the need to consider ecological limits in economic theory see, in general, Herman Daly, *From Uneconomic Growth to a Steady State Economy* (EE, 2015), Chapter 2.

[136] See 5.2.2 and 5.2.3, below.

The focus on ensuring companies' longevity and resilience is informed by the nature of companies as legal persons. As mentioned above, the company as a form of business organisation is recognised by the law as a legal person, with the attribution of its legal personality and the provision of limited liability to shareholders constituting its existence as such. Effectively therefore, both limited liability and corporate legal personality partition shareholders and any other stakeholders from the existence of the company, making it a distinct and autonomous body.[137] The company has a character and body of its own, with interests, rights and responsibilities that are distinct from anyone that may be deemed as being part of the company because he is a member, or because he is otherwise an interested party in the business of the company.[138]

It may be argued that pursuing the companies' longevity and resilience in the foregoing sense is a misnomer, since their functioning entails the contribution of several processes that are undertaken from natural people, whose furtherance of interests may be equated with that of pursuing the companies' furtherance of objectives.[139] When viewing companies as power structures that depend on the amalgamation of the contributions of resources or actions from several interested parties to exist, this approach may be seen as logical. All resource providers and interested parties may submit their resources, or contribute through their actions in the furtherance of companies' business.[140] This may entail submitting their power to control any resources or be subjected to the actions of the company in return of a benefit from the

[137] Orts (n 14), 27-30.

[138] Keay (n 3), 198. See also, by reference to US Corporate Law, Kent Greenfield, *Corporations are People Too (And they Should Act Like it)* (PUP, 2019).

[139] For an account of these, see Orts (n 14), Chapters 1 and 2.

[140] Moore, 'Understanding the Modern Company' (n 50), 92-99.

fruits of the company's production.[141] Hence, it follows that the undertaking of a company's business in a way that will best meet these expectations is capable of attributing a form of an objective, in the respect that its production is reliant upon the existence of these practices.[142]

But for this to be regarded as the focus of the corporate objective, the power of controlling a company and the provision of return to the aforementioned individuals must be allocated to its controllers solely to achieve this end. As far as company law is concerned, directors are entrusted with the exercise of their power to meet companies' best interests as legal persons that are distinct from all of its stakeholders.[143] The law through the interpretation of the satisfaction of the best interests of the company have endeavoured to identify how this is best to materialise in light of satisfying several interests that accrue from companies' operations.[144] Regardless, the focus still remains on achieving the best interests of companies as legal persons that are recognised as being distinct from any other stakeholders.[145] It is clear therefore that the law recognises the existence and the pursuit of the best interests of a company as something that is distinct from the interests that accrue from its operations, despite the fact that their satisfaction is conducive to successfully achieving the latter.[146]

[141] ibid.

[142] See, in general, Oliver E. Williamson, *The Mechanisms of Governance* (OUP, 1999), Chapters 6 and 7.

[143] Moore, 'Understanding the Modern Company' (n 50), 110-116.

[144] Sjåfjell et al. (n 71), 90-94, 97-101.

[145] ibid.

[146] Evidence of this is found under common law as well. See for example, *Gaiman v National Association for Mental Health* [1971] Ch 317 (Ch), 330.

Several supporters of shareholder primacy do recognise companies' legal personhood, albeit within a context that seeks to explain shareholder primacy's normative account for the corporate objective.[147] Kraakman et al. for example have acknowledged that corporate legal personality is an essential attribute of companies.[148] Nevertheless, they state that such recognition comes from viewing the company as a 'heuristic formula' that bundles together several characteristics that comprise shareholders' ability to organise themselves syllogistically to conduct business around the goal of creating shareholder value as a priority.[149] To them, the company is acknowledged as an entity distinct from shareholders only in the same sense that a trust is distinct from its beneficiaries, but which it still endeavours to benefit them through the outcomes of its legal effects.[150]

Such an understanding resonates with participant theories of the corporation. These theories tend to explain the nature of companies as legal entities by depicting them as entities that are formed by and for upholding the best interests of the participants that comprise them as a priority.[151] The company as a form of business organisation under these theories is usually seen as an aggregate of its shareholders, or a collective noun used to describe the sum of the contractual relationships formed around satisfying the participants' self-interest.[152] In light of this, the company is seen as appropriate to be

[147] Kraakman et al. (n 26), 8.

[148] ibid.

[149] ibid. See also, Easterbrook, Fischel (n 27), 10-12.

[150] ibid. See also, in general, John Armour, Michael J. Whincop, 'The Proprietary Foundations of Corporate Law' (2007) 27(3) Oxford Journal of Legal Studies 429.

[151] Orts (n 14), 13. Agency theory is usually seen as being used as the foundation to support an 'extreme' version of participant theory. See on this, in general, David Millon, 'Theories of the Corporation' (1990) 1990 (2) Duke Law Journal 201.

[152] ibid, 13-15.

solely concerned with the furtherance of its participants' financial interests, with shareholders being identified to be such participants.[153] The recognition of the company as a legal entity is assumed as being nothing more than the recognition and authorisation of the company to exist solely in the foregoing sense and purpose.[154]

Viewing companies on the basis of participant theories of the corporation acts in antithesis to viewing companies as an aftermath of a governmental authorisation to exist subject to the State's control, or as an entity formed as a result of the 'concession' of the State to grant its authority to exist to promote the State's ends.[155] Companies following this rationale are viewed as entities recognised by the State with the primary focus of their authorisation being the adoption of practices that are conducive to upholding the State's interests, or pursue social causes on behalf of the State.[156] From this perspective, companies are recognised as having legal personality because the State has authorised them to exist to pursue the State's ends or promote social causes from which the State will be benefited.[157] It therefore follows from this that the State can interfere in companies' business endeavours to dictate which practices will be adopted in order to ensure that companies contribute to the promotion of the purposes that the State endeavours to uphold through granting their existence.[158]

Essentially therefore, the recognition of the company's legal personhood seems to be not a matter that is subject to question by supporters of shareholder primacy on the basis of participant theories of legal entities. Rather, the issue lies more with

---

[153] ibid.

[154] Easterbrook and Fischell (n 27), 10-12.

[155] Watson, 'The Corporate Legal Person' (n 133), 138.

[156] ibid, citing CA Cooke, *Corporation, Trust and Company* (HUP. 1951) 67–69.

[157] ibid, 138-140.

[158] ibid.

acknowledging that corporate power is exercised in a manner that is in conformity with the circumstances in which a company adopts a legitimate existence per the rationale promoted by shareholder primacy.[159] For supporters of shareholder primacy, the pursuit of meeting shareholders' financial interests as a priority relative to the nature of companies as entities distinct from shareholders has both a normative and structural value.

The normative value lies with the belief that markets can best dictate the adoption of practices that can advance social welfare, with the market value of shares acting as the guiding star for identifying the most efficient way to do that.[160] The structural value lies with shareholder primacy's resonation with the participant theories of corporations. The company is assumed as an outcome of private ordering that makes State interference inappropriate beyond the recognition of companies as legal entities that act as a 'collective noun' for achieving efficient outcomes that can effectuate such private ordering.[161] The opposite is deemed that it tampers with the participant shareholders' ability to transact freely and in a way they deem appropriate to further their interests, which may ultimately tamper the market's ability to dictate how these can be calibrated as efficiently as possible by advocating for practices that advance social welfare through ensuring allocative efficiency.[162]

Whether the normative value of shareholder primacy is accurate with regards to the nature of companies as a matter of law as well as the ability of markets to dictate

---

[159] John E. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (OUP, 1993), 23-31.

[160] See, 2.2., above.

[161] Orts (n 14), 13-18.

[162] Susan M. Watson, 'The Corporate Legal Entity as a Fund' (2018) (6) Journal of Business Law 467, 468-469.

effectively on their own how companies can promote practices that lead to aggregate sustainable outcomes has been examined above.[163] In relation to its structural value, shareholder primacy's account for the legitimacy of the company's existence and exercise of power is centred around two key elements. The first is its understanding of the position of shareholders in companies as their ultimate controllers and residual claimants of their profits. The second relates to the grant of existence of companies as legal entities that should be solely concerned with the end promoted by shareholder primacy, namely, the pursuit of shareholders' financial interests as a priority. In light of these, it is then considered that the State cannot legitimately interfere with corporate affairs to impose any sort of responsibilities other than those that are conducive to satisfying private ends, which are assumed that they should take the form of satisfying shareholders' financial interests as a priority.[164]

The extent to which shareholder primacy's account for the position of shareholders in companies is in line with their actual position as a matter of law has been examined above.[165] As far as the intervention by the State is concerned, such a concern would only make sense if the State had a right to intervene in corporate affairs because of attributing special benefits in companies of a kind that did not exist in other forms of business organisation. Alternatively, such a concern would be valid if companies were recognised and thus brought into existence as legal persons solely for carrying out practices that seek to promote the State's ends.[166]

---

[163] See Chapter 2, above, 2.3. and 2.4.

[164] Watson, 'The Corporate Legal Entity' (n 162), 468-470.

[165] See Chapter 2, above, 2.3.

[166] Parkinson (n 159), 23-31.

Having in mind the present regulation of companies, neither of these seem that they are apposite.[167] The State is not allowing companies to exist in return for some privilege to uphold the public good in the sense of promoting the State's interests or promote social causes.[168] Companies equally do not derive their existence as a result of the State's concession to exist to serve the State through their practices in a manner that will seek to promote such ends either. Companies are allowed to exist to pursue their own private ends, subject to any responsibilities they have as a matter of law to do this without impeding others adversely. Indeed, companies are being regulated as such based on an understanding that the public interest arising from corporate practices is the ability of companies to adopt actions that facilitate the satisfaction of their private interests through ensuring their financial success. This is generally seen through the lens of pursuing practices that create wealth for companies, through which the interests of the society are presumed as being met through it indirectly.[169]

While this may resonate with shareholder primacy's normative and structural values, it does not mean that shareholder primacy's understanding of the nature of companies relative to their attribution of legal personality is an accurate one. To understand the company as a legal person solely to prioritise shareholders' financial interests fails to reflect on the fact that the provision of the corporate status is something that is not attributed to the shareholders for them to be afforded any primacy in terms of satisfying their financial interests. The legal personality of the company is not attached nor is provided to shareholders, but it is identified with the business organisation itself and

[167] Mary Stokes, 'Company Law and Legal Theory' in William Twinning (ed) *Legal Theory and Common Law* (Wiley-Blackwell, 1986), 162-165.

[168] William W. Bratton, 'The New Economic Theory of the Firm' (1989) 41(6) Stanford Law Review 1471, 1475-1480

[169] Parkinson (n 159), 23-31.

the assets that it holds.[170] The company cannot be identified through the amalgamation of the outcomes of private ordering of shareholders. The existence of a company is evident through the funds and property it holds, with its existence being dependable on its creation and recognition by the State.[171]

Similarly, this does not provide considerable ground to establish that the private ends that companies are allowed to pursue should be equalised with an expectation that companies will promote the State's ends or pursue social causes that extend beyond the facilitation of companies' private ends. Through recognising companies as legal persons that are distinct from shareholders, the State is warranted to intervene in companies' affairs through regulation to establish safeguards that prevent the abuse of the company as a form of business organisation and its interests as a legal person.[172] Nevertheless, it must be noted that it is difficult to sustain an argument which sees the recognition and grant of existence of the company as a means of granting the State a general right to articulate how the public interest accruing from companies' operations as described above should be upheld.[173]

The reasons for this are multiple. For one, the recognition of the existence of companies as legal persons following the concession of the State for them to exist does not involve the grant of a certain privilege to those wishing to found companies.[174] The act of general incorporation, although State-controlled, is freely available to

---

[170] Keay (n 3), 183-188, citing *Lee v Lee's Air Farming* Ltd (n 46).

[171] Susan M. Watson, 'How the Company Became an Entity: A new understanding of Corporate Law' (2015) (2) Journal of Business Law 120, 139, citing Cooke (n 156), 18.

[172] For example, in the instance of committing fraud. See on this, *Prest v Petrodel Resources Ltd* [2013] UKSC 34

[173] Parkinson (n 159), 23-31. See the discussion made on this in relation to shareholder rights and their regulation by the law in Chapter 5, 5.3, below.

[174] Watson, 'How the Company Became an Entity' (n 171), 17-18.

anyone. The privilege once attached to getting a certain business incorporated that was once connoted due to the grant of existence of companies by an Act of Parliament has now disappeared.[175] Furthermore, any privileges attached to incorporation in relation to the execution of certain functions on behalf of the State, or the provision of rights for conducting commerce exclusively on behalf of the State, have also disappeared due to the availability of general incorporation.[176]

If anything, and in consistence with the present economic orthodoxy, the public interest accruing from the operations of companies in terms of pursuing their private interests has become a background justification for the free availability of incorporation. Through this, the public interest is met through facilitating the development of large-scale business enterprises that through their actions they can benefit the society in the process.[177] It follows from this, therefore, that the availability of general incorporation of companies connotes that a company is founded and granted a right of existence not to serve the State's interests, but to pursue its private ends. The pursuit of companies' private interests is then equated with the public interest accruing from the operations of companies and identified as the way by which the public interest is met.[178] Nevertheless, these private ends do not necessarily have to align with the ends or interests pursued by shareholders, nor is this a validation of shareholder primacy's normative account for the corporate objective.[179] The company through its recognition

[175] Cooke (n 156), Chapter 2.

[176] ibid.

[177] Parkinson (n 159), 23-31.

[178] Ibid, 29 citing Cooke (n 156) for emphasis.

[179] Susan Watson, 'The Taxonomy of the Modern Company' in Innovations in Susan Watson, P. M. Vsudev (eds), *Corporate Governance: Global Perspectives* (EE, 2017).

as a legal person has an autonomous existence of its own, and is allowed to pursue its ends in various ways, subject to their regulation by the law.[180]

Such regulation should not be assumed as an act of interference by the State to uphold its public ends either. The grant of the right of a company to exist does not warrant the State a right of intervention in the sense of pursuing public ends, neither it constitutes an entitlement of the State to interfere in corporate affairs by virtue of the fact it gives them the right to exist.[181] The regulation of companies by the law, which may include upholding the public interest in the sense of promoting interests or include responsibilities that are not conducive to increasing shareholders' profits, does not seek to constrain the companies' ability to transact.[182] Rather, it seeks to confer companies with the right and the ability to transact freely, subject to the imposition of any expectations on the outcomes of the exercise of their rights and power relative to what society through law expect from companies to achieve through their power in the process.[183]

What this means is that the right of the State to regulate companies in terms of pursuing their private ends and therefore uphold the public interest accruing from their operation does not derive from the grant of the existence of companies. A general intervention to uphold the public interest accruing from companies' operations can be founded based solely on ensuring that the concentration of power in the private hands of companies and the effect of the exercise of such power is undertaken to uphold the public interest.[184] The State's role under this can be identified as one that it does not

[180] See Chapter 2, 2.3, above.

[181] But see, Orts (n 14), Chapter 5

[182] Watson, 'The Corporate Legal Person' (n 133), 138.

[183] Sjåfjell et al. (n 71), 90-91.

[184] Parkinson (n 159), 29-31.

to seek to regulate companies in a way that may diverge them from pursuing their private ends. Instead, the role of the State can be seen as one that ensures that the provision of the companies' right of existence to pursue their private ends is accompanied with an element of legitimacy for the appropriate purposes in which corporate power is to be exercised to align with the public interest arising from the pursuit of their private ends.[185]

The inability of the State to regulate companies to uphold public ends does not lead to accepting that shareholder primacy's normative account in terms of the regulation of companies by the law is apposite in any way. The fact that the State has no right to intervene in the companies' affairs to uphold the public interest accruing from the companies' operations by virtue of their legal characteristics does not validate shareholder primacy's account for the corporate objective or the extent to which the State should regulate companies by virtue of its consideration of companies as an outcome of private ordering. In fact, to say that the company is the outcome of private ordering says nothing about the legitimacy of the possession of corporate power or its regulation by the law, which can in turn refute some form of State intervention in light of it to ensure that the public interest accruing from corporate practices is upheld from its exercise.

Supporting shareholder primacy's normative account for the corporate objective additionally disregards several key fundamental legal parameters that identify that the public interest accruing from the pursuit of companies' private ends is not always equated with pursuing shareholders' financial interests as a priority. With the recognition of the company as a legal person and its regulation as such, the interests

[185] Greenfield (n 138), 1-29.

of shareholders are but one of the various considerations in need to be taken into account.[186] Given its legal characteristics and its regulation by the law, the company cannot be deemed as a wholly contractual phenomenon centred around the satisfaction of shareholders' self-interest, or an outcome of private ordering that is merely recognised as a 'collective noun' by the State.[187] The provision of the company with separate legal personality and shareholders with limited liability are beyond the reach of private ordering. The State is not recognising their provision solely by reference to cultivating contractual transactions more efficiently, but because companies are recognised by the law a priori as legal persons which may have interests that often diverge from prioritising shareholders' financial interests.[188]

2.5.2. Companies' Sustainable Development

The identification of companies as legal persons and the calibration of the normative account for the corporate objective to be reflective of this through dictating that its discharge should be equated with the pursuit of their interests as an end in itself is capable of operationalising the process of meeting the public interest accruing from companies' practices. The means by which this is made possible is by aligning the normative account for the corporate objective with the acknowledgment that the law is treating companies as legal persons and regulates them accordingly relative to meeting their private ends that are distinct from their constituents. Orienting the corporate objective to secure the longevity and resilience of companies via pursuing

[186] See for example, CA 2006, S 172.

[187] This is regardless of the fact that accountability for the corporate control centres around shareholders' ability to promote such accountability. See on this, Moore, 'Understanding the Modern Company' (n 50). See also, in relation to regulating shareholders' ability to vote in the general meeting, Chapter 3, 3.4, below, and Chapter 5, 5.3, below.

[188] Watson, 'How the Company Became an Entity' (n 171), 17-18.

their interests as an end in itself gives to the interests of a company pragmatic configuration, which can stand as the basis for upholding the public interest that arises from companies' operations.[189]

Realising the normative account for the corporate objective in this manner raises important questions about the regulation of companies by the law to ensure that companies are acting in a way that aligns with upholding the public interest that accrues from their operations. This will be an issue that will be considered in Chapter 5 through the lens of considering the regulation of shareholders' rights by company law.[190] But in addition to this, this normative account for the corporate objective and its connotation as capable of operationalising the processes required to align with the public interest accruing from companies' operations raises questions about the criteria that should guide and inform corporate decision-making to implement its rationale.

Identifying such criteria connotes the identification of the operating mantras that should be in place to act as a guide for meeting the normative account for the corporate objective suggested herein. These can in turn act as the basis for considering whether the public interest accruing from corporate practices is aligned with current corporate practices as this may be seen through upholding the interests of companies as legal persons. Assuming that companies' pursuit of private ends, and as a result, the grant of legitimacy for corporate power to be concentrated, is pivotal for meeting the public interest accruing from companies' operations, then the public interest can be equated to that of ensuring that companies pursue their private ends effectively. It follows,

[189] Companies' interests and rights are deemed as being actionable and enforceable as rights that belong to the company per the Human Rights Act 1998. The approach taken with regards to enforcing companies' interests and rights is not an endemic phenomenon. See, in relation to the way companies' interests are treated under US Law, Greenfield (n 138).

[190] See Chapter 5, 5.3, below.

therefore, that, by considering companies as legal persons distinct from their constituents, the normative account for the corporate objective should be company-focused and act as a means of upholding the public interest accruing from companies' operations, with its mandate being the satisfaction of companies' private ends to secure their interests as an end in itself.

Such an account may be principally translated to considering how companies should endeavour to adopt practices that are capable of creating wealth for companies, from which companies' interests will be met in a manner that can align with the public interest.[191] The end goal arising from this should materially relate to fostering the financial success of companies by meeting their purposes and upholding the commitments they make in the process.[192] Several stakeholders' financial and non-financial interests are deemed that they should be taken into account in the course of adopting practices that seek to create wealth.[193] Promoting the adoption of practices that create wealth though can allow the consideration of the ways by which these interests are going to be managed and factored to avoid unwanted trade-offs occurring from the satisfaction of such interests at the expense of others. This in turn can allow directors to have a credible scope about the ways by which they can achieve this

---

[191] Parkinson (n 159), 41. It is impossible to make a discussion about the public interest arising from corporate operations in light of the way companies contribute to wealth creation for societies without a discussion about how such wealth is distributed to truly appreciate the way societies are actually benefited from such wealth. It is beyond the scope of this Thesis to analyse this element of conversation. See though, in general, Richard A. Posner, 'Utilitarianism, Economics and Legal Theory' (1979) 8 Journal of Legal Studies 103; John Rawls, *A Theory of Justice* (Revised Edition, HUP, 1999).

[192] Mayer, *Prosperity* (n 9), 109-129.

[193] This is an account that is acknowledged by several authors that support shareholders primacy as well as authors that promote more pluralist approaches to the identification of the corporate objective, See, Freeman (n 4), Jensen (n 89).

through having the interests of companies as their guide to adopt management that meets these interests in terms of creating profitable outcomes.[194]

Focusing on creating wealth for companies should not be solely translated to pursuing practices that are profit-maximising.[195] Rather, management that seeks to create wealth should aim for the adoption of strategies and practices that can secure that companies remain profitable now and in the future, irrespective of the fact that profit is maximised over a set period of time.[196] There are clear benefits to focusing on achieving this end. Ensuring the profitability of the company can allow companies to invest on their future. This can be done either through preserving several forms of capital needed to execute their practices to ensure resilience during adverse times, or implement some afterthought on realising how companies' strategies and plans will be calibrated in such a way that can secure their position in markets now and in the future.[197]

To achieve this, plans to maximise profitability or profits over a set period of time should be deemed as one of the parameters that are needed to be taken into account.[198] The focus on creating wealth for companies should embrace a wide variety

---

[194] Keay (n 3), 199.

[195] See, in general, Orts (n 14), 106-126; Beate Sjåfjell, 'Regulating for Corporate Sustainability: Why the Public-Private Divide Misses the Point' in Barnali Choudhuri, Martin Petrin (eds) *Understanding the Company: Corporate Governance and Theory* (CUP, 2017).

[196] Keay (n 3), 199.

[197] Ibid.

[198] The scope, implementation and enforcement of s.172 of the Companies Act allows considerable scope to determine this effectively. See, Chapter 2, 2.3, above. Cf Virginia Harper Ho, "Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder - Stakeholder Divide (2010) 36 The Journal of Corporation Law 59; Andrew Keay, 'Enlightened Shareholder Value, the Reform of the Duties of Company Directors and the Corporate Objective' [2006] Lloyds Maritime and Commercial Law Quarterly 335; Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's "Enlightened Shareholder Value Approach" (2007) 29 Sydney Law Review 577.

of methods and practices that seek to achieve just that. For example, the cultivation and preservation of a company's good reputation can be considered as a practice that can achieve this.[199] Companies may be highly incentivised to hold a good reputation. This may relate to having a good standing in the societies in which they operate, or cultivating working environments that make them attractive enough for people to contribute through their labour to the facilitation of their operations.[200] Adopting practices that can secure the good reputation of a company does not necessarily equate to maximising profits or profitability.[201] Regardless, a good reputation is capable of fostering the premises that are required for companies to continue undertaking profitable activities.[202]

Focusing on creating wealth for companies beyond considering profit maximisation can furthermore include practices that seek to engender trust and confidence in the operation of companies.[203] The erosion of trust and confidence in markets is a factor that has been identified as contributory to their current state of affairs and the detrimental effects that they have on the economies, the society and the environment.[204] A focus on creating wealth for companies should eschew actions that seek to maximise profits in the short-term that may prove ultimately detrimental due to

---

[199] See on this, in general, David Waller, Rupert Younger, *The Reputation Game: The Art of Changing How People See You* (Oneworld, 2018).

[200] But see, in general, Luc Boltanski, Eve Chiapello, *The New Spirit of Capitalism* (Verso, 2018).

[201] This may relate, for example, to the undertaking of costly advertising campaigns or awareness events about companies' operations. See on this, in general Waller, Younger (n 199).

[202] Ibid.

[203] Colin Mayer, Conceiving Corporate Commitment: Creation and Confirmation in Jennifer Hill, Randall S Thomas (eds) *Research Handbook on Shareholder Power* (2015, EE), 219.

[204] BIS, 'The Kay Review of UK Equity Markets and Long-Term Decision Making' (Final Report, 2012) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf accessed 13 March 2018; Mayer, 'Ownership, Agency, and Trusteeship' (n 92).

the erosion of trust between companies and their stakeholders, such as the redundancy of key workforce or the adoption of creative accounting practices.[205] Invoking the focus of the corporate objective towards adopting practices that ensure the resilience and longevity of companies through creating wealth for companies cannot justify these practices, since they often lead towards having decision-making in place that fails to consider how corporate capital should be allocated to secure the companies' future.

The mandate for creating wealth for companies does not dictate what the decision-making bodies of companies should be doing to achieve this. The actions that may be taken into account may materially depend on the industry that companies operate, the conditions of the respective market, and the outlook of companies' business. What this focus can achieve however, is ensuring that companies' interests in terms of wealth-creation will be taken as a reference point to identify how wealth can be created. The extent to which the decision-making bodies of companies will be deemed that they have taken a proper course of action can be configured through considering whether the companies' ability to remain profitable is facilitated. In making decisions, there can be an assessment of the profitability of a certain venture relative to the factors in need to be taken into account, and the extent to which this will benefit companies' interests.[206]

But while wealth creation is integral, the unconstrained pursuit of wealth-creating practices that is devoid of considering how companies affect societies is prone to failing to apprehend any challenges or provide solutions to the various issues

[205] Keay (n 3) 202. Cf Anderson (n 104).

[206] See on this, in general, Margaret M. Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (Brookings, 1995).

companies will be called to address, let alone mitigate the detrimental effect of their practices to societies.[207] By extension, an unconstrained pursuit of wealth-creating practices can prove ultimately detrimental for both societies and the ability of companies to exist, leading to a divergence from the public interest accruing from companies' operations.

The reason for this may be partly attributed to the idea that the creation of wealth will be deemed to be aligned with the public interest only if corporate practices are not outright sacrificing collective and individual values or interests, including their own in terms of securing their resilience and longevity.[208] This is reflected in various ways from the regulation of companies by the law to alleviate such effects, for example, in the provision of protection to creditors from the operation of companies whilst there is knowledge that they are on course of reaching insolvency.[209] Another example is found in the regulation of companies to reduce their impact on environmental and social degradation through the imposition of external restrictions or disclosure rules for outlining how companies refrain from adopting practices that are egregiously affecting the environment and the society.[210]

But in addition to this, the unconstrained pursuit of wealth creation may be deemed as being at odds with the public interest accruing from companies' operations if it is considered as being conducive to the generation of defects in the processes through which companies contribute to the advancement of social welfare through the creation

[207] Mayer, *Prosperity* (n 9), 33-40.

[208] Even supporters of shareholder primacy would agree to this end. See on this, Brian R. Cheffins, 'Stop Blaming Milton Friedman!' (2020) ECGI - Law Working Paper No. 523/2020.

[209] See, infra, Insolvency Act 1986, ss 213-214. But see Corporate Insolvency and Governance Act 2020, David Milman, 'Coronavirus: Concessions Extended' (2020) 34(2) Insolvency Intelligence.

[210] See, for example, Modern Slavery Act 2015.

of such wealth. Seeing social welfare from a strictly economic lens, the defects in the operation of markets may be reflective of the fact that companies at the micro level focus too much on wealth creation without assessing all relevant risks that derive from business practices.[211]

Such practices will be deemed privately profitable, but the extent to which they indeed contribute to the creation of wealth for societies is questionable when the costs bore by the misappreciation of such risks in the process outweigh any benefits gained financially, or if the wealth created is not benefitting the society in an way because of such costs.[212] An example of this is found in social and environmental degradation occurred from carbon dioxide emissions occurred as a result of the production of companies. A carbon-intensive production may be considerably profitable for companies, but its operation contributes ultimately to climate change that can prove ultimately detrimental for societies and their ability to operate in the coming years.[213] Society through law as well as market regulation are making efforts to rectify the effects of any divergences between companies' pursuit of private ends as these may be seen through the lens of creating wealth and the extent to which they align with the public interest in terms of creating wealth for the society in the process as well. But for companies to be able to adopt practices that meet the public interest accruing from their operations through the lens of pursuing their private ends, it is important for the decision-making bodies of companies to adopt governance systems that ensure such

[211] Mayer, *Prosperity* (n 9), 33-40. See also, in general, See also, Alex Edmans, *Grow the Pie: How Great Companies Deliver Both Purpose and Profit* (CUP, 2020).

[212] This has proved to be a theory that was ultimately discredited with the 2008 financial crisis, but which remains a key policy mandate. See on this, John Quiggin, *Zombie Economics: How Dead Ideas Still Walk Among Us* (PUP, 2011), Chapter 4.

[213] See Chapter 1, above.

an alignment. It follows therefore that companies, in pursuing their interests as an end in itself, should adopt practices that not only create wealth, but also develop the foundations that lead to its creation without depriving themselves of the ability to do so in the future, or impede the societies and the environment that accommodate their practices to keep doing that.[214]

It follows therefore that the normative account for the corporate objective that focuses on satisfying the interests of companies as legal persons as an end in itself should dictate the adoption of practices that create wealth for companies through their sustainable development. At a macro level, sustainable development refers to the organising principles that endeavour to meet societies' current economic needs while ensuring that Earth will be able through its natural systems to sustain social and economic activities.[215] In the corporate context, sustainable development is much more nuanced as a concept.[216] Nevertheless, there is some consensus in identifying that sustainable development in companies reflects on the ways companies can develop practices that can contribute to the facilitation of aggregate sustainable development, or ensure their survival as a going concern without being an undue impediment to the facilitation of aggregate sustainable development.[217] It reflects therefore on how companies can develop systems of governance that will develop profitable outcomes,

---

[214] Mayer, *Prosperity* (n 9), 33-40. Wider stakeholder considerations were considered to be part of the elements companies should consider in light of shareholder primacy as well. See Jensen, 'The Modern Industrial Revolution (n 49). But see, Chapter 2, 2.4., above.

[215] Neumeyer (n 7), 8.

[216] T. Dyllick and K. Hockerts, 'Beyond the Business Case for Corporate Sustainability' (2002) 11 Business Strategy and the Environment 130.

[217] Rupert J. Baumgartner, Daniela Ebner, 'Corporate Sustainability Strategies: Sustainability Profiles and Maturity Levels' (2010) 18(2) Sustainable Development 76, 78-79.

but in a way they will ensure their longevity and resilience on a basis that respects the environment and the societies that accommodate their practices.[218]

The creation of wealth is pursued to ensure that companies remain profitable and competitive in the market or industry in which they operate. But ensuring the creation of wealth through companies' sustainable development pertains to ensuring the survival of the company and its ability to remain profitable on a basis that both meets the interests of companies and align with the public interest accruing from their operation in the process. This is because companies' sustainable development connotes the mandate of the ability of companies to remain profitable, but without adversely affecting societies or risk their longevity and resilience in the process at a rate that will adverse the environment or the society in the process.[219]

An emphasis on creating wealth through ensuring companies' sustainable development, therefore, makes a call to embrace the long-term survival of companies relative to the need for their operations to advance social welfare. Such survival reflects on ensuring that companies will be profitable as well as competitive in the market in which they operate. Nevertheless, such profitability is deemed that it should be secured by refraining from affecting or distorting the ability of companies to keep being profitable by disrupting the social and ecological environments companies need to operate to keep doing this in perpetuity.[220] Ensuring the ability of companies to

[218] Beate Sjåfjell, Christopher M. Bruner, 'Corporations and Sustainability' in Beate Sjåfjell, Christopher M. Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019), 3.

[219] Stakeholder Theory is reflective of this account as well. See, F. Post, 'A Response to "The Social Responsibility of Corporate Management: A Classical Critique' (2003) 18 Mid-American Journal of Business 25.

[220] David Schrader, 'The Corporation and Profits' (1987) 6 Journal of Business Ethics 589, 590.

create wealth through their sustainable development connotes the facilitation of the existence of companies as a going concern. The decision-making bodies of companies must at least be able to develop a strategy that combines the creation of wealth for companies while keeping up with their liabilities, commitments and security of their survival on a basis upon which companies will adhere to the public interest accruing from their practices. The sustainable development of companies can be seen as the necessary precursor of companies' specific goals and means by which such strategy will be effectuated and developed.[221]

Survival though should not be regarded as the sole objective of companies, in the sense that companies should do anything that is just sufficient for them to exist and operate.[222] Survival through companies' sustainable development should seek to identify how companies are able to remain profitable relative to the risks that are being assumed so that they can survive in the market and industry in which they operate.[223] The call to sustainable development therefore is not a call to keep companies to eternal poverty. Rather, sustainable development signifies the need to ensure companies' ability to become profitable while taking into account the factors that may render their ability to do so impossible in the future to address them effectively, or set up strategies for doing so. Creating wealth through this lens must be aspired and pursued so long as the survival of the company is ensured relative to the factors in need to be taken into account to achieve that.

Companies' sustainable development presupposes managing carefully the various types of capital needed to facilitate their production as well as being mindful of the

---

[221] Keay (n 3), 230.

[222] Ibid.

[223] ibid

parameters by which these are being utilised to ensure that the creation of wealth is made on a basis that creates wealth for societies as well.[224] Companies must have various forms of capital that is capable of being utilised for the common cause of materialising the production of companies. For this to be possible, companies must be able to adapt to the societies and environment in which they operate, and avoid their degradation to continue operating while maintaining such capital efficiently. Ultimately, all such practices will need to be taken into account to ensure that companies remain profitable, in addition to the risks in need to be taken into account to ensure that effectively.[225] Ensuring this over time is necessary for a company to remain a going concern in perpetuity.[226] The development of the business activity of companies under sound economic and financial conditions is capable of resulting in the survival and development of the business, which can then satisfy stakeholders' interests and ultimately contribute to social wealth.

2.5.3. Strong Sustainability, Companies' Sustainable Development and Corporate Governance for Sustainability

A discussion about ensuring the existence of companies and their ability to create wealth through their sustainable development in a way that aligns with the public interest that accrues from their operations generates additional questions about identifying the way companies' sustainable development will be achieved. An important factor for companies to ensure this lies in their ability to adopt a wider

[224] ibid

[225] ibid

[226] Luca Cerioni, Andrew Keay, 'Corporate Governance and the Corporate Objective in the European Community: Proposing a Redefinition in Light of EC Law' (2008) 19 European Business Law Review 405.

perspective about the values they factor in the course of designing their practices and strategies to create profitable outcomes while securing their resilience and longevity.[227] Through focusing on facilitating their sustainable development, companies must appreciate the complexities of their practices as well as their effect on society and the environment that accommodates them in the course of determining how the said practices will create wealth for themselves that is in line with the said public interest.[228]

In light of the social and environmental considerations in need to be taken into account to achieve this, companies must factor several types of values that transcend the traditional consideration of financial value in the course of undertaking any decision-making.[229] A focus on ensuring companies' sustainable development calls for the adoption of a holistic view of the ways companies' economic transactions are assessed to ensure their development and creation of wealth, which connotes using different metrics for assessing and measuring corporate performance on the basis of a plethora of social, economic, and environmental value functions.[230] But for this to be

[227] Critical to this is the ability of companies to adopt systems of governance that can assist them to this end. On general theories on systems thinking, see, in general, Donella Meadows, *Thinking in Systems: A Primer* (Chelsea Green, 2017).

[228] Keay (n 3), 217-223.

[229] This should be read as going beyond the promotion of practices that endeavour to promote corporate social responsibility. See David Millon, 'Corporate Social Responsibility and Environmental Sustainability' in Beate Sjåfjell, Benjamin J. Richardson (eds) *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP, 2015), 37-38, 40-41, 69-76.

[230] Sjåfjell, Bruner, 'Corporations and Sustainability' (n 218), 7-10. Tobias Hahn et al, 'Tensions in Corporate Sustainability: Towards an Integrative Framework' (2015) 127 Journal of Business Ethics 297, 297-298, citing, inter alia, Donella Meadows, *Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (2nd edn, Earth Island, 1972); Mark Starik Gordon P. Rands, 'Weaving an integrated web: Multilevel and Multisystem Perspectives of Ecologically Sustainable Organizations' (1995) 20(4) Academy of Management Review 908.

possible, .[231] As mentioned above, sustainable development refers to the ability of economies to keep contributing to social and economic development to meet humanity's present needs without compromising the ability of future generations to do the same.[232] The vast majority of States have pledged their commitment to upholding sustainable development.[233] This commitment is now deemed as in course to be materialised through upholding the UN's Sustainable Development Goals, which introduced the commitments and goals of States to become economically, environmentally and socially sustainable by 2030.[234]

Several economic paradigms have been developed to determine the facilitation of sustainable development. Weak sustainability, for example, is one of the main paradigms introduced. As an extension to the established principles of neo-classical economics, weak sustainability considers that financial value and other forms of man-made capital are the prime form of capital that matters most in terms of meeting current and future generations' needs and utility.[235] Weak sustainability, though acknowledges that natural capital is important for the production of man-made capital. In the course

[231] Sigurd Sagen Vildåsen et al., 'Clarifying the Epistemology of Corporate Sustainability' (2017) 138 Ecological Economics 40, 41-42.

[232] See on this, UN World Commission on Environment and Development, 'Report of the World Commission on Environment and Development: Our Common Future' (1987) http://www.un-documents.net/our-common-future.pdf accessed 01 December 2019.

[233] UNCED, 'Agenda 21, Rio Declaration, Forest Principles' (1992)

[234] UNGA Res 70/1, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (25 September 2015) A/RES/70/1 www.undocs.org/A/RES/70/1 accessed 10 September 2019. Several initiatives were taken at an EU level. See, for example European Commission, EY, Study on directors' duties and sustainable corporate governance (Final Report, 2020) https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en accessed 10 November 2020. But see, Mark J. Roe, Roy Shapira, 'The Power of the Narrative in Corporate Lawmaking' (2020) ECGI- Law Working Paper 554/2020 https://ssrn.com/abstract=3703882.

[235] John M. Hartwick, 'Intergenerational Equity and the Investing of rents of exhaustible resources' (1977) 67(5) American Economic Review 972, 973.

of production, however, its preservation is not deemed as being pivotal so long as man-made capital is made in substitution for its depletion that is in line with the ways natural capital is to be maintained for its exploitation in perpetuity; and that technological advancement would make its use more efficient to avoid total depletion.[236]

The Thesis suggests that adopting practices that can lead economies to facilitate aggregate sustainable development that conforms to the paradigm of strong sustainability can lead to materialising sustainable development effectively, as opposed to the paradigm laid in weak sustainability.[237] Strong sustainability appreciates that natural and social capital are as significant as financial capital and other forms of man-made capital in economic transactions. But in comparison with weak sustainability, strong sustainability considers that natural capital is non-substitutable and non-infinite, and that both economic transactions and the societies' ability to support them depend materially on its abundance and maintenance.[238] In light of this, strong sustainability signifies the undertaking of economic transactions in a way that will maintain the functions that produce natural capital intact without tampering the ability of future generations to do the same.[239]

To achieve this, strong sustainability outlines the need for undertaking economic activities that contribute to the advancement of social welfare within a safe and operative environment that does not distort the regenerative and distributable

---

[236] On the differences between weak and strong sustainability, see, in general, Nigel Roome, 'Looking Back, Thinking Forward: Distinguishing Between Weak and Strong Sustainability' in Pratima Bansal, Andrew J. Hoffman (eds), *The Oxford Handbook of Business and the Natural Environment* (2011, OUP).
[237] ibid.
[238] ibid, 620-621.
[239] Neumeyer (n 7), 20-40.

capacities of the environment to provide natural resources and accommodate waste from consumption and social activities.[240] This is done by setting frameworks that determine how economic transactions are undertaken within the Earth's capacity to accommodate all human activities, including economic ones,[241] while respecting the social foundation that is in need to be in place as a threshold for the economy to operate and serve the society.[242] The key goal therefore, can be outlined as keeping the functions that facilitate economic transactions intact, while meeting present needs of society through the creation of utility out of economic production.[243]

The means by which this is deemed to be achieved remains a contested topic for proponents of strong sustainability. In general though, it is considered that strong sustainability promotes a drastic change in macro-economic theory. For supporters of strong sustainability, the promotion of sustainable development is considered to be the goal for the macro-economy, instead of the goal of achieving growth through prioritising the creation and consumption of man-made capital.[244] In this context, the economy is not considered as the 'whole', but as part, or a 'subsystem' that operates within the 'whole' of the ecology, which exists within the boundaries of the ability of the ecology to sustain its existence. In light of this, the economy is deemed as optimal to be growing at a scale that is relative to the capacity of the ecology to sustain its size and functions.[245]

---

[240] Roome, (n 236), 621-625. See also, Daly (n 135), Chapter 2.
[241] See, in general, David Griggs et al, 'Policy: Sustainable Development Goals for People and Planet' (2013) 495 Nature 305.
[242] Vildåsen et al. (n 231), 41.
[243] Ibid.
[244] Herman Daly, *Beyond Growth: The Economics of Sustainable Development* (Beacon, 1996), 31.
[245] Ibid, 45.

Strong sustainability is informed by the limitdness of the ability of the ecology to provide resources and space for economic activity, absorb the waste made from consumption and its ability to regenerate itself to keep providing these functions. Identifying an optimal means of operations that does not distort those limits is seen as capable of leading to an optimal account of an economy that seeks to sustain itself to keep existing within the limits and capacity of the ecology to accommodate its functions.[246] Strong sustainability encompasses the need to allocate resources efficiently in the sense connoted in neoclassical economics. But in addition to this, strong sustainability superimposes on the efficient allocation of resources the criterion to achieving it at an optimal scale of the macroeconomy relative to the aforementioned limits, which consider how resources are allocated equitably to meet present needs of societies without affecting the ability of societies to keep doing the same in the future.

Raworth's modelling of sustainable development is particularly useful in understanding how strong sustainability's parameters can effectively outline how economies will operate within a safe and operative environment.[247] Raworth's model is first informed by setting several precautionary limits that seek to act as the basis for securing Earth's capacity to sustain economic activities.[248] Current research realises these through the scientific concept of planetary boundaries. The concept is concerned with the growing understanding of the capacity of Earth's physical capacity to sustain human activities, which is incentivised by the impact human activities have on the ecosphere.[249]

[246] Ibid.

[247] Kate Raworth, *Doughnut Economics: Seven Ways to Think like a 21st Century Economist* (Penguin, 2017), Chapter 2.

[248] ibid, 72-76.

[249] David Griggs et al., 'An Integrated Framework for Sustainable Development Goals' (2014) 19(4) Ecology and Society 49, 51-53.

Planetary boundaries identify several processes that are integral for Earth to continue providing humans with all necessary attributes for facilitating life and their activities within it. This includes the Earth's capacity to accommodate activities in terms of space, the ability of the environment to continue providing all resources required for human activities and regenerate them to repeat the process, and its ability to manage the waste flowing from the use of such resources.[250]

Scientific research on planetary boundaries identifies nine processes that form these planetary boundaries.[251] These processes are not static in nature, but they are considered to be a continuous work in progress that seek to provide a dashboard of issues humanity needs to apprehend to develop solutions for the alleviation of their effects in order not to distort the fundamental dynamics of Earth's capacity to sustain human activities.[252] Planetary boundaries can serve as a framework that sets precautionary limits on how to undertake several activities to safeguard Earth's capacity to sustain human activities. They can assist in configuring the amount of pressure human activities impose on these processes before Earth's capacity to sustain them is in jeopardy in order to act as a starting point of setting various sustainability factors to avoid such an occurrence.[253]

The concept of planetary boundaries therefore can act as a measure for adopting a precautionary approach towards the development of economic activities by setting discrete boundaries to alleviate current and future generations from the unknown and

[250] Johan Rockström et al., 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) 14(2) Ecology and Society 31.
[251] Will Steffen et al., 'Planetary boundaries: Guiding human development on a changing planet' (2015) 347 Science.
[252] ibid.
[253] Rockström et al. (n 250).

irreversible effects of transgressing these boundaries.[254] Through the concept of planetary boundaries, therefore, the economy is deemed as a subsystem that is dependable on Earth's capacity to accommodate it and provide it with its natural resources to continue its operations. In line with this, the economy is capable of being operative only when its physical scale is relative to the ability of Earth to sustain it.[255] Accordingly, the concept calls economic actors to manage the use of natural resources and the environment at a rate where Earth will be capable of providing natural resources and facilitate the environment needed to continue undertaking all economic activities.[256]

Raworth's model is complemented by the call to secure the social foundation required to ensure humanity's prosperity.[257] It seeks to respect human rights while it can secure justice, equality and the provision of good quality of life for people around the world.[258] Leach et al.'s work on identifying the goals for respecting this social foundation has been significantly influential for the identification of all actions and processes in need to be made within planetary boundaries to achieve the foregoing.[259] Currently, the social foundation identifies these goals within the context of covering essential needs for humanity, which include the provision of energy, income and occupation, food, clean water, education, healthcare, housing, political voice, peace and justice.[260]

---

[254] Raworth (n 247), 72-76.
[255] Daly (n 135), 1.
[256] Raworth (n 247), 73.
[257] ibid, 50-53, 76-80.
[258] ibid.
[259] Melissa Leach et al., 'Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity', in World Social Science Report 2013: Changing Global Environments (Paris: OECD Publishing, 2013), 86.
[260] ibid.

Without these functions in place, the economy cannot function, at least efficiently, just like the society cannot function without the economy's contribution in securing its foundation.[261]

Research undertaken on the extent to which strong sustainability is a better paradigm for sustainable development in opposition to weak sustainability has proved so far inconclusive, especially with regards to the substitutability of natural capital.[262] Nevertheless, there are good reasons to suggest that conforming to strong sustainability's paradigm is important for sustainable development to be achieved. Neumeyer has summarised these reasons to risk, uncertainty and ignorance. As stated above, the extent of the effect of environmental degradation onto the economy is extremely deep, and probably irreversibly catastrophic at a rate that cannot be measured or risk-assessed effectively or compensated accordingly through substitution of capital forms. In light of the uncertainty that this creates, it is wise to identify and set precautionary limits on the capacity of the economy to develop itself to refrain from actions that mathematically lead to facing such outcomes.[263]

Ignorance about the future in light of these uncertainties is possible to generate additional impetus to conforming to strong sustainability's mandate. Humanity's knowledge about the potential harm of biodiversity loss, apart from uncertain, is also ignorant about its severity in regards to a plethora of issues in need to be considered. One therefore, cannot know the loss of value terms of the destruction of biodiversity on the basis that knowledge about it and the extent of the harm from its loss is a work in progress. In light of these uncertainties and ignorance about the world, the

[261] ibid.

[262] Neumeyer (n 7) Chapters 3 and 4.

[263] Ibid, 106.

probability estimates of economic harm arising from unsustainable development not only becomes hard to predict, but possibly dangerous enough for action to be taken to limit the effect of current practices that are known that they are creating it in the first place. Conforming to the paradigm of strong sustainability can operationalise the setting of these precautions, so that research and development of methodologies are capable of determining how economies can lead to the betterment of social welfare in perpetuity in light of these.

Raworth's model as well as the operating functions and mantras of strong sustainability are useful in determining what should be expected from economies in terms of facilitating aggregate sustainable development. Nevertheless, they must be downscaled to apply as parameters that will dictate in the corporate context how companies will adopt practices that ensure their sustainable development in a manner that is consistent with the way that economies will facilitate sustainable development that conforms to the paradigm of strong sustainability. To achieve this, it is important for companies to take into account several considerations, values and metric functions that span across different levels of economic, social and environmental considerations and analysis of corporate practices.[264] In order for these parameters to be factored effectively, companies must be capable of realising this objectives at various levels of analysis on their individual, organisational and systemic level.[265] At the same time, various interests, issues and considerations must be co-ordinated and organised

[264] Vildåsen et al. (n 231), 41-42.

[265] ibid.

accordingly, and as these are arising at various timeframes, regions and activities of companies' operations.[266]

Adopting practices informed by the parameters required for economies to facilitate aggregate sustainable development that conforms to the paradigm of strong sustainability in the corporate context, therefore, highlights the need to consider all material processes and relationships that are integral for the facilitation of companies' operations within a premise that realises their inter-relations and complexities.[267] The development of profitable practices are highly dependable on companies' ability to create systems that do not distort the environment's capacity to provide resources and space to keep doing that in the future or affect adversely societies in the process.[268] But to do this in perpetuity and on a sustainable basis, companies must improve their practices by factoring the foregoing as effectively as possible while keep being profitable.[269] This underlines the need for companies to realise several ESG considerations in differing contexts across the whole of the company's operations to ensure that they will be economically, socially and environmentally sustainable for their betterment and profitability in light of the foregoing context.[270]

The process of achieving this requires considerable emphasis on the control of the company and the development of all appropriate accountability mechanisms required to be in place for achieving it.[271] This only signposts to the need to consider how

---

[266] This in part resonates with theories revolving incomplete contracting on the basis that companies' actors in firms may endeavour to establish a satisfactory co-ordination mechanism or governance structures for dealing with problems and contingencies as these may arise, Griffiths (n 24), 38.

[267] Hahn et al (n 230), 301.

[268] Mayer, *Prosperity* (n 9), 120-124.

[269] ibid.

[270] ibid.

[271] Keay (n 3), 231-275, 293-319.

corporate governance will be developed for the implementation of processes that seek to best achieve this.[272] The Thesis opines that adopting corporate governance for sustainability, namely corporate governance that is informed by the parameters in need to be in place to secure companies' sustainable development in a way that can lead economies in aggregate to facilitate aggregate sustainable development that conforms to the paradigm of strong sustainability, can best realise this.[273] This entails the development of systems of production, organisation and development that are oriented, calibrated and implemented not only on the basis of maximising profits for shareholders as a priority, but on a basis that profit is pursued in a manner that is informed by all social and environmental factors that can assist in the development of practices that can conform to the parameters of strong sustainability.[274]

This however is not a simple endeavour to undertake, and it is important to factor that it will entail the continuous consideration of issues based on processes that transcend the development of systems that their merits are measured purely by creating value for shareholders.[275] Several processes and systems of management are also in need to be developed. At first instance, the development of corporate governance for sustainability suggests the widening of accounting principles and the consideration of values and capitals that must be accounted to evaluate the performance of the company at an environmental, social and economic level.[276] The development of

[272] ibid.

[273] Similar accounts were made in the literature. See Sjåfjell, Bruner, 'Corporations and Sustainability' (n 218), 7-10.

[274] ibid.

[275] Pratima Bansal, 'The Corporate Challenges of Sustainable Development' (2002) 16(2) Academy of Management Executive 122, 123-125.

[276] Veldman, Jansson (n 107), 8-12.

studies on this domain is still premature, but several suggestions are currently either in the making or suggested as an initial step to achieve this.[277]

Several studies in the literature have also identified that conforming to corporate governance for sustainability will require adopting strategies that are mindful of all interests and tensions that may arise.[278] Hahn et al. have developed an insightful model that can assist in addressing these issues in the course of transitioning to adopting more sustainable corporate practices.[279] The model illustrates a dynamic aspect of the changes in corporate governance in need to be made at an environmental, social and economic level, by including the temporal and spatial dimensions of the initiatives required to be undertaken for companies to become more sustainable at all levels.[280] Whether this will lead to transitioning companies to become more sustainable is a matter of future considerations and studies in the area. Regardless, the model can prove helpful in configuring how several financial concerns at an individual, organisational or systemic level across various spatial dimensions in the production of the company can create tensions with the need to have an orientation to creating more sustainable outcomes.[281] In addition, it can assist in developing basic concepts which companies can adopt to ensure their sustainable development through corporate governance for sustainability.[282]

This is because the model showcases that the dimensions of change at an economic, social and environmental level that companies are called to address are linked to

[277] ibid.

[278] Mayer, *Prosperity* (n 9), 125-129.

[279] Hahn et al (n 230), 301.

[280] ibid, 302.

[281] ibid, 303.

[282] Vildåsen et al. (n 218), 41-42.

differing societal interests at differing spatial levels, which their management will assist in the development of systems that can effectively lead companies towards becoming more sustainable.[283] It is also reflective of the systemic nature of sustainable economic development in aggregate, and the potential intersection of environmental, social and economic spheres of consideration in need to be factored to achieve it.[284] It is furthermore reflective of the temporal and spatial parameters of achieving companies' sustainable economic development, since it factors financial and other considerations as issues integral to be considered in the process of achieving companies economic development across different regions, sectors and aspects of its management and control, both organisationally and individually.[285]

Adopting corporate governance for sustainability does not alleviate the fact that hard decisions will be needed to be made. This can be considered to be the case especially in companies that operate in several industries that have been noted to be contributory to current environmental, social and economic challenges societies face, such as the aviation or mining industry. While the focus is not on securing the benefits of particular investors or the promotion of social causes, the directors would be particularly interested in ensuring the profitability of companies in a world where their sustainable development is affected by so many parameters that can eventually lead to their demise.

Adopting corporate governance for sustainability, therefore, should be taken as a reference point for determining the means that companies should do that to further their existence in light of the need for economies to facilitate sustainable development.

---

[283] ibid.

[284] ibid.

[285] ibid.

The decision-making bodies of companies should showcase the competence as well as the capacity to monitor the actions of companies using several metrics and figures to ensure the longevity and existence of companies in a world that aims to facilitate corporate and aggregate sustainable development. Focusing on benefitting the company as an institution in light of these is not concerned with identifying how such practices would be calibrated relative to these issues. Nevertheless, it imposes the normative premises required to dictate the adoption of them in such a way that will ensure the longevity and resilience of companies in a manner that will not distort the ability as well as the efforts to secure aggregate sustainable development now and in the future.

2.6. Conclusion

This Chapter identified how shareholder primacy fails to provide a normative account for the corporate objective that will be able to cultivate the premises required to ensure that companies will address the wider economic, social and environmental issues accruing from their practices. In light of this, the Chapter suggested to realise the normative account for the corporate objective as an effort to secure companies' longevity and resilience as legal persons. This was stated to be achieved through ensuring their sustainable development within a context that is informed by the parameters in need to be in place for companies to adopt practices that can lead economies to facilitate aggregate sustainable development by conforming to the economic paradigm of strong sustainability. The Chapter argued that adopting corporate governance for sustainability that can lead companies to adopt practices to achieve the foregoing can meet this objective. But for this to be undertaken effectively, the Chapter acknowledged that this will be an endeavour that will involve the

simultaneous recognition of varying and conflicting issues during the management of companies, and the adoption of solutions across companies' production, structure and organisation.

The contribution of several systems of regulation is integral to achieving this goal. Law is no exception to this, especially when it comes to the regulation of corporate governance by various areas of law. There is no doubt in saying that national governments hold the overarching responsibility in setting policies and laws external to the companies' organisation that protect the environment and the society.[286] Nevertheless, the gaps generated by them have shown that despite their implementation, several companies continue to be managed unsustainably. By setting the regulatory infrastructure for promoting the adoption of decision-making processes required to internalise sustainability considerations, the regulation of corporate governance by the law will be able to cultivate the responsibility to those controlling companies to commit to achieving companies' sustainable economic development as an effort to ensure their own sake and longevity.[287]

Realising the role of the legal regulation of corporate governance will not solve all the difficult questions that lie ahead of undertaking this endeavour. Apart from identifying which constituents within the corporate structure should be responsible to undertake these practices, law must consider the means it will regulate these to ensure the adoption of sustainable corporate practices within the parameters outlined in this Chapter.[288] This will require considering the capacity of corporate constituents to utilise their power in a manner that can lead to the adoption of corporate governance for

[286] Sjåfjell, Bruner, 'Corporations and Sustainability' (n 218), 7-10.

[287] ibid.

[288] ibid.

sustainability and identify the means of ensuring legally that the effect of their practices will be conducive to achieve the foregoing end.[289] This depends not only on the level of responsibility that can be attributable, but also on the level of commitment law should encourage such constituents to showcase in relation to ensuring that their practices will assist in ensuring companies' sustainable economic development.[290]

To a great extent, the initiatives in need to be considered revolve around directors' and board's control of companies. As the corporate constituents tasked with controlling the company unequivocally and for its best interests, the directors and the board hold the power, discretion and ability to adopt the initiatives required for addressing the issues discussed in this Chapter.[291] This can be done through adopting systems of governance that can effectively lead to the addressment of these issues for making companies more sustainable to ensure their longevity and resilience.[292]

Nevertheless, such an endeavour will be incomplete if there is minimum consideration of all other constituents who can exercise their influence or some form of control or decision-making in the companies' affairs. This signposts to the role of shareholders in corporate governance, and the extent to which shareholder engagement can promote or contribute to the development of corporate governance for sustainability. The remainder of the Thesis will consider this through the scope of an emerging aspect of the regulation of corporate governance, that of shareholder stewardship, and the extent to which it lays the premises that can regulate shareholder engagement to act

[289] Colin Mayer, Conceiving Corporate Commitment: Creation and Confirmation in Jennifer Hill, Randall S Thomas (eds) *Research Handbook on Shareholder Power* (2015, EE), 219.

[290] ibid.

[291] Keay (n 3), 231-276.

[292] ibid.

as a means of promoting or contributing to the development of corporate governance for sustainability.

3: Shareholder Stewardship, Corporate Governance for Sustainability, and the Scope of Shareholder Power

3.1. Introduction

The extent to which shareholder engagement is beneficial for corporate governance has been the subject of heated debates over the past few decades.[1] Nevertheless, policymakers have long acknowledged that shareholder engagement should be a welcome phenomenon.[2] Since the Cadbury Report, policymakers have purported to give scope to shareholders and the intermediaries that act on their behalf to utilise their power more actively to become an aspect of corporate governance that can contribute meaningfully to the development of appropriate business practices.[3]

The 2008 financial crisis brought into question the quality of shareholder engagement. Nevertheless, shareholder engagement at the time continued to be regarded at a policy-making level as a significant aspect of good corporate governance, a viewpoint that continues to be prevalent today.[4] In contrast with previous attempts to encourage active shareholder engagement, however, policymakers in support of shareholder

---

[1] Jennifer G. Hill, 'Visions and Revisions of Shareholders in Corporate Governance' (2000) 48(1) The American Journal of Comparative Law 39, 40-41.

[2] Simon Deakin, 'Against Shareholder Empowerment' in Janet Williamson et al. (eds), *Beyond Shareholder Value: The Reasons and Choices for Corporate Governance Reform* (Trades Union Congress, 2014), 36.

[3] See, for example, Adrian Cadbury, 'Report of the Committee on the Financial Aspects of Corporate Governance' (Gee, 1992) (Cadbury Report), 48-53. See also, Hampel Committee, 'Committee on Corporate Governance: Final Report' (Gee, 1998) (Hampel Report), 40-49; HM Treasury, 'Institutional Investment in the United Kingdom: A Review' (2001) (The Myners Report), 89-94.

[4] Dionysia Katelouzou, 'Reflections on the Nature of the Public Corporation in an Era of Shareholder Activism and Shareholder' in Barnali Choudhuri, Martin Petrin (eds) *Understanding the Company: Corporate Governance and Theory* (CUP, 2017), 117-118.

engagement saw shareholders and their intermediaries not only as capable, but also responsible, to monitor corporate performance via shareholder engagement in a way that can benefit both economies as well as the society in general.[5]

This positive narrative has found expression in the introduction of shareholder stewardship.[6] At the time of its inception, the objectives of shareholder stewardship were sought to be upheld through the introduction of the Stewardship Code, which introduced several soft-law disclosure requirements applicable to shareholders and asset managers acting on their behalf.[7] The requirements of the early versions of the Stewardship Code were imposed on a comply-or-explain basis, and primarily sought to ensure that shareholder engagement would be undertaken to facilitate companies' long-term financial performance, with the creation of shareholder value in the long-term being assumed by policymakers as the metric by which this can be measured and considered as achieved.[8]

Recent initiatives, however, now showcase that policymakers through shareholder stewardship seek to achieve this objective on a basis where ESG considerations will

[5] David Walker, 'A Review of Corporate Governance in UK Banks and Other Financial Industry Entities: Final Recommendations' (26 November 2009) https://ecgi.global/sites/default/files/codes/documents/walker_review_261109.pdf accessed 01 March 2021 (Walker Review) 17, 71-73.

[6] Katelouzou, 'Reflections' (n 4), 117. The beneficiaries of institutional investment community refer to both institutional shareholders as well as end investors or other recipients of services in the investment chain of shareholding.

[7] FRC, The UK Stewardship Code 2010, https://www.frc.org.uk/getattachment/e223e152-5515-4cdc-a951-da33e093eb28/UK-Stewardship-Code-July-2010.pdf accessed 02 February 2020 (2010 Stewardship Code); FRC, The UK Stewardship Code 2012, https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf accessed 02 February 2020 (2012 Stewardship Code).

[8] Jennifer G. Hill, 'Good Activist/Bad Activist: The Rise of International Stewardship Codes' (2018) 41 Seattle University Law Review 497, 504.

be embraced at a greater level.[9] This shift is evident both in the EU and in the UK's regulation of shareholder engagement and the means by which both now shape the implementation of the objectives of shareholder stewardship. The SRDII calls shareholders and their intermediaries to showcase via disclosure how they take, inter alia, ESG considerations into account to ensure that they adopt practices that align with the medium to long-term performance of shares.[10] This standard is also evident in the 2020 Stewardship Code.[11] Following its introduction, shareholders and their intermediaries are now expected to apply its principles and explain how they are doing so for the creation of long-term value for their beneficiaries that can lead to sustainable outcomes for the economy, the society and the environment.[12]

This change in the focus of shareholder stewardship is aspired to generate a new impetus for the adoption of shareholder engagement that addresses how companies will become more environmentally, socially and economically sustainable.[13] But despite its increasing support, this Chapter argues that the introduction of shareholder stewardship has not been accompanied with a credible account of what should be expected of shareholder engagement that is in line with the capacity shareholders and their intermediaries have at the corporate level to undertake it.[14] Regardless, the

---

[9] Iris H-Y Chiu, Dionysia Katelouzou, 'From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?' in Hanne Birkmose (ed), *Shareholders' Duties* (Kluwer Law International, 2017), 133.

[10] Directive of the European Parliament and of the Council 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L 132 (SRD II).

[11] FRC, The UK Stewardship Code 2020 https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf accessed 02 February 2020 (2020 Stewardship Code).

[12] ibid.

[13] But see, Chiu, Katelouzou, 'From Shareholder Stewardship to Shareholder Duties' (n 9).

[14] See, in general, Daniel Attenborough, 'The Vacuous Concept of Shareholder Voting Rights' (2013) 14(2) European Business Organisation Law Review 147.

Chapter acknowledges that shareholder engagement is possible to materialise. Primarily, engagement is possible through the exercise of shareholders' voting rights in the general meeting, which allows them to act collectively as decision-makers in companies.[15] Alternatively, shareholder engagement can materialise through the expression of voice formally in the general meeting or informally outside of it as part of the endeavours undertaken by shareholders or their intermediaries to secure their interests as investors alongside the exercise of shareholders' voting rights.[16]

Considering the breadth and scope of these powers, the Chapter indicates that shareholder engagement can be undertaken in a manner that is either responsive to directors' standard of management, or proactive to it, in the sense that shareholder engagement is utilised to signal changes in corporate governance. Having in mind the effect of shareholder engagement, and the calls to ensure that companies become more sustainable, the Chapter argues that shareholder stewardship's existence can be justified. But in comparison to the monitoring role that shareholders are aspired to have in corporate governance, the Chapter signifies that shareholder stewardship's justification should be based on seeking to attribute the responsibility to showcase engagement that promotes or contributes to companies' sustainable development.

3.2. The Ambivalent Views on Shareholder Engagement

The identification of the separation of shareholding ownership from the control of the company identified by Berle and Means in the 1930s as manifested in the UK led the

---

[15] Paul Davies, 'Shareholders in the United Kingdom' in Jennifer G. Hill, Randall S Thomas, *Research Handbook on Shareholder Power* (EE, 2015), 366-367.

[16] Beate Sjåfjell, 'Achieving Corporate Sustainability: What is the Role of the Shareholder?' in Hanne Birkmose (ed), *Shareholders' Duties* (Kluwer Law International, 2017), 394-396.

literature to traditionally acknowledge that shareholders are rationally apathetic about the ways companies are controlled.[17] In part, the origins of this observation derived from its correlation with the wide dispersion of shareholding ownership, which was signified as an indication that shareholders may have little incentives to express their voice or any form of control in corporate affairs.[18] Despite their gradual empowerment by the law,[19] shareholders' formal power until the 1980s was still identified as not being enough to incentivising shareholders to become more active in corporate governance.[20]

Against this backdrop, the successful engagement of several institutional shareholders in corporate governance beyond the market for corporate control has turned the attention of academics and policymakers towards considering the role of shareholders in corporate governance more readily in light of it.[21] Influenced by law-and-economics analyses of corporate governance, the examination of shareholder engagement is now usually made by considering the extent to which it can prove as an efficient way of monitoring corporate financial performance for the creation of

---

[17] Rafael La Porta et al. 'Corporate Ownership Around the World' (1999) 54(2) Journal of Finance 471, 492-493.

[18] For a historical account of shareholder ownership and power see, in general, Alfred Chandler, *Scale and Scope: The Dynamics of Industrial Capitalism* (HUP, 1990); Brian R. Cheffins, *Corporate Ownership and Control* (OUP, 2008).

[19] Andrew Johnston, 'The Shrinking Scope of CSR in UK Corporate Law' (2018) 74(2) Washington and Lee Review 1001, 1013- 1018.

[20] Attenborough (n 14), 150-152. This was deemed to be the case unless a more active stance in corporate affairs was materially concerned with the accumulation of better profits as a result of a breach of directors' duties. But see, Graeme Gunthree, *The Firm Divided: Manager-Shareholder Conflict and the Fight for Control of the Modern Corporation* (2017, OUP), 3-14, 28-42.

[21] Bernard S. Black, John C. Coffee, 'Hail Britannia?: Institutional Investor Behavior Under Limited Regulation' (1994) 92(7) Michigan Law Review 1997; Paul L. Davies, 'Institutional Investors: A UK View' (1991) 51(1) Brooklyn Law Review 129; Jonathan P. Charkham, *Keeping Good Company: A Study of Corporate Governance in Five Countries* (OUP, 1995).

shareholder value.[22] Such a consideration gradually conceptualised shareholder engagement as 'shareholder activism'.[23] Shareholder activism was initially seen as a form of shareholder engagement that was 'defensive' in nature.[24] This was deemed to be the case in the sense that investors with a pre-existing shareholding ownership would engage with directors or fellow shareholders to raise their concerns and ensure that the management of the company will address them effectively for the efficient creation of shareholder value.[25]

The literature towards the turn of the century identified that several institutional shareholders, such as hedge funds, could also use shareholder engagement as part of materialising their investment strategy.[26] But in comparison with the foregoing approach to shareholder engagement, the practices signified as being adopted by hedge funds were deemed as being more 'offensive' in nature.[27] This 'offensive shareholder activism' is understood as being typically characterised by the purchase of a substantial amount of shares in financially underperforming companies in capital markets.[28] These are then seen as used as a leverage to agitate for specific governance changes tasked to create shareholder value, which relies extensively on

[22] Bernard S. Black, 'Agents Watching Agents: The Promise of Institutional Investor Voice' (1992) 39 UCLA Law Review 811, 820-821.

[23] Ronald Gilson, Jeffrey Gordon, 'Agency Capitalism: Further Implications of Equity Intermediation' in Jennifer G. Hill, Randall S. Thomas (eds) *Research Handbook on Shareholder Power* (EE, 2015), 40.

[24] Brian R. Cheffins, John Armour, 'The Past, Present and Future of Shareholder Activism by Hedge Funds' (2012) 37 Journal of Corporation Law 51, 60.

[25] ibid.

[26] Alon Brav et al., 'Hedge Fund Activism, Corporate Governance, and Firm Performance' (2008) 63(4) Journal of Finance 1729, 1735. For an analysis of the nature of various types of hedge funds, see Alexander Kraik, 'Environmental, Social, and Governance Issues: An Altered Shareholder Activist Paradigm' (2019) 44(3) Vermont Law Review 493.

[27] Cheffins, Armour (n 24), 60-61.

[28] Brav et al. (n 26), 1735-1736.

the ability of such shareholders to act in concert with other shareholders to support the agenda either formally and informally.[29]

The success of both forms of engagement has often been noted in the literature.[30] Nevertheless, this success led to the generation of rather ambivalent views regarding the desirability of shareholder engagement.[31] Ironically, much of the ambiguousness derives from analyses that consider corporate governance through the lens of shareholder primacy's normative account for the corporate objective.[32] From this perspective, shareholder engagement is considered as being a desirable attribute of corporate governance or not by configuring whether it is possible to lead to the adoption of more efficient outcomes with regards to creating shareholder value.[33]

A key strand in the literature oppose the benefits of shareholder engagement on the foregoing basis. The understanding of shareholders as residual claimants or economic owners of companies is often understood by this viewpoint as justifying any initiatives taken by shareholders or their intermediaries to 'discipline' directors with regards to creating shareholder value.[34] However, several authors consider other methods as capable of deriving the same result more efficiently to that of shareholder engagement, thus questioning the benefits accruing from shareholder engagement.[35] Examples

---

[29] ibid.

[30] See, for example, William W. Bratton, 'Hedge Funds and Governance Targets' (2010) 95 Georgetown Law Journal 1375, 2007.

[31] Hill, 'Visions and Revisions' (n 1), 40-42.

[32] ibid. See also, Jill E. Fisch, Simone M. Sepe, 'Shareholder Collaboration' (2018) 98 Texas Law Review 863, 867-872.

[33] But see Chapter 2, 2.3-2.4, above.

[34] Brian R. Cheffins, *Company Law: Theory, Structure and Operation* (OUP, 1997), 54-58.

[35] Eugene F. Fama, Michael C. Jensen, 'Separation of Ownership and Control' (1983) 26(2) The Journal of Law and Economics 301, 307-311.

include the ability of markets and the boards to discipline directors to this end,[36] the development of contracts with directors that secure the efficient creation of shareholder value,[37] and the regulation of company law as the facilitative medium of ensuring directors' compliance with shareholder primacy's normative account.[38]

A diametrically opposite view to this considers shareholder engagement as fundamental to the creation of shareholder value.[39] This view forms part of an understanding that shareholders as the company's residual claimants should have the power to engage more frequently and keep directors into account for a plethora of issues to ensure that they pursue practices that actually create shareholder value more efficiently.[40] Since the corporate objective is canonised to this end, this view supports that shareholder engagement will operationalise its mandate, with the market being assumed as capable of dictating the aggregate adoption of good governance practices in the process.[41] In this context, shareholder engagement is argued that it must be facilitated and become more prevalent, because it can act as a 'corrective

---

[36] It is on this basis that takeovers are usually considered as a form of a disciplinary measure. See, in general, Henry G. Manne, 'Mergers and the Market for Corporate Control' (1965) 73(2) Journal of Political Economy 110, John C. Coffee, 'Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance' (1984) 84 Columbia Law Review 1163. Shareholder activism and engagement has been distinguished from takeovers. See, Cheffins, Armour, (n 24), 60-62.

[37] Stephen M. Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' (2003) 97(2) Northwestern University Law Review 547, 560.

[38] Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* (HUP, 1991), 34-39.

[39] Lucian A. Bebchuk, 'The Case for Increasing Shareholder Power' (2005) 118(3) Harvard Law Review 833.

[40] Lucian A. Bebchuk, 'The Myth of the Shareholder Franchise' (2007) 93(3) Virginia Law Review 675, 697-700.

[41] ibid.

mechanism' for situations where directors do not manage the company to the standard that shareholders would consider proper for the creation of shareholder value.[42]

The foregoing views usually inform themselves by analysing the effect that shareholder engagement has on creating shareholder value on a temporal level.[43] Views opposing shareholder engagement argue that it is undertaken to create shareholder value over the period of time in which they will hold the shares in the company.[44] By coining this orientation as creating shareholder value in the short-term, this understanding sees shareholder engagement as being detrimental because it is seen as a leverage to pressure directors to pay more dividends or raise the share's market value for the time shares are held without having much regard about the longevity and resilience of the company in the process.[45] Because of this, shareholder engagement is noted as being detrimental to corporate governance that would create shareholder value in what is deemed to be in the long-term. This is an orientation that is perceived as capable of ensuring corporate governance that is both beneficial for companies and optimal for them to advance social welfare through their practices when taken in aggregate.[46]

[42] Paul Rose, Bernard S. Sharfman, 'Shareholder Activism as a Corrective Mechanism in Corporate Governance' (2015) 2014(5) Brigham Young University Law Review 1015, 1022-1029.

[43] But see, Stuart L. Gillan Laura T. Starks, 'The Evolution of Shareholder Activism in the United States' (2007) 19(1) Journal of Applied Corporate Finance 55.

[44] Iman Abantawi, Lynn A. Stout, 'Fiduciary Duties for Activist Shareholders' (2007) 60 Stanford Law Review 1255, 1283-1292.

[45] ibid. cf Marcel Kahan, Edward B. Rock, 'Hedge Funds in Corporate Governance and Corporate Control' (2007) 155(5) University of Pennsylvania Law Review 1021.

[46] Henry Hansmann, Reinier Kraakman, 'The End of History for Corporate Law' in Jeffrey N. Gordon, Mark J. Roe (eds) *Convergence and Persistence in Corporate Governance* (CUP, 2004).

Several views oppose this and consider shareholder engagement an occurrence that can create shareholder value in the long term.[47] Shareholders in this context are seen as capable of signalling strategies that can increase shareholders' profits or raise the market value of shares in the long term, which will then be subject to the board's discretion to adopt them accordingly.[48] The satisfaction of shareholders' demands for maximised profits or the increase of the market value of shares in the long-term is seen as an orientation that can be adopted by configuring how this will be achieved in the foreseeable future. In this sense, shareholder engagement is seen as a monitoring mechanism for creating shareholder value over a self-determined period of time that can be seen as being long-term, depending on the company's business, the shareholders' interests, and the pricing and dictation of shares' market value that is informed by the foregoing.[49]

The ambivalence of opinions about shareholder engagement is amplified due to the generation of views that consider the extent of its compatibility with the way companies are understood that they should operate for the betterment of the society beyond the perspective of shareholder primacy.[50] To a certain extent, several studies consider shareholder engagement as an effort of shareholders to exert control over the affairs of the company for self-serving purposes, which does not necessarily translate to

[47] Bebchuk, 'The Case for Increasing Shareholder Power' (n 39), 883-884.

[48] Bernard S. Sharfman, 'Activist Hedge Funds in A World of Board Independence: Creators or Destroyers of Long-Term Value?' (2016) 2015(3) Columbia Law Review 813, 831-837.

[49] ibid.

[50] See, from a stakeholder-theory-oriented perspective, Lynn A. Stout, 'The Mythical Benefits of Shareholder Control (2007) 93(3) Virginia Law Review 789.

ensuring the longevity and resilience of companies in the process.[51] Usually informed by the criticism made on shareholder engagement for being a vehicle for creating shareholder value in the short-term, these studies also consider shareholder engagement as having a detrimental impact on the ability of directors to take into account a wider set of interests in the course of their management and control of the company.[52] As a result, these studies tend to denounce the utility of shareholder engagement as an occurrence which can lead to the development of corporate governance that can make companies contribute to social and economic prosperity, to the point of calling for greater board insulation from shareholders' influence to achieve this goal.[53]

Several studies in the literature that acknowledge this criticism call for the re-calibration of the objectives of the institutional investment community to ensure that shareholder engagement will be set on a path to serve broader societal objectives.[54] These studies typically derive from initiatives that endeavour to mainstream the implementation of 'socially responsible investing' (henceforth, SRI).[55] SRI is mainly used as an umbrella term to describe initiatives that seek to align investment and engagement practices with the investee companies' addressment of several non-

---

[51] Lorraine E. Talbot, 'Polanyi's Embeddedness and Shareholder Stewardship: A Contextual Analysis of Current Anglo-American Perspectives on Corporate Governance' (2011) 62(4) Northern Ireland Legal Quarterly 451, 453.

[52] ibid. Cf Kahan, Rock (n 45) 1070-1072.

[53] Lorraine E. Talbot, 'Corporate Governance and the Political Economy of the Company' in Beate Sjåfjell, Christopher M. Brunner (eds) *Cambridge Handbook of Corporate Law and Sustainability* (CUP, 2019), 92-99.

[54] Initiated as an argument in James P. Hawley, Andrew T. Williams, *Rise of Fiduciary Capitalism: How Institutional Investors Can Make Corporate America More Democratic* (UPP, 2000), xi.

[55] Benjamin J. Richardson, Maziar Peihani, 'Universal Investors and Socially Responsible Finance: A Critique of a Premature Theory' (2015) 30 Banking & Finance Law Review 405.

economic issues as part of the efforts made to create value from investments.[56] Although it emerged alongside a growing opposition of the investment community to unethical corporate practices,[57] SRI now encompasses a wider range of initiatives that aim to integrate ESG considerations into stock variations, investment management and shareholder engagement.[58] In this context, studies that promote SRI showcase shareholder engagement as a means to pursue the creation of shareholder value from the adoption of socially responsible, and, to a certain extent, sustainable, corporate practices.[59]

The theories developed around the notion of 'Universal Investors', namely investing bodies with an internationalised portfolio of investments, and the signification of their potential to contribute to the betterment of capital markets and corporate governance through shareholder engagement usually informs SRI and initiatives that promote its rationale.[60] These theories suggest that those bodies who invest in companies that externalise wider economic, social and environmental consequences from their operation to increase their current financial performance may ultimately act to the

[56] Susan N. Gary, 'Best Interests in The Long Term: Fiduciary Duties And ESG Integration' (2019) 90 Colorado Law Review 731, 736-738.

[57] Lloyd Kurtz, 'Socially Responsible Investment and Shareholder Activism' in Andrew Crane et al. (eds) *The Oxford Handbook of Corporate Social Responsibility* (OUP, 2008); Russell Sparkes, Christopher J. Cowton, 'The Maturing of Socially Responsible Investment: A Review of the Developing Link with Corporate Social Responsibility' (2004) 52 Journal of Business Ethics 45.

[58] Emile van Duuren et al., 'ESG Integration and the Investment Management Process: Fundamental Investing Reinvented' 2016 138(3) Journal of Business Ethics 525

[59] Benjamin J Richardson, 'Financial Markets and Socially Responsible Investing' in Beate Sjåfjell, Benjamin J. Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP, 2015), 236.

[60] See, for example, Franck Amalric, 'Pension Funds, Corporate Responsibility and Sustainability' (2006) 59(4) Ecological Economics 440; Matthew J. Kiernan, 'Universal Owners and ESG: Leaving Money on the Table?' (2007) 15(3) Corporate Governance 478.

detriment of other investments made by them across the globe.[61] By factoring these investors' worldwide, large-scale diversification of investment, these theories posit that the foregoing may give intrinsic financial motivation to investors to adopt behaviour akin to SRI to alleviate these issues, which includes the prospect of shareholder engagement as well.[62] In light of this, these theories are suggestive of mainstreaming SRI as the way which these investors should behave in markets and inform the objectives of their engagement practices both for their financial sake and the creation of a positive impact in the economy and society.[63]

3.3. The Introduction and development of Shareholder Stewardship

Despite the ambivalence of views about shareholder engagement, policymakers have long acknowledged and encouraged its frequent occurrence as an aspect of good corporate governance. Since the Cadbury Report, various policy initiatives, reports and soft-law codes have outlined that shareholders or their intermediaries should make good use of shareholder rights, and maintain an active dialogue with directors and fellow shareholders that can lead to companies' better financial performance by reference to the creation of shareholder value.[64] While this was more instrumental in

---

[61] Richardson, Peihani (n 55), 412.

[62] ibid.

[63] James P. Hawley, Andrew T. Williams, 'The Universal Owner's Role in Sustainable Economic Development' (2002) 9(3) Corporate Environmental Strategy 284, 287-289.

[64] Cadbury Report (n 3); Hampel Report (n 3); Myners Report (n 3). These led to the introduction of the Combined Code 1998. FRC, The Combined Code: Principles of Good Governance and Code of Best Practice (June 1998) https://www.frc.org.uk/getattachment/53db5ec9-810b-4e22-9ca2-99b116c3bc49/Combined-Code-1998.pdf accessed 02 February 2020. See now, FRC, The UK Corporate Governance Code 2018 https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF accessed 02 February 2020 (2018

nature, the EU's regulation of corporate governance sought to ease the ability of shareholders to exercise their voting rights across borders as part of promoting shareholder engagement on the same basis. Such efforts materialised through several initiatives as well as through regulation, such as the introduction of the 2007 Shareholder Rights Directive.[65] The 2007 Shareholder Rights Directive sought to allow shareholders to ask questions as well as propose resolutions in the general meeting.[66] It furthermore endeavoured to providing shareholders with the power to request the calling of a general meeting,[67] in addition to recognising various methods to vote in it to ensure broader participation.[68]

The aftermath of the 2008 financial crisis, however, would question the quality of corporate and investment practices as well as the frameworks that sought to secure their proper functioning.[69] Shareholder engagement and the frameworks that sought to promote it were not an exception to this criticism. Several reports and authors showcased that shareholders and their intermediaries were pressuring directors to adopt corporate governance that would create shareholder value in the short-term, which was identified as a key factor to the creation of the financial crisis.[70] But instead

Corporate Governance Code). The Myners Report as well as the Walker Report was particularly influential in the development of ISC's 'Code on the Responsibilities of Institutional Investors' in 2009.

[65] Directive 2007/36/EC of the European Parliament and of The Council of 11 July 2007 on the Exercise of Certain Rights of Shareholders in Listed Companies [2007] OJ L184/17, [10].

[66] ibid, Art 9. See now, Companies Act 2006 (CA 2006), s 319A.

[67] ibid, Art 6.2. See now, CA 2006, s 303.

[68] Such as the recognition of electronic voting. ibid, Art 8. See now CA 2006, s 360A.

[69] See, in general, John Quiggin, *Zombie Economics: How Dead Ideas Still Walk Among Us* (PUP, 2011).

[70] Jacques de Larosière, 'Report of the High Level Group on Financial Supervision in the EU' (25 February 2009), https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf accessed 05 May 2018. See also, Lorraine E. Talbot, 'Why Shareholders Shouldn't Vote: A Marxist-progressive Critique of Shareholder Empowerment' (2013) 76(5) Modern Law Review 791.

of seeing this as an incidence that should lead to reappraise shareholder engagement and its regulation by the law, several reports saw these shortcomings as a pattern of behaviour that regulation can address to make shareholder engagement a beneficial aspect of corporate governance.

For example, the Walker Review concluded that the shortcomings of the financial institutions which their actions led to the financial crisis were partly attributed to the lack of shareholder engagement that would monitor corporate decision-making for the development of practices that would create shareholder value in the long term.[71] By factoring shareholders as companies' economic owners, the Walker Review concluded that had shareholders engagement was undertaken more frequently and responsibly for the creation of long-term value (presumably meaning shareholder value in the long-term in light of the consistency of the terminology used with agency theory), directors' excessive risk-taking would have been prevented.[72] In light of this, the Walker Review recommended that shareholder engagement should be undertaken more frequently by considering shareholders as stewards of their investment and the investee companies' governance.[73] This was recommended as part of ensuring that companies are managed for the creation of value in the long-term, which was assumed as key for developing good corporate governance.[74]

Albeit on a slightly different basis, the suggestion for the adoption of shareholder engagement in light of this assumed stewardship responsibility is found in the Kay

[71] Walker Review (n 5), 68-72.

[72] ibid.

[73] ibid.

[74] ibid.

Review as well.[75] The report outlined, inter alia, that the tendency to adopt shareholder engagement to create shareholder value in the short-term is detrimental both for investee companies' corporate governance and capital markets when such practices are taken in aggregate.[76] To remedy this, the Kay Review suggested to re-calibrate capital markets' focus towards investing in companies' real financial performance over undertaking practices that simply trade shares as commodities.[77] It furthermore recommended the adoption of practices on the part of shareholders and their intermediaries that will create value in the long-term (which presumably refers again to creating shareholder value in the long-term).[78] Among its recommendations, the Kay Review saw the facilitation of effective working relationships around this goal as integral to achieving it. This included the undertaking of active shareholder engagement by seeing shareholders and their intermediaries as stewards of their investment and companies, who should monitor corporate governance in a way that achieves the aforementioned goal.[79]

The recommendations made principally by the Walker Review have acted as the foundation for the introduction of shareholder stewardship. As mentioned in Chapter 1, shareholder stewardship can be defined as a regulatory concept that seeks to steer shareholders and their intermediaries towards adopting practices that can benefit both

---

[75] BIS, 'The Kay Review of UK Equity Markets and Long-Term Decision Making' (Final Report, 2012) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf accessed 13 March 2018 (Kay Review), 43-44.

[76] ibid, 45.

[77] ibid, 45-47.

[78] ibid.

[79] ibid.

investee companies and their beneficiaries.[80] Though initially centred around shareholder engagement, the milieu of shareholder stewardship has now expanded to considering the fruition of this goal from the perspective of both shareholder engagement and the shareholders' and their intermediaries' investment management. From an investment management perspective, shareholder stewardship now reflects on attributing the responsibility on the institutional investment community to make informed decisions about investments and the ways by which they are managed.[81] From the context of shareholder engagement, shareholder stewardship underlines its frequent undertaking with the purpose of ensuring that investee companies will thrive financially, which can in turn assist their longevity and resilience in a way that is consistent to ensuring overall economic prosperity.[82]

Shareholder stewardship was accompanied by other initiatives that sought to increase corporate accountability to shareholders, such as the provision to the general meeting with the ability to make a mandatory resolution for approving executives' remuneration policy.[83] While shareholders' practices in corporate governance with regards to this domain were regulated at a hard-law level in various perspectives, shareholder stewardship's objectives were sought to be realised initially mainly at a soft-law level through the introduction of the Stewardship Code. The Stewardship Code was initially

---

[80] Dionysia Katelouzou, *Institutional Shareholders and Corporate Governance: The Path to Enlightened Stewardship* (CUP, 2021 forthcoming).

[81] See, FCA, 'Building a regulatory Framework for Effective Stewardship: Feedback to DP19/1' (FS19/7, 2019) https://www.fca.org.uk/publication/feedback/fs19-7.pdf accessed 10 May 2020.

[82] ibid.

[83] See now CA 2006, ss 226B, 226C, 439, 439A. From a law-and-economics perspective, a vote on executive pay is understood as a measure of ensuring adequate managerial accountability. See Michael C. Jensen, Kevin J. Murphy, 'Performance-Pay and Top-Management Incentives' (1990) 98 Journal of Political Economy 225; Michael C. Jensen, William Meckling, 'Managerial Behaviour, Agency Costs, and Ownership Structure' (1976) 3 Journal of Financial Economics 305.

introduced in 2010 by the FRC to formalise by regulation the ISC's Code of Good Practices, and was later updated in 2012 to provide further clarifications.[84] Like their informal predecessor, these early versions of the Stewardship Code imposed several disclosure requirements on shareholders and asset managers on a comply-or-explain basis. Compliance with these early versions of the Stewardship Code aspired to showcase how shareholders and asset managers undertook their engagement practices in compliance with the Stewardship Code's principles.[85] This was in turn aspired that it should have led to the promotion of the 'long-term success of companies', from which shareholders' and asset managers' beneficiaries and the economy was deemed that they would prosper.[86]

On its face, the rationale behind the introduction of the early versions of the Stewardship Code, and through it, the rationale of achieving shareholder stewardship's objectives, seems at first sight identical to past endeavours to encourage frequent shareholder engagement on the basis of promoting the creation of shareholder value.[87] Regardless, the novelty of the early versions of the Stewardship Code and the efforts to materialise the objectives of shareholder stewardship through them is found in the desirability of the outcomes of shareholder engagement.[88] The introduction of shareholder stewardship was clearly informed by the understanding that creating shareholder value in the short-term is detrimental for companies' longevity and resilience as well as for the ability of economies to prosper.[89]

---

[84] 2010 Stewardship Code (n 7).

[85] 2012 Stewardship Code (n 7).

[86] ibid.

[87] Talbot, 'Corporate Governance' (n 53), 94.

[88] Konstantinos Sergakis, 'The UK Stewardship Code: Bridging the Gap Between Companies and Institutional Investors (2013) 47(1) Revue juridique Thémis de l'Université de Montreal 109, 120.

[89] Walker Review (n 5), 68.

Nevertheless, shareholder engagement was still seen as a fundamental aspect of good corporate governance, in the sense that it can promote or contribute to its development by acting as a monitoring mechanism for ensuring companies' proper financial performance.[90]

In light of this, shareholder stewardship through the early versions of the Stewardship Code was sought to make shareholder engagement a means of promoting the adoption of practices that ensured the long-term financial performance of the company as an antithesis to creating shareholder value in the short-term.[91] There was limited account on what this orientation meant as a matter of law. Having in mind the reports that influenced the introduction of shareholder stewardship, the imposition of this objective seems to have been imposed based on the rationale that the foregoing objective would lead in re-orienting shareholders' and asset managers' incentives to pursue practices that would promote or contribute to the development of corporate governance that would create shareholder value in the long-term, which is thought that is contributory to ensuring social and economic prosperity.[92] From this, it may be argued that it was expected that both their beneficiaries and companies would be benefited in the process, in the sense that shareholders and asset managers would take into account all and any issues related to the performance of companies that may preclude them from creating value for shareholders that is in line with this end.[93]

---

[90] ibid.

[91] See, by reference to the same implementation of logic by the SRD II, Rafael Savva, 'Regulating Institutional Shareholders in the Medium to the Long-term: An Analysis of the 2017 Shareholder Rights Directive's Shareholders' Duties' (2020) 14 (1) International Company and Commercial Law Review 1, 4.

[92] ibid.

[93] ibid.

While capital markets seemed as being on course of recovery from the 2008 financial crisis, there is little evidence to suggest that the early versions of the Stewardship Code have been contributory to this end from the perspective of ensuring that shareholder engagement was undertaken to promote the objectives of shareholder stewardship. Furthermore, there is little evidence to suggest that the early versions of the Stewardship Code affected the ways by which shareholders and their intermediaries approached shareholder engagement, at least with regards to promoting corporate governance that truly benefited companies and the economies in aggregate. Continuous corporate scandals and collapses in the last decade were indicative that shareholder engagement has not been utilised to alleviate companies' malpractices on several occasions, even after the efforts of the FRC to implement a form of an enforcement mechanism to stimulate compliance with the 2012 Stewardship Code.[94] In addition to this, several reports and studies indicated that several shareholders have not changed their tendency to promote practices that lead to the creation of shareholder value in the short-term, or adopt the minimum means possible to showcase shareholder engagement.[95]

At least for the latter issue, the lack of engagement was identified as being the result of the ways investment management is regulated as well outside of the context of the early versions of the Stewardship Code. The Law Commission found that, at least as a matter of law, several institutional investors would not be found in breach of their legal and contractual duties if their practices in relation to shareholder engagement

[94] FRC, 'Developments in Corporate Governance and Stewardship 2015' (January 2016) https://www.frc.org.uk/getattachment/a0a980b7-17bc-43b5-adcc-b2096a1528ae/Developments-in-Corporate-Governance-and-Stewardship-2015-FINAL.pdf accessed 10 May 2020, 12-14.

[95] Kay Review (n 75), Anna Tilba, Terry McNulty, 'Engaged Versus Disengaged Ownership: The Case of Pension Funds in the UK' (2013) 21(2) Corporate Governance: An International Review 165.

merely ensured that asset managers acting on their behalf would adopt practices that could lead to some form of shareholder engagement. This is suggestive of the conclusion that minimum means of shareholder engagement is not against their legal mandate, with the Stewardship Code having minimum effect, if any, on it to regularise its frequency.[96] At the same time, the Law Commission identified that the same asset managers would not be found in breach of their mandate if they undertook the minimum means possible to showcase engagement, especially when it is factored that they are the recipients of contravening messages in relation to its undertaking and the objectives it should pursue.[97]

Together with the idea that the Stewardship Code is not contributory to achieving the objectives of shareholder stewardship identified above, the Stewardship Code was overhauled by the Kingman Review.[98] The Review outlined serious criticism against the Stewardship Code and the ability of the FRC to effectuate shareholder stewardship's objectives through it. But at the same time, the Kingman Review reiterated previous accounts about the standard of shareholder engagement with regards to the abilities and capacities of shareholders and their intermediaries to comply by its principles and showcase the outcomes that arise from shareholder engagement accordingly to consider whether shareholder engagement aligns with the objectives of shareholder stewardship.[99]

---

[96] Law Commission, 'Fiduciary Duties of Investment Intermediaries' (Law Com No.350, 2014), Chapter 5

[97] Ibid.

[98] John Kingman, 'Independent Review of the Financial Reporting Council' (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767387/frc-independent-review-final-report.pdf accessed 10 January 2020, 8.

[99] Ibid.

3.4. SRD II and the 2020 Stewardship Code

Despite the criticism, shareholder stewardship continues to be supported at a policy-making level as a concept whose objectives are pivotal to be materialised for the betterment of the economy and companies' functioning.[100] Recent approaches on achieving shareholder stewardship's objectives, however, showcase a change in the way these are perceived that they should be met.[101] The pursuit of creating shareholder value in the long-term and the calls for companies to perform financially in line with the latter continue to be the main drivers for the calibration of shareholder stewardship's objectives and the efforts to materialise them through regulation. Regardless, policymakers now aspire that shareholders and their intermediaries will adopt practices that embrace ESG considerations at a greater level.[102] The scope of upholding shareholder stewardship's objectives has been expanded as well.[103] Shareholder stewardship's objectives now seek to be materialised not only through imposing rules on shareholders and asset managers, but also through imposing rules on the undertaking of practices by shareholders' proxy advisors that are tasked with the provision of several services that are conducive to configuring good approaches to investment management and shareholder engagement accordingly.[104]

[100] Ibid.

[101] Chiu, Katelouzou (n 9), 144-150.

[102] See for example, European Commission, 'Action Plan: Financing Sustainable Growth' (Communication) COM (2018) 97/F1.

[103] FRC, Proposed Revision to the UK Stewardship Code (January 2019) https://www.frc.org.uk/getattachment/8caa0e9c-58bb-41b2-923e-296223755174/Consultation-on-Proposed-Revisions-to-the-UK-Stewardship-Code-Jan-2019.pdf accessed 10 January 2020,1.

[104] FRC, FCA, 'Building a Regulatory Framework for Effective Stewardship, (Discussion Paper DP 19/1, January 2019) https://www.fca.org.uk/publication/discussion/dp19-01.pdf accessed 10 January 2020.

This change in the focus of promoting the materialisation of shareholder stewardship's objectives is evident primarily from the EU's regulation of shareholders' rights, both with regards to shareholders' investment management and shareholder engagement. Just like in the UK, the EU was concerned about the ways by which the institutional investment community's actions were contributory to the surgence of the events that led to the 2008 financial crisis, to the point of declaring that the trust in its functioning is seriously questioned.[105] However, the EU Commission through several consultations and green papers reiterated the integrality of responsible shareholder engagement to become contributory to the 'long-term sustainability of EU companies'.[106] In a way that echoes the introduction of shareholder stewardship in the UK, therefore, the EU Commission endeavoured to determine that regulation is needed to increase the level and quality of shareholder engagement relative to the investment policies undertaken as well as the services utilised to achieve this that are in line with the aforementioned objectives.

The rules adopted to achieve this end are primarily manifested through the amendments made to the First Shareholder Rights Directive by SRDII, which have now been transposed in the UK by several regulatory frameworks that amend regulations operated by FCA, the Pensions Regulator and BEIS.[107] The SRDII has introduced a framework which requires Member States to impose disclosure requirements on several types of shareholders (defined as pension funds and

[105] European Commission, Corporate Governance in Financial Institutions and Remuneration Policies (2010) COM 284 (June 2010), 8.

[106] European Commission, 'Proposal for a Directive Of The European Parliament And Of The Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement' (2014) COM 213 final, 2.

[107] SRD II (n 10).

insurers) and asset managers with regards to their investment management and engagement practices.[108] These rules were imposed in addition to the provision of several rights to shareholders and the imposition of transparency rules to investee companies in relation to the identification of shareholders and the transmission of information to them.[109] It furthermore identified the need for proxy advisors to identify coherent information in regards to the role they undertake and the policies they

[108] Ibid, Article 1, which amends the First Shareholder Rights Directive to include: Article 3g (Engagement Policy), Article 3h (Investment Strategy), and Article 3i (Transparency of Asset Managers). The FCA has transposed several of the requirements laid down by the SRD II in relation to the engagement policy and investment strategy for Asset Managers and Insurers. See FCA Handbook Instrument: Shareholder Rights Directive (Asset Managers and Issuers) Instrument 2019 (FCA 2019/68). The rules contained therein are found now, for insurers, in Senior Management Arrangements, Systems and Controls Sourcebook (SYSC), 3.4. (SRD Requirements). The rules contained therein for Asset managers are now found in Conduct of Business Sourcebook (COBS), 2.2B (SRD requirements). The rules applicable for pension funds were transposed by the UK's Pensions Regulator. See Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019, which amended Occupational Pension Schemes (Investment) Regulations 2005, Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013, and Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations 2018.

[109] See, inter alia, ibid, Article 1. Article 1 amends the First Shareholder Rights Directive to include: Article 3a (Identification of Shareholders), Article 3b (Transmission of Information), Article 3c (Facilitation of the exercise of shareholder rights), Article 3d (Non-discrimination on costs), Articles 9a and 9b (Right to Vote on Remuneration Policy and information to be provided), and Article 9c (Transparency and Approval of Related-Party Transactions). For Articles 3a, 3b, and 3d transposition, see Companies Act 2006, ss 112-113, 322, 327, 483, and Part 22.For Article 3c transposition, see Companies (Shareholders' Rights to Voting Confirmations) Regulations 2020 (SI 2020/717). For Articles 9a and 9b transposition, see Companies (Directors' Remuneration Policy and Directors' Remuneration Report) Regulations 2019 (SI 2019/970). For Article 9c transposition, see FCA Handbook Instrument: Listing and Disclosure Sourcebooks (Shareholder Rights Directive) Instrument 2019 (FCA 2019/73).

implement to execute it diligently, and disclose their policies in relation to the execution of their functions.[110]

More specifically, SRDII now amends the First Shareholder Rights Directive to require Member States to introduce measures which ensure that shareholders will disclose their investment strategy publicly. The disclosure is expected to explain, inter alia, how it contributes to the medium-to-long term financial performance of their assets.[111] Where an asset manager is investing on behalf of the said shareholders, SRDII further provides that these shareholders must disclose further information in relation to the arrangement undertaken. Such information includes the ways that the asset managers' incentives and strategy aligns with the shareholders' investment management, the ways by which the medium-to-long-term financial performance of investee companies is taken into account and informs decisions on engagement, and the ways by which ESG factors are taken into consideration to this end by reference to investee companies' non-financial performance.[112]

This disclosure is complemented by additional rules imposed on asset managers specifically. The SRD II now requires Members States to ensure that asset managers disclose to shareholders with which they have an arrangement to invest on their behalf the ways by which their investment strategy and its implementation is undertaken.[113] It furthermore requires such disclosure to identify how the investment strategy and its implementation is consistent with the arrangements made with shareholders, which

[110] Ibid, Article 1. Article 1 amends the First Shareholder Rights Directive to include Article 3j. For transposition of Article 3j, see, The Proxy Advisors (Shareholders' Rights) Regulations 2019. See also, Financial Services (Miscellaneous Amendments) (EU Exit) Regulations 2020 (2020/628).

[111] ibid, Art 3H.

[112] ibid

[113] Ibid, Art 3i.

includes identifying how the investment strategy contributes to the medium-to-long term performance of shareholders' assets. Additional information is required to be disclosed in relation to the risks undertaken or factored in the investment strategy and its implementation as these may relate to the investments made, and the use of proxy advisors for undertaking any engagement activities or updating the investment strategy.

The foregoing provisions are supplemented with an additional requirement to the impose disclosure rules on shareholders and asset managers in relation to making their engagement policy publicly available on a comply-or-explain basis. The engagement policy must outline, among other parameters, the extent of its consistency with shareholders' and asset managers' investment strategy as well as the way that it is being implemented in light of it.[114] Whilst the comply-or-explain basis of the obligation to disclose the engagement policy is familiar due to the early versions of the Stewardship Code, SRDII requires the engagement policy disclosed to include information that transcend the parameters laid by the latter.

Among other issues, SRD II requires shareholders and asset managers to identify the ways by which shareholder engagement was undertaken to monitor investee companies in relation to their financial and non-financial performance, which includes taking into account several ESG considerations and the quality of corporate governance.[115] In addition, shareholders are asked to identify how such engagement policy has been implemented, which includes identifying the processes made to

[114] ibid, Art 3G.

[115] ibid

undertake such engagement, in addition to the ways shareholders' voting rights were exercised.[116]

While it introduced disclosure requirements similar to those of the early versions of the Stewardship Code, SRDII differs from them in two key respects. The first relates to the issues that are expected from shareholders and their intermediaries to consider. SRDII outlined in much more detail that the engagement policy of shareholders and asset managers should account for the means by which financial and non-financial considerations are taken into account, in addition to signifying how the matters addressed have an impact on a wider set of stakeholder interests and the environment.[117] The same is evident in the disclosure of the investment strategy of shareholders and asset managers, which is expected to be developed based on assessments of the medium-to-long term financial and non-financial performance of the investee companies that is required to take into account ESG considerations more readily.[118]

The second is the imposition of the principles emanating from such disclosure requirements. Just like the early versions of the Stewardship Code, the disclosure of the engagement policy is imposed on a comply-or-explain basis. Nevertheless, this is accompanied by the mandatory disclosure requirement of the investment strategy of shareholders and asset managers, which includes an obligation to outline how their investment decisions are made.[119] Having this in mind, it can be stated that SRDII seeks to impose a normative expectation on shareholders and asset managers to

[116] ibid

[117] ibid, Article 3G(a).

[118] Ibid, Art 3H(2). But see, Hanne S. Birkmose, 'Forcing Shareholder Engagement: Theoretical Underpinning and Political Ambitions' (2018) 29(4) European Business Law Review, 613.

[119] Chiu, Katelouzou (n 9), 144-150

showcase engagement, with the disclosure requirements acting as the means to calibrate their incentives to adopt practices for the creation of shareholder value that has taken into account their investee companies' medium-to-long term financial and non-financial performance.[120]

This normative expectation is evident in the recent update of the Stewardship Code in 2020, which complements now the framework introduced to transpose the rules contained in SRDII. In line with SRDII's principles, the application of the principles of the 2020 Stewardship Code is imposed on both shareholders' and asset managers' investment and engagement practices. But in comparison with its previous versions, the 2020 Stewardship Code sets out principles that regulate several service providers acting as proxy advisors as well.[121] Just like its earlier versions, the 2020 Stewardship Code is also comprised of soft-law disclosure requirements.[122] Through these, it is expected that shareholders, their asset managers and service providers will self-regulate themselves and adopt practices that are in compliance with the spirit of its principles, with the disclosure of their practices signifying the means that they have done so.[123]

Nevertheless, the imposition of the Stewardship Code's principles is not treating compliance as a purely voluntary practice. In addition to making a mandatory statement about the extent of asset managers' compliance with it,[124] the 2020

[120] Birkmose (n 118), 632.

[121] 2020 Stewardship Code Code (n 11), 5.

[122] On the extent of the adequacy of the Stewardship Code's disclosure requirements see, by reference to the 2012 Stewardship Code, Iris H-Y Chiu, 'Private vs Public Enforcement of Shareholder Duties' in Hanne S. Birkmose, Konstantinos Sergakis (eds) *Enforcing Shareholder Duties* (EE, 2019).

[123] ibid, 124-125.

[124] FCA Handbook, Code of Conduct, Rule 2.2.3.

Stewardship Code expects from shareholders and their intermediaries deciding to comply with it to apply the totality of its principles, and explain through their disclosure how they have done so.[125] In a fashion similar to the Second Shareholder Rights Directive, the disclosure requirements call shareholders and their intermediaries to showcase the undertaking of engagement practices; and outline how several financial and non-financial considerations were integrated in the course of developing their investment and engagement practices.[126]

Compliance with the principles of the 2020 Stewardship Code is expected that it will lead shareholders to adopt practices that will create long-term value for their beneficiaries, but in a way that can lead to sustainable outcomes for the economy, the environment and the society.[127] Again, no sufficient justification is provided to signify what this orientation means as a matter of law. Given the development of the rationales revolving around the introduction of shareholder stewardship, it seems that this orientation is probably aligned more with promoting practices that create shareholder value in the long-term as the innate goal of such engagement, provided that this can lead to more sustainable outcomes in the process.[128]

The 2020 Stewardship Code brings several key novelties in the efforts to materialise shareholder stewardship's objectives. The imposition of its disclosure requirements on an 'apply-and-explain' basis is the first of these.[129] Once shareholders and their intermediaries elect to be bound by it, their flexibility in determining their compliance

---

[125] 2020 Stewardship Code (n 11), 5-7.

[126] ibid.

[127] ibid.

[128] FCA, 'Building a regulatory Framework for effective stewardship' (n 81), 12-15.

[129] Betty (H.T.) Wu et al., 'Say on Pay' Regulations and Director Remuneration: Evidence from the UK in the Past Two Decades' (2020) 20(2) Journal of Corporate Law Studies 541, 565.

with the Stewardship Code is allowed solely within the context and application of its principles.[130] The 2020 Stewardship Code dictates the principles that should animate shareholders' and their intermediaries' practices on the basis of the end promoted by it; and expects from them to explain their investment and engagement practices as well as outline how their practices comply with the spirit of these principles.[131] It therefore creates an element of an expectation that the spirit of the principles contained therein will be followed by shareholders and their intermediaries, and allows them to self-regulate themselves to comply accordingly, and showcase the means they have done so through disclosure.[132]

The overall objective imposed by the 2020 Stewardship Code for shareholders and intermediaries to pursue in the course of doing so is also slightly different from its earlier versions.[133] The pursuit of creating shareholder value is still deemed as the main purpose of shareholder engagement, but solely in the respect that this will be oriented in what is deemed to be in the long-term.[134] This may be argued that it is assumed that it will directly derive from companies that are oriented towards generating value with a view to uphold this objective, in the respect that such pursuit of value is contingent on the ability of companies to adopt practices that can lead to its creation, provided that they can take a number of social and environmental issues into account.[135]

[130] ibid, 566.

[131] 2020 Stewardship Code (n 11), 5-7.

[132] Wu et al. (n 129), 566.

[133] Talbot, 'Corporate Governance' (n 53), 94.

[134] ibid. Cf Talbot, 'Polanyi's Embeddedness' (n 51), 460-463.

[135] FCA, 'Building a regulatory Framework for effective stewardship' (n 81), 12-15.

Under the 2020 Stewardship Code however, the pursuit of this objective is expected to be made not by merely taking into account ESG considerations, but by encapsulating them more readily as part of the considerations in need to be factored to pursue the creation of such value in the long-term. Principle 7 of the 2020 Stewardship Code is evidence of this change. Principle 7 requires shareholders and their asset managers to disclose how they have integrated material environmental, social and economic considerations in their investment and engagement practices, and explain how their decisions in light of these were taken as to serve the interests of their beneficiaries.[136] From this, it is expected of them to explain how these factors informed their practices, and outline how these were undertaken in a way that would comply with the objective promoted by the Stewardship Code relative to the views and best interests of their beneficiaries.[137]

3.5. Shareholders' Capacity to Engage in Corporate Governance

The change in the focus of materialising the objectives of shareholder stewardship as these are now calibrated by the rules transposing SRDII and the 2020 Stewardship Code can be seen as a mark that shareholder stewardship's objectives are now sought to be discharged on a different level.[138] Rather than encouraging the undertaking of engagement practices in a way that takes into account wider considerations in the process, the SRD II and the Stewardship Code now expect from shareholders and their intermediaries to monitor corporate performance and adopt engagement

[136] 2020 Stewardship Code (n 11), Principle 7.

[137] ibid.

[138] On the change of shareholder stewardship's objectives to promote sustainable economic development see, Alice Klettner 'The Impact of Stewardship Codes on Corporate Governance and Sustainability' (2017) 23 New Zealand Business Law Quarterly 259.

practices that focuses on ensuring the creation of shareholder value on a basis that integrates ESG considerations as material to the calibration of their practices.[139] This is noted as being cognisant of a series of uncoordinated understandings at an informal level that see ESG integration and shareholder engagement not only a means of securing good financial performance in terms of creating shareholder value, but also a means for adopting more sustainable business practices. It is also informant of endeavours to mainstream SRI, but through initiatives that seek to embrace ESG issues into securities valuation, investment decision-making, and shareholder engagement at a greater level as material for the creation of value for such shareholders now and in the future.[140]

This noted change in the orientation of achieving shareholder stewardship's objectives can therefore be identified as an indication that policymakers through shareholder stewardship now aspire to see shareholders adopting practices conducive to promoting corporate governance that integrates relevant ESG considerations to become more sustainable themselves.[141] In light of this, it can be stated that shareholder stewardship through the foregoing frameworks is now intended to steer shareholders towards adopting investment management that will embrace ESG considerations to galvanise aggregate and corporate sustainable development in the same manner as calls made in the literature to adopt practices that are akin to the postulates of SRI.[142] The same may apply for shareholder engagement as well, with

[139] Dionysia Katelouzou 'Shareholder Stewardship: A Case of (Re)Embedding Institutional Investors and the Corporation?' in Beate Sjåfjell, Christopher M. Bruner (eds) *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP 2019), 587-589.

[140] Van Duuren et al. (n 58), 526-527.

[141] Katelouzou, 'Shareholder Stewardship' (n 139), 587.

[142] ibid.

SRDII provisions and the 2020 Stewardship Code acting as the regulatory instruments that seek to ensure that shareholders will monitor corporate performance by reference to the creation of shareholder value; and engage to promote or contribute to the development of more sustainable practices as the basis to achieve that.[143]

But despite the aspirations, one cannot neglect the fact that the introduction of shareholder stewardship and the current efforts to materialise its objectives has not been accompanied with a credible account of what is expected of shareholder engagement that is in line with shareholders' capacity and scope of power to showcase such engagement. Shareholder engagement is expected to be undertaken in a manner that extends beyond the exercise of shareholders' voting rights.[144] In addition to ensuring responsible investment management, shareholder engagement is expected to be undertaken at a rate that will lead shareholders and their intermediaries to monitor investments to secure the viability of their investment in terms of creating value and the companies' longevity in which they have invested in relative to a number of ESG considerations.[145]

Nevertheless, the capacity under which shareholders and their intermediaries are expected to undertake these practices has not been addressed effectively. Only shareholders' and their intermediaries' stewardship responsibility is raised to signify the importance of the monitoring role shareholder engagement can take relative to the creation of shareholder value in light of several practices.[146] No legal basis, however,

[143] ibid, 587-589, citing for a public interest argument, *Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time* (2nd ed., MA: Beacon, 2001). Cf Talbot, 'Polanyi's Embeddedness' (n 51).

[144] 2010 Stewardship Code (n 7).

[145] ibid. See now 2020 Stewardship Code (n 11).

[146] This has been noted to be the case for SRD II as well. See, Birkmose (n 118), 616-632.

was provided to substantiate the existence of such stewardship responsibility to undertake this in light of the capacity and scope of power that shareholders and their intermediaries have to undertake any engagement practices in corporate governance either. At least from the perspective of introducing shareholder stewardship in the UK, the attribution of shareholders' and their intermediaries' stewardship responsibility was founded more on the basis of shareholders' perceived economic ownership of the company.[147] Through this, it has been implicitly assumed that shareholders are entitled to exercise actively some discretion and monitoring of corporate governance through their engagement, which its regulation will seek to ensure to be made more responsibly and with a view to promote practices that are environmentally, socially and economically sustainable.[148]

It appears therefore that the use of agency theory and the rationale that shareholders are the residual claimants of the profits of companies and their economic owners have been the key influencers for the introduction of shareholder stewardship.[149] But as mentioned in Chapter 2, agency theory fails to reflect on the fact that shareholders as a matter of law are neither the economic owners of the company nor the residual claimants of companies' profits.[150] The company is a legal person distinct from shareholders, with its control being mainly subject to the discretion of the board and the managing directors, which shareholders have limited capacity to question. The claim of shareholders from the profits of the company may be indeterminate, but it is

[147] Walker Review (n 5), 68-72; Kay Review (n 75) 45-47.

[148] Talbot 'Polanyi's Embeddedness' (n 51), 460-463.

[149] Cf Katelouzou, 'Reflections' (n 4). On the political determinants and analyses of shareholder power see, Christopher M. Bruner, *Corporate Governance in the Common Law World: The Political Foundations of Shareholder Power* (CUP, 2013), 28-110.

[150] See Chapter 2, above, 2.3.

not a residual one, in the sense that they are entitled to the whole of the profits of the company once all other liabilities are covered. The company as a legal person is the proprietor of its profits, with shareholders having an analogous claim from this should dividends are being declared.[151]

Nevertheless, it must be noted that this does not invalidate the fact that shareholders can showcase some form of engagement in corporate governance, either by themselves or through an asset manager or any other intermediary. This can be done either by exercising their rights and powers that are afforded to them by the law; or by voicing their views to directors or fellow shareholders. This Section will provide an account of the nature of these and the effect they can have on corporate governance. This will allow the analysis made in this Chapter to appreciate the breadth and scope of power that shareholders and their intermediaries have to undertake any engagement practices and the capacity under which it can be undertaken. It will furthermore assist in determining what, if any, role can shareholder stewardship have in the regulation of corporate governance to promote or contribute to the development of corporate governance that dictates the adoption of more sustainable practices relative to the capacity of shareholders and their intermediaries to adopt shareholder engagement.

3.5.1. Formal Shareholder Rights and Power

Over the years, the rights and powers that are signified in the literature as capable of being utilised by shareholders and their intermediaries to undertake their engagement practices have mainly revolved around the formal rights shareholders possess as

[151] ibid.

these are provided by company law.[152] While these can be categorised in various ways, shareholders' formal rights can essentially be grouped in three broad segments from a corporate-governance perspective.[153] These are the property rights that shareholders enjoy as a result of owning shares, their right to receive dividends from the company's profits, and their right to vote in the general meeting.[154]

These formal rights have often been recognised in the law-and-economics literature as legal entitlements in the form of ownership rights which entitle shareholders as the economic owners of companies to exercise their discretion in corporate governance to ultimately control it for the creation of shareholder value as a priority, either on their own or through their intermediaries.[155] While it has been showcased that this remark bears limited ground as a matter of law,[156] it must be acknowledged that shareholding ownership entitles shareholders to deal with shares in any way the deem appropriate as a form of property, subject to any rules and laws that may restrict such an ability.[157] For example, shareholders have the ability to transfer their shares, or assign them to different beneficiaries. Shareholders can also use their shares as a form of security, from which they can receive further capital to conduct other business and finance transactions.[158]

---

[152] See, by reference to a law-and-economics approach to understanding shareholder rights, John Armour, 'Shareholder Rights' (2020) 36(2) Oxford Review of Economic Policy 314, 315-317.

[153] Benedict Sheehy, 'Shareholders, Unicorns and Stilts: An Analysis of Shareholder Property Rights' (2006) 6(1) Journal of Corporate Law Studies 165, 197-198.

[154] David Milman, *The Company Share* (2018, EE), 111-112.

[155] Armour (n 152), 315.

[156] Sheehy (n 153), 200, citing Pete Spender, 'Guns, Greenmail: Fear and Loathing after Gamboto' (1998) 22 Melbourne University Law Review 96, 113–15.

[157] This is subject to various provisions and frameworks as a matter of law. See Milman (n 154), 74-102.

[158] ibid.

But apart from this, the enjoyment or exercise of shareholders' other rights cannot be regarded as property rights deriving from the economic or legal ownership of companies.[159] This is firstly evident when considering the legal context of shareholders' right to receive dividends. The property rights shareholders possess regarding the receipt of dividends are restricted solely to the receipt and management of the amount that shareholders get in monies once the company declares dividends.[160] The provision of dividends as a right in itself though does not arise from shareholders' ownership of the company, but from the ownership of the shares themselves.[161] The provision of dividends therefore is solely analogous to the amount shareholders are entitled to once dividends are declared, depending on the class in which they belong to, and the percentage of shareholding ownership that they hold. These are configured by the terms of the contract of purchase of shares, the register of shares, the articles of association and the regulation of dividend distribution by company law.[162]

Even though the frequent receipt of dividends is customary, Chapter 2 showcased that shareholders have limited discretion to configure the financial value of dividends received, or the frequency by which dividends will be declared.[163] It must be also mentioned that the receipt of dividends is not legally enforceable, nor can it be exercised as a right against the company or the directors to declare them.[164]

---

[159] Marios Koutsias, 'The Fallacy of Property Rights' Rhetoric in the Company Law Context: From Shareholder Exclusivity to the Erosion of Shareholders' Rights' (2017) 28(6) International Company and Commercial Law Review 216 ,216- 218.

[160] Milman (n 154), 113.

[161] See on this, Chapter 2, above, 2.3.

[162] Milman (n 154), 113. See also, CA 2006, ss.829-853.

[163] See Chapter 2, above, 2.3.

[164] ibid. See also, Milman (n 154), 113.

Considering the fact that shareholders do not own the company, the profits made from the company's business are not the property of the shareholders. The profits belong to the company, which are managed by directors in accordance to what they think it is best for the interests of the company.[165] The declaration of dividends is a matter that functionally rests within the directors' prerogative, with shareholders having limited capacity to question it. This is unless there is evidence of a breach of their duties, which has indirectly and as a result of the breach of the duty affected their ability to receive dividends.[166]

The only formal channel of power that allows shareholders to have some discretion in corporate governance is the exercise of shareholders' voting rights in the general meeting.[167] Yet it must be noted that this is not a power that can be assumed that it derives from the ownership of companies.[168] As a matter of law, the ownership of shares merely enables shareholders to attend the general meeting. It furthermore attaches on shareholders the right to vote in it, provided that shares actually have voting rights attached to them.[169] Hence, the ownership of shares only confers on shareholders the ability to vote in the general meeting, which similarly provides them with the ability to treat this enabling right to be assigned to others to be exercised in any manner that shareholders may deem that it is appropriate.[170]

---

[165] ibid.

[166] But see, in general, David Kershaw, 'The Rule in Foss v Harbottle is Dead: Long Live the Rule in Foss v Harbottle' (2015) (3) Journal of Business Law 274.

[167] Sjåfjell, 'Achieving Corporate Sustainability' (n 16), 385-389.

[168] Sheehy (n 153), 200-202.

[169] Robert Flannigan, 'Shareholder Fiduciary Accountability' (2014) (1) Journal of Business Law 1, 6-7.

[170] ibid, 7-8. On assignment of powers and the treatment of shares as a form of property, see, Milman (n 141), 74-102.

The right to vote in the general meeting as a form of power in itself though cannot be said accurately that it derives from shareholding ownership.[171] Rather, it derives from the articles of association, which allow shareholders to vote in the general meeting to exercise the powers bestowed on it to animate the will of the company as a legal person.[172] As a matter of law, the company as a legal person through its articles is the source and beneficiary of any powers that are conferred to the general meeting, with shareholders having the right to vote in it as a result of owning shares.[173] The scope provided through the exercise of shareholders' voting rights cannot be said that it is a function discharged solely for the self-serving purposes of shareholders.[174] Subject to some exceptions, the purpose of voting in the general meeting in aggregate as a matter of law is to exercise the powers bestowed on the general meeting, which functions alongside directors' control to animate the will of the company by discharging the powers bestowed on it.[175] Hence, the authority of shareholders to vote in the general meeting derives from the company, which gives them the collective ability to discharge the powers bestowed on the general meeting to express the will of the company on its own behalf.[176]

No doubt, though, shareholders' exercise of voting rights will be discretionary, which will of course involve the consideration of the betterment of their self-interest in the

[171] Sheehy (n 153), 200-202. cf Easterbrook, Fischel (n 38), 66.

[172] Flannigan, 'Shareholder Fiduciary Accountability' (n 169), 7-9. See also, CA 2006, s 33.

[173] ibid.

[174] Robert Flannigan, 'Fiduciary Duties of Shareholders and Directors' (2004) (1) Journal of Business Law 277, 285-286.

[175] Andrew Keay, 'Board Accountability and the Entity Maximization and Sustainability Approach' in Barnali Choudhury, Martin Petrin (eds) *Understanding the Company: Corporate Governance and Theory* (CUP, 2017), 284-285.

[176] Flannigan, 'Shareholder Fiduciary Accountability' (n 169), 9-11.

process, especially in the absence of any fiduciary duties owed to the company in relation to this.[177] Shareholders have the ability, and they are perfectly entitled to express their views about the business of the company, and the means by which it may affect their interests, either individually or as a whole.[178] This may be expressed either through exercising their voting rights, or through raising a number of issues to discuss in the general meeting with directors or fellow shareholders in the course of holding the general meeting.[179] Shareholders are also perfectly entitled to consider how their voting will affect their self-interest, and lobby to uphold them via undertaking discussions to raise any issues which in their opinion are in need to be considered.[180]

Perhaps the most significant form of power afforded to the general meeting for shareholders to vote is that of the appointment and removal of directors. While there is a need for an ordinary resolution to remove a director, shareholders can appoint directors through voting in the general meeting in accordance with the articles of association.[181] The board has the ability to appoint directors as well, but they must retire at the holding of the next general meeting, where shareholders may re-appoint them.[182] The general meeting has additionally the full control and discretion to alter the articles of association by passing a resolution that is compliant with the procedures contained therein.[183] The articles contain the necessary provisions for the functioning and constitution of the company in terms of its management and procedures.

[177] Sheehy (n 153), 201.

[178] Keay, 'Board Accountability' (n 175), 285-286.

[179] But see Sjåfjell, 'Achieving Corporate Sustainability' (n 16), 382-384.

[180] Keay, 'Board Accountability' (n 175), 285-286.

[181] CA 2006, s.168; The Companies (Model Articles) Regulations 2008 (SI 2008/3229) (Model Articles), Sch 3, Arts 20.

[182] Model Articles, Art 21.

[183] CA 2006, s 21.

Changing the articles will usually require a special resolution, but there are instances where there will be a need for unanimity to effectuate certain changes within it.[184]

Shareholders through the general meeting can also instruct directors to undertake certain actions, which provides shareholders with some scope to exercise discretion on the control of the company. Company law clearly vests the control of the company on directors, but shareholders through the general meeting per the articles can instruct directors to take certain actions for several issues.[185] In some situations, the general meeting can instruct directors to undertake certain actions,[186] or provide its approval for various issues related to the affairs of the company. This entails the approval for substantial property transactions,[187] the directors' executive remuneration policy,[188] and certain related-party transactions.[189] Shareholders through the general meeting may be able to bring a derivative action on behalf of the company as well to challenge managerial actions.[190] Nevertheless, this will be an action that will be assessed based on whether directors breach their duties owed to the company, not on whether shareholders' interests in profit are in any way tampered; or whether their perception

[184] See, for example, CA 2006, s 1156.

[185] Model Articles, Art 4. See also *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34 (CA).

[186] An example of this can be found in the case of takeovers. The main provisions that implement the Takeovers Directive in the UK are contained in Part 28 of the Companies Act 2006 and the City Code of Takeovers.

[187] CA 2006, s 190.

[188] CA 2006, s 439a.

[189] CA 2006, s 409.

[190] CA 2006, ss 260-264. Shareholders are also entitled to bring a claim for an unfair prejudicial conduct, CA 2006, ss 994-996. Nevertheless, the case remains that shareholders' pursuit of unfair prejudicial conduct relates to getting relief for harm caused to their interests qua shareholders. See, in general, Andrew Keay, 'An Assessment of Private Enforcement Actions for Directors' Breaches of Duty' (2014) 33(1) Civil Justice Quarterly 76.

of appropriate management of the company is antithetical to directors' standard of management.[191]

3.5.2. Informal Shareholder Meetings and Communications

Shareholders' exercise of voting rights and the ability to discuss formally any issues about the company's performance provides shareholders and their intermediaries with the ability to engage with directors and fellow shareholders through the medium of the general meeting. But besides the use of shareholders' formal power to showcase engagement, shareholders and their intermediaries can also undertake practices outside the general meeting at an informal level as well.[192] Usually, these practices entail the undertaking of discussions with directors that are concerned with several issues related to the financial performance of the company.[193] It is not uncommon however for such practices to include the undertaking of discussions with fellow shareholders or other intermediaries as well. These may be concerned with the co-ordination of shareholders' actions prior to the holding of a general meeting to vote on a specific issue, or become part of their endeavour to co-ordinate their interests prior to the facilitation of a meeting with directors to discuss several issues outside the general meeting.[194]

---

[191] See on this, in general, Kershaw (n 166).

[192] The majority of studies in the literature consider informal shareholder engagement through the lens of shareholder activism for purely financial matters. Nevertheless, the literature indicates that shareholder engagement is undertaken for sustainability issues as well. See, in general, Jackie Cook, 'Political Action Through Environmental Shareholder Resolution Filing: Applicability to Canadian Oil Sands?' (2012) 2(1) Journal of Sustainable Finance and Investment 26.

[193] Sjåfjell, 'Achieving Corporate Sustainability' (n 16), 391-93.

[194] ibid.

Over the years, shareholders and their intermediaries have adopted several methods to express their voice informally with directors or fellow shareholders. The scale and significance of them though usually depends on the approach taken and the objectives pursued through these practices vis-à-vis directors or shareholders as addressees.[195] Commonly, shareholders and their intermediaries may undertake several meetings or correspondence with directors or fellow shareholders for the provision of fresh information about the company's performance or for the co-ordination of actions in relation to adopting engagement with directors for particular issues revolving the financial performance of the company.[196] The outcome of these is expected to inform directors of the views of shareholders or their intermediaries about the standard of the performance of the company, which may give insight to directors about the means the performance of the company is perceived outside its management. Alternatively, shareholders may seek to co-ordinate shareholders' actions to adopt a common approach in relation to their discussions with directors or for the exercise of their voting rights or any other engagement sought to be undertaken.[197]

A stronger approach to this one may involve adopting initiatives that are of the same scale, but for the pursuit of a much more rigorous agenda. Should they are concerned with the company's performance, shareholders or their intermediaries may adopt the same initiatives to express their concerns about the company exhibiting performance

[195] Law-and-economics literature tends to consider the scale and scope of this type of shareholder engagement within the context of shareholder activism. See, Cheffins, Armour (n 24), 60-61.

[196] Informal meetings may be undertaken alongside journalists, with the potential of developing information sellable for trading purposes. Tony Golding, The City: *Inside the Great Expectation Machine: Myth and Reality in Institutional Investment and the Stock Market* (FT Prentice Hall, 2002), 204.

[197] But see, by reference to undertaking engagement practices related to upholding sustainable economic development, Chapter 4, below, 4.4.

issues or adopting strategies that arguably merit considerable criticism.[198] Being much more hostile in tone though, it may be the case that the outcome of this communication will be to 'raise the alarm' to directors or fellow shareholders about the level of the performance of the company or the quality of its governance.[199] In the context of engagement with directors, this action is undertaken to influence directors to re-consider the methods implemented in the company to develop different outcomes that will conform or address the salience of the matters raised by shareholders.[200] This may be usually reinforced with a statement that shareholders may exercise their formal rights to remove them from office.[201] In the context of engagement with shareholders, such communication may form part of an effort to elicit their collective support for particular issues related to the aforementioned, or for the adoption of specific measures to address these issues within shareholders' competence.[202]

The undertaking of these practices is not recognised as a right or power conferred to shareholders by company law, and neither it has been endeavoured to be attributed on any capacity in other areas of law.[203] Nevertheless, it may be argued that it gains sufficient grounding on the basis that this endeavour is conducive to the effective discharge of shareholders' and intermediaries fiduciary duties and contractual obligations to their beneficiaries.[204] In any case, the undertaking of these meetings and communications at an informal level has gained legitimacy at a soft-law level by

[198] Marc T. Moore, Martin Petrin, *Corporate Governance: Law, Regulation and Theory* (Palgrave, 2017), 114.

[199] ibid.

[200] ibid, 115.

[201] ibid, 116.

[202] See Chapter 4, below, 4.4.

[203] Sjåfjell, 'Achieving Corporate Sustainability' (n 16), 394-395.

[204] Richardson, 'Financial Markets and Socially Responsible Investing' (n 59), 250-255.

the 2020 Stewardship Code and by the transposed rules of the SRDII.[205] Having this in mind, the rules that transposed SRDII provisions and the 2020 Stewardship Code can essentially be regarded as the framework that seeks to set all and any expectations about the outcomes that should derive from it.[206]

The legitimation of shareholders' informal meetings and discussions by the 2020 Stewardship Code and the provisions that transpose SRDII are furthermore accompanied by its consideration as a material aspect of governance processes that should be in place from other soft-law instruments and frameworks.[207] Under the 2018 Corporate Governance Code for example, the directors of the company must on a comply-or-explain basis seek their regular meetings with shareholders to understand their views on corporate governance and their effects on the company's performance and strategy.[208] In addition to effectuating the conduct of general meetings, directors are expected to further have regular meetings and communication with major shareholders on significant matters informally, as these are enshrined and informed by their duty to promote the best interests of the company through the application of s.172 of the Companies Act.[209]

3.5.3. Capacity and Ways to Showcase Engagement

Reflecting on the foregoing, shareholders or the intermediaries acting on their behalf seem that they hold some discretion in corporate governance through the collective

[205] Sjåfjell, 'Achieving Corporate Sustainability' (n 16), 394-395.

[206] But see, Katelouzou, 'Shareholder Stewardship' (n 139), 587.

[207] Sjåfjell, 'Achieving Corporate Sustainability' (n 16), 394-395.

[208] 2018 Corporate Governance Code (n 64).

[209] ibid, Rules 3-4.

exercise of shareholders' voting rights.[210] In general, it may be stated that such power entitles shareholders and their intermediaries to cultivate the premises required for directors to organise and manage the company in a way that they deem that the company will prosper. For example, the power to alter the articles of association can be utilised to determine the company's specific objectives and orient the expectations that need to accrue from the company's operations.[211] This can in turn provide much scope for directors to manage the company accordingly, subject to their duties that are owed to the company and regulated by company law. Should shareholders or their intermediaries consider that this may not be the case, they can simply remove them from office through the exercise of shareholders' voting rights and appoint others that they believe that they can best achieve this standard of management and control.[212]

But besides this, shareholders have limited scope to exercise any discretion in the control of the company, or signify how the company should best be managed. These are competences that reside with the company's managing directors and the board.[213] The general meeting can instruct directors to take certain actions, but the areas in which these can be provided are quite limited, and not directly associated with the material controlling aspects of the company.[214] It must be noted though that the scope of the power to give instructions is mainly subject to the articles of association. This

[210] This power has been traditionally static in corporate governance over the years, Attenborough (n 14), 150-152.

[211] Beate Sjåfjell et al. 'Shareholder Primacy: The Main Barrier to Sustainable Companies' in Beate Sjåfjell, Benjamin J. Richardson (eds) *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP, 2015), 143-144.

[212] ibid.

[213] cf Andrew Keay, Joan Loughrey, 'The Framework for Board Accountability in Corporate Governance' (2015) 35(2) Legal Studies 252.

[214] Andrew Keay, *The Corporate Objective* (2011, EE), 311.

makes it legally possible for shareholders to alter the articles in a way that the general meeting reserves some of these key powers.[215] But apart from the fact that this is difficult to be done in terms of passing a special resolution to effectuate this, the articles provide by default the control of the company to directors, with shareholders rarely, if ever, questioning this division of power.[216]

The approval powers the general meeting holds are equally quite limited. This can be evident by taking as an example the general meeting's power to approve remuneration policies.[217] The pursuit of opportunistic practices for greater executive pay was clearly contributory to the inception of the 2008 financial crisis and various corporate scandals.[218] Notwithstanding, it is unclear how a vote for the approval of the remuneration policy will enable shareholders to determine how the company can actually be managed more responsibly, let alone be set in course to adopt more sustainable practices.[219] Directors and the board are those responsible for developing the remuneration policy, and explain its development based on the company's performance across all of its levels by disclosing relevant information.[220] Shareholders have no discretion or saying in developing it or determine the factors taken into account to calibrate it. Their power is restricted in merely approving the remuneration policy on the basis of the information provided, and subject to the expectation to vote

[215] Sjåfjell et al. (n 211), 142-144.

[216] ibid.

[217] Andrew Johnston, Beate Sjåfjell, 'The EU's Approach to Environmentally Sustainable Business: Can Disclosure Overcome the Failings of Shareholder Primacy?' in Marjan Peeters, Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (EE, 2020), 408.

[218] Wu et al. (n 129), 566.

[219] Johnston, Sjåfjell (n 217), 408.

[220] CA 2006, s 439A. See also, Moore, Petrin (n 198), 240-241.

in the general meeting in a way that their voting serves the best interests of the company.[221]

But despite having limited discretion in the control and management of the company, the very existence of shareholders' formal power is capable of making shareholder engagement considerably influential in corporate governance.[222] As mentioned above, should shareholders or their intermediaries become displeased with managerial practices, they can simply remove directors from office, instead of directly questioning their actions legally. This alone can be a powerful influencer on directors' management of companies, since it is possible that directors may be led towards adopting management that reflects the shareholders' view about how companies should be managed.[223] Similarly, shareholders may change the specific purposes of the business of the company in the articles, and utilise it as a leverage in combination with their power to remove directors from office to ensure that they adopt practices conducive to the satisfaction of their interests.[224] Alternatively, they may utilise the approval and instruction powers they hold as a leverage to promote specific corporate policies in a manner that is again conducive to what they believe to be appropriate for corporate governance.[225]

The influence that shareholders or their intermediaries may yield on directors because of the effect of the exercise of their voting rights may additionally materialise by shareholders' expression of voice in corporate governance at a formal and informal

[221] Bruner (n 149), 31.

[222] Chris Mallin, 'Institutional Investors: The Vote as a Tool of Governance' (2012) 16 Journal of Management & Governance 177, 185.

[223] Sjåfjell et al. (n 211), 142-144.

[224] ibid.

[225] ibid.

level.[226] This can be done through raising of issues or matters that shareholders may deem that directors should address in the course of managing companies.[227] Based on their assessment of the information they hold about corporate performance, shareholders or their intermediaries may raise some concerns or issues to address through any proposals submitted or statements made in the general meeting.[228] While these are usually not legally binding, their existence in combination with the effect of the exercise of their voting rights is capable of making directors considering these issues and statements as being salient enough.[229] Shareholders may undertake these practices in private meetings and communications with directors as well, making informal meetings and communication as just another avenue for shareholders to influence directors' practices. The effect of these is again not legally binding, but they can be considerably influential on directors, depending on their inclination to deal with the matters raised by shareholders.[230]

Having these in mind, shareholders' capacity and scope to engage with directors or fellow shareholders can materialise in two key ways. Principally, engagement can take place through the limited discretion afforded by the collective exercise of shareholders' voting rights in the general meeting, which makes shareholders capable of acting collectively as decision-makers in corporate governance.[231] Alternatively, and in

[226] Mallin (n 222), 185.

[227] On the means shareholders can do that in the general meeting see, in general, Christoph Van der Elst, 'Shareholder Engagement and Shareholder Voting Modes: Two of a Different Kind' (2019) ECGI Law Working Paper No. 435/2019 https://ssrn.com/abstract=3323848 accessed 22 April 2019.

[228] Jay B. Kesten, 'Towards a Moral Agency Theory of the Shareholder Bylaw Power' (2013) 85(3) Temple Law Review 485, 500-503.

[229] E. James M. Gifford, 'Effective Shareholder Engagement: The Factors that Contribute to Shareholder Salience' (2010) 92 Journal of Business Ethics 79, 79-81.

[230] ibid.

[231] Sjåfjell, 'Achieving Corporate Sustainability' (n 16), 394-395.

addition to exercising shareholders' voting rights to this end, engagement can take place through shareholders' or their intermediaries' ability to express their voice in corporate governance to exert their influence by leveraging the effect of the exercise of shareholders' voting rights.[232] Although an argument may be formed that this too may form part of shareholders' capacity to act as decision-makers of the company when this is undertaken at a formal level in the general meeting, it is probable to state that these endeavours in isolation may form part of shareholders' endeavours to ensure their interests as investors in the company.[233]

These capacities allow shareholders and their intermediaries to undertake engagement practices in corporate governance in different ways, depending on their business model and the investment strategy undertaken. At one end, it is possible that shareholders or their intermediaries will engage with directors or fellow shareholders in a manner that is responsive to directors' standard of management.[234] A clear example of this can be found in situations where shareholders will exercise their voting rights in the general meeting to approve a certain proposal set forth by directors. Shareholders or their intermediaries in the process may try to signify issues related to the performance of the company to generate some discussion with directors or fellow shareholders. This can take place either during the voting process in the general meeting, or informally outside of it prior to its holding. The statements made will not be

[232] Mallin (n 222), 185.

[233] Some strands in the literature consider this to be an issue worthy of legal attention. See, for example, Iman Abantawi, Lynn A. Stout, 'Fiduciary Duties for Shareholders' (2008) 60 Stanford Law Review 1255, 1274-1292.

[234] Paul Davies, 'The UK Stewardship Code 2010-2020 from Saving the Company to Saving the Planet?' (2020). ECGI Law Working Paper No. 506/2020 https://ssrn.com/abstract=3553493, accessed 15 June 2020, 365-366.

legally binding, but they may be influential enough on directors' perception of the appropriate control the company.[235]

In addition, shareholders or their intermediaries can utilise their power or voice in a manner that they can proactively engage with directors or fellow shareholders to signal issues or demand from directors changes in corporate governance that relate to the company's management and governance.[236] Shareholders and their intermediaries can pursue this form of engagement through the exercise of their voting rights in the general meeting by making a legally binding request to directors to hold one.[237] Shareholders and their intermediaries though will still have limited capacity to exercise any discretion in corporate governance on a legally binding basis. What they can do however is to utilise their influence in a way that can raise the salience of the issues they consider important during their discussions with directors or shareholders, either in the general meeting, or outside of it, to see several changes being implemented in the governance of the company.[238]

3.6. Shareholders' Breadth of Power and Shareholder Stewardship

The analysis made in the previous Section indicates that shareholder engagement can materialise in various ways and under different capacities. Having in mind the potential effect that shareholder engagement can have in corporate governance, therefore, it is logical to appreciate the efforts to regulate shareholder behaviour via the framework set to uphold shareholder stewardship's objectives to ensure the responsible

[235] Gifford (n 229).

[236] This is usually associated with offensive shareholder activism. See Kraik (n 26), 512.

[237] This is possible by requesting the call of a general meeting. See CA 2006, s.303.

[238] Kraik (n 26), 512.

undertaking of shareholder engagement.[239] Yet the fact remains that the introduction of shareholder stewardship and the efforts to uphold its objectives via the rules that transposed SRDII and the 2020 Stewardship Code so far have not been developed in a manner that is reflective effectively of the foregoing.[240] Only the stewardship responsibility of shareholders and their intermediaries was signified to act as monitors of corporate performance and to engage with directors to ensure the company's proper functioning. As outlined above though, this has been based on perceiving shareholders as the economic owners of companies, not on the actual ability and capacity of shareholders and their intermediaries to adopt any practices conducive to showcasing shareholder engagement.

Having this in mind, one may be easily led to the conclusion that policymakers see shareholder stewardship as a regulatory concept that seeks to ensure that shareholders and their intermediaries have a greater say in corporate governance to keep directors accountable to them to create shareholder value as a priority. This may be established on the logic that in light of the conceptualisation of shareholder stewardship based on the postulates of agency theory, shareholder engagement is essentially perceived as a process that shareholders are entitled to undertake to monitor corporate performance through shareholder engagement to ensure just that.[241] This may be then equated with a derivative belief that shareholder stewardship is a market-invoking regulatory concept, which seeks to assist capital markets to

[239] Sergakis (n 88), 120.

[240] Sjåfjell, 'Achieving Corporate Sustainability' (n 16), 394-395.

[241] Talbot 'Polanyi's Embeddedness' (n 51), 460-463.

‘correct’ themselves to efficiently contribute to advancing social welfare by having shareholder value as the metric to achieve that.[242]

The current efforts to uphold and enforce shareholder stewardship’s objectives may be seen as being supportive of this logic. The objectives of shareholder stewardship are endeavoured to be upheld mainly through hard law and soft law disclosure requirements based on agency theory’s paradigm of corporate governance.[243] The disclosure rules are aspired that they will act as the drive that will lead shareholders towards being more responsible when engaging with directors or shareholders to satisfy their interests in profit.[244] Nevertheless, both the rules that transpose SRDII and the 2020 Stewardship Code afford shareholders and their intermediaries with great flexibility to configure the means that they will do so. Shareholders and their intermediaries, therefore, are provided with significant latitude to configure what they deem as responsible shareholder engagement, with the pursuit of creating shareholder value as a priority potentially acting as the main goal and animating factor for its undertaking.[245]

The heavy reliance on self-regulation additionally indicates the freedom that shareholders and their intermediaries have to articulate the basis upon which they will establish their responsible engagement to satisfy their interests.[246] While the principles contained in the 2020 Stewardship Code and the rules that transposed SRDII have to

---

[242] Ibid. cf Katelouzou, ‘Shareholder Stewardship’ (n 139), 587-589.

[243] ibid.

[244] ibid.

[245] See, Chapter 5, below, 5.2.2.

[246] On the merits of apply-and-explain see, by reference to corporate governance codes, see, Aino Asplund, ‘Lost in Accountability. 'Comply or Explain', 'Apply or Explain' and 'Apply and Explain' in a test: The Barriers to Company Benefit?’ (2020). 13(3) International and Comparative Corporate Law Journal 111.

be followed, shareholders hold significant discretion to configure the means that they will do so. Their disclosure is possible that it may merely indicate how they have complied with them while pursuing the generation of profits for themselves as a priority. The outcome from their compliance therefore is one that may lead shareholders and their intermediaries to be responsible participants in corporate governance on a basis that merely showcases how ESG considerations calibrated the pursuit of creating shareholder value as a priority.[247]

Notwithstanding, the noted shift in the promotion and upholding of shareholder stewardship's objectives by noting the need for encapsulating ESG considerations more readily also manifest policymakers' intentions to uphold wider public interest considerations arising from shareholder engagement.[248] No doubt, policymakers' intentions to uphold shareholder stewardship's objectives continue to be predominantly influenced by views that conceptualise corporate governance through the lens of agency theory and focuses on the financial performance of companies and shareholders as investors, with shareholder value being assumed as a proxy for achieving the prosperity of them. Nevertheless, policymakers seek to ensure that the creation of shareholder value will not be made at the expense of investee companies' or end investors' or beneficiaries' interests in the process, as these are informed by an imperative to avoid tampering societies and the environment.[249] The creation of shareholder value as a priority seems that it is recognised to be the scope and end goal for attributing shareholders with the responsibility of engaging in corporate

[247] Hanne S. Birkmose, 'Duties Imposed on Specific Shareholders Only, and Enforcement Implications' in Hanne S. Birkmose, Konstantinos Sergakis (eds) *Enforcing Shareholders' Duties* (EE, 2019), 39-43, 56-58.

[248] Katelouzou, 'Shareholder Stewardship' (n 139), 587-589.

[249] ibid

governance to pursue it accordingly.[250] Nevertheless, this is established solely on the extent to which shareholder engagement will factor how shareholder value is created from practices that ensure the viability of companies' businesses to create it in the long-term, and in a manner that can create sustainable outcomes in the process by factoring wider ESG considerations in the process.[251]

Whether the establishment of this objective and approach to regulating shareholder engagement is fit to steer shareholders and their intermediaries towards adopting practices that can meaningfully promote or contribute to corporate governance for sustainability to secure companies' sustainable development in the way outlined in Chapter 2 is a matter that Chapter 5 will consider in detail.[252] Suffice to say for the purposes of the analysis made here, this orientation showcases policymakers' intentions to cultivate via shareholder stewardship the understanding that shareholder engagement must factor ESG considerations as material in the processes undertaken to pursue the creation of shareholder value.[253] From this, it is aspired that shareholder engagement will contribute to achieving better corporate governance that can facilitate companies' sustainable development, which will be able to present readiness to encapsulate ESG considerations as material issues that can determine the fundamental value of companies and the extent to which their functioning is economically, socially and environmentally sustainable.

It can be argued therefore that the aforementioned stand as evidence that policymakers seek to uphold shareholder stewardship's objectives through the rules

[250] cf Savva (n 91).

[251] FCA, 'Building a regulatory Framework for effective stewardship' (n 81).

[252] See Chapter 5, below, 5.2.3.

[253] Bruner (n 149), 31.

that transpose SRDII and the 2020 Stewardship Code by endeavouring to steer shareholders and their intermediaries away from monolithically pursuing the discharge of their self-interest without acknowledging wider considerations in the process for the opportunistic creation of profits.[254] They seek, therefore, to encourage shareholder engagement that is in line with this former objective to alleviate possible situations of detrimental self-dealing undertaken by shareholders or their intermediaries, and secure the creation of shareholder value that can lead to the generation of more sustainable outcomes.[255]

At least on the face it, this observation suggests that shareholder stewardship seems to be in the process of transitioning to become a regulatory concept that seeks to ensure that shareholder engagement will too contribute to the promotion and contribution to the development of corporate governance that can make companies more environmentally, socially and economically sustainable.[256] When this is combined with the need to respond to the current convergence of environmental, social, and economic crises that are in part generated by business,[257] the ability of shareholders and their intermediaries to use their power and voice to engage in corporate governance and the effect that it can have on it justify the existence of shareholder stewardship to become a means of pursuing the cultivation of companies' sustainable development via regulation. This is so in the sense that shareholder stewardship can act as a concept that seeks to attribute on shareholders and their

[254] Katelouzou, 'Reflections' (n 4), 119.

[255] ibid.

[256] cf, Deidre Ahern, 'The Mythical Value of Voice and Stewardship in the EU Directive on Long-Term Shareholder Engagement: Rights Do Not an Engaged Shareholder Make' (2018) 20 Cambridge Yearbook of European Legal Studies 88, 111.

[257] Birkmose, 'Forcing Shareholder Engagement' (n 118), 614.

intermediaries with the responsibility to adopt practices that lead to shareholder engagement that is conducive to upholding companies' sustainable development, from which their interests will be satisfied in the process.

The normative basis upon which this Thesis claims that the existence of shareholder stewardship should be established will be analysed in Chapter 5 in detail. Suffice to say for the analysis made here, there is at least a weighty normative argument for the attribution of such responsibility. There is strong consensus indicating that shareholders' and intermediaries' beneficiaries would want their contributions to be invested, managed, and generate financial value without creating an undue impediment on the companies their assets have been invested in or in the economy, the society and the environment in aggregate.[258] It is possible to see therefore that shareholders' and intermediaries' upholding of fiduciary duties and contractual obligations to such beneficiaries could be interpreted as being upheld on the basis of such expectations, not against them.[259] This again gives room for shareholder stewardship to act as the medium upon which shareholders and their intermediaries will be attributed with the responsibility to factor ESG considerations and promote companies' sustainable development, in the sense that doing so will ensure that their beneficiaries' interest in accumulating value created out of sustainable outcomes will be met.[260]

[258] EU High Level Group on Sustainable Finance, 'Financing a Sustainable European Economy: Final Report' (January 2018) https://ec.europa.eu/info/sites/info/files/170713-sustainable-finance-report_en.pdf accessed 20 February 2021, 27.

[259] Iris H-Y Chiu, Dionysia Katelouzou, 'Making a Case for Regulating Institutional Shareholders' Corporate Governance Roles' (2018) (1) Journal of Business Law 67, 68. But see, Chapter 4, below.

[260] Ibid.

Having in mind the scope and breadth of their ability to engage in corporate governance however, it must be noted that the justification of the existence of shareholder stewardship is found solely in the sense that it should seek to regulate shareholder behaviour relative to the competence and capacity that shareholders and their intermediaries have to showcase engagement that can lead to companies' sustainable development.[261] It is therefore posited that shareholder stewardship can only act as a regulatory concept that can secure responsible shareholder engagement in the capacities identified above.[262] The same may apply in the context of steering shareholders towards adopting investment practices that are conducive to facilitating this end, with the upholding of shareholder stewardship's objectives having the potential to expand its milieu across the adoption of prudent investment management practices that will cultivate the responsible engagement of shareholders.[263]

This essentially means that the justification of shareholder stewardship should not be understood as giving scope to see it acting as a concept that will steer shareholders towards engaging in corporate governance with the aim to monitor corporate performance to keep directors accountable to them for the creation of shareholder value as an end in itself.[264] In light of the breadth and scope of power that shareholders have to showcase any engagement in corporate governance, it is evident that shareholders do not hold the legal capacity, nor the scope to undertake any such practices to this end. These are functions that are attached to the board of directors to

[261] Deakin (n 2), 36.

[262] It is on this basis that several authors justify the existence of hard-law duties on shareholders in the context of corporate governance. See, in the context of US corporate governance, Abantawi, Stout (n 235).

[263] Klettner (n 138), 262-263.

[264] Hill, 'Good Activist/Bad Activist' (n 8), 499, 524.

undertake, not shareholders.[265] Boards across companies are those that are tasked, and hold the time and expertise, to undertake functions that will ensure that their management is set to develop strategies, practices and organisation which can lead to companies' thriving and resilient longevity.[266] Through the regulation of directors' duties and control of the company at a hard-law and soft-law level, the law has developed the regulatory functions that attribute the responsibility on boards to undertake these, with regulation endeavouring to lead them towards undertaking their functions in a manner that can achieve the foregoing end.[267]

Even the most adamant supporters of attributing this monitoring function on shareholders concede that boards should ideally be those that monitor corporate performance and management to increase managerial accountability.[268] Yet it is true that boards have oftentimes failed to undertake practices that would steer companies towards becoming more sustainable, or ensure that several detrimental corporate practices would be alleviated.[269] It is often based on this observation that several supporters of the monitoring role of shareholders in corporate governance establish their rationale, which often leads them towards calling for regulatory reforms to facilitate this as an added layer of managerial accountability.[270] It is also on this very

[265] Jonathan Macey, *Corporate Governance: Promises Kept, Promises Broken* (PUP, 2008), 51.

[266] Margaret M. Blair, Lynn A. Stout, 'Director Accountability and the Mediating Role of the Corporate Board' (2001) 79(2) Washington University Law Quarterly 403, 423.

[267] Several proposals have been made over time to achieve this at a board level. See, for example, Beate Sjåfjell, Mark B Taylor, 'A Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose' (2018) 13 International and Comparative Corporate Law Journal 40.

[268] Such a concession is found across the vast spectrum of arguments and models that are promoted in corporate governance. See, for example Rose, Sharfman (n 42); Richardson, 'Financial Markets and Socially Responsible Investing' (n 59). This view however is not always universal. See Bebchuk, 'The Myth of the Shareholder Franchise' (n 40).

[269] Sjåfjell, Taylor (n 267), 45-48.

[270] Macey (n 265), 50-54.

basis where current endeavours to promote shareholder stewardship's objectives are established, with the influence of agency theory animating the scope of regulation to achieve it.[271]

While understandable from the perspective of endeavouring to secure proper managerial accountability, the Thesis respectfully rejects this rationale, at least from the perspective of prioritising the creation of shareholder value as the end for adopting shareholder engagement. Given that such practices do not bear the responsibilities that the board does, nor is it possible for shareholders or their intermediaries to be legally accountable in the same manner as the board does to the company should they undertake such accountability function for self-serving purposes, the provision of the role of monitoring the management of the company on shareholders for the creation of shareholder value as a priority is prone to undermine the authority of the board that is legally allocated to them via company law. This however is capable of making company law, and the attribution of the responsibility on directors to undertake prudent management and monitoring practices that are in line with it, a mere compliance endeavour.[272] This may undermine the significance of the regulation of companies by company law and the enforcement of its rules, especially with regards to the allocation of control, responsibility and development of initiatives that can lead to the development of appropriate business practices that may transcend the creation of shareholder value at a given time.[273]

---

[271] Birkmose, 'Forcing Shareholder Engagement' (n 118), 614.

[272] Talbot, 'Why Shareholders Shouldn't Vote' (n 70), 804-805.

[273] Sjåfjell, 'Achieving Corporate Sustainability' (n 16), 394-395; Martin Lipton, William Sevvitt, 'The Many Myths of Lucian Bebchuk' (2007) 93(3) Virginia Law Review 733, 740. But see, Chapter 4, below, 4.2-4.3.

If anything, therefore, the existence of shareholder stewardship from the perspective of shareholder engagement can only be justified on a twofold basis. In part, it can act as a regulatory concept which can attribute the responsibility on shareholders and their intermediaries to exercise the discretion that they have in corporate governance when they collectively act as decision-makers in the company through exercising their voting rights to uphold companies' sustainable development. It can furthermore act as the medium which seeks to attribute the responsibility on shareholders to exercise their voice or voting rights to secure their interests as investors in a manner that does not tamper other interests in the process, with a view to uphold their interests through companies' sustainable development. Any monitoring of corporate performance taken within this context can be understood as being done within the scope of shareholders' capacity to undertake the foregoing, but not for keeping the management accountable to them in any way for the creation of shareholder value as a priority in any way.

3.7. Conclusion

This Chapter identified the emergence of shareholder stewardship in light of the ambivalent views about the role of shareholder engagement in corporate governance, and the noted shift in upholding its objectives via endeavouring to steer shareholders and their intermediaries towards adopting practices that can facilitate corporate and aggregate sustainable development. After outlining the divergence of views about the extent to which shareholder engagement is beneficial for corporate governance in the literature, the Chapter indicated that policymakers long considered shareholder engagement as a desirable aspect of corporate governance. While the 2008 financial crisis brought many regulatory efforts at the time into question, the Chapter outlined that shareholder engagement was still considered as a significant aspect of corporate

governance. This was the case provided that shareholder engagement would be actively undertaken for the development of long-term value for companies, an orientation that is still believed that it will lead companies to contribute to social and economic prosperity, with long-term shareholder value acting as a proxy for its appropriate development.

The Chapter indicated that the introduction of shareholder stewardship and the efforts to facilitate its objectives through the Stewardship Code were initially promoting active shareholder engagement based on achieving the foregoing end. While the Stewardship Code continues to be oriented to this end, the Chapter outlined that its recent update in 2020 alongside the introduction of the rules that transposed SRDII created the premises to expect from shareholders and their intermediaries to adopt practice that will lead to shareholder engagement that is conducive to this end, but in a manner that will ensure that sustainable outcomes will derive from it.

By considering the breadth and scope of shareholders' rights and power as a matter of law, the Chapter identified that shareholder engagement can be undertaken in two key ways. The first is found in the limited discretion that shareholders have in corporate governance as decision-makers in companies through the collective exercise of their voting rights in the general meeting to discharge any powers that are provided to it to exercise the will of the company. The second is found through their ability to express their voice with directors and shareholders to secure their interests as investors. This can be done either formally in the general meeting, or informally, through the pursuit of private meetings or communication with directors or other fellow shareholders.

Informed by these, the Chapter identified that shareholders and their intermediaries can engage with directors or fellow shareholders solely within the limited discretion

that they hold in corporate governance as decision-makers to exercise the powers attributed to the general meeting, or through the influence they can exert on directors by leveraging the effect of the latter in the course of expressing their voice to secure their interests as investors. The Chapter has identified that such engagement can be undertaken in a manner that is either responsive to directors' standard of management, or proactive to it, in the sense that shareholders or their intermediaries can seek through it to lobby for changes in corporate governance. Depending on the scale and scope of shareholder power, both initiatives can take place in the capacity of shareholders to act collectively as decision-makers in the company, or as investors in the course of protecting their interests.

The Chapter argued that despite the ambivalence in the views about shareholder engagement and the ways that its objectives are endeavoured to be achieved, shareholder stewardship in light of the effect of shareholder engagement on corporate governance justifies its existence as a means of ensuring companies' sustainable economic development. The extent to which this will be possible will depend on the ability of the regulatory instruments seeking to uphold shareholder stewardship's objectives, namely the rules transposing SRDII and the 2020 Stewardship Code, to apprehend issues that are inherent in shareholders' current investment and engagement practices effectively which may diverge them from adopting practices conducive to cultivating companies' sustainable development. Having in mind the suggestion made in Chapter 2 to develop corporate governance for sustainability to achieve companies' sustainable development based on the parameters that can lead economies in aggregate to facilitate sustainable development through conforming to strong sustainability, the next Chapter will provide an account of the issues

shareholder stewardship is called to address so that shareholder engagement is undertaken to promote or contribute to its development.

4: The Challenges to Ensuring the Undertaking of Shareholder Engagement for the Promotion of Companies' Sustainable Development

4.1. Introduction

Combined with the efforts to ensure that companies become more sustainable, the notable transition of shareholder stewardship towards becoming a regulatory concept that seeks to ensure that shareholder engagement promotes or contributes to this end has been found in Chapter 3 that justifies its existence on the basis of promoting companies' sustainable development. Such justification should come with the realisation that policymakers through shareholder stewardship should be able to provide the regulatory framework required to ensure that shareholder engagement is undertaken to this end. This, however, is anything but a simple endeavour. By viewing companies' sustainable development through the lens of the normative account for the corporate objective suggested in Chapter 2 and the promotion of corporate governance for sustainability as a means to achieve it, this Chapter shows that such a regulatory framework must be able to address several issues that emanate from the current standard of shareholder engagement.

These issues are directly related to the incentives of shareholders and their intermediaries to adopt practices that lead to shareholder engagement and the objectives pursued by it. As this Chapter will outline, shareholder engagement, should it is undertaken, tends to promote corporate governance that ultimately proves detrimental to facilitating companies' sustainable development, at least in the form promoted in Chapter 2. The signification of this challenge is raised as a result of the

fact that, currently, the incentives for shareholder engagement are informed by the imperative of creating shareholder value in what is deemed to be in the short-term as a priority.[1] Such an orientation however has often been proved that it urges directors to manage companies in accordance to this end, which can affect detrimentally companies' longevity and resilience as well as the environment and the societies in which companies operate.[2]

In the case shareholder engagement is informed by ESG considerations to promote companies' sustainable development, studies showcased that this is often done when such considerations will serve shareholders' incentives to create shareholder value as a priority. This 'business case' for shareholder engagement that promotes companies' sustainable development, however, is prone to pushing for companies' sustainable development that may lead economies to facilitate aggregate sustainable development that conforms to the paradigm of weak, instead that of strong, sustainability.[3] The Chapter questions the extent to which shareholder engagement of this nature is desirable, since it may not positively facilitate the adoption of practices that precautionary respect Earth's capacity to sustain economic activities, or secure social integrity in the process.

---

[1] Lorraine E. Talbot, 'Polanyi's Embeddedness and Shareholder Stewardship: A Contextual Analysis of Current Anglo-American Perspectives on Corporate Governance' (2011) 62(4) Northern Ireland Legal Quarterly 451, 453.

[2] Benjamin J. Richardson, Maziar Peihani, 'Universal Investors and Socially Responsible Finance: A Critique of a Premature Theory' (2015) 30 Banking & Finance Law Review 405, 413.

[3] Colin Mayer, 'Shareholderism Versus Stakeholderism – a Misconceived Contradiction. A Comment on 'The Illusory Promise of Stakeholder Governance' by Lucian Bebchuk and Roberto Tallarita' (2020) ECGI Law Working Paper No. 522/2020, https://ssrn.com/abstract=3617847 accessed 02 December 2020.

Although shareholders' and their intermediaries' incentives to adopt practices that lead to shareholder engagement are calibrated by multiple factors relevant to their particular characteristics and business models, the Chapter argues that certain parameters are particularly influential in the calibration of the current standard of shareholder engagement.[4] From a normative perspective, the institutional investment community's adherence to shareholder primacy's normative account for the corporate objective as supported by theories like ECMH often lead shareholders and their intermediaries to partition themselves from adopting practices relevant to cultivating companies' sustainable development unless there is evidence that shareholder value is created.[5] As a result, and in addition to derivative issues related to the current structure of capital markets as well as the regulation of the institutional investment community, shareholders and their intermediaries tend to adopt practices that lead to shareholder engagement that seeks to create optimal financial outcomes irrespective if such actions prove ultimately detrimental for companies.[6]

Policymakers should be able through shareholder stewardship to address these issues effectively for the effective promotion of companies' sustainable development through shareholder engagement. But in addition to this, policymakers through shareholder stewardship must identify how the regulatory instruments adopted to achieve its objectives will be capable to steer and/or assist shareholders and their intermediaries to adopt practices that can lead to shareholder engagement that

[4] For a similar approach to tracing the multi-dimensionality of factors affecting shareholder engagement from the perspective of shareholder activism, see, Lori Verstegen Ryan, Marguerite Schneider, 'The Antecedents of Institutional Investor Activism' (2002) 27(4) The Academy of Management Review 554.

[5] Iris H-Y Chiu, Dionysia Katelouzou, 'Making a Case for Regulating Institutional Shareholders' Corporate Governance Roles' (2018) (1) Journal of Business Law 67, 69.

[6] E. James M. Gifford, 'Effective Shareholder Engagement: The Factors that Contribute to Shareholder Salience' (2010) 92 Journal of Business Ethics 79, 79-81.

promotes companies' sustainable development. In light of the suggestions made in Chapter 2, this Chapter considers these issues through the need for a collective action for the undertaking of shareholder engagement.[7]

The Chapter identifies several factors which may render a collective action for shareholder engagement that promotes companies' sustainable development difficult to occur, especially when this is seen through the lens of the suggestions made in Chapter 2. Analyses in the literature usually find the number of shareholders required to participate in an action and the enormity of costs required to facilitate it as the main inhibitors of facilitating shareholder engagement.[8] But in addition to these, the Chapter identifies the need for information consistent with the performance of the company on an environmental, social and economic level, and the increased intermediation caused as a result of asset managers' as factors that may prejudice the facilitation of a collective action as well.

4.2. Shareholders' Current Standard of Engagement

Chapter 3 identified that shareholder engagement can be undertaken under shareholders' different capacities as a matter of law. Having in mind the effect that it can have on corporate governance and the calls to steer companies towards being more sustainable, it can be stated that shareholder stewardship's existence as a regulatory concept that seeks to promote shareholder engagement that contributes to

[7] Some preliminary findings in the course of writing this Thesis about shareholder collective action were made available in Rafael Savva, 'Shareholder Power as an Accountability Mechanism: The 2017 Shareholder Rights Directive and the Challenges Towards Enhancing Shareholder Rights' (2018) 5(2) Journal for the International and European Law, Economics and Market Integrations 277.

[8] Bernard S. Black, 'Agents Watching Agents: The Promise of Institutional Investor Voice' (1992) 39 UCLA Law Review 811, 820-822.

this end through promoting companies' sustainable development is justified. But despite making this argument, the Thesis realises that policymakers through shareholder stewardship should introduce a regulatory framework that achieve its objectives to this end by addressing several issues related to the current standard of shareholder engagement.[9] Having in mind the suggestion made in Chapter 2 for pursuing companies' sustainable development through corporate governance for sustainability to secure companies' interests as an end in itself, these issues relate to the way the incentives of shareholders and their intermediaries to adopt practices that can lead to shareholder engagement diverge significantly from it.[10]

While this is not entirely controversial,[11] the evidence in hand from the standard of shareholder engagement firstly indicates that its current frequency is rather modest.[12] This has in part acted as one of the substantial criticisms made by the Kingman Review about the effect of the 2012 Stewardship Code in the context of the FRC's inability to

[9] Chiu, Katelouzou (n 5), 71-76.

[10] For a normative account about how shareholder stewardship can potentially attribute the responsibility on shareholders to adopt practices that promote or contribute to the development of corporate governance for sustainability that can lead to conforming to the paradigm of strong sustainability see, Chapter 5, below, 5.3. For a similar account from a law and economics perspective, see, Ryan, Schneider (n 4), 554-556.

[11] The Thesis considers that the frequency of shareholder engagement is dictated principally by the competence that shareholders have to undertake it. It is furthermore calibrated by the desirability of its quality, instead of the frequency by which it is undertaken. See, Chapter 5, 5.3, below.

[12] See, for example, FRC, 'Developments in Corporate Governance and Stewardship 2016' (January 2017) https://www.frc.org.uk/getattachment/ca1d9909-7e32-4894-b2a7-b971b4406130/Developments-in-Corporate-Governance-and-Stewardship-2016.pdf accessed 28 June 2019, 24-35. Several studies are cognisant of this. See, for example, Marco Becht et al., 'Corporate Governance Through Voice and Exit' (2019) ECGI Finance Working Paper No. 633/2019 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3456626 accessed 09 May 2020.

enforce its rules effectively onto shareholders and asset managers.[13] The report characterised many of the signatories of the Stewardship Code's disclosures as being 'boilerplate'.[14] No sufficient justification or analysis was given as to the meaning of this term. Notwithstanding, it seems to be indicating that signatories' disclosures provided little detail about the practices that have been undertaken to showcase active engagement, the objectives pursued when shareholder engagement was indeed undertaken, and the frequency of doing so.[15]

When shareholder engagement is indeed apparent, the literature noted that the substance of the objectives pursued is contrary to promoting sustainable corporate practices, at least when seen through the parameters in need to be in place for economies to facilitate sustainable development that conforms to the paradigm of strong sustainability. To a great extent, it has been noted that shareholder engagement continues to pressure for the creation of shareholder value in the short-term as a priority.[16] As mentioned in Chapter 3, this connotation usually refers to the efforts to generate shareholder value through increasing the market value of shares

[13] John Kingman, 'Independent Review of the Financial Reporting Council' (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767387/frc-independent-review-final-report.pdf accessed 10 January 2020.

[14] Ibid.

[15] Paul Davies, 'The UK Stewardship Code 2010-2020 from Saving the Company to Saving the Planet?' (2020). ECGI Law Working Paper No. 506/2020 https://ssrn.com/abstract=3553493, accessed 15 June 2020, 9.

[16] Shareholder short-termism is typically attributed to hedge funds and their tendency to adopt forms of 'offensive shareholder activism'. See, John C. Coffee, Darius Palia, 'The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance' (2016) 41 Journal of Corporation Law 545. cf Dionysia Katelouzou, 'Myths and Realities of Hedge Fund Activism: Some Empirical Evidence' (2013) 7 Virginia Law & Business Review 459.

or the receipt in dividends over a specified period of time, irrespective of the effects this may have on companies' longevity and resilience.[17]

There is a great deal of debate on the extent to which this phenomenon is detrimental for corporate governance.[18] The general consensus though accepts that the institutional investment community tends to prefer shareholder engagement that is animated by this end, even if there is disagreement on the extent to which this is a problem for corporate governance.[19] Several commentators pushing back on the extent to which the pursuit of shareholder value in the short-term is a material problem for corporate governance usually relies on the fact that markets are efficient to signify that pressure from shareholders to create value in the short-term is often rebutted by the efficient pricing of shares.[20] This argument is typically made by relying on ECMH, and the rationale that the market value of shares can act as a proxy for the extent to which corporate governance leads to the creation of healthy and resilient corporate performance relative to all risks companies are exposed to.[21]

---

[17] Usually, short investment horizons are seen as being correlated to shareholder short-termism. See John C Coffee, 'Preserving the Corporate Superego in a Time of Activism: An Essay on Ethics and Economics' (2016) https://ssrn.com/abstract=2839388 accessed 02 March 2018.

[18] See, in general, Kent Greenfield, 'The Puzzle of Short-Termism' (2011) 46 Wake Law Forest Law Review 627; Therese Strand, 'Short-Termism in the European Union' (2015) 22 Columbia Journal of European Law 15; George W. Dent, 'The Essential Unity of Shareholders and the Myth of Investor Short-Termism' (2010) 35 Delaware Journal of Corporate Law 97.

[19] Paul Krüger Andersen et al., 'Response to the Study on Directors' Duties and Sustainable Corporate Governance by Nordic Company Law Scholars' (2020) Nordic & European Company Law Working Paper No. 20-12 https://ssrn.com/abstract=3709762 accessed 15 November 2020, 5-7.

[20] See, for example, Mark J. Roe, 'Corporate Short-Termism- In the Boardroom and in the Courtroom' (2013) 68 The Business Lawyer 977, 993-996.

[21] Robert Anderson, 'The Long and Short of Corporate Governance' (2015) 23 Georgetown Mason Law Review 19, 35-41.

But despite the theory's alluring adherence in practice, ECMH has fallen over the years into disrepute.[22] Primarily, there is now evidence that showcases that pressure by markets to create shareholder value in the short-term has led to tremendous corporate and market failures over the years.[23] This alone directly questions the extent to which the pricing of shares and pursuit of creating value and organisation based on its indications is capable of signifying good corporate governance, let alone allow shareholder engagement animated by it to promote the adoption of corporate governance that ensure companies' sustainable development relative to all risks and issues companies generate on the environment and the society.[24] But in addition to this, and for reasons that will be outlined in below and in Chapter 5, there is literature showing that shareholders tend to orient the satisfaction of their interests in profit through pursuing the creation of shareholder value in the short-term, even if this ultimately leads to detrimental effects for the discharge of their interests.[25] The amalgamation of factors that lead shareholders and their intermediaries towards adopting practices akin to shareholder engagement that pursues the creation of shareholder value in the short-term leads them to depreciate the processes required to value shares relative to the whole of the risks companies are exposed to or generate

---

[22] See, Chapter 2, above, 2.4.

[23] See, in general, BIS, 'The Kay Review of UK Equity Markets and Long-Term Decision Making' (Final Report, 2012) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf accessed 13 March 2018 (Kay Review).

[24] Lynne L. Dallas, 'Short-Termism, the Financial Crisis, and Corporate Governance' (2011) 37 Journal of Corporation Law 264, 292-308.

[25] Marc T. Moore, Edward Walker-Arnott, 'A Fresh Look at Stock Market Short-Termism' (2014) 41 Journal of Law and Society 416, 421.

in the process, let alone adopt practices that lead to shareholder engagement that meaningfully considers them.[26]

While shareholder engagement is deemed as being typically informed by the pursuit of shareholder value in the short-term, this does not mean that shareholders and intermediaries have never promoted sustainable corporate practices.[27] Following the promulgation of SRI as a prudent means of calibrating investment management, various studies have showcased that the institutional investment community increasingly integrates ESG considerations in investment management and practices that lead to shareholder engagement.[28] This is now extended beyond the identification of practices that may diverge from interacting with companies that are considered as being 'sinful', such as companies involved with the sale of tobacco and alcohol.[29] Investment management and shareholder engagement are now increasingly calibrated towards factoring ESG criteria as considerations that should be taken into account as material in the promotion of shareholders' financial welfare, in the sense that their factoring will minimise exposure to future risks arising from environmental and social degradation.[30]

---

[26] Demetra Arsalidou, 'Institutional Investors, Behavioural Economics and the Concept of Stewardship' (2012) 6 Law and Financial Markets Review 410, 412.

[27] See, by reference to Dutch corporate governance, Anne Lafarre, Christoph Van der Elst, 'Corporate Sustainability and Shareholder Activism in the Netherlands' in in Beate Sjåfjell, Christopher M. Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019), 260-262.

[28] Li-Wen Lin, 'Corporate Social and Environmental Disclosure in Emerging Securities Markets' (2009) 35 North Carolina Journal of International Law and Commercial Regulation 1, 5–7.

[29] Mads Andenas, Iris H-Y Chiu, *The Foundations and Future of Financial Regulation: Governance for Responsibility* (Routledge, 2014), 404.

[30] Diane Del Guercio, Hai Tran, 'Institutional Investor Activism' in H Kent Baker, John R Nofsinger (eds) *Socially Responsible Finance and Investing: Financial Institutions, Corporations, Investors and Activists* (Wiley, 2012), 360-361.

But apart from the fact that the frequency of shareholder engagement conducive to SRI's postulates is modest and largely dependable on its compatibility with shareholders' and intermediaries' investment management and business strategies,[31] shareholder engagement of this type tends to be undertaken when it is first and foremost indicative that shareholder value will be created as a priority.[32] This 'business case' approach to supporting sustainable corporate practices, however, is prone to making shareholder engagement a means of promoting companies' sustainable development that can lead economies to facilitate aggregate sustainable development in a manner that conforms to the paradigm of weak sustainability.[33]

The extent to which practices that can facilitate aggregate sustainable development in a manner that leads to conform to the paradigm of weak sustainability can provide solutions to the challenges humanity faces which are partly arising from current corporate or investment activity is questionable. Space in this Thesis does not allow the provision of a detailed analysis about the short-comings of weak sustainability.[34] Suffice to say, weak sustainability supports the integration of social and environmental considerations in economic activities so long as man-made capital is made as a

---

[31] Carmen Juravle, Alan Lewis, 'Identifying Impediments to SRI in Europe: A Review of the Practitioner and Academic Literature' (2008) 17(3) Business Ethics: A European Review 285, 287-290. It must be noted that there is an indicative increasing tendency to engage in corporate governance for these reasons. See Lafarre, Van Der Elst (n 27).

[32] David Millon, 'Shareholder Social Responsibility' (2013) 36 Seattle University Law Review 911, 924-925.

[33] Nigel Roome, 'Looking Back, Thinking Forward: Distinguishing Between Weak and Strong Sustainability' in Pratima Bansal, Andrew J. Hoffman (eds), *The Oxford Handbook of Business and the Natural Environment* (2011, OUP), 620-621.

[34] See, in general, Eric Neumeyer, *Weak Versus Strong Sustainability: Exploring the Limits of two Opposing Paradigms* (3rd edn, EE, 2013).

priority, which is usually calculable by utility found in the creation of financial value.[35] This resonates with the understanding that not doing so will exacerbate the generation of trade-offs associated with economic activities, to the point of not developing financial value at a rate that will promote social and economic prosperity.[36]

While this is a legitimate concern, it must be remembered that the trade-offs associated with environmental, social and economic values and considerations in the course of conducting economic activities are always ubiquitous.[37] This extends to current investment management and engagement practices, especially within the context of managing any risks associated with investing in companies.[38] The problem therefore is not that these trade-offs exist. Rather, the issue lies more with managing them for the development of practices that will promote companies' sustainable development as well as the facilitation of aggregate sustainable development as effectively as possible.[39] In comparison with strong sustainability, weak sustainability considers these issues as material and crucial to be factored as long as they are indicative of the generation of man-made capital.[40] Should it is evident that the substitution of values can generate trade-offs that their management is conducive to generating man-made capital, weak sustainability gives room for the possibility of such substitution, provided that the rules imposed for ensuring the lack of depletion of

[35] Sigurd Sagen Vildåsen et al., 'Clarifying the Epistemology of Corporate Sustainability' (2017) 138 Ecological Economics 40, 41-42.

[36] ibid.

[37] See Chapter 2, above, 2.4.

[38] Jay Cullen, Jukka Mähönen, 'Taming Unsustainable Finance: The Perils of Modern Risk Management' in Beate Sjåfjell, Christopher M. Bruner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019), 103-104.

[39] See Chapter 2, above, 2.4.

[40] Roome (n 33), 621.

resources are upheld, and that technological advancement will prolong such depletion.[41]

No doubt, weak sustainability, albeit arising through established concepts and theories about economic organisation, represents the imposition of new ideas, and calls for the application of new concepts in the management of risk and economic transactions for the facilitation of sustainable development. Nevertheless, the case remains that it promotes the generation of incremental changes in economic transactions for the maintenance of the values required to ensure aggregate sustainable development, so long as there is indication that financial value will be created as a priority.[42] This is regardless of the fact that this is prone to create premises that may fail to factor effectively the convergence of environmental, social and economic crises societies and the economies are faced with and are currently called to provide remedies to them.[43]

Several authors in the literature have been quite critical of weak sustainability's rationale in light of this. They have identified it as a paradigm that is more concerned with the creation of financial value rather than developing systems upon which this goal will be facilitated that integrate the materiality of social and environmental considerations in need to be factored on a multi-level and multi-modal analysis to generate it.[44] But because of this, it has been noted that weak sustainability tends to

[41] Vildåsen et al. (n 35), 41.

[42] Ibid.

[43] See, in general, Herman Daly, 'Allocation Distribution And Scale: Towards An Economics That Is Efficienct, Just And Sustainable' (1992) 6(3) Ecological Economics 185; Herman Daly, *Beyond Growth-The Economics of Sustainable Development* (Beakon Press, 1997).

[44] Melissa Leach et al., 'Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity', in World Social Science Report 2013: Changing Global Environments (Paris: OECD Publishing, 2013), 86.

neglect the fact that several natural resources cannot be substituted in the course of undertaking any economic activities; or that the breach of Earth's capacity to sustain human activities will increase the scarcity of these resources at a rate of depletion that is greater from any technological advancements that seek to enhance the efficiency of their consumption.[45] In addition, it has been noted that it fails to provide a coherent scope about how the social foundation is to be preserved or appreciate the interconnectivity of social and environmental issues, except from raising an expectation that an achievement of greater financial value will lead to social prosperity.[46]

Having in mind the foregoing, it may be safely argued that shareholder engagement that promotes companies' sustainable development that may lead economies to facilitate sustainable development that conforms to the paradigm of weak sustainability may not be effective to promote sustainable corporate practices that can truly contribute to alleviating companies' detrimental effects on the society and the economy.[47] The adoption of practices that take into account wider sustainability criteria only when they are conducive to generating value for shareholders as a priority may allow shareholders to pick and choose the considerations they deem important to campaign for in the course of shareholder engagement to generating value for shareholders as a priority, instead of their totality being used to inform the means by which their interests in profit will be satisfied.[48] Given the effect of shareholder

[45] Paul Ekins et al., 'A Framework for the Practical Application of the Concepts of Critical Natural Capital and Strong Sustainability' (2003) 44 Ecological Economics, 165. See also, in general, Herman Daly, *From Uneconomic Growth to a Steady State Economy* (EE, 2015), Chapter 2.

[46] Leach et al. (n 44), 86.

[47] Colin Mayer, 'Ownership, Agency, and Trusteeship: An Assessment' (2020) 36(2) Oxford Review of Economic Policy 223, 229-230.

[48] ibid.

engagement on corporate governance, however, it is possible that shareholders and their intermediaries may continue pressuring companies to adopt practices that do not necessarily ensure that they are on a more sustainable path, which may ultimately lead to catastrophic consequences when corporate activities are taken in aggregate to consider the extent to which aggregate sustainable development is truly facilitated.[49] If anything, therefore, such practices will only definitely secure shareholders' interests in profits, regardless of the outcomes in the process.[50]

4.3. Factors Affecting the Standard of Shareholder Engagement

Over the years, the literature identified multiple factors that orient shareholders' and intermediaries' objectives and incentives to adopt practices that lead to the current standard of shareholder engagement outlined above. Often, the investment strategies adopted by certain shareholders or intermediaries, such as hedge funds, have been cited as key in the development of incentives that are quite opportunistic in nature, which usually tend to inform practices that lead to shareholder engagement.[51] Because of this, there is some consensus in the literature positing that shareholders and intermediaries that adopt such investment strategies are prone to adopting practices that lead to shareholder engagement that will usually be aligned with the

[49] Beate Sjåfjell, Mark B. Taylor, 'A Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose' (2018) 13 International and Comparative Corporate Law Journal 40, 59.

[50] ibid, 59-60.

[51] Leo E. Strine, 'Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System' (2017) 126 Yale Law Journal 1870, 1898-99. cf Katelouzou, 'Myths and Realities' (n 16).

[51] Coffee, Palia (n 16), 573. On the means hedge funds can undertake such engagement see, through the context of shareholder activism, Brian R. Cheffins, John Armour, 'The Past, Present, and Future of Shareholder Activism by Hedge Funds' (2011) 37 Journal of Corporate Law 51. See also Chapter 3, above, 3.4.

creation of shareholder value in the short-term, as opposed to others that have wider, long-term orientations which may take into account ESG considerations at a greater level.[52]

By coining shareholders adopting a long-term investment strategy as Universal Investors, the literature considers them as capable of adopting a 'buy and hold' approach that in turn incentivises the adoption of practices that lead to shareholder engagement animated by this end.[53] An example where this strategy is found to be implemented lies with index funds, whereby investment is made by tracking the financial performance of specified indexes of companies.[54] Every time these indexes showcase a change in the companies they include in their listing, index funds follow them automatically and conduct the trading of shares accordingly to match the index.[55] Because of such practices, they tend to invest in companies for longer periods of time, which has been signified that this may lead them to shareholder engagement which may consider ESG considerations and companies' sustainable development because of the systemic risks involved with trading on the basis of tracking indexes.[56]

While it is not the intention of this Thesis to embark on specific analyses of these attributes, the current standard of shareholder engagement as outlined above indicate that irrespective of the investment strategies adopted, the standard of shareholder engagement is typically oriented within the spectrum of creating shareholder value in

---

[52] Alexander Kraik, 'Environmental, Social, and Governance Issues: An Altered Shareholder Activist Paradigm' (2019) 44(3) Vermont Law Review 493. 528.

[53] Richardson, Peihani (n 2), 411-414.

[54] Jill E. Fisch et al., 'The New Titans of Wall Street: A Theoretical Framework for Passive Investors' (2019) 168 University of Pennsylvania Law Review 17, 27-31.

[55] Davies (n 15), 12-13.

[56] James Gifford, "Measuring the Social, Environmental and Ethical Performance of Pension Funds" (2004) 53 Journal of Australian Political Economy 139, 140-41.

the short-term and the factoring of ESG considerations when there is a business case for it. Shareholders that as investors adopt an active investment strategy, such as hedge funds, take much of the blame for being short-termist in focus when it comes to shareholder engagement.[57] But against this backdrop, shareholders that tend to adopt more short-termist practices ironically acquire the support of all other shareholders to ensure that the influence they try to exert on directors through shareholder engagement will come to fruition.[58]

Hence, despite the fact that shareholders and intermediaries diverge significantly in terms of their characteristics and attributes with regards to their investment management and business strategy, they seem to have a symbiotic relationship when it comes to the calibration of their incentives and objectives that animate the undertaking of shareholder engagement.[59] The Thesis posits that several parameters prove quite influential in the cultivation of the current standard of shareholder engagement.[60] Primarily, the Thesis opines that the dominance of shareholder primacy with regards to the provision of a normative account for the corporate objective contributes immensely in the calibration of the objectives pursued by an undertaking of shareholder engagement.[61] As a result of it, and in addition to the nature of current capital market practices and their regulation by the law, shareholders

[57] Katelouzou, 'Myths and Realities' (n 16), 462. Cf Marcel Kahan, Edward B. Rock, 'Hedge Funds in Corporate Governance and Corporate Control' (2007) 155(5) University of Pennsylvania Law Review 1021, 1083.

[58] Ronald J. Gilson, Jeffrey N. Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113 Columbia Law Review 863, 867–68.

[59] Kraik (n 52), 543.

[60] A similar account was made in Chiu, Katelouzou (n 6).

[61] On the extent to which shareholder primacy can provide the normative premises required to respond to current unsustainability of practices, see, Chapter 2, above.

and their intermediaries tend to prioritise profits regardless of the outcomes in the process, to the point of diverging significantly from promoting companies' sustainable development, let alone promoting it on the basis of pursuing corporate governance for sustainability.[62]

4.3.1. The Normative Effect of Shareholder Primacy

From a normative perspective, the prevalence of shareholder primacy as a social norm over the conceptualisation of the corporate objective, and the correlated belief in capital market's ability to advance social welfare based on the postulates of ECMH can be argued that they contribute immensely to the cultivation of the current standard of shareholder engagement.[63] This extends both to the substance of the objectives pursued by shareholders and intermediaries in the course of adopting practices that lead to shareholder engagement, and the frequency that is required to make shareholder engagement a meaningful aspect of promoting companies' sustainable development.[64] The conformation of shareholders' and intermediaries' incentives and practices to these has not just been evident in the literature. Several reports, such as the Kay Review, have signified that the institutional investment community is unquestionably faithful to the postulates of shareholder primacy and ECMH as a means of promoting social welfare through business and corporate activity, regardless of the constant provision of evidence to the contrary.[65]

---

[62] Sjåfjell, Taylor (n 49), 59-60.

[63] See on this, in general, Kay Review (n 23), Chapter 4.

[64] For the determinants that lead to adhering to these theories from a political-economic perspective, see Christopher M. Bruner, *Corporate Governance in the Common Law World: The Political Foundations of Shareholder Power* (CUP, 2013), 28-110.

[65] Kay Review (n 23). Generally, the strength of shareholder primacy as a social norm has been noted as an incident that 'finalised' the regulation of corporate governance by company law, Henry Hansmann,

Whether companies and economies are capable of addressing social, environmental and economic issues generated by business to facilitate corporate and aggregate sustainable development on the basis of conforming to shareholder primacy's and ECMH's rhetoric has been outlined in Chapter 2.[66] Suffice to say herein, shareholder primacy's normative account for the corporate objective relies tremendously on the extent to which the strong connotation of ECMH holds in practice. Albeit compelling, ECMH in its most uncontroversial form recognises that publicly available information is reflected in pricing of shares as well as the market value of shares. But together with the assumption of rationality of market actors as well as the idea that they possess such information, ECMH postulates that the market value of shares constitutes an unbiased estimate of the fundamental value of shares relative to the idea that the market value of shares reflects all anticipated earnings and cash flow of companies as they may be affected by all such risks that companies are faced with.[67] Thus, adopting any practices on the basis of pursuing shareholder value is deemed as proper for the facilitation of good corporate practices, in the sense that the market value of shares will be able to act as a metric or a proxy for determining whether corporate practices are indeed beneficial for the advancement of social welfare, with the market through its forces being able to provide an estimate or an account for this.

While ECMH's and shareholder primacy's rhetoric proves to be alluring enough, there is plenty of evidence to suggest that this may not be credibly the case. Such is the

---

Reinier Kraakman, 'The End of History for Corporate Law' in Jeffrey N. Gordon, Mark J. Roe (eds) *Convergence and Persistence in Corporate Governance* (CUP, 2004). But see, John Armour et al., 'Shareholder Primacy and the Trajectory of UK Corporate Governance' (2003) 41 British Journal of Industrial Relations 531.

[66] See Chapter 2, above, 2.3-2.4.

[67] Ibid.

case to the point of misappreciating the wider effect of companies on the environment and societies that accommodate their practices as well as the risk inherent in the harm caused by their degradation when decisions are made in reliance to shareholder primacy's normative account for the corporate objective and the market value of shares. As it was stated in Chapter 2, cognitive biases are capable of distorting the ability of markets through their forces to correctly estimate the value of shares relative to all the information that is held to correctly set their pricing. These cognitive biases can be found at all stages of intermediation of shareholding ownership, which may lead in the adoption of practices that may fail to take into account issues and considerations that may affect companies and investments in the long-term, even if there is faith that the market value of shares is indicative of these.

Such an occurrence may be particularly prevalent in the case of appreciating risks and assessing information about environmental and social degradation to be integrated in share prices. As stated in Chapter 2, the probability estimates created by factoring environmental and social degradation are unreliable, either because the methods used to aggregate them fail to factor them effectively in pricing, or because such information is either too speculative or hard to find to integrate them accordingly. But if the situation is as such, it means that the market value of shares may only be able to reflect on the information that can be aggregated, which can exclude information that cannot be processed that could showcase the detrimental effects of business practices on the environment and the society. Anchoring on such information, however, to pursue any kind of practices, is probably going to prove detrimental for promoting corporate and aggregate sustainable development. This may lead to a grave mismatch between what the market value of shares dictate as good corporate governance and what companies

actually are doing to be more environmentally, socially, and economically sustainable on a basis that can truly lead to aggregate sustainable development.

But despite this level of abstraction, the prowess of shareholder primacy and ECMH in terms of influencing the calibration of the standard of shareholder engagement continues to be prevalent.[68] Because of this, both tend to orient shareholders and their intermediaries towards adopting practices that lead to shareholder engagement that prioritises the creation of shareholder value at all costs, under the belief that this aligns with the corporate objective, and that markets can ensure that companies contribute through their practices to the advancement of social welfare.[69] If shareholder engagement is undertaken to this end, it is furthermore generally conceived as a legitimate request protected by the law, regardless of the implications in the process.[70] Similarly, in case there is a belief that their interests in profit are discharged at a satisfactory level, shareholder engagement may be deemed as unnecessary, even if the company is managed unsustainably and therefore counter to their ultimate interests in the future, should they remain shareholders in companies.[71]

The influence that shareholder engagement may exert on directors to ensure that the creation of shareholder value is prioritised is only bolstered when it is combined with the prevalence of the rhetoric of shareholder primacy and EMCH over directors'

[68] The prowess of theories used to support shareholder primacy are so influential that tend to influence any criticism made about shareholder primacy. See, for example, Margaret M. Blair, Lynn A. Stout, 'A Team Production Theory of Corporate Law' (1999) 85(2) Virginia Law Review 247. cf Brian R. Cheffins, 'The Team Production Model as a Paradigm' (2015) 38 Seattle University Law Review 397.

[69] John Armour, Jeffrey N. Gordon, 'Systemic Harms and Shareholder Value' (2014) 6(1) Journal of Legal Analysis 35, 36-38.

[70] Sjåfjell, Taylor (n 49), 54-57.

[71] Chiu, Katelouzou (n 6), 67.

perception about how companies need to be managed.[72] The conformation of business circles to these has made directors extremely amendable to shareholders' demands for generating shareholder value as a priority, with the effect of shareholder engagement proving considerably influential to the cultivation of directors' actions to this end.[73] This is not to say that directors have limited capacity to acknowledge that their management must encapsulate additional considerations to create profitable outcomes.[74] Nevertheless, such acknowledgment is often diluted to their conformation to prioritising the creation of shareholder value, with additional environmental, social and economic issues arising from corporate practices being factored so long as they are indicative of achieving the former.[75]

There are various reasons behind the prevalence of shareholder primacy, which extends to political and socio-economic articulations of modern financial capitalism.[76] In part, this may be attributed to the cultivation of the idea that market activities are a predominantly private issue, which is embedded in the understanding that the financiers or providers of capital of the company should ultimately control the ways their capital is used, with market forces assumed as capable of indicating which

[72] Beate Sjåfjell et al. 'Shareholder Primacy: The Main Barrier to Sustainable Companies' in Beate Sjåfjell, Benjamin J. Richardson (eds) *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP, 2015), 83-86, 144.

[73] Armour, Gordon (n 69), 38.

[74] See, for example, Business Roundtable, 'Statement on the Purpose of a Corporation' (2019) https://system.businessroundtable.org/app/uploads/sites/5/2021/02/BRT-Statement-on-the-Purpose-of-a-Corporation-Feburary-2021-compressed.pdf accessed 21 February 2021.

[75] Millon (n 32), 926. Efforts to promote sustainable economic development often fail to rectify this issue due to the elusiveness of the term 'sustainability'. See, Roome (n 33), 621.

[76] See, in general, Bruner (n 64), John Kay, *Other Peoples Money: Masters of the Universe or Servants of the People* (Profile Books, 2016); Lorraine E. Talbot, *Progressive Corporate Governance for the 21st Century* (Palgrave, 2011).

practices promote overall social welfare.[77] As mentioned in the previous Chapters though, directors at a corporate level should take into account a wide array of issues over identifying the betterment of corporate affairs, despite the fact that shareholder engagement is particularly influential and may can steer them to a different direction.[78]

Regardless, shareholder primacy continues to remain a prevalent influencer on shareholders' current standard of engagement.[79] From a legal perspective, one of the most important reasons that this remains prevalent lies in the interpretive room provided by the legal context underpinning the regulation of the corporate objective with regards to what it is expected of companies to do as social institutions in the course of undertaking their business practices.[80] Company law to this day provides little account about how the corporate objective is perceived as a matter of law, especially with regards to what companies are ought to be doing to uphold their objectives as social institutions.[81] The only indication of authority to this end is found in the way the interests of the company are interpreted by the legal norm of shareholder value as it is now found in s.172 of the Companies Act, which may be said that it acts as the rule that forms the core guidelines about how companies should operate to ensure their longevity and resilience.[82]

---

[77] Beate Sjåfjell, 'Regulating for Corporate Sustainability: Why the Public-Private Divide Misses the Point' in Barnali Choudhury, Martin Petrin (eds) *Understanding the Company: Corporate Governance and Theory* (CUP, 2017).

[78] See Chapter 2, above, 2.3; Chapter 3, above, 3.4.

[79] But see, Chapter 2, above, 2.3-2.4.

[80] Sjåfjell et al (n 72), 90-94.

[81] ibid.

[82] But see, Georgina Tsagas, 'Section 172 of the Companies Act 2006: Desperate Times Call for Soft Law Measures' in Nina Boeger, Charlotte Villiers (eds), *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart, 2018).

But as mentioned in Chapter 2, the legal norm of shareholder value does not legally manifest shareholder primacy's normative argument.[83] The legal norm of shareholder value stands as a means of dictating how the interests of the company as a legal person should be met by reference to the welfare of shareholders' interests as a whole.[84] Profit maximisation for shareholders as a matter of law is but one of the interpretations of the notion, with the focus being the creation of wealth for the company as a legal person, from which all other interests, including those of shareholders, will be met.[85] If anything, it includes by a wide margin a substantial portion of considerations that directors are entitled to undertake, provided that it can be proved that such practices were taken with a view to uphold the company's best interests as a legal person.[86]

Nevertheless, the means by which shareholder value interprets the best interests of the company provide enough room for shareholder primacy to reign as the interpretation of the corporate objective that should animate corporate and business practices, including those of shareholders and their regulation by the law.[87] Although shareholder value has been clearly interpreted by courts as not embracing shareholder primacy's rationale, the means by which the overall welfare of the company is measured by reference to the welfare of shareholders as a priority provides ample ground for shareholder primacy's normative account for the corporate objective to gain legitimacy and dictate how companies should be governed.[88] This is

---

[83] See Chapter 2 above, 2.3.

[84] Sjåfjell et al (n 72), 99-100.

[85] Jonathan Mukwiri, 'The Myth of Shareholder Primacy in English Law' (2013) 24(4) European Business Law Review, 217, 228.

[86] Sjåfjell et al (n 72), 99-100.

[87] Mukwiri (n 85), 230.

[88] ibid.

especially the case in public companies where shareholding ownership is quite dispersed, with the law allowing significant latitude for supporters of shareholder primacy to establish its rationale to ensure the facilitation of market efficiency, which is deemed as pivotal to dictate how social and economic welfare will be achieved.[89]

4.3.2. Current Capital Market Practices

The normative prevalence of shareholder primacy and ECMH provide sufficient ground for the cultivation of incentives to showcase shareholder engagement for the creation of shareholder value as a priority, irrespective of the outcomes in the process. But as a result of this, shareholders and their intermediaries are embedded within a capital market system that is systemically calibrated to adhering to such postulates.[90] Over the last decades, the institutional investment community has embraced markedly the benefits that are associated with diversifying investments to manage risks and the efforts to generating profits as efficiently as possible.[91] Shares are furthermore now fully-paid up and capable of being purchased and sold at national and international capital markets with relative ease, making shares an almost perfectly liquid investment that can be traded instantly.[92] At the same time, technological advancements developed to make investments more cost-effective and efficient provide investors

[89] Sjåfjell et al (n 72), 121-122.

[90] Roger M Barker, Iris H-Y Chiu, *Corporate Governance and Investment Management: The Promises and Limitations of the New Financial Economy* (EE, 2017), 125-126, 131.

[91] The rise of institutional investing and the expertise associated with it was met with optimistic views with regards to the benefits it would bring to the advancement of social welfare. See, for example, Michael Useem*, Investor Capitalism: How Money Managers are Rewriting the Rules of Corporate America* (Basic Books, 1999).

[92] Paddy Ireland, 'Financialisaton and Corporate Governance' (2009) 60(1) North Ireland Law Quarterly 1, 21-24.

with the ability to invest in shares at a lower cost; and with as minimum risk as possible to remain competitive in the market for attracting more beneficiaries or clients.[93]

The institutional investment community's desire for liquid, low-risk and low-cost investment in shares was supposed to be made at the capital-market level to support companies who require additional capital to undertake their productive activities in a manner that does not tamper their ability as well as the economy's to continue to do so.[94] Their profitable operation was then supposed to benefit shareholders and their intermediaries in the process (including clients and beneficiaries), making their investment in shares or their trading more successful.[95] But because of the influence of shareholder primacy and ECMH, capital markets have now become a medium for the increasing satisfaction of the former as a priority, with the latter being assumed as probable and possible to become a reality in the process and as a result of what market forces would dictate based on the market value of shares.[96] But as mentioned above, shareholders and their intermediaries seldom consider wider sustainability considerations for this to be the case in terms of ensuring that companies and business in general contributes effectively to social welfare. If they do, they will usually factor them within a context that is, to a great extent, informed by the need to create shareholder value as a priority, with an utmost belief that doing so will lead to having

[93] Ronald J. Gilson, Jeffrey Gordon, 'Agency Capitalism: Further Implications of Equity Intermediation' in Jennifer Hill, Randall S. Thomas (eds) *Research Handbook on Shareholder Power* (2015, EE), 37-38.

[94] Colin Mayer, *Prosperity: Better Business Makes the Better Good* (OUP, 2018), 103.

[95] On the potential benefits assumed that they would arise from this, see James P. Hawley, Andrew T. Williams, 'Shifting Ground: Emerging Global Corporate-Governance Standards and the Rise of Fiduciary Capitalism' (2005) 37(11) Environment and Planning A: Economy and Space 1995.

[96] Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler, 2012), Chapter 8. See also, in general, John Quiggin, *Zombie Economics: How Dead Ideas Still Walk Among Us* (2010, PUP).

more sustainable companies that can indeed contribute to economic and social prosperity.[97]

Whether this understanding can effectively lay the premises required for the signification of the practices that can be adopted to counter companies' unsustainable management has been analysed above.[98] As far as shareholders' and intermediaries' incentives to adopt practices that lead to shareholder engagement is concerned, the pursuit of increasing financial value out of investing in shares has become the sole objective shareholding ownership based on the criterion of creating shareholder value. As a result, this has become the core issue surrounding the adoption of shareholder engagement.[99] Regardless of the investment strategy adopted, shareholders and intermediaries tend to trade shares at a much more frequent pace than in the past in pursuit of this objective, leading them to treat shares as commodities capable of deriving better financial value, instead of holding them to derive value out of the productive outcomes of companies.[100]

Alternatively, shareholding is used as a medium to demand from investee companies better profits to satisfy an ever-increasing desire for greater financial value.[101] In this environment, any incentives to adopt practices that lead to shareholder engagement is mainly calibrated by the satisfaction of shareholders' and intermediaries' interests in profits either by increasing the creation of shareholder value or by trading shares as

[97] While inconclusive, the evidence suggests that shareholder engagement is undertaken when it is conducive to maximising value. See, for example, John Hendry et al. 'Responsible Ownership, Shareholder Value and the New Shareholder Activism' (2007) 11(3) Competition and Change 223.

[98] See Chapter 2, above 2.4.

[99] Chiu, Katelouzou (n 6), 73-74.

[100] Kay Review (n 23), Chapter 7.

[101] See 4.2, above.

frequently as possible.[102] Any other considerations are factored in the process or inform the objectives of shareholders' engagement so long as the foregoing objective is first and foremost met.[103]

The adoption of investment and engagement practices based on SRI is by no means an indication that shareholders' incentives in adopting these diverge significantly from the aforementioned.[104] To be clear, it is evident that several shareholders and their intermediaries adopt practices conducive to the postulates of SRI.[105] Nevertheless, the adoption of practices that can in aggregate lead to the facilitation of sustainable development that conforms to strong sustainability's paradigm is still not widespread.[106] While several shareholders promulgate the adoption of ESG criteria to achieve this, the evidence in hand signify that shareholders and intermediaries do not consider the totality of these to inform their investment and engagement practices accordingly.[107] If anything, they postulate for the adoption of practices that give scope to consider certain types of environmental or social issues, but with significant flexibility to invest or undertake practices that lead to shareholder engagement for creating

---

[102] Shareholder short-termism has been correlated with the lack of shareholder engagement for proper purposes. Black, 'Agents Watching Agents' (n 8), 863.

[103] While the arguments surrounding this statement are usually focused on hedge funds, there is literature suggesting that this is the case for institutional investors that adopt passive investing strategies as well. See, for example, Jill E. Fisch, 'The Uncertain Stewardship Potential of Index Funds' (2020) ECGI Law Working Paper No. 490/2020 https://ssrn.com/abstract=3525355 accessed 19 September 2020.

[104] See, by reference to R&D developments, Brian J. Bushee, 'The Influence of Institutional Investors on Myopic R&D Investment Behaviour' (1998) 72(3) The Accounting Review 305.

[105] Benjamin J. Richardson, 'Aligning Social Investing with Nature's Timescales' in Beate Sjåfjell, Christopher M. Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019), 573.

[106] There are however exceptions. See Roome (n 33), 623.

[107] Richardson (n 105), 569.

shareholder value in companies that are mired by equally significant issues that may diverge from conforming to strong sustainability when such practices are taken in aggregate, albeit on a different scale and dynamic.[108]

Such an approach is undertaken irrespective of the fact that it is prone to disregarding issues that in the long-term may prove catastrophic for companies and the economy in aggregate, which includes shareholders' interests in profit as well.[109] While this may sound as too obvious for not to be considered on the part of the institutional investment community, shareholders and their intermediaries tend to neglect the materiality of it. Several scholars in the literature have attributed this to the near-complete severance of shareholders' and intermediaries' interests in profit from the productive activities of companies.[110] The value of shares, both in the sense of the signification of shares' market value and the amount of returns they generate, are increasingly detached from the prospects of generating it from the productive elements of the business of companies relative to the considerations that need to be taken into account to keep doing that in the future.[111]

This however often leads to the alienation of shareholders' desire for profit from the calibration of their interests based on the totality of the issues accruing from companies' practices, unless these are conducive to keep maximising their profits in

---

[108] Lorraine E. Talbot, 'Corporate Governance and the Political Economy of the Company' in Beate Sjåfjell, Christopher M. Brunner (eds) *Cambridge Handbook of Corporate Law and Sustainability* (CUP, 2019), 98.

[109] See on this, Chapter 2, above, 2.4.

[110] Talbot, 'Corporate Governance' (n 108).

[111] William Lazonick, 'Profits Without Prosperity: How Stock Buybacks Manipulate the Market, and Leave Most Americans Worse Off' (2014) Institute for New Economic Thinking https://www.ineteconomics.org/research/research-papers/profits-without-prosperity-how-stock-buybacks-manipulate-the-market-and-leave-most-americans-worse-off accessed 21 June 2020.

the first place.[112] Coupled with the aforementioned, shareholders and intermediaries showcase limited commitment to the promotion of companies' sustainable productivity, and the means their engagement will promote or contribute to addressing companies' unsustainable management, even when this is seen through the sphere of their competence to do so.[113] This leads them to engage with companies solely when there is indication of profitable ventures in their investment, irrespective of whether this may consider wider economic, social and environmental considerations in the process.[114]

The intermediation associated with the adoption of practices that lead to shareholder engagement has been stated by several reports such as the Kay Review as being the key contributor to the existence and amplification of these issues. As a matter of law, collective investment management is mainly characterised by shareholders' beneficiaries' reliance on asset owners, asset managers, and other service providers to invest capital in shares, hold custody over shares, exercise discretion to adopting investment strategies, and adopt practices that lead to shareholder engagement formally or informally.[115] The relationship formed by investing through shareholders as institutions is mainly governed either by trust law or by the contract that outlines the investment objectives and the relationship formed, and the standards of the

[112] Talbot, 'Corporate Governance' (n 108), 97-99.

[113] Mayer, *Prosperity* (n 94), 103-106.

[114] Black, 'Agents Watching Agents' (n 8), 863. A more recent argument to this end was made by reference to shareholders that adopt passive investing strategies from a law-and-economics standpoint. See Marcel Kahan, Edward B. Rock, 'Index Funds and Corporate Governance: Let Shareholders Be Shareholders' (2020) 100 Boston University Law Review 1771.

[115] Simon C.Y. Wong, 'Why Stewardship is Proving Elusive for Institutional Investors' (2010) Butterworths Journal of International Banking and Financial Law 406, 407-408.

institutional shareholders' conduct as they are governed by fiduciary and tort law.[116] Asset managers and other service providers' utilisation is furthermore governed by contract, which may extend to some form of regulation of rights and duties that set several expectations. Albeit complex as will be seen below, shareholders' beneficiaries are assumed that in principle they want shareholders and their intermediaries to adopt practices that will ensure that their interests will not be harmed in any way detrimentally.[117]

There is strong evidence to suggest that shareholders' beneficiaries would ideally prefer shareholders and their intermediaries to undertake practices that do not exploit companies or the wider economy, the society and the environment in an unsustainable manner.[118] Having in mind the relationships formed between shareholders and beneficiaries as a matter of law, it is not controversial to suggest that shareholders, asset managers and any other intermediaries should factor this desire and support through their practices the adoption of more sustainable corporate practices.[119]

But in spite of the fact that shareholders and their intermediaries to a large extent do not lead shareholders to undertake such activities, shareholders' beneficiaries have practically limited ability to signalling them the undertaking of investment and engagement practices that can promote sustainability.[120] The dominant position of shareholders, asset managers and other intermediaries to define the means by which

---

[116] Chiu, Katelouzou (n 6), 79-82.

[117] ibid.

[118] EU High Level Group on Sustainable Finance, 'Financing a Sustainable European Economy: Final Report' (January 2018) https://ec.europa.eu/info/sites/info/files/170713-sustainable-finance-report_en.pdf accessed 20 February 2021, 27.

[119] Evidence suggests that this is the case. See, for example, George Serafeim, 'Public Sentiment and the Price of Corporate Sustainability' (2020) 76(2) Financial Analysts Journal 26.

[120] Chiu, Katelouzou (n 6), 77-78.

they will manage funds and execute practices that lead to shareholder engagement has practically eclipsed it.[121] In general, shareholders' beneficiaries are practically disempowered from investment management and shareholder engagement, mainly as a result of beneficiaries' reliance on the expertise and knowledge of shareholders, asset managers and other service providers to manage their funds accordingly.[122] Given the amount of beneficiaries involved as well, it is plausibly assumed that shareholders' beneficiaries can easily become disinterested to participate in any decisions associated with the fate of their investments, despite their desire to see the adoption of more sustainable practices.[123]

The plausibility of this is only amplified by the growth of the chain of intermediation for the exercise of shareholders' investment and engagement practices.[124] Various services revolving around asset management, brokerage, investment and engagement advice by proxies, and the provision of custodial services are usually outsourced first by shareholders onto asset managers, and then by asset managers to other service providers.[125] This outsourcing however maximises an already diffused relational web of undertaking practices that lead to shareholder engagement that is set to consider real issues that concern companies' management and the way that they are set on course to become more sustainable.[126] This effectively limits even further shareholders' beneficiaries from controlling the fate of their investment and the

---

[121] ibid, 79.

[122] ibid.

[123] ibid.

[124] Demetra Arsalidou, 'Shareholders and Corporate Scrutiny: The Role of the UK Stewardship Code' (2012) 9(3) European Company and Financial Law Review 342, 360.

[125] Eva Micheler, 'Facilitating Investor Engagement and Stewardship' (2013) 14(1) European Business Organization Law Review 29, 39.

[126] Kay Review (n 23), Chapters 4, 6.

scope of shareholder engagement as well as the extent to which it is being managed without ultimately harming them.[127]

Not only that, but the growth of the chain of intermediation is at a level that makes shareholders become even further alienated from the means by which companies are being governed with a view to ensure their sustainable development, let alone consider how such practices will lead to the facilitation of aggregate sustainable development.[128] In an environment that is oriented towards maximising profits for shareholders as efficiently as possible though, the shaping of shareholders' incentives and the receipt of services to undertake their activities is solely governed by this objective only, with upholding companies' sustainable development being in their minds solely when it is indicative that their interests for maximised profits will be met relative to the creation of shareholder value.[129] This however practically leads both the institutional investment community and their clients and beneficiaries towards entering the capital market not to support companies through investment, but to undertake practices mainly for trading purposes, regardless of the effects that this may have on companies and the economy.[130]

4.3.3. The Law Governing the Institutional Investment Community

The conclusion from the findings of reports like the Kay Review in relation to the foregoing indicate that shareholders' and intermediaries' responsibilities will have to be recalibrated via the imposition of fiduciary duties that dictate the adoption of practices that lead to shareholder engagement that supports companies' real

[127] On the effects of this, see, Wong (n 115).

[128] Micheler (n 125), 38-39.

[129] ibid.

[130] Mayer, *Prosperity* (n 94), 103-106.

productive performance. This is usually postulated as a way that would lead shareholders and intermediaries towards adopting practices that take into account all such considerations that will lead economies to fruitfully contribute to the advancement of social welfare, which include, inter alia, the effective integration of ESG criteria and/or considerations.[131] But despite the theoretical value of such a proposition, the reality is that the current regulation of institutional investment community in relation to shareholder engagement is fundamentally different to what such reports conceptualised for the imposition of fiduciary duties on shareholders and intermediaries that are owed to each other to be possible.[132] At the same time, it may be argued that the law governing the relationships of shareholders and intermediaries in relation to the way shareholder engagement is undertaken seems to be contributory to the current standard of shareholder engagement.

Shareholder engagement of a kind that meaningfully promotes companies' sustainable development relies to a great extent on the ability of shareholders and their intermediaries to adopt practices to this end and on their incentives to do so accordingly. Nevertheless, as mentioned above, shareholders and intermediaries currently adopt practices that lead to shareholder engagement that diverges significantly from this end either because of their adherence to shareholder primacy's and ECMH's postulates, or because of the potential misalignment of incentives and objectives in the chain of intermediation as a result of the current practices capital markets adopt in aggregate. While the role of law is to correct such behaviours, it may be stated that, apart from unclear, it is providing shareholders and intermediaries with considerable discretion over whether shareholder engagement must be undertaken,

[131] Kay Review (n 23), Chapters 6-13.

[132] But see Chapter 5, below.

let alone calibrate it in a manner that promotes companies' sustainable development.[133]

This is attributable to the fact that the law governing the institutional investment community is highly complex and unclear in terms of the way the inter-relationships between each mode of regulation relevant to shareholders or intermediaries are governed.[134] Depending on the type of shareholder or intermediary, different rules and areas of law apply. But in general, it could be stated that the key area of law that regulates shareholders and intermediaries revolves first and foremost around the agreements made between parties. This is due to the contractual nature of the relationships that may be made between beneficiaries and shareholders, shareholders and asset managers, and then asset managers and any other service providers.[135] This apparent regulatory taxonomy is found even in organisations where they are principally organised and set up as trusts. Certain pension funds, for example, are found to be such organisations, with the trust deed defining the powers and constraints of pension funds as trustees in the course of managing the contributions of their beneficiaries.[136]

In addition to the agreements made between parties, several other rules and laws are applicable as well. Legislation enacted by Parliament may be applicable, together with any regulations made under these to enforce it accordingly. Pension funds that are set up as trusts, for example, are regulated by the Pensions Act 1995 and 2004 as well

---

[133] Law Commission, 'Fiduciary Duties of Investment Intermediaries' (2014) LC 350, Chapter 11.

[134] This is an issue that is raised in Chapter 5 as in need to be addressed for shareholder stewardship to act as a concept that meaningfully promotes shareholder engagement that can promote or contribute to corporate governance for sustainability at the investee company level. See Chapter 5, below.

[135] Law Commission (n 133), Chapter 3.

[136] Ibid, 3.5.

as several regulations enacted under them to regulate behaviour.[137] Rules enacted and enforced by several regulators, such as the FCA, are also applicable to shareholders and intermediaries. Such rules may be applicable to several investment intermediaries that their relationship with clients and beneficiaries is set up on contract, with disclosure rules acting as the locus of calibrating behaviour accordingly.[138] Common law principles are also applicable in certain instances, which may include, inter alia, the imposition of fiduciary duties.

Different types of shareholders will be regulated accordingly by different types of rules and laws stemming from these sources of law. Fiduciary duties imposed on shareholders as investors are but one type of rules and laws imposed on them. In general though, such fiduciary duties will arise only when there is indeed a fiduciary relationship in place.[139] Shareholders that as investors are set up as a trust, are usually found in the case of certain pension funds. However, the law in relation to their fiduciary duties does not preclude them from refraining from adopting practices or set agreements with beneficiaries and intermediaries that may refrain from adopting practices that lead to shareholder engagement, or from adopting practices that do not consider ESG integration to the point of being in line with the parameters that can lead to the facilitation of sustainable development that conforms to the paradigm of strong

[137] Pensions Act 1995, Pensions Act 2004. See also, Occupational Pension Schemes (Investment) Regulations 2005.

[138] An example of such rules is found in the Conduct of Business Rules (COBS). If such rules are breached, regulators have a wide discretion to enforce them under the Financial Services and Markets Act 2000.

[139] These may be seen as relationships that involve status-based fiduciaries or fact-based fiduciaries. See on this, *Lac Minerals Ltd v International Cororna Resources Ltd* (1989) 61 DLR (4th) 14; *Chirnside v Fay* (2006) NZSC 68.

sustainability.[140] Just like with directors of companies, such shareholders have considerable discretion to decide the functions that they should undertake to promote the best interests of their beneficiaries, which includes the calibration of their investment principles and practices in a manner that aligns with the consideration of wider systemic risks as well as the wellbeing of companies relative to them.[141]

Fiduciary duties will not be usually found in other cases, especially when it comes to the relationships formed between shareholders and intermediaries. For example, the relationship between shareholders and asset managers is primarily governed by an investment management agreement. This agreement will specify the means by which shares are going to be managed and provide details about the means by which voting as well as other forms of engagement will be executed, either by the asset manager directly or through the use of other service providers. This will usually be calibrated by the asset manager's own preferences as to how far and what matters in terms of the content of such engagement, and the way that shareholder engagement is going to be undertaken based on the policies implemented. In general however, evidence suggests that references to the ways by which shareholder engagement is going to be undertaken in line with the objectives of shareholder stewardship is missing.

This suggests that as a general rule, the investment management agreement does not cultivate responsibilities for the responsible undertaking of shareholder engagement with a view to promote companies' sustainable development.[142] Essentially, therefore,

---

[140] *Cowan v Scargill* [1985] Ch 270.

[141] Ibid. The discretion of shareholders set up as trusts is quite wide. See Pensions Act 1994, s 34. Nevertheless, it is a principled one. See Occupational Pension Schemes (Investment) Regulations 2005 SI 2005 No 3378, Reg 4(2).

[142] BIS, 'Metrics and Models Used to Assess Company and Investment Performance' (2014) BIS Research Paper No 190.

asset managers are free to decide the means and ways by which they will choose to undertake practices that lead to shareholder engagement, subject to the imposition of any rules by regulators to curb such behaviour. Asset managers however may be comfortable under this standard of events to adopt practices that can showcase that they meet any targets set as efficiently as possible. In the absence of fiduciary law dictating such relationships, asset managers may undertake the minimum effort possible to abide by shareholders' investment strategies and desires. They furthermore undertake it with a view to pursue financial targets as an end in itself without having due regard to wider issues that may be generated in the process, unless they are financially material.[143]

Fiduciary duties do not play much of a role in regulating the terms contained in these agreements. A Law Commission Report taken in 2014 has found that, as a matter of law, the relationship of asset managers and shareholders is unclear in regards to the rise of fiduciary duties to this, with a considerable uncertainty as to the outcome of potential litigation due to the limited cases being brought into courts to consider this issue.[144] In certain circumstances, asset managers will have to comply with the mandates of asset owners in terms of the principles being set for investment and use of shareholder power.[145] But in other instances, the law is not entirely clear on the extent to which the mandate asset managers are given is prone to give rise to fiduciary duties that extend to taking into account such considerations.[146] But even if it was, litigation as well as other considerations relevant to bringing a case against a wholly discretionary decision governed by rules that are quite open-ended would not have

[143] Ibid.

[144] Law Commission (n 133), Chapter 11.

[145] Occupational Pension Schemes (Investment) Regulations 2005 SI 2005 No 3378, Reg 4(2)-(5).

[146] Law Commission (n 133), Chapter 11.

given rise to considering how shareholder engagement should have been undertaken, let alone consider how such behaviour would be calibrated to promote specific policies and mandates.

4.4. Collective Action and Shareholder Engagement

Overall, the previous section indicated that both law and practice do little in terms of cultivating the incentives for the adoption of practices that lead to shareholder engagement that can indeed promote companies' sustainable development in the manner suggested in Chapter 2. This means that shareholder stewardship, provided that it acts as a concept that seeks to promote this end, will need to provide the regulatory framework that address the foregoing. But in addition to this, shareholder stewardship must be able to have regulatory frameworks in place that can address issues concerned with the functional capacity of shareholders and intermediaries to adopt practices that lead to shareholder engagement that promotes this end.[147] While related to the factors that affect shareholders' and intermediaries' incentives to adopt practices that lead to shareholder engagement, these issues revolve around shareholders' and intermediaries' ability to facilitate a collective action to adopt any practices that lead to this end.[148]

---

[147] Many of the issues arising from the functional capacity of shareholders to engage in corporate governance relate materially on the ability of shareholders to engage relative to the type of each shareholder, Ryan, Schneider (n 5), 557-558.

[148] Savva (n 7), 285. The theory of collective action can prove particularly useful in identifying how several of the issues shareholders are faced in the course of their engagement can be addressed. For an account of the theory of collective action see, Mancur Olson, *The Logic of Collective Action* (HUP, 1965); Russell Hardin, *Collective Action* (Baltimore, 1983); Todd Sandler, *Collective Action: Theory and Applications* (UMP, 1992); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP, 1990).

In part, the need to facilitate a collective action is reflective of the fact that shareholder engagement may involve the exercise of voting rights to discharge a certain power afforded to the general meeting, which usually requires the adoption of an ordinary or a special resolution.[149] Hence, the ability of shareholders and intermediaries to engage effectively through it will depend materially on the extent to which a matter set on vote in the general meeting is endorsed by at least the majority of shareholders or the intermediaries acting on their behalf.[150] The need for a collective action may furthermore be evident in instances where shareholder engagement takes the form of voicing concerns or other issues at a formal or informal level.[151] For such shareholder engagement to achieve its objectives, the shareholders and intermediaries undertaking it will need to be considerably influential to their addressees, to the point that the matters raised will be effectively considered as being salient enough.[152] This however may not be possible without the support of several shareholders or intermediaries that are capable of exerting such influence.[153]

Depending then on the capacity under which shareholder engagement is undertaken, a collective action will effectuate its undertaking.[154] But the extent to which this will be possible to be done in a manner conducive to promoting or contributing to the development of corporate governance for sustainability to promote companies'

[149] See Chapter 3, above, 3.4.2.

[150] Black, 'Agents Watching Agents' (n 8), 817.

[151] This may be the case even if engagement is differentiated between shareholder activism and any other initiatives taken. See Gaia Balp, Giovanni Strampelli, 'Institutional Investor Collective Engagements: Non-Activist Cooperation vs Activist Wolf Packs' (2019) Bocconi Legal Studies Research Paper No. 3449989 https://ssrn.com/abstract=3449989 accessed 10 January 2021.

[152] Gifford (n 56), 139.

[153] See on this, in general, Randall S. Thomas et al., 'The Second Wave of Hedge Fund Activism: The Importance of Reputation, Clout, and Expertise' (2016) 40 Journal of Corporate Finance 296.

[154] Balp, Strampelli (n 151).

sustainable development as outlined in Chapter 2 depends on shareholders' and intermediaries' capacity to overcome several problems inherent in the possible facilitation of such collective actions.[155] These 'collective action problems' can be categorised in three key segments.[156]

The main collective action problem lies in the identification of cost-effective ways to facilitate a collective action.[157] For example, if shareholders and intermediaries need to provide a coherent response to a proposal set forth in the general meeting, the costs required to incur will be relative to the actions needed to ensure that this response will achieve just that.[158] The same goes for proposals set forth by shareholders or intermediaries or any endeavours to express their voice formally or informally on a proactive basis. The difference lies in the fact that this may involve the consideration of additional issues and actions in need to be undertaken to ensure that shareholder engagement will achieve its intended outcomes.[159] Cost-effective methods therefore will be needed for shareholders and intermediaries not only to be incentivised to undertake such actions relative to the benefit they expect in return, but also ensure

---

[155] See on this, by reference to Australian corporate governance, Tim Bowley, Jennifer G. Hill, 'Stewardship and Collective Action: The Australian Experience' (2020) ECGI Law Working Paper No. 491/2020, https://ssrn.com/abstract=3530402 Accessed 10 May 2020.

[156] Savva (n 7), 285. The majority of authors in the literature provide accounts about shareholders' collective action problems within the context of agency theory. The Thesis below uses the literature to exemplify shareholders' collective action problems, but solely through the context of their capacity and competence to engage.

[157] See, in general, Oliver Hart and Luigi Zingales, 'Companies Should Maximize Shareholder Welfare Not Market Value' (2017) 2(2) Journal of Law, Finance, and Accounting 247.

[158] ibid, 250.

[159] The difference in initiatives will change the attitude towards the adoption of shareholder engagement on the basis of the costs inherent in its facilitation. For an initial modelling of shareholders' behaviour to this end, see, ibid.

that the processes required to be made to facilitate a collective action will not act as a crucial impediment on shareholders' incentives to undertake them.[160]

The feasibility of a collective action for issues related to companies' sustainable development is also a matter to be considered.[161] The institutional investment community is largely an heterogenous group, with often conflicting interests and means of identifying how investment and engagement practices integrate ESG.[162] Co-ordination of shareholders' and intermediaries' objectives for the facilitation of a collective action therefore, will be a significant problem for shareholders to overcome.[163] This is because such co-ordination will be needed to ensure that the end objectives of the action will be mutually considered as something desirable for all participants in it; and that the action will be informed by issues related to the sustainable performance of the company.[164]

The need to co-ordinate shareholders' and intermediaries' interests presupposes that shareholders are willing to participate in a collective action. However, the feasibility of a collective action will depend on shareholders' and intermediaries' propensity to participating in a collective action relative to the choices they have at their disposal as

---

[160] See, from the context of shareholder activism, Lucian A. Bebchuk et al. 'The Agency Problems of Institutional Investors' (2017) 31 Journal of Economic Perspectives 89.

[161] Bernard S. Black, John C. Coffee, 'Hail Britannia? Institutional Investor Behavior Under Limited Regulation' (1994) 92 Michigan Law Review 1997, 2053-2054.

[162] Ryan, Schneider (n 5), 557-560.

[163] Black, 'Agents Watching Agents' (n 8), 826-827.

[163] It is on this basis where shareholders will need to seek the support of other shareholders, so that the engagement is supported. See, Ronald J. Gilson, Jeffrey N. Gordon, 'The Agency Costs of Agency Capitalism': Activist Investors and the Reevaluation of Governance Rights' (2013) 113 Columbia Law Review 863. 867.

[164] Hart, Zingales (n 157).

well as the incentives, interests and issues that calibrate their practices.[165] Even when a collective action is beneficial, shareholders and intermediaries may have the incentive to free-ride on the efforts of others.[166] Alternatively, shareholders and intermediaries may consider that any responsibilities to beneficiaries and clients will be better discharged if they choose to exit the company in question, or defer to the current affairs of the company.[167] When too many shareholders adopt free-riding behaviour, the collective action may be deemed unfeasible to those willing to do so.[168]

Whether the institutional investment community will be able to overcome these problems will depend on the extent to which several factors exacerbate their severity. It is not the intention of the Thesis to provide an empirical or theoretical analysis about how several of these factors may or may not contribute to the severity of these collective action problems. Nevertheless, it is important to provide a brief account of these, since the upholding of shareholder stewardship's objectives will require addressing them through the regulatory instruments that seek to achieve them.

4.4.1. The Number of Participants and Dispersion of Shareholding Ownership

Among the most frequently cited factors that affect the ability to facilitate a collective action for the undertakeing of shareholder engagement is the number of particiapnts needed to facilitate one and the high dispersion of shareholding ownership.[169] From

---

[165] Kahan, Rock, 'Hedge Funds in Corporate Governance' (n 57), 1048-1057.

[166] Black, 'Agents Watching Agents' (n 8), 826-827.

[167] ibid.

[168] Edward B. Rock, 'The Logic and (Uncertain) Significance of Institutional Shareholder Activism' (1991) 79 Georgetown Law Journal 445, 461.

[169] See, for example, Henry Manne, 'Some Theoretical Aspects of Share Voting: An Essay in Honor of Adolf A. Berle (1964) 64 Columbia Law Review 1427; Frank H. Easterbrook, Daniel R. Fischel, *The*

as early as the signification of the separation of shareholding ownership from the control of the company, these two key elements have been considered by the literature to be the key contributors to disincentivising shareholder engagement.[170] But while the literature relied extensively on this remark to explain shareholder passivity through the lens of agency theory and the creation of shareholder value, few authors signified these issues in light of the processes in need to be in place for shareholder engagement that is consonant with upholding companies' sustainable economic development.[171]

The high dispersion of shareholding ownership and the number of shareholders required to participate in a collective action may be an issue of concern when shareholder engagement takes the form of the collective exercise of shareholders' voting rights. Under this, the number of participants in the action and the dispersion of shareholding ownership will be an issue that is reflective of the relative ability of shareholders and intermediaries to concentrate enough votes to pass or counter a certain resolution.[172] In such an occasion, the number of votes required to pass or counter the resolution relative to the concentration of shareholding ownership will determine the extent to which a collective action to mutually vote to pass a resolution or not will be possible to be undertaken effectively.[173] If too many participants are

Economic Structure of Corporate Law (HUP, 1991), Chapter 3; Reinier Kraakman et al., *The Anatomy of Corporate Law* (3rd edn, OUP, 2017), Chapter 3.

[170] Andrew Keay, 'Company Directors Behaving Poorly: Disciplinary Options for Shareholders' (2007) (1) Journal of Business Law 656, 664-675.

[171] See, for example, Benjamin J. Richardson, 'Financial Markets and Socially Responsible Investing' in Beate Sjåfjell, Benjamin J. Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP, 2015), 256-258.

[172] Kraakman et al. (n 169), 59-62.

[173] Maria Isabel Sáez, Damaso Riaño, 'Corporate Governance and the Shareholders' Meeting: Voting and Litigation' (2013) 14(3) European Business Organisation Law Review 343, 350-352.

required to co-ordinate the effective exercise of voting to make a decision, the dispersion of shareholding ownership and the number of shareholders will be a significant impediment for an effective shareholder engagement.[174]

The same issue may be apparent in the efforts to express voice either in the general meeting, or informally in their communications and meetings with directors and fellow shareholders.[175] This is because in these occasions, the co-ordination of shareholders' and intermediaries' interests participating in the action, and the undertaking of meetings to express their voice in a co-ordinated fashion may require the incurrence of costs that require contribution by at least all of the participants in the action for it to be made feasible. The greater the number of participants required to co-ordinate their decision in this case however, the more likely it will be that the costs that may be required to be incurred will be high enough.[176]

The contribution to the costs by all participants may determine materially the extent to which a collective action is going to be undertaken.[177] When the increase of the number of participants will increase the amount of costs in need to be incurred, the level of contribution to the costs for each participant may increase at a rate where it can exceed any benefits received.[178] In such instances, at least the choice of free-

---

[174] Arguments to this end were initially suggested in collective action problems by Olson (n 148). But see, Todd Sandler, 'Collective Action: Fifty Years Later' (2015) 164 Public Choice 195. But see, for example, the suggestions made in Jean-Pascal Gond, Valeria Piani, 'Enabling Institutional Investors' Collective Action: The Role of the Principles for Responsible Investment Initiative' (2013) 52(1) Business & Society 64.

[175] Keay (n 170), 669-670.

[176] ibid.

[177] Rock (n 168), 453.

[178] This will usually be the case if contribution to the costs is correlated with the number of shareholders required to participate in a collective action. See on this, in general, Sandler, *Collective Action* (n 148), Chapter 2.

riding or exiting may be deemed as a better choice for each shareholder.[179] This is because a participant may consider that is better off in terms of satisfying his interests either by expecting others to facilitate the action, or exit the company and invest elsewhere.[180] A growing concurrent abstention from the collective action though may lead to instances where not enough shareholders will contribute to the costs of the collective action, making it therefore unfeasible.[181]

The degree of concentration of shareholding ownership may dictate the number of participants.[182] This is because the number of participants may be subject to changes if shareholding ownership is dispersed at a level where the number of participants does not inhibit the facilitation of a collective action relative to the costs required to be incurred.[183] Thus, the number of participants may be directly related to the total of shareholding ownership percentage held to effectuate an action.[184] Provided that the enormity of costs required to be spent is not an impeding factor, the number of participants will not be material if the concentration of shareholding ownership percentage is at a rate which allows the facilitation of a collective action.[185]

---

[179] Sandler, 'Collective Action: Fifty Years Later' (n 174).

[180] Savva (n 7), 287.

[181] On the incentives of individuals to consider these issues see, in general, Albert O. Hirschman: *Exit, Voice, And Loyalty: Responses To Decline In Firms, Organizations, And States* (HUP, 1970). Cf, by reference to shareholder engagement, Eleonora Broccardo, 'Exit vs. Voice' (2020) University of Chicago, Becker Friedman Institute for Economics Working Paper No.2020-114 https://ssrn.com/abstract=3680815 accessed 29 September 2020.

[182] Rock (n 168), 457.

[183] ibid, citing Hardin (n 148).

[184] ibid, 459.

[185] Savva (n 7), 287-288.

4.4.2. Enormity of Costs and Availability of Information

The capacity under which shareholders and intermediaries will choose to adopt practices to showcase shareholder engagement will determine the particular processes required to facilitate a collective action, with the number of participants required to participate in one and the dispersion of shareholding ownership acting as possible determinants of its feasibility. But in addition to this, the enormity of costs required to be incurred to facilitate the action will be a significant factor as well.[186] The enormity of the costs required to be incurred will again depend on the capacity that shareholder engagement is undertaken.[187] But in addition to this, the extent to which shareholders will participate in an action in a manner that is responsive or proactive to directors' standard of management will also be material in the amount of costs that are in need to be incurred.

For example, where directors put a certain proposal for approval by shareholders in the general meeting, the shareholders' and intermediaries' costs to approve or disprove it may be restricted to animating their decision and the co-ordination of their interests to respond accordingly. Directors in this case will have devoted sufficient time and effort to develop these proposals to be as detailed as possible for shareholders to be able to vote on them.[188] The proposal alongside the information disclosed will be capable of being processed by service providers outside of the company, the services of which can be used by shareholders and other intermediaries to inform themselves

[186] Micheler (n 125), 37-38.

[187] Bowley, Hill (n 155), 14.

[188] On the means by which the board can effectively undertake these functions, see, in general, Blair, Stout (n 68).

about how they can possibly adopt practices that will to engaging with directors and fellow shareholders to respond to it accordingly.[189]

In the process, shareholders and intermediaries may additionally incur some costs to signify any issues related to the proposal or its effect on corporate governance either formally in the general meeting, or outside of it.[190] It is possible that these initiatives will too require less initiative from shareholders to inform themselves about the performance of the company and any issues arising from the proposal, since again these will be provided by directors.[191] Nevertheless, their initiative will require considering how the substance of the proposal will best serve their interests in light of the sustainable performance of the company across all its levels, and identify how the co-ordination of shareholders' actions will be achieved so that the resolution passed is reflective of the foregoing.[192]

The same costs will be required to be incurred in the case where shareholder engagement is proactive in nature. But in comparison to any engagement undertaken that is responsive to directors' standard of management, shareholders and intermediaries will require to possess the information required to calibrate their interests, and develop the issues and proposals that shareholders would ideally want to set forth either in the form of proposals in the general meeting or in the form of issues they would like to discuss with directors and fellow shareholders.[193] In comparison with the foregoing therefore, shareholders and intermediaries may require to incur additional expenses to configure the objectives of their practices relative to the

---

[189] Davies (n 15), 12-14.

[190] ibid.

[191] See on this, in general, Broccardo (n 181).

[192] Kraik (n 52), 542-449.

[193] Davies (n 15), 14.

sustainable performance of the company, and the ways that they should animate and co-ordinate their practices and objectives accordingly.[194]

Several parameters can affect the enormity of such costs. It is possible that organisational aspects related to the facilitation of the collective action will play a significant role in their configuration.[195] This is because the amount of costs in need to be spent are contingent on the processes by which the general meeting or any other meetings and communications outside of it are held, the protocols in place for the facilitation of any practices that lead to shareholder engagement, and the availability and processing of all material information needed to inform an action.[196]

In addition, the organisation of each shareholder or intermediary can dictate the amount of costs incurred. Depending on the nature of the action and its particularities, shareholders and intermediaries may consider having access to expertise related to informing the action or the exercise of shareholder rights that is external to their practices, which may require additional expenditure.[197] Such services may further exacerbate any incentives to adopt practices that lead to engagement.[198] Combined with difficulties in extracting information that will animate the action, the addition to the

[194] ibid.

[195] Micheler (n 125), 36-43. A number of studies in the area have focused on considering these issues in light of the particularities of several types of shareholders. See, for example, Dorothy S. Lund, 'The Case Against Passive Shareholder Voting' (2018) 43 Journal of Corporation Law 493; Lucian A. Bebchuk, Scott Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2019) 119 Columbia Law Review 2029.

[196] Several articles in the literature have made suggestions for minimising costs associated with shareholder engagement. See, by reference to voting in the general meeting, Christoph Van der Elst, Anne Lafarre, 'Bringing the AGM to the 21st Century: Blockchain and Smart Contracting Tech for Shareholder Involvement' (2017) ECGI Law Working Paper No.358/2017 https://ssrn.com/abstract=2992804 accessed 09 January 2019.

[197] Gilson, Gordon, 'Agency Capitalism' (n 163), 38-42.

[198] ibid.

costs because of these may further disincentivise them from participating in an action, especially when risk-assessment metrics and information cannot help them in identifying the reasons they should engage with companies for issues related to their sustainable development.[199]

For shareholder engagement to be able to note issues related to companies' sustainable development, it is furthermore important for relevant information that will be processed to animate the objectives of the collective action to be in place.[200] Similarly, when shareholders hold information about the willingness of other shareholders or intermediaries to participate in the action, the costs incurred in relation to tracing fellow shareholders or intermediaries willing to participate in a collective action may be considerably minimised. When both forms of information are available and ready to be processed, the enormity of costs related to the facilitation of the action can be condensed to gathering and processing it to animate the objectives and the common policy the action will pursue.[201] Furthermore, the costs that each shareholder or intermediary will require to incur may be mitigated to processing such information to consider whether participation complies with his investment strategy so as to participate in a collective action.[202]

Regulation that provides ease in the access of such information will be critical in the ability of shareholders to engage in corporate governance in a cost-effective

[199] Cullen, Mähönen (n 38), 108.

[200] Black, 'Agents Watching Agents' (n 10), 815. See on this, in general, Anne Lafarre, Christoph Van der Elst, 'Blockchain Technology for Corporate Governance and Shareholder Activism' (2018) ECGI Law Working Paper No. 390/2018, https://ssrn.com/abstract=3135209 accessed 10 January 2019.

[201] ibid.

[202] See on this, Gond, Piani (n 174).

manner.[203] But while the availability of information is clearly a parameter that can assist at easing shareholder engagement, the quality of such information will be a significant factor that can impede the substance of a collective action, and therefore its success in relation to promoting or contributing to the adoption of sustainable corporate practices.[204] It is possible that shareholders and intermediaries may be able to integrate ESG considerations in line with the parameters that can lead to conforming in aggregate to the paradigm of strong sustainability.[205] But even if this is feasible to be done effectively, shareholders and intermediaries will be unable to facilitate a collective action informed by these considerations when the information required to be held does not indicate the sustainable performance of the company at an environmental, social and economic level.[206]

---

[203] But see, Andrew Johnston, 'Market-Led Sustainability through Information Disclosure' in Beate Sjåfjell, Christopher M. Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019).

[204] The introduction of the Non-Financial Reporting Directive intends to address the pitfalls of sustainable performance reporting. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330. See on this, Deirdre Ahern, 'Turning Up the Heat? EU Sustainability Goals and the Role of Reporting under the Non-Financial Reporting Directive' (2016) 13(4) European Company and Financial Law Review 599.

[205] But see, Cullen, Mähönen (n 38), 106-108.

[206] On the challenges arising from adopting a framework for sustainability reporting, see, Georgina Tsagas, Charlotte Villiers, 'Why 'Less is More' in Non-Financial Reporting Initiatives: Concrete Steps Towards Supporting Sustainability' (2020) 10(2) The Journal of Accounting, Economics and Law: A Convivium 1. Companies continue to be oriented, governed, and develop their reporting based on prioritising their economic/financial commitments. See Bob Tricker, *Corporate Governance: Principles, Policies and Practices* (4th edn, OUP, 2019), 406-424. See also, Kent Greenfield, 'New Principles for Corporate Law' (2015) 1(1) Hastings Business Law Journal 87, 112-118; Alan Dignam, 'The Future of Shareholder Democracy in the Shadow of the Financial Crisis' (2013) 36 Seattle University Law Review, 639–94, 668.

4.4.3. Intermediation, Diversification of Investment, and Competition

The foregoing analysis indicates that a considerable number of factors may affect the facilitation of a collective action. Even within the sphere of the competence of shareholders and intermediaries to adopt practices that lead to shareholder engagement, shareholder stewardship must be able to provide responses to these with regulation that eases the incurrence of excessive costs, the access of shareholders to information, and the ability to co-ordinate themselves and engage accordingly. Of course, the severity of these issues will vary depending on the capacity upon which shareholders and intermediaries will wish to adopt practices that lead to shareholder engagement relative to the extent to which they will elect to do so in a manner that is responsive to directors' standard of management or proactive to it, and the objectives that are being sought to be facilitated.

But while addressing these issues through regulation is important, there are several parameters that policymakers should be cognisant of them in the course of endeavouring to uphold shareholder stewardship's objectives in a manner that promotes companies' sustainable development. One of these is intermediation, which falls materially on the role of asset managers in managing and holding shares.[207] Since asset managers may require considerable expenditure on outsider service providers to inform their actions, participation in an action may be considered less advantageous due to the incurrence of potentially greater costs.[208] This is because asset managers will not only need to contribute to any potential costs to facilitate the collective action, but they will have to incur all relevant expenses to animate themselves in such

[207] Wong (n 115), 406-408.

[208] Ibid.

direction. If the costs outweigh any potential benefits gained, alternative courses of action may be deemed as more viable options to that of engagement.[209]

The choice of participating in a collective action can be further affected by the fact that shareholders' and intermediaries' decision to participate in an action must be reflective of the means it is set to satisfy their clients' and beneficiaries' interests.[210] Even if an action is informed by strong sustainability's parameters, participation in a collective action will still be capable of being deemed unfeasible as a result of shareholders' and intermediaries' need to satisfy their beneficiaries' interests.[211] When a collective action requires incurring the costs outlined above, and by considering that the benefits of such action may crystallise long after meeting any expectations for value, participation may prove less attractive.[212] This can easily lead them to abstain from a collective action, especially if free-riding is possible to be made.[213]

The decision to participate in a collective action will also be one that is assessed on the basis of the enormity of cases where a shareholder or intermediary will need to undertake similar endeavours in other companies.[214] Considering that institutional shareholders and intermediaries often diversify investments in shares, the decision to participate in a collective action will depend on the provision of value from their

---

[209] But see Broccardo (n 181).

[210] This includes ensuring the management of conflicts of interests that may diverge from ensuring this goal. See, Black, 'Agents Watching Agents' (n 10), 826-827.

[211] Bowley, Hill (n 155), 2.

[212] See, Jaap W. Winter, 'Shareholder Engagement and Stewardship: The Realities and Illusions of Institutional Share Ownership' (2011) https://ssrn.com/abstract=1867564 accessed 23 December 2017.

[213] Shareholders adopting passive investment strategies are seen as having many disincentives to engage in corporate governance due to their diversified portfolios, Lund (n 195). Cf Kahan, Rock, 'Index Funds and Corporate Governance' (n 114).

[214] Julian Franks, 'Institutional ownership and governance' (2020) 36(2) Oxford Review of Economic Policy 258, 265-268.

investments from across the whole of the portfolio.[215] As such, if participation in collective action is a dilemma for a shareholder or intermediary in several companies, the decision to participate in an action concerning a specific company may be affected by the investment strategy implemented with regards to deriving value.[216]

This will be the case regardless of whether a shareholder's investment strategy is closely related to the monitoring of corporate performance. It is true that shareholders or intermediaries investing in specific companies may operate by having a small portfolio of companies which, on its face, may allow them to initiate actions on a much more frequent basis.[217] However, if they consider the value from engagement not desirable for the satisfaction of their self-interest, they may not participate in such an action.[218] On the same continuum, shareholders and intermediaries who invest by tracking changes in indexes may require to undertake the same action in a substantial number of companies that have invested.[219] Considering how they operate in relation to attracting investments though, and the fact that they may often compete for attracting beneficiaries, the decision to engage may be offset by a desire to remain competitive in capital markets. Depending on the situation and nature of the action then, the incentive not to participate in it may be a high one, regardless of type of shareholder, or engagement and investment strategies.[220]

---

[215] ibid.

[216] Gilson, Gordon, 'Agency Capitalism' (n 163), 38-42.

[217] Kraik (n 52), 510-518.

[218] ibid. cf Broccardo (n 181).

[219] Jill E. Fisch et al., 'The New Titans of Wall Street' (n 103) 52-53.

[220] ibid, 30-33.

The competition in capital markets for attracting beneficiaries may also determine the feasibility of the choice of participating in an action or not as well.[221] To be clear, beneficiaries have the potential to inform themselves of possible benefits of deriving value from their investment through the adoption of sustainable corporate practices. Nevertheless, it may be the case that the same beneficiaries will also choose to invest their assets by using the services of institutional shareholders or intermediaries whose fees are cost-effective relative to the benefits gained.[222] Even after the integration of ESG considerations, the costs required to be incurred to participate in an action may be at a level which will lead at the increase of the fees imposed on beneficiaries.[223] As a result, however, this may possibly make shareholders and intermediaries participating in an action less attractive to beneficiaries and opt for those whose fees are more economically efficient. Therefore, in order to remain competitive in the market of attracting beneficiaries, shareholders and intermediaries may consider choosing alternative courses of action to that of participation to keep up with the market for attracting beneficiaries.[224]

The amalgamation of the parameters mentioned in this subsection can possibly exacerbate further any material factors that may affect shareholders' and intermediaries' intuition to adopt any practices that lead to shareholder engagement. But the extent to which these will exacerbate their inability to overcome their collective action problems relies to a significant extent upon the intuition and prerogative of each shareholder and intermediary to address them to ensure that their engagement with companies within the sphere of shareholders' competence will remain possible.

[221] Bebchuk, Hirst (n 195), 2056.

[222] See, by reference to shareholders adopting passive investment strategies, Lund (n 195), 118-119.

[223] ibid.

[224] ibid.

Shareholders and intermediaries are those that are legally, and functionally responsible for the addressment of these issues to ensure responsive or proactive shareholder engagement. Their management of assets and use of shareholders' rights and power is the one which animates and configures the extent to which several of these issues are going to become more prevalent, and whether wider sustainability criteria are going to be factored effectively in the course of ensuring the adoption of any engagement practices.

Addressing via regulation the standard of behaviour of shareholders and intermediaries therefore is important not only to cultivate their intuition to adopt practices that lead to better shareholder engagement, but also to ensure that the effect of the foregoing parameters will not act as a significant impediment on the decision to showcase shareholder engagement.[225] Shareholders and intermediaries bear the ultimate responsibility to address these issues, making such regulation integral to the facilitation of any practices that may be required to ensure their adherence to the facilitation of collective actions effectively.[226] The extent of achieving this though will be significantly difficult. Influenced materially by the current trend and adoption of investment and engagement practices, shareholders and intermediaries may be disinclined from considering participation in a collective action, let alone factoring wider sustainability criteria without an apparent evidence of maximisation of their profits in the process.[227] Informed by these however, it is possible that they may not provide due regard to adopt any engagement practices. This is because they may be simply

[225] On the enforcement of shareholder stewardship and the elements in need to be considered, see, in general, Konstantinos Sergakis, 'Legal vs Social Enforcement of Shareholder Duties' in Hanne S. Birkmose, Konstantinos Sergakis (eds), *Enforcing Shareholders' Duties* (EE, 2019).

[226] Chiu, Katelouzou (n 6) 79.

[227] ibid.

considered as being nothing more than a mere formality that is in need to be undertaken, which may be deemed as important so long as greater profits are indicative from being passive.

4.5. Conclusion

In acknowledging the justification of shareholder stewardship as a concept that can ensure that shareholder engagement can promote companies' sustainable development, this Chapter provided an account of the issues that shareholder stewardship should address to achieve this. By approaching the analysis of these issues through the lens of promoting companies' sustainable development as outlined in Chapter 2 and the signification of corporate governance for sustainability as a means to achieve this, this Chapter has outlined that shareholder stewardship should first address the incentives of shareholders and intermediaries that lead to the current standard of shareholder engagement. The Chapter identified that should shareholders and intermediaries adopt practices that lead to shareholder engagement, they either do so with the aim to opportunistically satisfy their interests in profits regardless of the effect on companies in the process or develop practices that may lead to aggregate sustainable development that adheres more to the paradigm of weak, instead that of strong, sustainability.

The reasons behind the calibration of shareholders' incentives relate to the key characteristics and practices of shareholders with regards to the means they develop their investment and engagement practices. But despite these, the Chapter has identified that in general, shareholders' adherence to the norms revolving around shareholder primacy and the belief that markets will address these issues on the basis of market efficiency lead them to having these incentives. Because of shareholders'

adherence to these, the Chapter argued that the current systemic behaviour and structure of capital markets lead them to calibrating their incentives in the manner identified above, regardless of their ability to acknowledge that the wider neglect of sustainability issues may have a detrimental impact on companies and their interests as well.

While addressing the incentives generating the current standard of shareholder engagement is important, the Chapter showcased that shareholder stewardship should additionally address issues that relate to the functional capacity of shareholders and intermediaries to adopt practices that lead to shareholder engagement that promotes companies' sustainable development. The Chapter considered these issues in light of the need to undertake a collective action to showcase shareholder engagement effectively. Through this, the Chapter identified that shareholders and intermediaries will have to overcome several collective action problems which relate to identifying cost-effective methods to undertake their engagement practices, the co-ordination of their interests and practices and the alleviation of possible free-riding by other shareholders.

Depending on the capacity under which shareholder engagement will be undertaken, the Chapter identified several factors which may render the severity of these problems severe enough, to the point of making the collective action unfeasible. These issues traditionally revolve around the number of shareholders and required to participate in corporate governance, the high dispersion of shareholding ownership and the enormity of costs. But in addition to these, the Chapter identified the availability and quality of information consistent with the integration of ESG considerations to promote companies' sustainable development, and several parameters which their severity

depends materially on the practices undertaken by intermediaries in terms of utilising shareholder power.

The convergence of the foregoing lead the Thesis to argue that shareholders' current standard of engagement diverges significantly from adopting practices that can actually promote or contribute to the development of corporate governance for sustainability. In order for shareholder stewardship's objectives to be upheld, even within the context that Chapter 3 justified its existence, policymakers should adopt regulatory instruments which will be able to address these effectively. Most of these issues appear to inform policymakers' endeavours to ensure that shareholders' practices will be adopted in a manner that can ensure companies' sustainable economic development, albeit through the rationale identified in Chapter 3. Through the Stewardship Code and the rules that transposed SRDII, there is an expectation that these issues will be addressed effectively. Whether this will be the case, and the extent to which there is room for potential reform or reconceptualisation of shareholder stewardship will be considered in the next and final Chapter.

5: The Effect of the Shareholder Stewardship's Current Legal Regime and a Call for its Reconceptualization

5.1. Introduction

The analysis made in Chapter 4 indicates that shareholder stewardship must be able to address several issues related to the objectives and functional capacities of shareholders and their intermediaries to undertake practices that lead to shareholder engagement that promotes companies' sustainable development. This is especially the case when shareholder engagement is seen within the context identified in Chapter 2 and the pursuit of corporate governance for sustainability as a means of promoting companies' sustainable development. Policymakers seem to be aware of most of these, albeit on the basis of regulating shareholder engagement through the lens and rhetoric of agency theory.[1] Through the introduction of the rules that transpose the rules of SRDII and the 2020 Stewardship Code, policymakers aspire not only to encourage responsible shareholder engagement, but also address most of these issues so that shareholder engagement becomes an aspect of corporate governance that upholds companies' sustainable development.[2]

---

[1] FRC, Proposed Revision to the UK Stewardship Code (January 2019) https://www.frc.org.uk/getattachment/8caa0e9c-58bb-41b2-923e-296223755174/Consultation-on-Proposed-Revisions-to-the-UK-Stewardship-Code-Jan-2019.pdf accessed 10 January 2020,1-8. See also, Chapter 3, above, 3.3. above.

[2] Ibid. This has been identified in the literature as a form of an investor-led governance that will address wider social, environmental and economic issues. See, Dionysia Katelouzou, 'Reflections on the Nature of the Public Corporation in an Era of Shareholder Activism and Shareholder' in Barnali Choudhuri, Martin Petrin (eds) *Understanding the Company: Corporate Governance and Theory* (CUP, 2017). But see Chapter 3, above, 3.4-3.5.

While It is too early to deduct its effectiveness, this Chapter argues that there are reasons to believe that shareholder stewardship's current legal regime will be an inadequate means of regulating shareholder engagement to become a means of promoting companies' sustainable development.[3] This Chapter supports this argument on a twofold basis. Firstly, the Chapter posits that it is unclear whether the SRDII's and 2020 Stewardship Code's disclosure rules and heavy reliance on self-regulation are capable of addressing the issues arising from the current standard of shareholder engagement on their own.[4] Secondly, it is questionable whether the orientation of the objective set by the SRDII and 2020 Stewardship Code for shareholders and intermediaries to pursue in the course of adopting practices that lead to shareholder engagement is fit to provide the intellectual premises required for the promotion of companies' sustainable development.[5]

The amalgamation of these lead the Chapter to argue that, at best, the fruition of shareholder stewardship's objectives through the rules that transpose SRDII and the 2020 Stewardship Code may lead to shareholder engagement that promotes companies' sustainable development that can lead in facilitate aggregate sustainable development that conforms to the paradigm of weak sustainability.[6] Given the scope

[3] A similar argument was raised in the literature. See, Deirdre Ahern, 'The Mythical Value of Voice and Stewardship in the EU Directive on Long-Term Shareholder Engagement: Rights Do Not an Engaged Shareholder Make' (2018) 22 Cambridge Yearbook of European Legal Studies 88.

[4] The making of this argument is by no means novel. See, by reference to the 2010 Stewardship Code, Brian R. Cheffins, 'The Stewardship Code's Achilles' Heel' (2010) 73(6) The Modern Law Review 1004.

[5] A similar argument was made by reference to SRDII in Rafael Savva, 'Regulating Institutional Shareholders in the Medium to the Long-term: An Analysis of the 2017 Shareholder Rights Directive's Shareholders' Duties' (2020) 14 (1) International Company and Commercial Law Review 1.

[6] The desirability of this phenomenon is often seen as going against the development of appropriate corporate governance practices. See, for example, Lorraine E. Talbot, 'Polanyi's Embeddedness and Shareholder Stewardship: A Contextual Analysis of Current Anglo-American Perspectives on Corporate Governance' (2011) 62 Northern Ireland Legal Quarterly, 451.

and the effect of shareholder engagement on corporate governance, however, the Chapter argues that the time is ripe to consider how shareholder engagement is going to be regulated so that it meaningfully supports companies' sustainable development on a basis that is informed by all such issues that would make it a means for promoting aggregate sustainable development.

The Chapter argues that shareholder stewardship has the potential to act as the regulatory concept that can set the legal framework which can achieve this.[7] But for this potential to materialise, the normative rationale of shareholder stewardship must be reconceptualised. This relates to the expectations set on shareholders and their intermediaries in the course of adopting their practices that may lead to shareholder engagement, and the way shareholder stewardship's objectives are sought to be upheld relative to promoting corporate and aggregate sustainable development.[8] Having in mind the suggestion made in Chapter 2 for reconceptualising the normative account for the corporate objective, the Chapter suggests that shareholder stewardship should be understood as a regulatory concept that must seek to ensure that shareholder engagement is undertaken in a manner that is in line with facilitating companies' sustainable development for their own sake through promoting corporate governance for sustainability.[9]

[7] A similar argument is found in Dionysia Katelouzou, 'Shareholder Stewardship: A Case of (Re)Embedding Institutional Investors and the Corporation?' in Beate Sjåfjell, Christopher M. Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019).

[8] Ibid, 590.

[9] See Chapter 2, above, 2.5. On the competence and capacity of shareholders to engage in corporate governance see, Chapter 3, above, 3.4-3.5.

To do this effectively, the Chapter argues that shareholder stewardship should cultivate the responsibility on shareholders and their intermediaries to undertake their practices that lead to shareholder engagement in a manner that is conducive to facilitating the foregoing purpose. The introduction of disclosure rules as those contained in the rules transposing SRDII and the 2020 Stewardship Code is an important step to this end. Nevertheless, it is merely an initial one towards ensuring that such a goal is materialised. The Chapter argues that such responsibility should extend to the imposition of liabilities for potentially refraining from undertaking practices that lead to shareholder engagement of this nature. This may include introducing duties owed to the company that relate to the ability of shareholders to collectively vote in the general meeting as decision-makers in companies.

5.2. The Potentially Limited Effect of Shareholder Stewardship's Current Legal Regime.

Chapter 4 identified that shareholder stewardship has a considerable number of issues to address, especially when one acknowledges that its existence is justified based on the rationale that it can seek to ensure that shareholder engagement is undertaken responsibly for the promotion of companies' sustainable development.[10] To a great extent, shareholder stewardship is called to counter the opportunistic tendencies of shareholders and their intermediaries to undertake practices that lead to shareholder engagement that seeks to secure their interests in profit regardless of the possible effects this may have on companies' longevity and resilience or the wider effect of such practices on the environment and societies.[11] From a more functional

[10] See Chapter 3, above, 3.5.

[11] See Chapter 4, above, 4.2 - 4.3.

perspective, shareholder stewardship must also consider how several of the factors that exacerbate the collective action problems shareholders and intermediaries face will be addressed, so that they will at least be able to adopt practices that lead to shareholder engagement that is informed by ESG criteria and promotes companies' sustainable development in line with them.[12]

Policymakers seem to be aware of the existence of most of these issues. Since the resurgence of the 2008 financial crisis, various reports and consultation papers in the UK and the EU have noted the issues identified in Chapter 4, and acknowledged that it is imperative to solve them so that shareholder engagement contributes meaningfully to the longevity and resilience of companies.[13] Through the transposition of the rules contained in SRDII as well as the introduction of the 2020 Stewardship Code, policymakers in the UK and the EU aspire to address most of these issues so that the objectives of shareholder stewardship in relation to shareholder engagement are upheld. This is aspired to be done on a basis that seeks both to secure shareholders' beneficiaries' interests and help in facilitating effective relationships with companies as well as with the environment and societies so that shareholder engagement becomes a means of securing companies' sustainable development as a vehicle for aggregate sustainable development.[14]

---

[12] See Chapter 4, above, 4.4.

[13] FRC, 'Developments in Corporate Governance and Stewardship 2016' (January 2017) https://www.frc.org.uk/getattachment/ca1d9909-7e32-4894-b2a7-b971b4406130/Developments-in-Corporate-Governance-and-Stewardship-2016.pdf accessed 28 June 2019; John Kingman, 'Independent Review of the Financial Reporting Council' (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767387/frc-independent-review-final-report.pdf accessed 10 January 2020.

[14] FRC, 'Proposed Revision to the UK Stewardship Code' (n 1).

By viewing shareholder engagement as capable of acting as a monitoring mechanism of corporate management and performance, policymakers through the rules that transpose SRDII and the introduction of the 2020 Stewardship Code aspire that shareholders will be able to act as norm-enforcers in companies for the development of good corporate practices.[15] They furthermore expect of shareholders not only to integrate ESG considerations in their investment practices, but also ensure that their practices that lead to shareholder engagement will lead in the creation of more sustainable outcomes at the investee company level, which will eventually lead to promoting the development companies' sustainable development to become a means to this end.[16]

No doubt, both the SRDII and the 2020 Stewardship Code are the most detailed attempts to date that seek to address the effect and scope of shareholder engagement in corporate governance.[17] They also act as the most genuine of attempts to ensure that shareholder engagement will be made in a manner that sustainable outcomes will accrue in the process.[18] Nevertheless, there are several reasons to suggest that both

[15] ibid, 6-8.

[16] ibid. In addition to transposing SRD II, this expectation emanates from various other consultations indicating the need for shareholders to adopt these practices. See, for example, DWP, 'Clarifying and Strengthening Trustees' Investment Duties' (June 2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739331/response-clarifying-and-strengthening-trustees-investment-duties.pdf accessed 02 February 2021; Implementation Taskforce 'Growing a Culture of Social Impact Investing in the UK: Final Report' (June 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811914/Final_report_by_the_Implementation_Taskforce_Growing_a_culture_of_social_impact_investing_in_the_UK_2019.pdf accessed 02 February 2021.

[17] Iris H-Y Chiu, Dionysia Katelouzou, 'Making a Case for Regulating Institutional Shareholders' Corporate Governance Roles' (2018) (1) Journal of Business Law 67, 86.

[18] The aspiration that stewardship codes are capable of achieving this goal is not endemic to the UK. Since the introduction of the SRD II, several EU Member States have adopted similar codes to regulate

frameworks will prove an inadequate means of regulating shareholders' practices in a manner that will effectively uphold shareholder stewardship's objectives, let alone steer the institutional investment community towards adopting practices that can lead to shareholder engagement that promotes or contributes effectively to companies' sustainable development.[19] The reasons behind this extend to the way the rules transposing SRDII and the 2020 Stewardship Code are expected to be complied by shareholders, and the way that their milieu of principles is endeavoured to be enforced on them on the basis of the overarching objective set for shareholders and intermediaries to pursue in the process. Each of these issues will be considered below.

5.2.1. Attribution of Responsibility and Enforcement

Primarily, the criticism against shareholder stewardship's current regulatory framework relates to the possible effectiveness of the rules transposing SRDII and the 2020 Stewardship Code with regards to the way these are expected to steer shareholders and intermediaries towards adopting practices that lead to shareholder engagement that truly promotes sustainable business practices.[20] As mentioned in Chapter 3, policymakers in both the EU and the UK have been traditionally supportive of active shareholder engagement as a means of correcting corporate governance failures. Through the tenets of shareholder stewardship and the regulation of the

---

shareholders' practices. See, in general, Dionysia Katelouzou, Konstantinos Sergakis, 'When Harmonization is Not Enough: Shareholder Stewardship in the European Union' (2021) European Business Organisation Law Review https://link.springer.com/article/10.1007/s40804-020-00198-5 accessed 10 February 2021.

[19] See Chapter 2, above, 2.5.2.

[20] On the economic rationale for regulating shareholders' practices see, Hanne S. Birkmose, 'Duties Imposed on Specific Shareholders Only, and Enforcement Implications' in Hanne S. Birkmose, Konstantinos Sergakis (eds) *Enforcing Shareholder Duties* (EE, 2019) 40-43.

institutional investment community based on them, it is aspired that shareholder engagement is going to be undertaken more responsibly to this end.

This is assumed the case if shareholders and intermediaries adopt practices with a view to promote the longevity and resilience of companies on the one hand, and the welfare of their end investors and clients on the other, as key to ensuring social and economic prosperity. This is generally understood through the rhetoric and understanding of agency theory, with the creation of shareholder value in the long-term usually being deemed as a proxy or a metric for identifying whether the foregoing objectives are achieved.[21] With the addition and greater embracement of ESG considerations, it is furthermore aspired that shareholder stewardship will not only ensure that shareholder engagement will be undertaken solely for issues that will ensure the financial resilience and longevity of companies, but also be concerned with all those things required to secure companies' sustainable development as material of achieving the aforementioned.

The foundation of the means by which this is aspired to be achieved is found in the rules that transpose SRDII. As outlined above, SRDII requires pension funds, insurers and asset managers to disclose on a comply-or-explain basis their engagement policy and the way that this is calibrated by taking several factors into account, including that of the financial and non-financial performance of investee companies.[22] The 'opt-out' nature of the 'comply-or-explain' provision may be deemed at first as a soft-law means of regulating shareholder engagement, albeit through the imposition of 'hard law' disclosure requirements. Nevertheless, due to the 'hard law' nature of the provisions

[21] Chapter 3, 3.3-3.5 above. But see Chapter 5, 5.2.2, below.

[22] See Chapter 3, above, 3.4.

that transpose SRDII, it can be noted that its imposition is not far from postulating for a responsibility to showcase actions that lead to shareholder engagement that takes into account factors which extend beyond purely financial considerations.[23] This is can be said to be the case especially when one takes into account the rules imposed on asset owners and asset managers by SRDII and previous legislation in relation to the disclosure of investment management strategies on a mandatory basis, which call to identify the ways that wider ESG criteria are taken into account.

Although not an express provision, then, the mandatory disclosure obligations related to asset owners' and asset managers' investment management strategy, together with the need to at least explain how the engagement policy is not in conformity with SRDII's provisions, are enough to set an expectation that shareholder engagement is going to be undertaken with a view to consider how ESG criteria are taken into account. Such an expectation, especially due to the mandatory nature of the disclosure rules related to investment management strategies, may be seen as elevated to become an expectation that such shareholder engagement is going to be undertaken at a minimum extent in accordance with SRDII's provisions in relation to shareholder engagement. This may be deemed to be based on the idea that the rules imposed by SRDII are acting as a top-down premise that seeks to 'nudge' shareholders and their intermediaries towards adopting practices that conforms with its rationale, with the rules adopted to transpose it acting as a manifestation of the minimum means possible to uphold shareholder stewardship's objectives as they are manifested in the principles of SRDII.

[23] Iris C-Y Chiu, Dionysia Katelouzou, 'From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?' in Hanne Birkmose (ed), Shareholders' Duties (Kluwer Law International, 2017), 117.

This minimum standard and the setting of an expectation on shareholders and intermediaries to adopt practices that conform to shareholder stewardship's rhetoric can be said that is complimented by the 2020 Stewardship Code. Comparatively, the 2020 Stewardship Code contains provisions related to shareholder engagement that extent beyond the factors that SRDII calls shareholders and intermediaries to consider in both their investment management strategy and the policy they have in place in relation to the practices they adopt that can lead to shareholder engagement.[24] The Stewardship Code makes explicit references to sustainability and companies' sustainable development, in addition to promoting the consideration of material factors in the development of companies as well as the exposition of shareholders and intermediaries to risks that extend beyond those that are financially material.[25] These include, inter alia, environmental degradation as well as social and wider economic issues that are of relevance to shareholders and intermediaries.[26]

Being soft-law in nature, however, the 2020 Stewardship Code, like its predecessors, introduces more like a principles-based, soft-law approach in regulating shareholders' and intermediaries' practices. In essence therefore, the 2020 Stewardship Code seems like it sets a framework of best-practice principles that seek to raise awareness about how shareholders and intermediaries will pursue their practices, rather than mandatory legal rules that they are obliged to comply with.[27] Their spirit, however, is aspired that it will be upheld by shareholders and their intermediaries in the course of

[24] FRC, The UK Stewardship Code 2020, https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf accessed 02 February 2020 (2020 Stewardship Code), 4.

[25] Ibid.

[26] Ibid.

[27] For a critical account about the principles-based approach of regulating corporate governance, see, in general, Marc T. Moore, *Corporate Governance in the Shadow of the State* (Hart Publishing, 2013).

adopting their practices, to the point where they can showcase this by disclosure in compliance with both the Stewardship Code and the rules transposing SRDII.[28] While the principles contained in the 2020 Stewardship Code are by no means mandatory in application, they can be seen as a set of expectations of a higher standard, or 'organisation rules', imposed on shareholders and their intermediaries regarding the standard of their practices. Their imposition on a soft-law basis is capable of providing shareholders with the scope to self-regulate themselves accordingly to showcase their compliance with them, while remaining compliant with the rules that transposed SRDII that provide the minimum standard upon which such compliance is going to be undertaken.[29]

As mentioned in Chapter 3 though, the scope of shareholders' and intermediaries' self-regulation in relation to the 2020 Stewardship Code is not completely voluntary. Once shareholders and their intermediaries elect to be bound by it, the principles of the 2020 Stewardship Code are expected to be applied in their totality. Furthermore, the disclosures made by shareholders and their intermediaries in compliance with the Stewardship Code are aspired to showcase not only the policies implemented in relation to the investment and engagement practices shareholders undertake, but also signify the outcomes of their compliance with the principles of the 2020 Stewardship Code.[30]

[28] This approach of regulating corporate governance that has been consistently adopted over the years, even following the financial crisis in 2008. But see, Iris H-Y Chiu, 'Reviving Shareholder Stewardship: Critically Examining the Impact of Corporate Transparency Reforms in the UK' (2014) 38 Delaware Journal of Corporate Law 983, 986-1014.

[29] On the soft-law regulation of corporate governance, see, Melvin A. Eisenberg, 'Corporate Law and Social Norms' (1999) 99 Columbia Law Review 1253.

[30] 2020 Stewardship Code (n 24), 4.

Although compliance with its principles relies on self-regulation, the 2020 Stewardship Code cannot be considered as being purely bottom-up, market-driven either, in the sense that shareholders and their intermediaries will determine freely how such compliance will be made.[31] Policymakers expect of shareholders' beneficiaries to ensure that shareholders and their intermediaries are adopting practices that seek to uphold shareholder stewardship's objectives through their compliance with the principles of the 2020 Stewardship Code.[32] This certainly raises the expectation on shareholders' beneficiaries to adopt practices that will ensure that shareholders and their intermediaries will comply with the spirit of the principles contained therein, and aspire that they will take measures to ensure shareholders' and their intermediaries' effective compliance with it to secure their ultimate interests.[33] At the same time, the FRC is overseeing shareholders' and their intermediaries' compliance with the Stewardship Code as well. Since 2016, the FRC has introduced a tiering exercise to assess the quality of disclosures, and tiers them accordingly in two categories that showcase the level of compliance of shareholders with the Code's principles.[34] Through this, the FRC is expecting to reinforce the compliance of shareholders and

---

[31] See Chapter 3, above, 3.3.

[32] FRC, 'Proposed Revision to the UK Stewardship Code' (n 1); FRC, FCA, 'Building a Regulatory Framework for Effective Stewardship' (Discussion Paper DP19/1, January 2019) https://www.fca.org.uk/publication/discussion/dp19-01.pdf accessed 10 January 2020.

[33] This resembles the Kay Review's recommendations with regards to creating investment chains that meet current and future needs based on trust, confidence and cooperation. See, BIS, 'The Kay Review of UK Equity Markets and Long-Term Decision Making' (Final Report, 2012) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf accessed 13 March 2018 (Kay Review), 86-88.

[34] FRC, 'Developments in Corporate Governance and Stewardship 2015' (January 2016) https://www.frc.org.uk/getattachment/a0a980b7-17bc-43b5-adcc-b2096a1528ae/Developments-in-Corporate-Governance-and-Stewardship-2015-FINAL.pdf accessed 10 May 2020, 12-14.

their intermediaries with the principles of the Code, and incentivise them to adopt practices that will steer them towards becoming more responsible in the course of developing their strategies and practices.[35]

Essentially then, the 2020 Stewardship Code can be understood as a framework that seeks to mutually reinforce state and market pressures to facilitate the imposition of the substance of its principles.[36] The 2020 Stewardship Code's framework of principles is being imposed by the State to uphold the wider sustainability considerations that shareholders should be taking into account in the course of adopting their practices so that the public interest accruing from their effect on corporate governance is being upheld.[37] But instead of imposing this through mandatory rules, it is expected that a soft-law disclosure regime will provide shareholders and their intermediaries with the flexibility to conform their practices accordingly, and showcase how the outcome of their efforts is in conformity with the Code's principles.[38]

Together with the rules that transpose SRDII that act as the foundation for ensuring that shareholders and intermediaries integrate such considerations in the course of adopting practices that lead to shareholder engagement, the 2020 Stewardship Code seeks to symbiotically provide a framework by which shareholders and their

---

[35] Ibid; FRC, 'Annual Review of Corporate Governance And Reporting 2017/2018 (October 2018) https://www.frc.org.uk/getattachment/f70e56b9-7daf-4248-a1ae-a46bad67c85e/Annual-Review-of-CG-R-241018.pdf accessed 10 May 2020. The FRC will review compliance with the Stewardship Code based on the Tiering exercise introduced towards the end of 2021.

[36] A similar point was made by reference to the Corporate Governance Code in Marc T. Moore, Martin Petrin, *Corporate Governance: Law, Regulation and Theory* (Palgrave, 2017), 62-64.

[37] Chiu, 'Reviving Shareholder Stewardship' (n 28), 986-987, 1003.

[38] But see, by reference to the 2012 Stewardship Code, Konstantinos Sergakis, 'The UK Stewardship Code: Bridging the Gap Between Companies and Institutional Investors (2013) 47(1) Revue juridique Thémis de l'Université de Montreal 109, 135-140.

intermediaries will conform to shareholder stewardship's rationale on a higher level. With the rules transposing SRDII acting as the minimum regulatory baseline for identifying the expectations set on shareholders and intermediaries with regards to shareholder engagement, the 2020 Stewardship Code's principles and provisions seek to raise greater awareness about how shareholder engagement should be undertaken by raising higher standards that go beyond SRDII's rules, albeit on a basis that give considerable flexibility to embrace such standards based on their particularities. In doing so, the 2020 Stewardship Code provides the flexibility to shareholders and their intermediaries to comply with the disclosure requirements set by the rules transposing SRDII, while endeavouring to meet the expectations set by them by complying with the higher standards set by the 2020 Stewardship Code.

When shareholders' beneficiaries are dissatisfied with the outcomes that have been disclosed, it seems that it is expected of them, in the first place, to communicate their dissatisfaction, and facilitate an effective dialogue by which they will endeavour to steer shareholders and their intermediaries towards adopting more practices that conform with shareholder stewardship's rationale. In case there is limited compliance, it is possible to see that policymakers aspire that the same beneficiaries will take a more robust approach by possibly rescinding their investments, or adopt 'name and shame' practices against shareholders for their failure to adopt more responsible and sustainable investment and engagement practices.[39] Given that such practices may undermine shareholders' and their intermediaries' relative standing and competitive advantage, they may act as a form of an accountability mechanism which will ensure

[39] The extent to which there is a 'market' demand for stewardship is still unclear given the limited evidence in the literature. See Dionysia Katelouzou, Eva Micheler, 'The Market for Stewardship and the Role of the Government' (2020) ECGI Law Working Paper 556/2020, https://ssrn.com/abstract=3704258 accessed 13 October 2020.

that shareholders and their intermediaries will 'discipline' themselves and adopt practices that conform more readily with the principles of the 2020 Stewardship Code and the rules that transpose SRDII.[40]

These forms of compliance can be assumed that it is expected that they will be reinforced by the overseeing of shareholders' and their intermediaries' disclosures as well by the relevant regulators. Non-compliance with the rules transposing SRDII is likely to impose fines upon shareholders and their intermediaries, either from the FCA or the Pensions Regulator. Possible deference from the principles of the 2020 Stewardship Code are subject to enforcement by the FRC as well. Shareholders' and intermediaries' positioning in the lesser end of the FRC's tiering exercise may incentivise shareholders to conform their practices in accordance with the spirit of the principles contained in the 2020 Stewardship Code to improve their position in them, so that they remain competitive in the market while showcasing that their practices are actually sustainable.[41] The oversight from these regulators may be seen that it can act as a means of assisting shareholders' beneficiaries to undertake the foregoing practices to keep shareholders and their intermediaries accountable to them for their practices.[42] This is so in the sense that the tiering of disclosures and the fines imposed may provide shareholders' beneficiaries with the information required to undertake the aforementioned, and thus enhance their position to act as norm enforcers in their

[40] The introduction of the 2020 Stewardship Code and the prioritisation of beneficiaries' interests seems to be pointing to this direction. See, for example, FRC, FCA (n 32), 20, 22-23, 25, 31.

[41] This may relate to reputational incentives to adopt these practices as well. See, by reference to shareholders adopting passive investment strategies, Marcel Kahan, Edward B. Rock, 'Index Funds and Corporate Governance: Let Shareholders Be Shareholders' (2020) 100 Boston University Law Review 1771, 1797-1800.

[42] Iris H-Y Chiu, 'Private vs Public Enforcement of Shareholder Duties' in Hanne S. Birkmose, Konstantinos Sergakis (eds) *Enforcing Shareholders' Duties* (EE, 2019), 125.

respective capacity for the failure of shareholders and their intermediaries to adopt more appropriate practices.[43]

Undoubtedly, the existence of the rules transposing SRDII and the 2020 Stewardship Code as well as the endeavour to enforce their principles in the manner outlined above can be useful in the regulation of shareholders' investment and engagement practices. Especially when seen through the context of cultivating sustainable business practices, the development and regulation of shareholders' and intermediaries' practices cannot be ensured solely through imposing hard-law measures in the form of fiduciary duties that are enforced by formal legal enforcement mechanisms.[44] This is because the imposition of any rules on shareholders and their intermediaries, and the security of their compliance will depend much on shareholders' and their intermediaries' ability to do so relative to the strategies implemented and their respective organisation to see them coming to fruition.[45] Having in place a regulatory framework that is flexible enough to give space for shareholders and intermediaries to comply with any standards of shareholder engagement set by the law can possibly assist in regulating such practices alongside hard-law rules in a way that can ensure that certain elements revolving around the standard and functioning of shareholders' and intermediaries' practices will be addressed.[46]

---

[43] But see, Ewan McGaughey, 'Does Corporate Governance Exclude the Ultimate Investor?' (2015) 16(1) Journal of Corporate Legal Studies 221.

[44] Konstantinos Sergakis, 'Legal vs Social Enforcement' in Hanne S. Birkmose, Konstantinos Sergakis (eds) *Enforcing Shareholders' Duties* (EE, 2019), 128-134.

[45] But see Roger M Barker, Iris H-Y Chiu, *Corporate Governance and Investment Management: The Promises and Limitations of the New Financial Economy* (EE, 2017), 131.

[46] Sergakis, 'The UK Stewardship Code; (n 38), 135.

Regardless, it is questionable whether the foregoing alone will be an adequate means of securing that shareholders and intermediaries will adopt more responsible engagement practices relative to upholding in the process companies' sustainable development. Shareholders' current objectives to adopt engagement practices for the creation of shareholder value as a priority regardless of the effects in the process indicate that shareholders may prove unable to self-regulate themselves in a manner that the objectives of shareholder stewardship will be upheld.[47] This may be stated to be the case especially when one factors that the regulation of shareholders and their intermediaries at a capital market level is providing considerable ground for them to adopt practices that conform to this end. Because of this, it is possible that shareholders and their intermediaries may continue adopting practices that entail making systemic errors with regards to managing the potential risks accruing from their practices, since many of the considerations they should have taken into account may be side-lined if there is limited evidence that their factoring will improve the generation of greater financial value for themselves as a priority.[48]

Self-regulation cannot provide better results with regards to shareholders' and intermediaries' ability to overcome the challenges arising from their functional capacity to engage in corporate governance either. As mentioned above, shareholders' and intermediaries' ability to adopt practices that lead to shareholder engagement requires

---

[47] See Chapter 4, above, 4.2-4.3. Since the Kay Review, it has been signified that shareholders must re-evaluate and re-organise their investment and engagement practices to ensure that their engagement leads to socially beneficial outcomes. This includes, among other elements, the reduction of intermediation and diversification for the purposes of meaningful, 'long-term' shareholding. See, Kay Review (n 33), Chapters 5-8.

[48] Leo E. Strine, 'One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long-Term Unless Their Powerful Electorates Also Act and Think Long-Term?' (2010) 66 Business Lawyer 1,16-18. See also, Chapter 2, above, 2.4; 5.2.3, below.

the facilitation of a collective action.[49] But for this to be done effectively, both shareholders' incentives and their ability to overcome their collective action problems depends on several factors that often extend beyond shareholders' ability to control them, unless some co-ordinating or incentivising factors or processes exist.[50] But even if these are in place, it is questionable whether shareholders' and intermediaries' standard of behaviour will change if their objectives and incentives to adopt practices that lead to shareholder engagement remain calibrated towards factoring ESG considerations solely when there is a 'business case' for it.[51]

In the absence of a regulatory framework that address these issues more readily therefore, the imposition of Stewardship Code's and SRDII's disclosure requirements can only go so far as setting the expectations of the outcomes of shareholder engagement, but without having in place the mechanisms required to see them coming into fruition beyond aspiring that shareholders and their intermediaries will self-regulate themselves to this end. [52] Even if shareholders' and their intermediaries' disclosures do showcase the outcomes of compliance with the principles of the Stewardship Code and the rules transposing SRDII, they will probably only showcase the means shareholders have taken practices that show compliance with the principles contained therein.[53] Shareholders and intermediaries though have significant latitude

[49] See Chapter 4, above, 4.4.

[50] ibid.

[51] See on this, in general, Gaia Balp, Giovanni Strampelli, 'Institutional Investor Collective Engagements: Non-Activist Cooperation vs Activist Wolf Packs' (2019) Bocconi Legal Studies Research Paper No. 3449989 https://ssrn.com/abstract=3449989 accessed 10 January 2021.

[52] Chiu, 'Reviving Shareholder Stewardship' (n 28), 1012-1014.

[53] See, by reference to the application of the SRD II, Birkmose 'Duties Imposed on Specific Shareholders' (n 20), 56-58. See also, by reference to corporate governance codes, David F. Larcker, Brian Tayan, 'Seven Myths of Corporate Governance' (2011) Stanford University Closer Look Series No.CGRP-16, https://ssrn.com/abstract=1856869 accessed 23 January 2018.

to consider the level of their compliance with them. This means that they can still elect to determine the level of integration of wider sustainability considerations, even if their integration is stated to be material given the considerations that are in place by regulation. Hence, they still have considerable discretion to pick and choose the considerations they will take into account so long as financial value for the satisfaction of their interests in profit is generated as a priority in light of the fact that shareholder primacy's influence over them is dictating such action in the first place.[54] On the same continuum, they still have considerable discretion to elect whether engagement is feasible, even if it is expected that such engagement should ensure that companies will be monitored to be driven on a more sustainable path.[55]

Coupled with the orientation of the overarching objective set by the 2020 Stewardship Code and the rules transposed by SRDII for shareholders to pursue in the course of adopting their practices, it is possible that self-regulation will probably lead to compliance with the spirit of these principles so long as it is evident that shareholder value is created as a priority. As a result, however, it is possible to see that such disclosures will probably only showcase the effect of shareholder engagement in companies by reference to the means it helps in the creation of shareholder value, without necessarily having any indication about whether such engagement was done with a view to promote corporate and aggregate sustainable development.[56] Having in mind the analysis that will be made in the next Section however, it is unclear whether

[54] The definition of sustainability is still an issue that needs to be addressed more effectively. See, Georgina Tsagas, Charlotte Villiers, 'Why 'Less is More' in Non-Financial Reporting Initiatives: Concrete Steps Towards Supporting Sustainability' (2020) 10(2) The Journal of Accounting, Economics and Law: A Convivium 1, 6-10.

[55] Birkmose, 'Duties Imposed on Specific Shareholders' (n 20), 56-58. See also, 5.2.3, below.

[56] ibid, 56-58.

such disclosure, and, consequently, the enforcement of these principles on the basis of showcasing how shareholders' interests in profit were upheld, will in any way ensure that shareholders' and intermediaries' practices will be beneficial for creating better corporate practices.[57]

As mentioned above, it is expected of shareholders' and intermediaries' clients and beneficiaries to adopt practices that will ensure that such shareholders and beneficiaries will meaningfully comply with the principles contained in SRDII and the 2020 Stewardship Code and showcase this via their disclosure. It is furthermore aspired that better disclosure will ensure that such beneficiaries and clients will determine how such practices are undertaken, to consider the extent to which they will continue to support such shareholders and intermediaries. However, it is unlikely that shareholders' beneficiaries will be able to step up to this role effectively.[58] As mentioned in Chapter 4, shareholders' beneficiaries are often practically alienated from shareholders' and their intermediaries' practices with regards to the processes they undertake related to their engagement with companies.[59] In addition to the collective action problems they are usually going to be faced with as well, it is unclear whether they have any formal or informal power to put pressure on shareholders and their intermediaries to comply better with the spirit of the principles of the Stewardship Code, or even communicate with them effectively to this end beyond of scope of pressure it can be put based on market pressures to generate more value.[60]

[57] See, 5.2.3., below.

[58] See, by reference to the financial motivations of shareholders' beneficiaries, Katelouzou, Micheler (n 39), 12-23. cf Sergakis, 'Legal vs Social Enforcement' (n 44), 141-142.

[59] See Chapter 4, above, 4.3.2.

[60] See Chapter 4, above, 4.4.

Ironically, this has acted as one of the main reasons for introducing the tiering exercise by the FRC: to ensure that market pressures and the ability of shareholders' beneficiaries to pressure shareholders to adopt more sustainable practices will be reinforced by the State's oversight of disclosures.[61] It is questionable however, whether the FRC's oversight is going to be effective enough. While disciplining shareholders through the pressures of the market can provide a form of compliance with the Stewardship Code, it is not clear how the oversight executed by the FRC through the tiering exercise introduced will assist in any meaningful way in ensuring that shareholders will comply with its principles besides circulating and assessing the qualities of such disclosures.[62] This especially the case if one factors that the FRC's oversight lacks the enforcement sanctions required to provide a clear public enforcement mechanism for the State to steer shareholders and their intermediaries to this direction.[63] Without these, private demands for accountability by shareholders' beneficiaries will remain the only means to enforcing the principles of the Code, with the State merely reinforcing these through the tiering exercise. Having in mind that shareholders' beneficiaries may find it difficult to keep shareholders and their intermediaries accountable though, the enforcement of the Stewardship Code even through this hybrid means that regulating shareholder behaviour is prone to probably prove ineffective on its own.[64]

[61] FRC, 'Developments in Corporate Governance and Stewardship 2015' (n 34).

[62] Chiu, 'Private vs Public Enforcement' (n 42) 124-125.

[63] ibid.

[64] Sergakis, 'The UK Stewardship Code' (n 44), 137-140.

5.2.2. The Orientation of the Objective Set by SRDII and the Stewardship Code

In addition to the criticism made above, there are reasons to believe that the orientation of the objective set by SRDII and the 2020 Stewardship Code for shareholders and intermediaries to pursue in the course of undertaking their practices may fail to provide the normative premises required for them to be steered towards meaningfully promoting companies' sustainable development.[65] As mentioned in Chapter 3, shareholders and intermediaries are expected to disclose under the rules that transposed SRDII how their investment strategy is consistent with the medium-to-long term performance of their assets by taking into account several factors, which includes the financial and non-financial performance of companies. Such investment strategy is then assumed that it informs the engagement policy of shareholders, which is undertaken in accordance with its line of reasoning. In light of this, it may be stated that shareholder engagement is expected to be undertaken in a manner that is consistent with the investment strategy adopted, which is expected to be calibrated in a manner that pursues the medium-to-long term performance of assets as identified under the rules transposing SRDII.

At the same time, compliance with the 2020 Stewardship Code is expected to lead in the adoption of practices that seek to create 'long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society'.[66] No credible provision outlines what this means as a matter of law. Nevertheless, several references are included across the provisions of the 2020 Stewardship Code that suggest an account for considering companies' financial and

[65] But see Tsagas, Villiers (n 54), 6-10.

[66] 2020 Stewardship Code (n 24), 4.

non-financial performance as material factors that would lead in achieving the foregoing goal. These extend to the expectations being set on shareholder engagement in reference to the furtherance of the purpose of each signatory as well as the indication of the means by which companies' interests are being upheld, with particular reference to s.172 of the Companies Act and the security of the financial and non-financial performance of the company.[67]

These different accounts about the objective that shareholders and their intermediaries should pursue in the course of adopting practices that lead to shareholder engagement seem that they promote the adoption of practices at the corporate level that seek to create long-term value with a view to ensuring its creation out of sustainable business practices. Several authors in the literature have signified that this orientation may have a similar meaning to that of s.172 of the Companies Act,[68] albeit on the basis of ensuring the welfare of shareholders' beneficiaries in terms of creating profits for them through integrating a set of wider sustainability considerations.[69] Nevertheless, no clear account has been provided by policymakers so far to validate this with surety. The only indication provided was established on the basis that shareholders' and intermediaries' stewardship responsibility should flow from creating value for their clients beneficiaries as the main priority of any practices

[67] Ibid, 4, Principles 6-9.

[68] Companies Act 2006, s.172.

[69] Paul Davies, 'The UK Stewardship Code 2010-2020 from Saving the Company to Saving the Planet?' (2020). ECGI Law Working Paper No.506/2020 https://ssrn.com/abstract=3553493, accessed 15 June 2020, 25. The establishment of this logic may be supported in light of viewing shareholders as being 'enlightened' following the introduction of the of s.172 of the Companies Act 2006. See, Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach' (2007) 29 Sydney Law Review 577, 579. cf Chiu, 'Reviving Shareholder Stewardship' (n 28), 1013.

adopted, as this was informed and articulated on the basis of the tenets of agency theory.[70]

Based on statements made by policymakers at an EU and UK level, it has been recognised that shareholders' practices should focus on contributing to companies' sustainable development implicitly through the pursuit of practices that create value for shareholders' and intermediaries' clients and beneficiaries. This has been noted in the sense that any sustainable outcomes arising from any practices adopted should flow solely through pursuing the creation of such value for shareholders' and their intermediaries' beneficiaries and clients in what is deemed to be in the long-term as a priority, as this may be ensured provided that companies are oriented towards adopting practices that are conducive to its creation.[71] Companies' sustainable development as well as aggregate sustainable development are not referred explicitly in either of these objectives. Judging however by the scope of the Principles governing the 2020 Stewardship Code and the rules transposing SRDII, it seems that it is expected that both will be considered in the course of shareholder engagement by orienting shareholders' and intermediaries' incentives to be in conformity with pursuing the objectives set by the 2020 Stewardship Code and the rules transposing SRDII.[72]

It may be safe to assume therefore that policymakers aspire that the adoption of practices that seek to create value for shareholders' and intermediaries' beneficiaries and clients in the long-term per the accounts of the 2020 Stewardship Code and the rules transposing SRDII will both secure the satisfaction of any interests in profit and

[70] Katelouzou, Micheler (n 39), 5.

[71] FCA, 'Building a regulatory Framework for Effective Stewardship: Feedback to DP19/1' (FS19/7, 2019) https://www.fca.org.uk/publication/feedback/fs19-7.pdf accessed 10 May 2020, 11-13.

[72] 2020 Stewardship Code (n 24), Principles 8-12.

lead shareholder engagement towards becoming a means of promoting corporate governance that can lead to the adoption of more sustainable practices.[73] This is assumed to be the case as opposed to doing the same in what is deemed to be in the short-term, which has been identified as being detrimental for companies and the economy in aggregate when seen through the creation of shareholder value in the short-term.[74] By setting the expectation to adopt practices that can lead to sustainable outcomes, it seems that policymakers additionally aspire that shareholders will adopt practices that seek to create value for them in what is deemed to be in the long-term, but which can promote or contribute to corporate governance that generate such value as well.[75]

Based on this, it may be argued that, essentially, policymakers expect of shareholders and their intermediaries to adopt practices that lead to shareholder engagement that is based on the relative metrics they use and the information they hold about companies to create greater financial returns for themselves on the basis of the creation of shareholder value. This is then expected to assist them to promote or contribute through to companies' sustainable development.[76] At least in theory, and by factoring the foregoing, this means that shareholders and intermediaries are expected to adopt practices that ultimately seek to gain profits out of changes in the market value of shares of investee companies in the long-term, or pursue the receipt of dividends from companies that are managed in a manner that will facilitate the

---

[73] See Chapter 3, above, 3.4. See also, FRC, FCA (n 32), 20, 31.

[74] See on this, Chapter 3, above, 3.3.

[75] ibid.

[76] Savva, 'Regulating Institutional Shareholders' (n 5), 4-5. Cf Hanne S. Birkmose, 'From Shareholder Rights To Shareholder Duties – A Transformation of EU Corporate Governance In a Sustainable Direction?' (2018) 5(2) Journal for the International and European Law, Economics and Market Integrations 69.

former, with an expectation that sustainable outcomes should flow from these accordingly.[77] If shareholders' pursuit for profit based on these is reflective of securing companies' sustainable development, it is possible to see that policymakers aspire that the pursuit of this objective in light of the foregoing will ensure that shareholder engagement will promote or contribute to facilitating it as well.[78]

But for this to be made possible, at least theoretically, the endeavour to gain profits out of the shares' market value and the increase of profits in dividends the long-term and with a view to see sustainable outcomes accruing in the process must differ from doing the same in the short-term.[79] Assuming that this rationale holds, shareholders and intermediaries can theoretically calibrate their practices accordingly to the former end. In addition, the pursuit of creating shareholder value in the long-term based on the foregoing must ensure that shareholder engagement will meaningfully promote or contribute to companies' sustainable development as well. This is so in the sense that both the pursuit of increasing the market value of shares and the receipt of dividends can act as good metrics for showcasing that corporate governance is set to ensure companies' sustainable development.[80]

Despite the aspirations, it is questionable whether any of these conditions will be met. Starting from the pursuit of creating profits based on the shares' market value, shareholders and intermediaries will only be able to adopt practices that can

[77] Ronald J. Gilson, Jeffrey N. Gordon, 'The Agency Costs Of Agency Capitalism: Activist Investors And The Revaluation Of Governance Rights' (2013) 113 Columbia Law Review 864, 874-889; Bernard S. Sharfman, 'Activist Hedge Funds in A World Of Board Independence: Creators Or Destroyers Of Long-Term Value?' (2016) 2015(3) Columbia Law Review 813, 831-837.

[78] A similar view is adopted with regards to orienting SRD II's objectives as well. See Savva, 'Regulating Institutional' (n 5), 4-5.

[79] ibid, 5.

[80] ibid.

beneficially promote or contribute to companies' sustainable development if the market value of shares reflects all information about the viability and extent to which companies are governed responsibly with a view to ensure their sustainable development.[81] Theoretically, several authors in the literature assume that this is possible based on ECMH. If capital markets are efficient enough to the point where its forces set the value of shares in what is deemed to be in the long-term relative to companies' current standard of practices and quality of governance, then the market value of shares will be able to determine whether companies are set to be governed accordingly.[82]

ECMH, therefore, must be deemed as being practically applicable. ECMH's stronghold of arguments is established on three key dimensions. Initially, it is assumed that investors will be capable of rationally valuing any shares in light of the information they hold about companies and the risks flowing from their business to the point of making the market efficient.[83] In the case there is some irrationality in the pricing of shares, supporters of ECMH consider that their effect will be alleviated as a result of the fact that irrational valuations will cancel each other out, to the point where the market will

---

[81] This is an argument that is usually aligned with analyses from a shareholder primacy perspective. See, for example, Henry Hansmann, *The Ownership of the enterprise* (HUP, 1996), Chapters 1-3. cf Bernard S. Black, 'Agents Watching Agents: The Promise of Institutional Investor Voice' (1992) 39 UCLA Law Review 811; Thomas Lee Hazen, 'The Short-Term/Long-Term Dichotomy and Investment Theory: Implications for Securities Market Regulation and for Corporate Law' (1991) 70 North Carolina Law Review 137.

[82] See, for example, Lucian A. Bebchuk, 'The Case for Increasing Shareholder Power' (2005) 118(3) Harvard Law Review 833; Lucian A. Bebchuk,' The Myth that Insulating Boards Serves Long-Term Value' (2013) 113 Columbia Law Review 1637; Robert Anderson, 'The Long and Short of Corporate Governance' (2015) 23 Georgetown Mason Law Review 19.

[83] Eugene F. Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25(2) The Journal of Finance 383.

remain efficient.[84] If such irrationality is made on a great scale, it is finally assumed that rational arbitrageurs can value the same or essentially similar shares at different prices in secondary markets, making the value of these shares reflecting their rational price in light of the information held about companies, to the point where the market will become efficient again.[85]

While there are views that disagree with this,[86] there is a broad consensus in the literature that argues that the institutional investment community tends to pursue the increase of shares' market value in what is deemed to be in the short-term.[87] This is so in the sense that shareholders and intermediaries undertake practices that put pressure on companies to increase the market value of shares so that they can profit from it, regardless of the effect that this may have on companies in the process.[88] But because of this, several authors in the literature showcase that markets tend to become increasingly incapable of dictating the adoption of good corporate governance practices, simply because the market value of shares cannot reflect effectively on whether good corporate governance is adopted or not for the creation of value for shareholders relative to the management of risks inherent in their operation.[89]

---

[84] Ronald J. Gilson, Renier H. Kraakman, `The Mechanisms of Market Efficiency' (1984) 70 Virginia Law Review 549, 581.

[85] ibid, 572-579.

[86] See, for example, Mark J. Roe, 'Corporate Short-Termism- In the Boardroom and in the Courtroom' (2013) 68 The Business Lawyer 977, 993-996. Supporters of ECMH have showcased over the years some doubt about ECMH's prominence. See Michael C. Jensen, `Agency Costs of Overvalued Equity' (2005) 34 Financial Management 5.

[87] See, generally, Lynn A. Stout, 'The Mechanisms of Market Inefficiency: An introduction to the New Finance' (2003) 28 The Journal of Corporation Law 635.

[88] See Chapter 3, above, 3.2.; Chapter 4, above, 4.2.

[89] Lynn A. Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler, 2012), 63-69. See, by reference to informational issues regarding sustainability, Jay Cullen, Jukka Mähönen, 'Taming Unsustainable Finance: The Perils of

As a result, it can be argued that the undertaking of shareholder engagement in pursuit of increasing the market value of shares to create financial returns for shareholders and intermediaries will mostly be incapable of securing the adoption of good corporate governance practices. This is because shareholders and intermediaries will most likely pressure companies to adopt practices that increase such market value to profit from it, but without necessarily ensuring that companies' longevity and resilience in the process will be upheld.[90] Since the market value of shares is possible that it may fail to reflect on whether good corporate governance is in place or not as a result of the fact that shareholders may tend to buy and sell shares in accordance with the means by which their interests in maximising their returns, it is possible that shareholders and intermediaries in the course of engaging in corporate governance to achieve the foregoing via increasing the market value of shares may pressure companies to adopt practices that will reflect just that.[91] However, it has often been proven that doing so usually leads companies to divest in all material elements and considerations they should have taken into account to ensure their longevity or their sustainable economic development.[92]

Support for this is generally found in the literature of behavioural finance.[93] Behavioural finance outlines that capital markets can in many ways be systematically inefficient as

---

Modern Risk Management' in Beate Sjåfjell, Christopher M. Bruner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019), 107.

[90] See Chapter 4, above, 4.2-4.3.

[91] Stout, 'The Mechanisms of Market Inefficiency' (n 87), 71, citing Roger L. Martin, *Fixing the Game: Bubbles, Crashes, and What Capitalism Can Learn from the NFL* (HUP, 2011), 12–13.

[92] This consideration is applicable regardless of investment strategies adopted. See Chapter 4, above, 4.3. This informed the Kay Review as well in terms of the recommendations made. See Kay Review (n 33), 33-37.

[93] Andrei Shleifer, *Inefficient Markets: An Introduction to Behavioral Finance* (2000 OUP), 5-10, 16-23.

a result of the fact that market actors, including shareholders, often make several cognitive and behavioural errors with regards to assessing the risks arising from certain investment and corporate practices.[94] As a result, it affects the ability of markets to dictate clearly through the pricing of the market value of shares the practices that companies should undertake to ensure their efficiency and overall longevity. It furthermore showcases that the market value of shares may often prove an unreliable metric for reflecting clearly on the extent to which certain corporate governance practices can be adopted to secure companies' longevity and resilience based on it, which can then secure aggregate social and economic prosperity.[95]

Behavioural finance tends to disclaim the effectiveness of arbitrage to achieve efficiency in the market as well. For the arbitrage to be successful, any market actors that wish to act as arbitrageurs must be able to value rationally the same shares or substantially similar shares.[96] Nevertheless, there are various reasons to suggest that this may likely not be the case.[97] For example, those who are expected to act as arbitrageurs are also subjected to the same individual biases with the rest of market actors. As a result, it is possible that these biases may lead them towards adopting practices that are deemed as just irrational as the rest of market actors.[98] Furthermore, financial incentives are likely to work against their ability to step in the shoes of

---

[94] Cass R Sunstein et al., 'Behavioural Approach to Law and Economics' (1998) 50 Stanford Law Review 1471, 1477-1478.

[95] Shleifer (n 93) 10-13, 16-18.

[96] Savva, 'Regulating Institutional Shareholders' (n 5), 6.

[97] Demetra Arsalidou, 'Institutional Investors, Behavioural Economics and the Concept of Stewardship' (2012) 6 Law and Financial Markets Review 410, 414-415.

[98] Marc T. Moore, Edward Walker-Arnott, 'A Fresh Look at Stock Market Short-Termism' (2014) 41(3) Journal of Law and Society 416, 421-423.

arbitrageurs, unless there is evidence that greater profits will be made in the process.[99] Depending on the investment strategy adopted, the costs for undertaking such practices are relatively high in comparison to the benefits accrued.[100] It is possible to see therefore that unless there is a substantial profit arising from undertaking these practices, market actors will unlikely act as arbitrageurs, even if failing to do so may ultimately affect their interests in the long-run.[101]

Having these in mind, one may easily be led towards making two conclusions. Firstly, absent any financial incentives, shareholders and intermediaries in pursuit of satisfying their interests in profit through increases in the market value of shares can adopt practices that lead to shareholder engagement that can be practically be differentiated between adopting it with a view to increase the market value of shares in the short-term or in the long-term.[102] This essentially means that, theoretically, it will be possible for them to adopt practices that are aligned with the latter orientation, which will then allow them to seemingly promote or contribute through their practices to upholding companies' sustainable development if the market value is reflective of companies' standard of corporate governance.[103] Secondly, given the general indication that shareholders and intermediaries conform more to adopting practices in the former orientation, it is theoretically possible for shareholders and intermediaries to be steered via regulation towards adopting practices that seek to increase the shares'

[99] Kent Greenfield, `The Puzzle of Short-Termism' (2011) 46 Wake Forest Law Review 627, 632-634.

[100] But see, Alexander Kraik, 'Environmental, Social, and Governance Issues: An Altered Shareholder Activist Paradigm' (2019) 44(3) Vermont Law Review 493.

[101] Moore, Walker-Arnott (n 98), 421-423.

[102] Savva, 'Regulating Institutional Shareholders' (n 5), 6-7.

[103] ibid.

market value in what is deemed to be in the long-term, and thus ensure that their practices lead to the adoption of sustainable corporate practices.[104]

Having in mind the current standard of shareholder engagement though, such an aspiration would only have a solid theoretical and practical foundation if policymakers could ensure that the objective set by the Stewardship Code and SRDII is pursued by shareholders through enforcing their principles in a manner that is adhesive to its facilitation. Whether the current approach to enforcing SRDII and the 2020 Stewardship Code is possible to have any meaningful effect on changing shareholders' current standard of engagement practices has already been addressed above.[105] But even if systematic enforcement was made available for shareholders and intermediaries to be steered towards adopting practices in pursuit of making profits out of the increase of shares' market value in the long-term, it would still be possible that their practices will not promote or contribute effectively to companies' sustainable economic development.

As mentioned in Chapter 2, the level of uncertainty that derives from the scale of potential economic harm accruing from wider environmental and social issues that arise from current corporate practices is extremely deep, and there is limited information that can be utilised in the valuation of shares to configure the likely risks arising from it beyond making speculations about it.[106] This however undermines the ability of markets to valuing shares relative to the economic effects of these issues, even if it is calibrated in what is deemed to be in the long-term.[107] It furthermore

[104] ibid, 8.

[105] See 5.2.2., above.

[106] See Chapter 2, above, 2.4.

[107] ibid.

undermines its ability to act as a credible metric for estimating the extent to which companies are set on a more sustainable path to ensure their longevity and resilience.[108] As a result of this however, it is possible to see that markets, and through them, shareholders in the course of engaging in corporate governance to increase their profits in reliance to the market value of shares, may fail to adopt practices that actually promote or contribute to companies' sustainable development, even if wider sustainability considerations are factored in the process.[109] This is simply because the main objective of their engagement will essentially be the creation of profits based on the market value of shares, which may a priori prove an unreliable metric for configuring whether companies are set on a more sustainable path or not.[110]

When the collective of these decisions is taken in aggregate however, it is possible to see that shareholders and intermediaries, in pursuit of creating profits for them as a priority based on the market value of shares, may adopt practices that may outright fail to consider the materiality of addressing wider sustainability issues relative to companies operations effectively, even if this is deemed as pursuing the market value of shares in the long-term.[111] But if this is the case, it is possible that shareholders may become incapable of promoting companies' sustainable development, since the metrics they will use will probably not be reflective of what is actually needed to be done in companies for them to be set on a more sustainable path.[112] If anything, only shareholders' and intermediaries' expectations in profits relative to the metrics used to dictate the market value of shares will be met. Of course, some sustainable

[108] ibid.

[109] ibid.

[110] Cullen, Mähönen (n 89), 107-108.

[111] Savva, 'Regulating Institutional Shareholders' (n 5), 8.

[112] Ahern (n 3), 112.

considerations will be factored in the process.[113] Nevertheless, this may not be enough in terms of giving shareholders the scope to engage in corporate governance in such a way that they can promote or contribute to companies' sustainable economic development, at least on the basis of factoring all these considerations relevant to achieving it effectively.[114]

The same argument may be made with regards to pursuing practices that seek to increase the receipt of their dividends out of the performance of the company that is oriented towards achieving the foregoing. Given that shareholders' interests accruing from the operation of companies are often not in line with companies' welfare and longevity, the imposition of the objective set by the Stewardship Code cannot ensure that shareholder opportunism will be alleviated.[115] If profit is the end goal for shareholders, then it is possible that shareholders will adopt practices that will generally be set to secure such expectation.[116] Whether this will include the consideration of companies' sustainable economic development will depend on the considerations they may have taken into account to factor their claims accordingly.[117] In any case though, it is possible that the animation of their practices will be dictated on the basis of the relative expectations that shareholders have with regards to receiving such profit returns, not necessarily the security of companies' sustainable economic development in the process.[118]

---

[113] But see Chapter 4, above, 4.2.

[114] Savva, 'Regulating Institutional Shareholders' (n 5), 7-9.

[115] ibid.

[116] This argument is presented even in analyses made in the context of shareholder primacy that consider shareholder engagement as detrimental. See, for example, Stephen M. Bainbridge, *Corporate Governance after the Financial Crisis* (OUP, 2012), 234.

[117] ibid.

[118] Savva, 'Regulating Institutional Shareholders' (n 5), 10.

It is possible to see therefore that shareholders may be prone to adopt practices that outright neglect wider sustainability considerations, unless it is evident that profit in terms of dividends will accrue in the process. Policymakers through the objective set by the Stewardship Code and SRDII would clearly not have intended this. Nevertheless, the setting of this objective clearly provides shareholders with enough interpretive room to consider that doing so is in line with the SRDII's and Stewardship Code's principles and objectives set. If the factoring of ESG considerations is outweighed by the furtherance of upholding their interests in terms of creating financial returns for themselves, any efforts by shareholders or their intermediaries to secure their interests in profits on the basis of pressuring for greater dividends that arise from companies that are oriented to create shareholder value in what is deemed to be in the long-term may fail to promote any meaningful governance changes.[119] Given the enforcement of the Stewardship Code and the rules transposing SRDII however, it seems unlikely that shareholders will be steered in the opposite direction, and ensure that their engagement will actually benefit companies' sustainable development.

5.3. A Call to Re-Consider Shareholder Stewardship

The analysis made so far showcases that, despite the aspirations, the rules transposing SRDII and the 2020 Stewardship Code may possibly prove an inadequate means of ensuring that shareholder engagement will beneficially promote or contribute to the facilitation of companies' sustainable development, especially when this is seen through the context identified in Chapter 2. But when all of the issues identified above are factored in aggregate, it also seems that, currently, shareholder stewardship

[119] Ahern (n 3) 113.

through the upholding of its objectives via the rules that transpose SRDII and the 2020 Stewardship Code is also ideologically confused, if not conceptually flawed.[120]

No doubt, policymakers are in the course of transforming the upholding of the objectives of shareholder stewardship to ensure that shareholders' and intermediaries' practices are undertaken with a view to facilitate aggregate, and as with regards to engagement, corporate, sustainable development.[121] Nevertheless, the insistence on regulating shareholders' and intermediaries' practices through disclosure rules, and with a viewpoint oriented towards undertaking shareholder engagement for the creation of shareholder value as a priority indicates that policymakers are still not bold enough to undertake all steps required to actually attribute shareholders and their intermediaries the responsibility to uphold objectives that extend beyond the indicative satisfaction of their self-interest.[122]

Having this in mind, it can be argued that shareholder stewardship through the current legal framework tasked with achieving its objectives goes as far as setting the expectations of what shareholders and intermediaries should strive for in the course of their practices that lead to shareholder engagement, but ultimately fails to deliver their fruition within a context that is cognisant of all factors that need to be taken into account to secure corporate and aggregate sustainable development beyond the

[120] The signification of this argument was made as early as the first versions of the Stewardship Code. See, for example, Mads Andenas, Iris H-Y Chiu, *The Foundations and Future of Financial Regulation: Governance for Responsibility* (Routledge, 2014), 400.

[121] Ahern (n 3), 110-113. But note the rise of stewardship codes across the world in Dionysia Katelouzou, Peer Zumbansen, 'The New Geographies of Corporate Governance' (2020) 42 University of Pennsylvania Journal of International Law 51, 80-97.

[122] Andenas, Chiu (n 120); 400-404. Hanne S. Birkmose, 'Forcing Shareholder Engagement: Theoretical Underpinning and Political Ambitions' (2018) 29(4) European Business Law Review 613, 630.

confines of satisfying shareholders' self-interest. Because of this, it can be argued that shareholder stewardship may, at best, ensure that shareholders and intermediaries are steered towards adopting practices that conform more to promoting companies' sustainable development that can lead to the facilitation of aggregate sustainable development that conforms to the paradigm of weak sustainability, and with a scope to increase shareholders' profits as a priority.[123] But as mentioned in Chapter 4, practices that conform to weak sustainability tend to factor ESG considerations so long as financial value is indicative that is created as a priority. Whether this is the desirable means of ensuring corporate and aggregate sustainable development, however, is questionable in various respects.[124]

Because of these, the literature criticising the current standard of shareholder engagement, and as an extension to this, shareholder stewardship, as detrimental for ensuring corporate and aggregate sustainable development holds considerable validity.[125] Nevertheless, one must not neglect the fact that shareholder engagement continues to be quite influential in corporate governance despite this criticism.[126] Given the potential effect of this power on corporate governance, the time is ripe to ensure that shareholders and their intermediaries will adopt more responsible practices that

---

[123] An argument indicative of this is found in light of the application of the 2012 Stewardship Code in Andrew Johnston, 'Market-Led Sustainability through Information Disclosure' in Beate Sjåfjell, Christopher M. Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019).

[124] See Chapter 4, above, 4.2.

[125] See, for example, Lorraine E. Talbot, 'Why Shareholders Shouldn't Vote: A Marxist-progressive Critique of Shareholder Empowerment' (2013) 76(5) Modern Law Review 791.

[126] See chapter 3, above, 3.4.

lead to shareholder engagement that upholds corporate and aggregate sustainable development at a greater level.[127]

The Thesis suggests that shareholder stewardship has the potential to act as the regulatory concept that can secure this objective. But for this potential to come into fruition, it is important to reconceptualise shareholder stewardship's normative basis and endeavour to regulate shareholder engagement. This extends to the objectives of shareholder stewardship relative to the scope of power shareholders have to engage in corporate governance, the expectations set on shareholders to achieve them, and the way regulation by the law endeavours to calibrate shareholders' practices to this end effectively. Having in mind the suggestion made in Chapter 2 for reconceptualising the normative account for the corporate objective, the Thesis suggests to consider shareholder engagement as an aspect of corporate governance that should adhere to promoting or contributing to its facilitation. Based on this, the Thesis furthermore suggests the reconceptualisation of the objectives of shareholder stewardship for them to be endeavoured to be upheld in a manner that is relative to the fruition of this suggestion. The remainder of the Chapter will outline these in detail.

5.3.1. Shareholder Engagement for Upholding Companies' Sustainable Development

In all of its guises, corporate governance is comprised of all systems, processes and relationships that can facilitate corporate success.[128] Shareholder engagement in either of the capacities under which it can be undertaken is not alien to these. The

[127] ibid, 3.5.

[128] See, in general, John Kay, *Foundations of Corporate Success: How Business Adds Value* (OUP, 1993). cf Elaine Sternberg, *Corporate Governance: Accountability in the Marketplace* (IEA, 1998).

exercise of shareholders' voting rights forms an integral part of the decision-making processes of companies, despite having limited breadth and scope in comparison to the prerogative of directors with regards to managing companies.[129] Similarly, shareholders' expression of voice directly or through their intermediaries at a formal and informal level can be considered as being part of the processes that can be in place to uphold all those relationships and interests that companies should take note of and uphold in the course of developing their practices to further their business and existence in line with society would expect them to do.[130]

The predominance of shareholder primacy over the provision of the normative account for the corporate objective, and the efforts to establish the strength of its rationale based on various economic theories, have considered shareholder engagement as a mechanism of bettering shareholders' interests or as a vehicle for creating shareholder value, with the latter acting as a proxy for ensuring aggregate social welfare.[131] By viewing companies as a nexus of contracts and shareholders as the residual claimants of their profits, shareholders have been perceived as ultimately holding the power to ensure their interests in having maximised profits as the primary and definitive concern of companies' existence through the exercise of their voting rights.[132] The signification of shareholder value as an indication of the extent to which companies contribute to

---

[129] Shareholder power then may be thought as being ancillary to directorial power, especially when it comes to managing corporate transactions. See, Andrew Griffiths, *Contracting with Companies* (Hart, 2005), 108-114.

[130] Kay Review (n 33), 44-49. See also, John Kay, *Other Peoples Money: Masters of the Universe or Servants of the People* (Profile Books, 2016), 194-213.

[131] Beate Sjåfjell et al. 'Shareholder Primacy: The Main Barrier to Sustainable Companies' in Beate Sjåfjell, Benjamin J. Richardson (eds) *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP, 2015), 82-86.

[132] See, for example, Mark J. Roe, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance* (PUP, 1994), 235-238.

social welfare furthermore solidified shareholder engagement as a possible means of securing this.[133] While the views about the desirability of shareholder engagement is ambivalent, it is considered in light of shareholder primacy as a function that shareholders are entitled to undertake legitimately with the goal to solely uphold their interests in profit as a priority.[134]

Whether any of these remarks are reflective of the legal and economic realities of companies, the power and position that shareholders have in corporate governance to engage in it, and the extent to which they provide the normative premises required to respond effectively to current unsustainable business practices have been considered above.[135] In light of these, the Thesis suggested in Chapter 2 to re-conceptualise the normative account for the corporate objective, for it to be considered as an endeavour that seeks to ensure companies' longevity and resilience for their own sake through their sustainable development.[136] This normative account for the corporate objective is company-focused, and it seeks to ensure the adoption of practices that aim to further companies' existence while being cognisant of the totality of considerations that will assist them in doing so without affecting the environment and the societies which accommodate their practices.[137] The basis upon which this corporate objective to achieve has been suggested to be conceptualised on the basis of promoting aggregate sustainable development that conforms to the economic

[133] But see, Chapter 3, above, 3.2.

[134] Lucian A. Bebchuk, 'The Myth of the Shareholder Franchise' (2007) 93(3) Virginia Law Review 675, 697-700.

[135] See Chapter 2, above, 2.3-2.4; Chapter 3, above, 3.4.

[136] See Chapter 2, above, 2.5.

[137] ibid, citing Andrew Keay, *The Corporate Objective* (EE, 2011).

paradigm of strong sustainability, with the adoption of corporate governance for sustainability being argued as key to ensure its facilitation.[138]

This normative account for the corporate objective necessitates the furtherance of companies' success through their sustainable development as the main priority of their existence in light of the parameters which are required to be in place, from which shareholders' interests in profit will be met in the process. Contrary to shareholder primacy therefore, creating profits for shareholders through prioritising shareholder value is not the objective. Rather, it is only considered an aftermath of the furtherance of the business of companies that it is undertaken for companies' best interests as an end in itself. This is deemed to be accruing from processes that have encapsulated the totality of all considerations that will render companies becoming more sustainable and capable of furthering their longevity and resilience without affecting detrimentally the environment and the society on a disproportionate basis.[139] This is turn informed by a wider overall objective in aggregate to conform to the paradigm of strong sustainability: to develop economies that create value in the present and in the future which will advance social welfare within a context that respects the environment and the societies in the process.[140]

But as mentioned in Chapter 2, the upholding of companies' sustainable development for the benefit of companies in light of the foregoing through the development of corporate governance for sustainability will not be an easy task to achieve. The adoption of practices that will generate profit, which includes the creation of profits for

[138] Ibid.

[139] This will assist companies achieving the purpose for which they exist. See on this, Colin Mayer, *Prosperity: Better Business Makes the Better Good* (OUP, 2018), 109-115.

[140] Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist* (Penguin Random House, 2017), 43-53.

shareholders, is an important parameter for developing appropriate corporate governance practices.[141] Nevertheless, the development of companies' sustainable development relative to the parameters that can lead in the facilitation of sustainable development that conforms to the paradigm of strong sustainability will require the factoring and management of all risks and interests accruing from current and future corporate practices at differing spatial and temporal dimensions.[142] This of course connotes managing and developing all anticipations and satisfaction of interests accruing from corporate practices, which underlines the discharge and satisfaction of shareholders' interests in profit as well.[143]

These are of course functions that directors and the board will be tasked to undertake effectively. They are the ones who hold the information, but also the capacity, position, time, and legal responsibility to undertake them with a view to uphold companies' betterment as the main priority of the discharge of their duties to companies.[144] But such an indication provides little insight about the role of shareholder engagement in corporate governance.[145]

In light of the breadth and scope of shareholder power, shareholder engagement is suggested to be understood as an aspect of corporate governance that seeks to uphold companies' sustainable development for the sake of companies' benefit within

---

[141] See, generally, Alex Edmans, *Grow the Pie: How Great Companies Deliver Both Purpose and Profit* (CUP, 2020).

[142] See Chapter 2, above, 2.5.2.

[143] ibid, citing Tobias Hahn et al, 'Tensions in Corporate Sustainability: Towards an Integrative Framework' (2015) 127 Journal of Business Ethics 297, 301-311.

[144] Colin Mayer, 'Conceiving Commitment: Creation and Confirmation' in Jennifer G. Hill, Randall S. Thomas (eds) *Research Handbook on Shareholder Power* (EE, 2015), 219-224.

[145] ibid. See also, in general, Colin Mayer*, Firm Commitment: Why the Corporation is Failing Us and How to Restore Trust in it* (OUP, 2013).

the scope and competence that shareholders have in corporate governance to do so.[146] As mentioned in Chapter 3, this does not mean that shareholder engagement should act as a monitoring mechanism for the creation of shareholder value. Instead, it should be considered as an aspect of corporate governance that relates to the discharge of any powers bestowed on shareholders formally as a matter of law to ensure the best interests of companies as an end itself. It should furthermore be understood as an effort to do all things to ensure the satisfaction of their interests as one of the stakeholders of companies, but on a basis that is animated by the need to further companies' longevity and resilience out of their sustainable development with a strong sustainability mindset in place as the way to achieve this objective.

At a formal, legally binding level, it is possible to see such role for shareholder engagement materialising to a great extent within the confines of the exercise of shareholders' voting rights in the general meeting. Having in mind that the collective exercise of shareholders' voting rights allows shareholders or the intermediaries acting on their behalf to act as decision-makers in companies to discharge the powers bestowed on the general meeting, shareholder engagement is possible to contribute to achieving the foregoing end as part of the processes that effectively animate the will of the company on its own behalf and for its best interests.[147] As mentioned in Chapter 3, the general meeting acquires its authority and power by the company through the articles of association subject to their regulation by the law.[148] The authority that is

---

[146] See Chapter 3, above, 3.5.

[147] Beate Sjåfjell, 'Redefining Agency Theory to Internalize Environmental Product Externalities. A Tentative Proposal Based on Life-Cycle Thinking' in Eleonore Maitre-Ekern et al. (eds), *Preventing Environmental Damage from Products: An Analysis of the Policy and Regulatory Framework in Europe* (CUP, 2018), 113.

[148] Chapter 3, above, 3.4.1.

discharged by the collective exercise of shareholders' voting rights therefore is a power that emanates from the company, and it is supposed to be exercised in such a way that the company's will and discretion is to be expressed by the general meeting on its own behalf and for its best interests.[149]

Just like directors, therefore, the general meeting, and as a result, shareholders and their intermediaries through their capacity to vote within it, should effectively discharge its powers not solely to protect shareholders' interests in profit, but to uphold companies' best interests subject to their regulation by the law and as they are authorised by companies to do so through the articles.[150] The common function of the general meeting and, as a result of it, the collective exercise of shareholders' voting rights to discharge the powers bestowed on it, therefore, should be made to advance corporate prosperity.[151] Shareholders will have the ability and the opportunity to prosper and satisfy their interests in profit from ensuring corporate prosperity in the process, and as a result of furthering companies' existence.[152] Having this in mind, shareholders should be expected to exercise their voting rights not for the exploitation of their power to satisfy their self-interest, but to ensure that corporate wealth will

[149] Some authority is provided for shareholders to be doing so in certain circumstances. See, *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch. 656 (CA), 671; *Assenagon Asset Management SA v Irish Bank Resolution Corp Ltd* [2012] EWHC 2090 (Ch), 278-280.

[150] *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34 (CA), 40-43.

[151] Robert Flannigan, 'Shareholder Fiduciary Accountability' (2014) (1) Journal of Business Law 1, 6-8.

[152] Sjåfjell, 'Redefining Agency Theory' (n 147), 114.

overall be used for the best interests of companies, from which their interests in profit will proportionately be met.[153]

But the need to exercise their voting rights for and on behalf of companies in the abovementioned sense is but one set of interests that shareholders should consider in the course of doing so. Shareholders and their intermediaries should not only tasked to further the companies' interests in the course of voting in the general meeting, but they also need to discharge their own interests as well.[154] This materialises in the respect that the fruition of the latter is integral to ensure that shareholders abide by any duties and commitments they have towards their clients and beneficiaries, whose existence may be independent of the need to adopt practices that ensure the prosperity of companies.[155] The satisfaction of shareholders' beneficiaries interests, for example, are also material as well, especially if one factors that their satisfaction relies too much on the practices undertaken by shareholders and their intermediaries.[156] Essentially therefore, shareholders and their intermediaries should be tasked with adopting practices that balance their commitment to upholding both the best interests of companies and their beneficiaries as well, depending on the capacity under which shareholders are undertaking such practices.

[153] Andrew Keay, 'Board Accountability and the Entity Maximization and Sustainability Approach' in Barnali Choudhury, Martin Petrin (eds) *Understanding the Company: Corporate Governance and Theory* (CUP, 2017), 287-288.

[154] Sjåfjell, 'Redefining Agency Theory' (n 147), 114. This ultimately connotes the elements of considerations in need to be made relative to ensuring their commitments to their interests and their beneficiaries' interests. See Andenas, Chiu (n 120); 400-404.

[155] This acted as part of the animating factors that led to reviewing the Stewardship Code. See, FRC, FCA (n 33), 20, 31.

[156] Kay (n 130), 195-213.

It is on this basis where shareholder engagement adopts a separate but also key angle in the aspects that form the proper development of corporate governance. Shareholder engagement can form part of the endeavours undertaken by shareholders and their intermediaries to secure their interests as investors in companies, from which their beneficiaries' interests will be met proportionately.[157] Under this capacity, it is natural for shareholders to adopt practices that will ensure the security of their interests from the operation of companies.[158] Given that the discharge of such interests forms part of the legitimate interests arising from the operation of companies, it is uncontroversial for them to adopt practices that seek to discharge this objective effectively, since it forms part of the interests that companies should endeavour to uphold in the course of conducting their business.[159]

It is also uncontroversial though to consider any form of engagement animated by this end as an aspect of corporate governance that is related to the upholding of shareholders' interest in profit out of the furtherance of the business of the company. Given that shareholders have a legitimate claim from the business of the company, it is natural to consider the satisfaction of shareholders' interests in profit as part of the processes and functions required to uphold the companies' success just as upholding any other interests in the companies.[160] After all, the creation of profit for companies is supposed to be made relative to all interests that accrue from their operations and

---

[157] Sjåfjell, 'Redefining Agency Theory' (n 147), 114.

[158] Keay, 'Board Accountability' (n 153), 286-287.

[159] But see, Colin Mayer, 'Ownership, Agency, and Trusteeship: An Assessment' (2020) 36(2) Oxford Review of Economic Policy 223, 230.

[160] This has been realised consistently by various authors in the literature that conform to theories revolving around stakeholder theory's account for the corporate objective. See, for example, Margaret M. Blair, Lynn A. Stout, 'A Team Production Theory of Corporate Law' (1999) 85(2) Virginia Law Review 247, 276-286.

any considerations relevant to its sustainable economic development, so as to ensure that companies commit themselves to adopt practices that will effectively satisfy them in the process without being an impediment on the environment or the society in the process.[161] Any engagement undertaken therefore can be considered as part of the relationships formed in corporate governance relative to the upholding of companies' success, albeit from the perspective and function of satisfying shareholders' interests in profit from the operation of companies.[162]

The question that is being raised out of this is the way which such interests are going to be pursued to be facilitated at a formal and informal level, through the exercise of shareholders' rights and expression of voice in corporate governance.[163] Policymakers through the endeavour to facilitate shareholder stewardship's objectives via the rules transposing SRDII and the 2020 Stewardship Code have focused on steering shareholders and their intermediaries towards adopting practices with a view to create financial returns for them as a priority on the basis of creating long-term value. Given the analysis made above however, it is highly likely that shareholders may as well disregard a considerable amount of issues and considerations in need to be factored in the process.[164] Orienting shareholder engagement to regard solely the discharge of shareholders' and intermediaries' interests in profit therefore is prone to making them focusing on this end only, with the latter being considered as secondary to the pursuit of creating profits for shareholders, regardless of the consequences and effect in

[161] See Chapter 2, above, 2.5.2.

[162] Sjåfjell, 'Redefining Agency Theory' (n 147), 114-115.

[163] Chiu, 'Reviving Shareholder Stewardship' (n 28), 1013-1015.

[164] Savva, 'Regulating Institutional Shareholders' (n 5), 12.

corporate governance in the process.[165] In such a case, regardless of the altruistic considerations, their engagement will be as good as serving their self-interest.

This however may prove to be at odds with what is required to ensure the development of good corporate governance that encapsulates all such factors that will make companies more sustainable by reference to strong sustainability's parameters, which may lead shareholders pursuing practices and objectives contrary to achieving this.[166] What shareholders and their intermediaries should be doing in the course of adopting practices that lead to shareholder engagement that seeks to secure their interests is the adoption of practices that orient the satisfaction of their interests with the efforts to uphold companies' sustainable development for the benefit of companies.[167] What this means is that shareholders and their intermediaries, should they engage in corporate governance, should endeavour to adopt practices that, although informed by the pursuit of discharging their own interest, they are principally animated by the need to do so through adopting practices that seek to uphold or contribute to the development of corporate governance for sustainability. This is so in the sense that the facilitation of the latter will assist in the discharging of their interests more effectively and on a more sustainable basis.

For shareholders to be able to do so, it is important for them to adopt practices that essentially commit to upholding companies' sustainable development, from which profits that can satisfy their interests will be made in the process.[168] Hence, shareholders' pursuit for profits should be made as part of their commitment to

[165] ibid.

[166] Birkmose, 'Forcing Shareholder Engagement' (n 122), 632.

[167] This will require a considerable re-orientation of shareholders' current practices and incentives to engage. See, Chiu, 'Reviving Shareholder Stewardship' (n 28), 1013-1015; Ahern (n 3), 113.

[168] Kay Review (n 33), 44-50.

promote and uphold companies' sustainable development, not from ensuring the creation of profits for shareholders as a priority regardless of the outcomes in the process.[169] Their engagement practices, and as a result, investment strategies should be aligned with this end effectively, for their engagement to meaningfully ensure the discharge of their interests as investors without tampering companies' ability to become more sustainable.[170]

A question that might be risen is the scope of shareholder engagement. Given that many of the practices that shareholders and intermediaries are called to undertake in their respective capacities rely much on directors' control that can ensure companies' sustainable development in the first place, shareholder engagement can be undertaken in a manner that is responsive to the current standard of directors' management of companies. It is possible to see therefore such engagement to be undertaken more within the confines of adopting a certain resolution being put on vote in the general meeting, whereby shareholders will have the information, capacity and ability to discharge any functioning in corporate governance accordingly. Engagement in the form of expressing voice formally and informally is possible to be made to this end as well, either in response to directors' standard of management, or as a result of proactively signalling any issues for them to consider in the process. Yet again, such engagement is difficult to become anything more than an indication of what shareholders think companies should be doing to further their interests through furthering the business of companies, or express their concerns accordingly to this end.[171] Anything greater than this should be seen as a functioning that should

[169] Mayer, *Prosperity* (n 139) 109-115.

[170] Kay Review (n 33), 44-50.

[171] Keay, *The Corporate Objective* (n 137), 311-312.

effectively remain within the directors' remit of control, and not subject to shareholders' discretion to question.[172]

Of course, shareholder engagement remains particularly influential on corporate governance, especially when shareholders can effectively remove directors from office should they deem that their interests in profit are not met. This makes it important to ensure that shareholders will adopt practices that can seek to ensure the satisfaction of their interests out of the furtherance of companies' business on a sustainable basis in the course of their engagement and keep up with any commitments or expectations that arise from their holding of power in corporate governance that extends beyond the latter.[173]It is on this basis that shareholders as investors should be able to calibrate their practices and adopt engagement practices relative to the information they hold about the sustainable economic development of companies. It is also on this basis that it is important to ensure that shareholders in the course of doing so are factoring its development effectively, so that their incentives in profit are lobbied to be discharged without affecting the prospects of companies to focus on ensuring their sustainable economic development. The regulation of shareholders' practices by the law has an integral role in ensuring this, with shareholder stewardship having the potential to act as the regulatory concept that can lay the premises for adopting a framework that can effectively achieve this.

[172] Andrew Keay, 'Company Directors Behaving Poorly: Disciplinary Options for Shareholders' (2007) (1) Journal of Business Law 656.
[173] Katelouzou, 'Shareholder Stewardship' (n 9), 590.

5.3.2. The Role of Shareholder Stewardship

Provided that it is undertaken with the scope to promote or contribute to the development of corporate governance for sustainability as outlined above, shareholder engagement has the potential to assist in its facilitation. But the extent to which shareholders and intermediaries will be able to adopt practices that are akin to this relies on several key parameters.[174] Even within the confines of shareholder power, shareholder engagement will still require the facilitation of a collective action to be undertaken.[175] Furthermore, shareholders and their intermediaries must also be willing and capable of factoring ESG criteria related to facilitating companies' sustainable development on the basis of the foregoing in the course of animating their investment strategies, and as a consequence, their practices that will lead to shareholder engagement accordingly.[176]

There have been various studies within the scope of SRI that showcase that shareholders and intermediaries adopt and implement methodologies and practices that are concerned with addressing these issues.[177] From the perspective of investment methodologies, for example, studies in SRI have noted the adoption and development of practices that extend beyond the negative screening of investments,

---

[174] These generally relate to the ability and incentives of shareholders to adopt their practices, relative to the strategies they implement. See, in general, Balp, Strampelli (n 51).

[175] Rafael Savva, 'Shareholder Power as An Accountability Mechanism: The 2017 Shareholder Rights Directive And The Challenges Towards Enhancing Shareholder Rights' (2018) 5(2) Journal for the International and European Law, Economics and Market Integrations 277.

[176] Andenas, Chiu (n 120), 401.

[177] See, for example, John R. Becker-Blease, Corporate Socially Responsible Investing in H. Kent Baker, John R. Nofsinger (eds) *Socially Responsible Finance and Investing: Financial Institutions, Corporations, Investors and Activists* (Wiley, 2012); Li-Wen Lin, 'Corporate Social and Environmental Disclosure in Emerging Securities Markets' (2009) 35 North Carolina Journal of International Law and Commercial Regulation 1.

and include the factoring of wider sustainability considerations through the adoption of positive screening mechanisms as well.[178] Such practices typically involve the selection of investments in companies based on their performance at an environmental, social and governance level using various criteria and methods, including that of engagement with companies as a form of an investment strategy.[179] Mechanisms or mediums for co-ordinating shareholders' and intermediaries' practices have additionally been adopted to secure the easier undertaking of collective actions for the facilitation of shareholder engagement.[180] An example of such a medium is the Investor Forum, which since its creation, it is tasked with acting as a hub for ensuring that shareholders' incentives are aligned with the scope of showcasing better engagement practices with a view to promoting the adoption of more responsible business practices.[181]

The means by which shareholders and intermediaries can undertake more sustainable investment and engagement practices therefore can differ considerably, and several methodologies have been adopted or proposed to be implemented to develop such practices accordingly.[182] This diversity of approaches showcase the flexibility that shareholders and intermediaries are afforded to calibrate their objectives in the course

---

[178] For an analysis on the prospects of SRI, see Ardenas, Chiu (n 120), 400-410.

[179] Several reports showcase the increase in the undertaking of these practices. See, in general, Global Sustainable Investment Alliance, '2018 Global Sustainable Investment Review' (April 2019) https://www.ussif.org/files/GSIR_Review2018_3_28(2).pdf accessed 20 February 2020.

[180] See, for example, Craig Doidge et al., 'Collective Action and Governance Activism' (2019) 23(5) Review of Finance 893.

[181] The Investor Forum is undertaking on a yearly basis a review of its activities. See, for example, The Investor Forum, 'Annual Review 2020' (January 2021) https://invforumdev.wpengine.com/wp-content/uploads/_pda/securepdfs/2021/01/TIF-Annual-Review-2020-FINAL.pdf accessed 20 February 2021.

[182] But see Kay Review (n 33), Chapters 5-8.

of adopting practices that lead to shareholder engagement and the frequency of its undertaking relative to overcoming the collective action problems they face. But at the same time, such a flexibility can prove nebulous, especially when companies' sustainable development for the sake of ensuring their longevity and resilience is factored within a scope informed by the parameters that can lead to conforming to the paradigm of strong sustainability.[183] As already mentioned throughout various parts of this Thesis, shareholders and intermediaries are gradually grasping the need to factor wider sustainability criteria in the course of calibrating their practices. But due to the current flexibility being afforded by regulation, and with social norms in place that dictate the pursuit of creating profits for themselves as a priority, they may consider their integration solely when there is a business case for the satisfaction of their interests in profit as a priority, irrespective of the potentially detrimental effects that may accrue from these.

By factoring the aforementioned and the potential inability of shareholders and intermediaries to self-regulate themselves to adopt more responsible practices, it is important for the law to provide a framework that can ensure this with a view to uphold companies' sustainable development, which will also provide solutions to the factors that exacerbate their collective action problems for doing so effectively.[184] Given its gradual transition to ensuring that shareholders' practices promote or contribute to achieving this goal, it is possible to see shareholder stewardship acting as the regulatory concept that can provide the legal framework required to achieve this within a context informed by the call to developing corporate governance for sustainability

[183] Benjamin J. Richardson, Wes Cragg, 'Being Virtuous and Prosperous: SRI's Conflicting Goals' (2010) 92 Journal of Business Ethics 21, 22-23.

[184] Hanne S. Birkmose, 'European Challenges for Institutional Investor Engagement: Is Mandatory Disclosure the Way Forward?' (2014) 11(2) European Company and Financial Law Review 214, 242.

that is informed by strong sustainability's parameters for the sake of companies' longevity and resilience.[185] This can be done with the objective of cultivating the responsibility on shareholders and intermediaries to undertake practices within the sphere of their competence in a manner that is conducive to ensuring the foregoing, provided that it is reflective of the capacity of shareholders to undertake such practices in the first place.

The basis of proposing the indication of this potential derives from the wider public interest that is inherent in the undertaking of shareholders' engagement practices.[186] Given the effect of shareholder engagement and the fact that the aggregate exercise of their voting rights is an authority provided to be exercised on behalf of the company, it is possible to argue that it should be expected of shareholders and their intermediaries to factor all such considerations that ensure the welfare of companies and their beneficiaries in the course of undertaking their practices.[187] Such considerations should extend beyond investor-determinable criteria that would monolithically ensure their interests in profit. Instead, they should encapsulate all those considerations that would ensure that shareholders' pursuit of interests is made for the satisfaction of their self-interest while ensuring that this will not be made at the expense of the companies they have invested in or any other interests in the process.[188]

As with the regulation of companies by the law, the wider public interest accruing from shareholder engagement is unrelated to dictating shareholders to take measures that

---

[185] Katelouzou, 'Shareholder Stewardship' (n 9), 590.

[186] The wider public interest considerations arising from shareholders' engagement practices has been risen as an issue since the 2008 financial crisis. Chiu, 'Reviving Shareholder Stewardship' (n 55), 986.

[187] Iman Abantawi, Lynn A. Stout, 'Fiduciary Duties for Activist Shareholders' (2007) 60 Stanford Law Review 1255, 1293.

[188] ibid.

would pursue achieving public considerations on behalf of the State.[189] Rather, it accrues from ensuring the undertaking of shareholder engagement to further shareholders' and intermediaries' private interests as these are calibrated by the interests of their beneficiaries and clients, but relative to all such considerations that will render their pursuit as possible to be made without prejudicing any other interests in the process, or pursue them while being an impediment on others.[190] After all, as far as the exercise of shareholders' voting rights is concerned, the law expects of shareholders not to prejudice any interests in the process of discharging their self-interest.[191] This is furthermore evident in the regulation of the duties shareholders and their intermediaries hold to shareholders' beneficiaries or clients respectively.[192] The current legal framework dictating shareholders' and their intermediaries' duties do not overtly hinder the encapsulation of such considerations.[193] In several respects even, it entails an overarching discretion to factor these issues as material in the calibration of overall welfare for shareholders' beneficiaries, in the sense that their factoring is integral in the animation of shareholders' and their intermediaries' decisions to generate profit for them.[194]

The extent to which such attribution of responsibility will be effective will depend on the means by which policymakers will endeavour to regulate shareholders' practices

[189] See Chapter 2, above, 2.5.1.

[190] On the extent to which shareholder engagement is a matter of public consideration see, Katelouzou, 'Shareholder Stewardship' (n 9), 587-590.

[191] Keay, 'Board Accountability' (n 153), 287-288.

[192] See on this, in general, Law Commission, 'Fiduciary Duties of Investment Intermediaries' (Law Com No.350, 2014).

[193] Chiu, Katelouzou (n 19), 90.

[194] Andrew Johnston, Paige Morrow, 'Fiduciary of European Institutional Investors: Legal Analysis and Policy Recommendations' (2016) University of Oslo Faculty of Law Research Paper No. 2016-04 https://ssrn.com/abstract=2783346 accessed 10 September 2019.

and the frameworks that will be introduced to this end.[195] Contrary to current practices made by policymakers, the Thesis suggests that shareholder stewardship should approach the attribution of the responsibility on shareholders in relation to the undertaking of shareholder engagement that upholds companies' longevity and resilience as the main priority of such engagement, from which shareholders' interests will be met accordingly. This means that such responsibility should be attached on the ability of shareholders to collectively vote in the general meeting and their capacity to undertake any other meetings and communications to express their voice in corporate governance to secure their interests as investors.[196] Such a responsibility should also be attributed in a manner that is cognisant of the outcomes and scope of shareholders' practices in corporate governance. This means that shareholders' responsibility must be attributed on them relative to the effect of their practices depending on the capacity upon which they are undertaking it, and the means by which the likely interests they have to consider will be balanced effectively with upholding companies' sustainable development.

Shareholder stewardship's objectives in the manner outlined herein will be capable of being materialised when the framework adopted will regulate shareholders' practices on a multi-dimensional basis, depending on the capacity that shareholders are undertaking their engagement practices. Future research in the area will provide key insights on the means by which this can be achieved effectively, both with regards to ensuring that shareholders' incentives will be oriented to promoting companies' sustainable economic development and to addressing any factors that exacerbate

[195] But see, Birkmose, 'European Challenges' (n 184).

[196] For a critique of the inability of shareholders to act as monitors of corporate management, see Chapter 3, above, 3.5. See also, in general, Daniel Attenborough, 'The Vacuous Concept of Shareholder Voting Rights' (2013) 14(2) European Business Organisation Law Review 147.

their collective action problems to engage in corporate governance to this end. While critical of its present articulation, it is possible to see provisions akin to rules transposing SRDII and the 2020 Stewardship Code acting as part of the regulatory framework which will ensure the attribution of such responsibility on shareholders when they engage in corporate governance in their capacity as investors.[197] But in light of the criticism made above, it is possible to see regulation of shareholders' practices having a meaningful effect only when several of the issues identified above are addressed.

The first of these issues relates to the objective set for shareholders and intermediaries to pursue, and the scope of disclosures shareholders and intermediaries are required to undertake. As already mentioned, the scope of orienting shareholders' and their intermediaries' pursuit of practices in compliance with the rules transposing SRDII and the Stewardship Code is prone to allow shareholders factoring ESG considerations solely when there is an indication that such practices are beneficial to ensuring their interests in profit. In light of the potential effects of such practices though, shareholders and intermediaries should not be given an objective that gives them a free reign to subjectively consider the encapsulation of such considerations and companies' sustainable development for the betterment of their welfare.[198]

Instead, a more integrated objective should be set on shareholders to pursue. An approach that is akin to the initial draft suggestion for the 2020 Stewardship Code may be able to act as the basis of developing such an orientation. Initially, the objective set for shareholders to pursue in compliance with the principles of the 2020 Stewardship

[197] Katelouzou, 'Shareholder Stewardship' (n 9), 594.

[198] Birkmose, 'Forcing Shareholder Engagement' (n 122), 635.

Code was done for the creation of 'sustainable value for beneficiaries, the economy and society'.[199] Provided that this objective reflects on the effect of the creation of such sustainable value for companies' sustainable economic development relative to conforming to the paradigm of strong sustainability, it is possible to see this objective as capable of orienting shareholders' practices to pursue practices that go beyond the opportunistic discharge discharge of their self-interest.[200] This can be the case if this objective is accompanied by principles that would dictate and encapsulate how shareholders are factoring companies' sustainable economic development as elements that would inform their engagement practices, depending on the capacity in which they are undertaking it.

The second revolves around ensuring that these principles are enforced beyond relying on self-regulation or market-driven initiatives.[201] Sergakis and Katelouzou have recently outlined a conceptual taxonomy for enforcing shareholder stewardship that is cognisant of these issues.[202] The first dimension of the authors' taxonomy is concerned with the level of enforcement and the nature of the enforcer at each level.[203] Self-enforcement is included in this, but the authors acknowledge the particularities associated with shareholders' practices and the insufficiency of shareholders' voluntary compliance. As a result, Sergakis and Katelouzou propose the inclusion of

---

[199] FRC, FCA (n 32), 11.

[200] See, in general, Alice Klettner 'The Impact of Stewardship Codes on Corporate Governance and Sustainability' (2017) 23 New Zealand Business Law Quarterly 259.

[201] See, in general, John Armour, 'Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment' (2008) ECGI Law Working Paper No.106/2008 https://ssrn.com/abstract=1133542 05 November 2020.

[202] Dionysia Katelouzou, Konstantinos Sergakis, 'Shareholder Stewardship Enforcement' (2020) ECGI Law Working Paper No.514/2020 https://ssrn.com/abstract=3564266 accessed 15 May 2020.

[203] ibid, 7.

a broad array of methods of third-party enforcement, which is comprised of public, semi-public, private, market, and social enforcement. They furthermore recognise various norm-enforcers across each level, such as national conduct authorities at the public level, entities created with the involvement of the State at quasi-public level and contractually related parties, such as shareholders' beneficiaries at the private level.[204]

The second dimension of the authors' taxonomy is concerned with the use of formal and informal mechanisms. Formal enforcement mechanisms revolve around the standardised judicial, quasi-judicial or administrative proceedings against shareholders with regards to their compliance with their duties and responsibilities.[205] Informal enforcement mechanisms may consist of the provision of annual reports and guidelines for better compliance with shareholders' duties and responsibilities, or the initiation of informal procedures which aim to warn shareholders of their possible non-compliance. The final dimension introduced is a temporal one, and consists of ex-ante and ex-post enforcement. Most formal forms of enforcement mechanisms can be seen as ex-post, and they can be understood mainly as mechanisms that seek to either conform shareholders' practices to the standards required to operate, or identify methods that can be used for restorative or compensatory purposes.[206] Ex-ante forms of enforcement can also play a role in enforcement as well, due to their ability to nudge shareholders either to comply with their duties and responsibilities, or conform their practices to the undertaking of collective actions in that effect to ensure compliance with undertaking better engagement practices.[207]

[204] ibid, 8.

[205] ibid, 9.

[206] ibid, 10.

[207] ibid.

The analysis undertaken throughout the Thesis signifies that the enforcement of the Stewardship Code should consider at least one additional dimension. As showcased in Chapter 4, the capability of shareholders and their intermediaries adopt practices that lead to shareholder engagement that promotes companies' sustainable development requires addressing both their incentives to be in line with achieving the latter effectively and providing the premises that will help shareholders overcome their collective action problems to engage effectively to this end.[208] Considering the complexity of this endeavour however, enforcement must seek to enforce the any principles relative to facilitating the mediums or incentives that can facilitate the undertaking of collective actions by shareholders effectively. The possibility of achieving the latter though may not necessarily just involve the imposition of responsibilities on shareholders to do so in a manner that they will consider issues beyond the satisfaction of their interests as a priority. In several occasions, the taking up of a collective action depends materially on the extent to which directors exercise their powers diligently and in a way that provide scope for shareholders to express their opinion, or raise issues to consider.[209] Should these are left unattended, the scope of shareholders' compliance with any principles imposed on them will remain a difficult endeavour to facilitate.[210]

The extent of the effectiveness of the aforementioned enforcement mechanisms will essentially depend on their potential application and discretion of policymakers to

[208] Chapter 4, above, 4.4.

[209] The effectiveness of the regulation of directors' practices via soft-law measures is questionable, Ian MacNeil, Xiao Li, 'Comply or Explain: Market Discipline and Non-Compliance with the Combined Code' (2006) 14 Corporate Governance: An International Review 486, 489-492.

[210] This extends to addressing the myriad of shareholders' functional capacity and incentive issues merely by disclosure. See, Birkmose, 'European Challenges' (n 184), 240-242.

adopt any enforcement mechanisms relative to the attribution of shareholders' responsibility to comply with any principles set. But even when these are factored, it is important to note that the regulation of shareholders' practices solely by principles and rules akin to the rules transposing SRDII and the 2020 Stewardship Code will have minimum effect. When one factors the considerations and interrelating actions that animate shareholders' and intermediaries' investment and engagement practices, the disclosure rules of the Stewardship Code and the rules transposing SRDII will only be able to play a small part in the attribution of responsibility of shareholders to adopt engagement practices relative to upholding aggregate and corporate sustainable development.[211] The management, undertaking, and regulation of shareholders' investment practices as well as the regulation of intermediaries' practices relative to the undertaking of their engagement practices based on the investment strategies adopted will also be material in ensuring that shareholders' practices are undertaken with a view of upholding shareholder stewardship's objectives.[212]

Shareholder stewardship therefore will be capable of ensuring that shareholders and intermediaries are adopting more responsible practices that lead to shareholder engagement that is in line with the suggestion made in this Thesis only if policymakers adopt a framework that will regulate such practices to achieve its objectives to this end on a multi-modal basis. The attribution of responsibility on shareholders to adopt engagement practices that promote companies' sustainable development, therefore, and the enforcement of any principles relative to ensuring it, must be informed and ensured by adopting all such frameworks required to secure that shareholders will

[211] Dionysia Katelouzou, Alice Klettner, 'Sustainable Finance and Stewardship: Unlocking Stewardship's Sustainability Potential (2020) ECGI Law Working Paper No. 521/2020 https://ssrn.com/abstract=3578447 accessed 12 May 2020.

[212] Chiu, Katelouzou (n 23), 90-92.

conform to adopting practices that factor ESG considerations relative to upholding companies' sustainable development.[213] While this means that shareholder stewardship's objectives will be required to be upheld through the regulation of shareholders' and intermediaries' practices as investors by financial and capital markets law at a hard-law level, it is possible to see company law having a great role to play in the attribution of such responsibility as well. This primarily relates to the regulation of the collective exercise of shareholders' voting rights by company law and the introduction of rules that raise the case for the imposition of such responsibility.

5.3.3. The Potential Contribution of Company Law

Over the years, common law outlined that the aggregate exercise of shareholders' voting rights to discharge any powers bestowed on the general meeting gives rise to several legal expectations under certain circumstances.[214] Albeit in limited circumstances, the main expectation that is currently imposed revolves around the understanding that shareholders will have to exercise their voting rights to discharge a power bestowed on the general meeting with regards to the alteration of the articles of association in such a way that will be in good faith for the best interests of the company, and not for an improper purpose.[215] Additionally, although not entirely clear, it is expected of shareholders not to commit fraud on minority shareholders, or at least

[213] This extends to regulating shareholders practices as investors by financial law as well. See on this, in general, Barker, Chiu (n 45).

[214] See *Re Charterhouse Capital Ltd* [2015] B.C.C. 574, [90]-[96].

[215] *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch. 656 (CA), 671. See also *Sidebottom v Kershaw Leese and Co Ltd* [1920] 1 Ch. 154 (CA), 163. See also, *CAS (Nominees) Ltd v Nottingham Forest FC plc* [2002] 1 BCLC 613 (Ch), *Citco Banking Corp NV v Pusser's Ltd* [2007] B.C.C. 205, *Edge v Pensions Ombudsman* [2000] Ch 602 (CA), *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 (CA), *Hunter v Senate Support Services Ltd* [2004] EWCH 1085 (Ch), *Peters' American Delicacy Co v Heath* (1939) 61 C.L.R. 457, *Sidebottom v Kershaw Leese and Co Ltd* [1920] 1 Ch 154 (CA).

abuse their interests in any detrimental way.[216] The cases raising these expectations over the years were not sufficiently clear as to the breadth and reach of these. Nevertheless, it seems that both expectations seek to cover instances where shareholders are misappropriating their power for the opportunistic furtherance of their interests to protect either the companies' or several shareholders' interests, depending on the situation.[217]

While common law has not provided clear answers to these, it is possible to see that a normative argument can arise based on these for the attribution of a responsibility on shareholders to exercise their voting rights more responsibly, at least with regards to upholding the best interests of the company.[218] In light of this, and given the fact that the aggregate exercise of shareholders' voting rights discharge powers as decision-makers in companies, it is possible to see the introduction of a collective duty owed by shareholders in the general meeting that can be owed to the company to ensure the facilitation of its best interests.[219] Several authors over the years have suggested the imposition of such a duty on shareholders on the basis of various arguments.[220] Mainly, such a suggestion has been raised on the rationale that shareholders are capable of abusing the effect of the exercise of their voting rights to further their interests without considering the likely effects of it.[221] Given that the power shareholders have is attributed to them to discharge a power afforded to the general meeting to exercise the will of the company, several authors consider that a duty owed

[216] *Re Charterhouse Capital Ltd* (n 214).

[217] Keay, 'Board Accountability' (n 153), 285-289.

[218] ibid, 289.

[219] Beate Sjåfjell, 'Achieving Corporate Sustainability: What is the Role of the Shareholder?' in Hanne S. Birkmose (ed), *Shareholders' Duties in Europe* (Kluwer Law International, 2017), 396.

[220] Abantawi, Stout (n 187), 1262.

[221] ibid, 1283-1292.

to the company can be imposed on them in the same manner of application as in the case of directors.[222]

But several other arguments can be raised as well. To a great extent, the attribution of such a duty will be capable of reflecting the suggestion made herein for the adoption of practices by shareholders which will seek to further their interests in profit derivatively and as a result of upholding companies' furtherance of interests as a priority.[223] Imposing therefore this duty on shareholders will ensure not only the recognition of companies as legal persons with distinct, albeit interrelated, interests from those of shareholders, but it will also be capable of cultivating the imposition of an understanding that shareholders' practices should be calibrated in a manner that is mindful of upholding companies' longevity and resilience as well.[224] It can therefore act as a manifestation of shareholders' commitment in the furtherance of companies' best interests relative to all considerations required to be taken into account, in the sense that this duty can act as the basis for clarifying as a matter of law that shareholders should ensure through their own end that its corporate objective will be met.[225]

Finally, the imposition of such a duty will not manifestly provide any major changes in the regulation of companies by the law, at least in comparison to alternative suggestions made with regards to the discharge of the powers bestowed on the

[222] Flannigan (n 151), 9.

[223] Keay, 'Board Accountability' (n 153), 286.

[224] ibid.

[225] ibid

general meeting.[226] As mentioned above, the imposition of such a duty on shareholders to be owed to companies reflects on the ability of shareholders to act as decision-makers in companies in the same manner as directors do in companies. Imposing a duty on shareholders therefore relative to this observation as part of securing the proper functioning of companies as well as the upholding of shareholder stewardship's objectives will not be a radical departure from any established understandings about the allocation of the control of the company.[227] Rather, it can be considered as a natural extension of the endeavours to ensure more responsible shareholder engagement. This can be based on identifying and realising the place of shareholders in companies as legal persons with regards to the exercise of the formal power they are provided with under law and the articles of association.[228] Attributing such a duty on shareholders, therefore, is capable of raising the salience of the responsible engagement of shareholders in companies by reference to securing their sustainable development and proper functioning, and provide clarity with regards to the discharge of the best interests of companies as a matter of law in relation to this issue from the perspective of shareholder power.

Of course, the suggestion for the imposition of such a duty merits some discussion, both with regards to the scope of the duty as well as its imposition and enforcement. The remainder of the Chapter will briefly examine some of these issues relative to the

---

[226] But see, Marc T. Moore, 'Understanding the Modern Company through the Lens of Quasi-Public Power' in Barnali Choudhuri, Martin Petrin (eds) *Understanding the Company: Corporate Governance and Theory* (CUP, 2017), 90-105.

[227] Cf Paddy Ireland, 'Limited Liability, Shareholder Rights and Corporate Irresponsibility' (2007) 34 Cambridge Journal of Economics 837; David Campbell, Stephen Griffin, 'Enron and the End of Corporate Governance?' in Sorcha MacLeod (ed) *Global Governance and the Quest for Justice: Volume II* (Hart Publishing, 2006).

[228] Abantawi, Stout (n 187), 1296.

arguments made above. It should be noted, however, that this examination is quite tentative in nature. It therefore remains subject to further research in the future. It is possible to argue though that a meaningful regulatory approach to upholding shareholder stewardship's arguments for upholding companies' sustainable development should be made central in the consideration of regulating shareholders' behaviour within the context of company law through the imposition of a duty owed to the company. The role of shareholders in corporate governance and its regulation by company law should not be excluded from this equation. The consideration of these issues is a rather emerging aspect in ensuring companies' sustainable development as a vehicle of contributing to aggregate sustainable development, but the time is ripe to considering these issues on a more considered basis.

5.3.3.1. Scope and Interpretation

As stated above, a natural starting point for the imposition of duties on shareholders that are owed to the company is to formalise any efforts to set expectations on shareholders with regards to the collective exercise of their voting rights. Given that the power afforded to shareholders is discharged when shareholders, either on their own or through their intermediaries, are collectively exercising their voting rights, it is probable to see the imposition of such duty being done on the general meeting as this is comprised by shareholders over time. This means that primarily, it is the collective of the shareholders exercising the powers of the general meeting through their voting that should bear this duty through the general meeting, with the duty being reflective of this state of affairs.

The purpose of imposing a duty on the collective exercise of shareholder rights upon the whole of shareholders that comprise the general meeting is to construct within the

general meeting a suitably other-regarding attitude when it comes to discharging the powers bestowed on the general meeting so that shareholders are adopting practices that consider and uphold the best interests of the company. Imposing such a duty should therefore call shareholders to collectively adopt practices that consider the satisfaction of the best interests of the company as an end in itself. This by extension means that shareholders or the intermediaries acting on their behalf, will have to often submit their self-interest in the process of upholding this objective so as to adopt practices that benefit the company. It then follows that this duty will naturally require shareholders to commit to the upholding of the best interests of the company even if these do not align with their own at the time, in the hope that doing so will indirectly meet their interests in the future as a result of the successful and sustainable operation of the company.

Imposing such a duty can affect the ways that shareholders and their intermediaries perceive that their interests should be met from the operation of companies, which may additionally affect the ways by which their practices are calibrated with regards to the collective exercise of their voting rights as well as the processes they have in place to execute this.[229] It must be noted however that this alone will not alter shareholder behaviour, especially when one factors the multiplicity of factors affecting it, and the current structure and management of investments by the institutional investment community.[230] In light of this, any duties imposed on shareholders that may be collectively owed to the company for the exercise of the general meeting's powers for the furtherance of its best interests can initially be deemed as being unenforceable,

[229] George Goyder, *The Responsible Company* (1961, Blackwell Publishers), Chapter 13.

[230] See on this, Chapter 4, above.

since potential disputes may not give rise to any justiciable issues in need to be considered within the context of their scope and analysis.[231]

Particular merit to this argument may be found to the fact that the imposition of this duty, like in the case of directors, is necessarily translated to the imposition of a responsibility in the form of a duty onto shareholders that is going to be subjective in nature. Potential disputes in the area about the ways by which the best interests of the company should be met by reference to the collective exercise of shareholders' voting rights are probably not going to be amendable to general standards of behaviour that dictate how should shareholders react with a view to promote the best interest of the company. Just like in directors' case then, the courts may be required to engage in an ad hoc evaluation of the ways by which shareholders have chosen to balance several considerations to see what is in the best interests of companies in the course of their voting. But this may necessarily be translated to be undertaken in such a way that probably no reasonable person would arrive to the conclusion that such a course of action is manifestly against the best interests of the company.

Having this in mind, it is safe to assume that the scope of the duty in terms of determining its scope by reference to upholding the best interests of the company will not go farther than an examination of the extent to which shareholders when acting collectively to exercise the powers bestowed on the general meeting have acted in good faith for the best interests of the company. This means that the courts, in identifying the scope of the duty, will not go as far as dictating whether shareholders' actions have acted in the best interests of the company or not, save in the cases where

[231] See, by reference to directors duties, Len S Sealy, 'Directors' Wider Responsibilities-Conceptual, Practical and Procedural' (1987) 13(3) Monash University Law Review 164, 175.

manifestly shareholders have abused their position by collectively exercising the powers of the general meeting in a manner that is inconsistent with the upholding of the best interests of the company. It is possible to see therefore that the imposition of such a duty will not go as far as constraining shareholder behaviour, but it will provide some form of a sufficient nucleus to consider whether certain actions undertaken are permissive in the course of undertaking any practices that lead to the discharge of the powers bestowed on the general meeting. Given however that the best interests of the company entail considering a myriad of issues, it is safe to argue that the abovementioned argument entails an element of validity in it.

Nevertheless, and despite the fact that the foregoing introduce valid observations, the imposition of a duty on the collective exercise of shareholders' voting rights is not pointless. Introducing a duty for the collective exercise of the general meeting's powers by shareholders can act as being a part of a necessary adjustment to create an appropriate legal setting for the changes policymakers would like to see on the standard of shareholder engagement, which is after all the intended consequence of all other methods of inducing responsibility on the institutional investment community relative to it. An introduction of a collective duty owed to the company by the general meeting can stipulate that shareholders are collectively under an obligation to decide on matters about the company that will ensure its longevity and resilience financially, but on a basis that in doing so they must consider the ways by which several other interests and considerations will be factored as material for the facilitation of the latter.

Suggesting the introduction of such a duty necessarily implies confronting the (social-norm derived) rationale that companies should focus on prioritising the creation of shareholder value per the postulates of shareholder primacy as well as the understanding that shareholders and their intermediaries are necessarily in pursuit of

it as a key priority when adopting practices that lead to shareholder engagement in the form of the exercise of shareholders' voting rights. An initial consideration against the imposition of this duty is an innate fear that doing so would lead to a dangerous loss of the imperative of shareholders to adopt practices that are primarily dictated by their pursuit of self-interest as well as the dictations of market forces in relation to advancing social welfare through allocative efficiency.[232] Given however the regulatory impetus to make shareholder engagement more responsible, and to the extent that this means that often shareholder engagement will have to be undertaken with a view that may deviate from the immediate satisfaction of shareholders' interests in terms of creating shareholder value, then it can be stated that the introduction of such a duty bears considerable validity, in the sense that its introduction will act as part of the endeavours to achieve the aforementioned.

The introduction of such a duty, as stated above, will not constrain necessarily the ability of shareholders to adopt practices that consider the furtherance of their self-interest in light of what is in the best interests of companies as this may be influenced by market forces. Nevertheless, its existence is capable of making shareholders more responsive to considerations that exceed the apparent creation of shareholder value as a priority by considering the extent to which the factoring of wider considerations, even at the apparent loss of immediate creation of shareholder value, will result in its superior accommodation within a context that is cognisant of all those things required to promote more sustainable practices. Having this duty in place therefore is possible to set the foundation of what is expected of shareholders to be doing at least by reference to the collective exercise of their voting rights, which can in turn assist other

[232] Usually, arguments deriving from this end derive from theories that are used to support shareholder primacy's rationale. See Chapter 2, above, 2.2.

forms of regulation in attaining their objectives in light of the fact that it is expected of shareholders and intermediaries to adopt practices that ultimately promote more sustainable corporate practices. The imposition of such a duty therefore is capable of internalising within the prospects of shareholders in the course of exercising their voting rights elements that may otherwise be seen external to shareholders' considerations have these not being deemed as relevant for the satisfaction of their interests.

A note should be made about the calibration of the meaning of the best interests of the company as well within this context. While not explored sufficiently, the literature assumes that common law precedent interprets and determines the interests of the company concerning the exercise of shareholders' voting rights by reference to the legal norm of shareholder value.[233] Nevertheless, there is precedent signifying that the interpretation of the interests of the company through the legal norm of shareholder value is restricted to situations where shareholders vote in the general meeting for matters that affect shareholders' interests inter se.[234] In such situations, the best interests of the company do not mean the company as an entity that is distinct from shareholders, but the shareholders as a whole.[235] It could be assumed though that the legal norm of shareholder value can be used to interpret the best interests of the company in cases concerning the company as an entity if, by analogy, it is determined that the interests of the company should be interpreted in the same manner and standard as that of directors under s.172 of the Companies Act.

[233] Andrew Keay, Hao Zhang, 'An Analysis of Enlightened Shareholder Value in Light of Ex Post Opportunism and Incomplete Law (2011) 8(4) European Company and Financial Law Review 445.

[234] *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch. 286 (CA); *Re Charterhouse Capital Ltd* (n 214).

[235] ibid, 291 per Evershed MR (emphasis added). See also, Jonathan Mukwiri, 'The Myth of Shareholder Primacy in English Law' (2013) 24(4) European Business Law Review, 217.

If this is the case, shareholders' exercise of voting rights under the proposed duty may be assumed as being exercised for the interests of the company as a separate legal person. This means that shareholders will have to determine whether the decisions of the general meeting should contribute to the overall wealth and prosperity of the company, which is defined by reference to the satisfaction of shareholders' interests that take into account a number of other interests and issues in the process.[236] Just like directors then, the courts can assess shareholders' good faith by considering whether shareholders genuinely believed that their actions would secure the best interests of the company by reference to the integrity of shareholders' interests as a whole having taken into account a number of other issues, considerations, or interests in the process.[237] In this respect, it may be possible to argue that shareholders sitting in the general meeting should be expected to give due regard to strategic deliberations that risk the integrity of the company's performance and, as a result, shareholders' interests as a whole.

If shareholder value as a legal norm will be assumed to be the basis of interpreting shareholders' interests, the possible duty imposed on shareholders will be neither prohibitive nor facilitatory of the exercise of shareholders' voting rights in a manner that can contribute to the company's sustainable development. So long as shareholders will highlight that they exercise their voting rights for the best interests of the company in good faith and for a proper purpose, shareholders can unequivocally pursue any course of action. Should the legal norm of shareholder value is deemed as the one that is to be used to interpret the best interests of the company regarding

[236] *Sidebottom* (n 215), 161-173. See also *Shuttleworth v Cox Bros and Co (Maidenhead) Ltd* [1927] 2 K.B. 9 (CA), 23–24, 26–27.

[237] Flannigan (n 151), 8-10.

the exercise of shareholders' voting rights under the proposed duty, the norm in itself is not prohibitive of shareholders exercising their voting rights in a way that can lead to the company's sustainable development. The opposite however may also be a possibility, provided that shareholders can showcase that they genuinely believe that their actions were made for the best interests of the company by reference to shareholders' interests as a whole.

Given the interpretive room that the legal norm of shareholder value provides for adopting practices in the latter direction, it is possible to see the need of addressing the best interests of the company as a matter of law as well in order to ensure that shareholders' practices will too be steered and informed by the need to facilitate the former.[238] Johnston et al. have presented a tentative proposal to reform company law to this end, by suggesting the satisfaction of the best interests of the company by orienting corporate practices to create sustainable value for themselves within planetary boundaries while respecting the interests of shareholders and any other involved parties and stakeholders.[239] The key element to this objective is the creation of sustainable value within planetary boundaries.[240] Like the suggestion made in

---

[238] Sjåfjell, 'Achieving Corporate Sustainability' (n 219), 396.

[239] Andrew Johnston et al, 'Corporate Governance for Sustainability' (2019) https://ssrn.com/abstract=3502101 accessed 02 February 2020.

[240] This suggestion is evident as influencing the EU Commission's efforts to contribute to the development of regulation addressing corporate governance for sustainability. European Commission, EY, Study on directors' duties and sustainable corporate governance (Final Report, 2020), available at: https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en. Cf Mark J. Roe et al., 'The European Commission's Sustainable Corporate Governance Report: A Critique' (2020) ECGI Law Working Paper 553/2020 https://ssrn.com/abstract=3711652 accessed 10 October 2020; Paul Krüger Andersen et al., 'Response to the Study on Directors' Duties and Sustainable Corporate Governance by Nordic Company Law Scholars' (2020) Nordic & European Company Law Working Paper No. 20-12 https://ssrn.com/abstract=3709762 accessed 15 November 2020, 5-7.

Chapter 2 for the normative account for the corporate objective, the endeavour to achieve this signifies the adoption of all practices within the pre-cautionary environmental limits imposed on human practices to ensure that companies' furtherance of interests will not be made at the expense of the environment that accommodates them.[241]

The protection and promotion of the interests of all stakeholders and shareholders involved in the development of this orientation of creating value for companies is furthermore informed by the need to be mindful of all such interests that companies should take into account to uphold their practices and contribute to the advancement of social welfare.[242] This does not extend solely to the jurisdictional limits of the regulation of companies. Rather, they encapsulate all such considerations in need to be factored relative to the broader societal impact of companies, which includes factoring any issues related to upholding any interests across the whole of the production chain of companies.[243] The broader societal impact of companies and its relative view to enhancing companies' welfare is prevalent in this calibration of the best interests of the company therefore within a context that is informed by the furthering of companies' main goal of upholding these while creating profitable outcomes for their own sake.[244]

5.3.3.2. Implementation and Enforcement

A proposal for the introduction of a duty owed to the company, however tentative, should at least briefly consider the implementation of such a duty. As stated above,

[241] Sjåfjell, 'Achieving Corporate Sustainability' (n 219), 399.

[242] Johnston et al (n 239).

[243] ibid.

[244] ibid.

the possible imposition of such a duty will clearly allow shareholders to vote freely within the boundaries of the law, and so long as the resolutions adopted are made for the best interests of the company. Hence, it will be possible to deduce that shareholders should not knowingly vote in the general meeting to adopt a resolution that will lead companies to adopt practices that are illegal, or that they would lead them towards their demise.[245] On the same continuum, it may be argued that shareholders should consider directors' and the boards' ability to ensure legal compliance, and consider based on the information they hold whether companies are managed by factoring these and all other parameters that may affect their best interests.[246] This however raises questions as to whether shareholders should proactively follow up on any information that indicates possible violations of the law occurring in the company, or whether they should demand from directors more information to discharge any powers afforded to the general meeting in accordance to discharging such a duty effectively.[247]

It may be safely said that, provided that they hold sufficient information about the company's performance as well as other issues that may be related to the affairs of the company, shareholders' discharge of the suggested duty will go as far as ensuring that shareholders have discharged the powers afforded to the general meeting collectively in light of the information they hold about the company and the task that they are called to consider when sitting in the general meeting. But for this to be done effectively, some form of information that can be validly be processed must be in place for shareholders to execute such function.[248] After all, the quality of the information

[245] Sjåfjell, 'Achieving Corporate Sustainability' (n 219) 394.

[246] ibid.

[247] ibid.

[248] See on this, Chapter 4, above, 4.4.

shareholders hold is a necessary pre-requisite for shareholders' and intermediaries' ability to overcome their collective action problems in relation to adopting practices that can meaningfully promote companies' sustainable development.[249]

But for this to be possible, shareholders must be able to have access to such information as well as having the ability to process it. Most of the processes in need to have such information will require supplementary regulation of companies by reference to the information they make available.[250] This signifies to the governance of the company with a strong-sustainability mindset by directors, and their provision of space, time, and information for shareholders to discharge such role. Naturally, the analysis made here would reflect only on the multi-dimensionality of the problems shareholders face and the need for their solution for shareholder stewardship as a concept to reach its potential through the lens of the suggestion for the imposition of a duty to the company. But in light of the latter's capacity of contribution to the development of corporate governance for sustainability and its dependency on having key information and premise for shareholders to exercise their voting rights accordingly, the consideration and regulation of directors' practices by company law are of outmost importance.[251]

So long as corporate practices and the companies' immediate control by directors is not addressed, it is highly questionable whether shareholders will be in any way

---

[249] Ibid.

[250] Movements have been made on this area in the UK for securing that companies disseminate information about their sustainable development and business practices. See, for example, BEIS, 'Restoring Trust in Audit and Corporate Governance: Consultation on the Government's Proposals' (March 2021).

[251] Andrew Johnston, Beate Sjåfjell, 'The EU's Approach to Environmentally Sustainable Business: Can Disclosure Overcome the Failings of Shareholder Primacy?' in Marjan Peeters, Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (EE, 2020), 408.

capable of discharging their own end of contribution to the development of corporate governance for sustainability. Future research therefore on the topic should endeavour first to consider directors' control and responsibilities for achieving this endeavour by taking into account the market, legal and social norms which dictate their activities. The possible contribution of shareholder stewardship should only be seen as a concept generated and capable of being considered as a result of it, which will act as a mechanism that will create signal to directors possible issues that they will need to address in their control to achieve the corporate objective with a strong sustainability mindset. The potential for shareholder stewardship to achieve that is evident. Whether this is feasible however will only be seen in the future, and after a considerable amount of changes in the way shareholder stewardship is seen as a concept.

In addition to this, shareholders as well as their intermediaries should be able to factor such considerations extensively. At least from the perspective of the regulation of the EU, there are plans that have accelerated the process of requiring of shareholders and intermediaries through disclosure to identify such processes. There is furthermore regulation that seeks to implement and identify common ground about the ways and methodologies by which shareholders' and intermediaries' practices will be animated by ESG considerations, in addition to the development of some common language with regards to the consideration of what a 'sustainable business practice' may actually mean.[252] Movement for adopting similar regulatory initiatives is evident in the UK as

[252] See for example, Communication From the Commission, Action Plan: Financing Sustainable Growth (2018) COM(2018) 97 final. See also, Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (2019) OJ L 198; Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks (2019) OJ L 317; Regulation (EU) 2020/852 of the European Parliament

well, with the aspiration that these would be enough to allow shareholders and intermediaries to undertake practices that lead to shareholder engagement that truly contributes to more sustainable business practices.[253]

Assuming that the foregoing are in place, then the implementation of the suggested duty may materialising through setting an added requirement to disclose the ways by which shareholders and intermediaries have adopted practices that act in compliance with such a duty. But the extent to which such duty will be fully complied will rely materially on the extent to which it can also be enforced. Introducing disclosure requirements with regards to making statements of compliance is possible to ensure compliance with the duty, at least on a procedural and formal basis.[254] Taking this route of enforcement, it is possible to see several regulators, such as the FCA and FRC, taking a role in the regulation of shareholders' practices by reference to ensuring that truly the statement of compliance is duly made with a view to showcasing how shareholders have adopted practices that comply with the duty. The sanctions that may be available for possible mal-compliance with such a disclosure duty may act as a deterrent for ensuring proper compliance. It remains however unknown whether enforcement solely by this means is possible to ensure that shareholders' exercise of voting rights can lead to proper compliance, in light of the fact that the consideration of such enforcement must be made relative to considerations that pertain to the

---

and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (2020) OJ L 198.

[253] See, inter alia, HM Treasury, BEIS, Green Finance Strategy: Transforming Finance for a Greener Future (July 2019); HM Treasury, Greening Finance: A Roadmap To Sustainable Investing (October 2021).

[254] Katelouzou, Sergakis (n 202).

existing regulation of shareholders' and intermediaries' practices by respective regulators.

Given the nature of the duty proposed, it is not possible to refrain from considering the consideration of the enforcement of such duty through litigation. Given that the duty will be owed to the company, one automatically is led to the conclusion that some form of an enforcement mechanism must be available as a matter of company law for the company to be able to enforce this duty whenever shareholders are in breach of their duty. The solution to this would be the ability to bring a derivative action against the general meeting for failing to adopt practices that act in compliance with the suggested duty introduced.[255] A challenge however with the consideration of the derivative action as a means of enforcing such a duty proposed is that the derivative action is available in the UK only to shareholders themselves to initiating. Considering ways to address this automatically become important, since there is an a priori conflict between the duty suggested to be imposed, and the ability to enforce it relative to the existing structure of correcting potential wrongs in the corporate governance of companies.[256]

It may be safely argued that it is possible for minority shareholders to consider bringing a derivative action against the decisions of the majority, in that their voting has animated the collective discharge of the general meeting's powers in a manner that affected detrimentally the company.[257] But while such an action will be designed to right any wrongs on behalf of the company, it is very difficult to see how certain shareholders will be able to take proceedings against other shareholders in relation to

[255] Suggested as a measure in Keay (n 137), 254.

[256] ibid

[257] M. Blair and L. Stout, 'A Team Production Theory of Corporate Law' (1999) 85 Va L R 247 at 293. cf David Millon, 'New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law' (2000) 86 Virginia Law Review 1001.

these issues, especially when such shareholders or their intermediaries would have acted on advice and/or initiatives that often derive from the same service providers. It is safe to say therefore that having derivative proceedings that are exercisable only by shareholders may, in one way or another, fail to instigate proceedings that can safely secure litigation through the lens of derivative action, save in exceptional circumstances where there is evidence of harm to the company that is identifiable by minority shareholders as being the result of the decisions of the general meeting.

Given that the proposal set herein is setting a duty owed collectively to shareholders, there seems to be no a priori reason why other constituents would be able on behalf of the company to ensure that such a duty is duly complied through the derivative action.[258] Implicit in the recognition and imposition of a duty to the general meeting that is owed collectively by shareholders to the company is a recognition that other constituents should be entitled to take action to safeguard the best interests of the company by ensuring shareholders' compliance with such a duty. As a result, ensuring this via a means of an enforcement mechanism such as the derivative action requires its accessibility to become more encompassing.

While the UK is currently restrictive as to who is able to initiate derivative actions, it is possible for the UK, in support of the implementation and enforcement of the duty suggested, to permit a greater range of possible applicants. Such an approach may be undertaken in light of other jurisdictions that adopted a similar line of approach.[259] Further research on the topic of enforcement will shed light on identifying which constituents can possibly be eligible for bringing a derivative action. Nevertheless, a

[258] See, by reference to derivative actions taken for directors duties, Janice Dean, *Directing Public Companies* (London, Cavendish Publishing, 2001), 155.

[259] See for example, Australian Corporations Act 2001, s 236.

suggestion can be made that legislation should be able to provide the ability for anyone who is interested in the affairs of the company to bring a derivative action, provided that there is a priori judicial discretion on identifying whether the applicant falls under the category of such a potential applicant.[260] In deciding whether anyone appears to be an applicant interested in the affairs of the company, legislation can introduce measures that constrain its definition to those who may have either direct financial interest in the affairs of the company, or a particular interest in the way that the company is being managed to meet its best interests as these may be regulated by the law.[261]

It is likely that under a derivative claim related to the potential breach of the duty proposed, the courts will have to make orders that are either declaratory or requiring action to be taken in companies to rectify the wrongs made from the decision in companies. This may in practice mean that the applicant of the derivative action would need to be one that felt that shareholders' collective exercise of voting rights that led to the discharge of the powers of the general meeting have prejudiced the company's position. This would also mean that the applicant would have to make a case that the action in question is in contravention with companies' sustainable development as well. This definitely produces an issue of identifying evidence that can suggest this, especially when the damage undertaken is not evident to be seen in the near future.[262] Possible amendments to the law as well as the indication of common ways by which corporate performance is to be assessed is of particular importance to rectify this

[260] Keay (n 137), 257.

[261] Introducing such a measure cannot be seen as a radical departure from what the law is proposing with regards to other jurisdictions concerning derivative actions. See, for example, Canada Business Corporations Act, s.238(d).

[262] Keay (n 137), 261.

issue. In general though, it is submitted that addressing at least the former will not act as a radical departure from the existing regulation of companies, for the reason that derivative actions are usually undertaken when there is indeed evidence of considerable harm induced. Provided that new methodologies in assessing corporate performance in light of the calls for their sustainable development are introduced, enforcement by a derivative action is possible to correct possible deviations from practices that may lead to companies' mismanagment as a result of an apparent shareholder opportunism.

5.4. Conclusion

This Chapter has considered the extent to which the rules transposing SRDII and the 2020 Stewardship Code will be capable of addressing the challenges arising from the current standard of shareholder engagement as the factors that may exacerbate the collective action problems inherent in its undertaking for the promotion of companies' sustainable development. The Chapter outlined that the 2020 Stewardship Code will prove an inadequate means of achieving this, especially when companies' sustainable development is seen through the context of adopting corporate governance for sustainability as outlined in Chapter 2. The Chapter identified that several problems inherent on relying on disclosure rules and the objective imposed on shareholders to pursue in compliance with the rules transposing SRDII and the 2020 Stewardship Code can make the regulation of shareholders' and intermediaries' practices incapable of ensuring effectively that they integrate ESG considerations accordingly, let alone doing it with a view to promote effectively companies' sustainable development beyond the apparent business case for meeting shareholders' interests in profit.

The amalgamation of these issues led the Chapter to conclude that the rules transposing SRDII and 2020 Stewardship Code, and through it, shareholder stewardship, will possibly lead shareholders and intermediaries to adopt practices that conform more to the paradigm of weak sustainability, and with a view to secure shareholders' profits as a priority regardless of the effects in the process. Given however the detrimental effects arising from positioning corporate practices to be oriented to the foregoing end, the Chapter argued that the criticism made for the use of shareholder stewardship as a means of ensuring companies' sustainable development holds considerable validity. Given however the scope and effect of shareholder engagement in corporate governance, the Chapter argued that the time is ripe to ensure that shareholders and intermediaries are adopting practices that will promote or contribute to companies' sustainable development more readily. In light of this, the Chapter argued that shareholder stewardship has the potential to act as the regulatory concept to achieving this, provided that its objectives and means of achieving them are re-conceptualised and considered more readily to achieve them beyond the confines of satisfying shareholders' self-interest.

Having in mind the normative account for the corporate objective suggested in Chapter 2 for endeavouring to ensure companies' sustainable development through adopting corporate governance for sustainability, the Chapter argued that shareholder stewardship can act as the regulatory concept that can steer shareholders towards adopting engagement practices relative to achieving this end. The Chapter argued that this is possible if it is first and foremost ensured that shareholder engagement is steered to be undertaken to this end. Based on the analysis made throughout the Thesis, the Chapter argued that the fruition of shareholder stewardship's objectives within the foregoing context will only be possible if policymakers endeavour to regulate

shareholders' practices to achieve this on a multi-dimensional and multi-modal basis. The Chapter identified that rules akin to those contained in SRDII and the 2020 Stewardship Code can contribute to such regulation, but it has been argued that this will be the case solely when policymakers address several of the issues that have been analysed in this Chapter. The Chapter furthermore identified the potential means by which company law can help in achieving shareholder stewardship's objectives through the potential imposition of a duty on shareholders owed to the company with regards to the collective exercise of their voting rights to be made for the best interests of the company.

These proposals are quite tentative in nature, and a number of issues are in need to be factored for further reflection and consideration in the future studies. It is integral to acknowledge therefore that developments in shareholder stewardship by reference to cultivating the need for corporate and aggregate sustainable development are still premature. The analysis made herein therefore can only be considered as a starting point to considering the means by which shareholders can engage in corporate governance without their practices impede companies' welfare or the efforts to ensuring aggregate sustainable economic development. Given the detrimental effects arising from current business practices, the scope of time available to addressing these to prevent future catastrophic consequences from them, and the role of shareholders in their creation, it is time to consider effectively how shareholders will be steered towards adopting practices that are cognisant of these issues so that their pursuit of their business endeavours achieve their purpose: to contribute to social welfare through the creation of overall economic wealth.

6: Conclusion

6.1. Synopsis

The Thesis considered the extent to which shareholder stewardship and the efforts to uphold its objectives via the rules that transposed SRDII and the 2020 Stewardship Code are capable of ensuring that shareholder engagement will be undertaken in a manner that will promote or contribute to the development of corporate governance for sustainability.[1] The Thesis has considered the extent to which shareholder stewardship can achieve this goal in light of shareholders' or their intermediaries' legal and functional capacity to undertake any practices that can lead to shareholder engagement practices at a formal or informal level, the effect of these practices on corporate governance, and the current standard of shareholder engagement.[2] In addition, the Thesis considered the extent to which the rules transposing SRDII and the 2020 Stewardship Code are fit to steer shareholders and their intermediaries towards adopting practices that uphold shareholder stewardship's objectives in a way that corporate governance for sustainability is promoted or upheld.[3]

The Thesis has argued that the efforts of policymakers to transition shareholder stewardship to become a regulatory concept that seeks to contribute to facilitating companies' sustainable development from the perspective of shareholder engagement, together with the effect that the latter can have in the development of

[1] The definition of shareholder stewardship is found in A similar term will be found in Dionysia Katelouzou, *Institutional Shareholders and Corporate Governance: The Path to Enlightened Stewardship* (CUP, 2021 forthcoming).

[2] See Chapter 3 and Chapter 4, above.

[3] See Chapter 5, above.

corporate governance, justify its existence.[4] Nevertheless, the Thesis questioned the extent to which the rules transposing SRDII and the 2020 Stewardship Code are in any way fit on their own to uphold shareholder stewardship's objectives with a view to promote or contribute to corporate governance for sustainability. Having in mind the effect of shareholder engagement, the Thesis argued that shareholder stewardship has the potential to attribute the responsibility on shareholders and their intermediaries to adopt practices that are conducive to this end.[5] This is the case provided that shareholder stewardship is cognisant of attributing such responsibility relative to ensuring companies' sustainable development in a way that can lead economies to facilitate aggregate sustainable development that conforms to the paradigm of strong sustainability.

6.2. Calling for a New Normative Account for the Corporate Objective

Chapter 2 established the background for the main arguments made in the rest of the Thesis by considering the normative account for the corporate objective in light of the environmental, social and economic challenges humanity is facing as they are partly generated by business activity. Chapter 2 identified the dominance of shareholder primacy's normative account for the corporate objective, and the ways by which it establishes its rationale relative to several economic theories revolving around ensuring that companies will become more efficient to create shareholder value, which

[4] Similar arguments about the justification of the existence of shareholder stewardship, albeit with reservations with regards to its present regulation were made in the literature. See, for example, Dionysia Katelouzou, 'Shareholder Stewardship: A Case of (Re)Embedding Institutional Investors and the Corporation?' in Beate Sjåfjell, Christopher M. Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019).

[5] Similar arguments were made in the literature. See, for example, ibid.

acts as a proxy for identifying how social welfare is advanced.[6] While acknowledging that these theories are useful in managing the relationships formed in companies to ensure allocative efficiency, Chapter 2 argued that shareholder primacy fails to provide the normative premises required to ensure that companies will effectively be steered towards adopting practices that alleviate the wider environmental, social and economic effects accruing from their practices or their exposure to them.

Chapter 2 established this argument in light of two key considerations. The first related to the fact that shareholder primacy's normative account for the corporate objective does not reflect on the legal realities of companies and the position of shareholders within them.[7] The second related to the fact that the pursuit of the creating shareholder value as a priority is prone to misappreciate the factoring and consideration of several ESG criteria as integral factors in need to be undertaken in corporate governance, unless there is indication of achieving the latter as a priority.[8]

Cognisant of this criticism, Chapter 2 suggested to re-conceptualise the normative account for the corporate objective. Chapter 2 furthermore suggested to understand it as an endeavour to uphold companies' best interests as an end in itself to secure their longevity and resilience. This was supported on the basis of ensuring companies'

---

[6] For an account on the means by which these theories have been used to examine the application of company law onto corporate governance affairs see, in general, Frank H. Easterbrook, Daniel R. Fischel, *The Economic Structure of Corporate Law* (HUP, 1991); Reinier Kraakman et al., *The Anatomy of Corporate Law* (3rd edn, OUP, 2017).

[7] Similar analyses were made in the literature over the years. See, for example, Lynn A. Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler, 2012).

[8] See on this, Beate Sjåfjell, 'Redefining Agency Theory to Internalize Environmental Product Externalities. A Tentative Proposal Based on Life-Cycle Thinking' in Eleonore Maitre-Ekern et al. (eds), *Preventing Environmental Damage from Products: An Analysis of the Policy and Regulatory Framework in Europe* (CUP, 2018).

sustainable development, which should be pursued on a basis where economies in aggregate will be able to facilitate aggregate sustainable development that conforms to the paradigm of strong sustainability.[9] This normative account for the corporate objective orients the goal of undertaking the business of companies to ensure their longevity and resilience for their own sake as an end in itself, from which all other interests, including those of shareholders, will be satisfied in the process. In contrast to pursuing the creation of shareholder value as a priority though, this objective postulates for the adoption of practices that are mindful of the need to respect the environment and the societies that accommodate their practices. These are deemed to be not ancillary, but material factors that should be taken into account to ensure the resilience and longevity of companies in a manner that the public interest accruing from their practices in terms of advancing social welfare is upheld.[10]

Informed by this suggested normative account for the corporate objective, Chapter 2 identified that the development of corporate governance for sustainability can assist companies to achieve this objective. Chapter 2 acknowledged that this will be an endeavour which will require adopting systems of corporate governance that implement complex methodologies and factor a multiplicity of issues and interests across different spatial and temporal dimensions. Given that the significant control of companies lies with directors to address these, Chapter 2 identified that further research will be needed to consider how they will achieve this effectively. Such an

[9] This normative account for the corporate objective resonates with similar calls to reconceptualise the corporate objective on a company-focused basis. See, for example, Andrew Keay, *The Corporate Objective* (EE, 2011); Colin Mayer, *Prosperity: Better Business Makes the Better Good* (OUP, 2018).

[10] For a model that can promote the development of strong sustainability, see, Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist* (Penguin Random House, 2017).

endeavour though should include considering how other constituents capable of exerting some discretion, control or influence in corporate governance will be able to promote corporate governance for sustainability. This turned the attention to shareholder engagement, and the way shareholder stewardship is in the process of transitioning to achieve this.

6.3. Shareholder Stewardship as a Means of Promoting Companies' Sustainable Development?

Chapter 3 considered the introduction of shareholder stewardship, its transition towards promoting companies' sustainable development and the scope and effect of shareholder engagement. After signifying several ambivalent views about the role of shareholder engagement in corporate governance, Chapter 3 identified that frequent and responsible shareholder engagement is traditionally considered as integral to ensuring corporate and aggregate economic prosperity.[11] While the 2008 economic crisis questioned the initiatives and policies adopted to promote active shareholder engagement, the Chapter identified that shareholder engagement continued to be considered beneficial for corporate governance.[12] But in comparison to previous

[11] For an account of the ambivalent views on the role of shareholders in corporate governance and the effect of shareholder engagement in it, see, Jennifer G. Hill, 'Visions and Revisions of Shareholders in Corporate Governance' (2000) 48(1) The American Journal of Comparative Law 39; Jennifer G. Hill, 'Good Activist/Bad Activist: The Rise of International Stewardship Codes' (2018) 41 Seattle University Law Review 497.

[12] David Walker, 'A Review of Corporate Governance in UK Banks and Other Financial Industry Entities: Final Recommendations' (26 November 2009) https://ecgi.global/sites/default/files/codes/documents/walker_review_261109.pdf accessed 01 March 2021; BIS, 'The Kay Review of UK Equity Markets and Long-Term Decision Making' (Final Report, 2012)

initiatives, policymakers in support of shareholder engagement considered that it should be undertaken responsibly and in a manner that takes several issues into account for the creation of shareholder value in the long-term, which was assumed as being a proxy for ensuring corporate and aggregate economic prosperity.[13]

The Chapter identified that shareholder stewardship was introduced to become a regulatory concept that should achieve this end, with the Stewardship Code acting as the main legal framework that sought to achieve its objectives on the basis of the foregoing.[14] While the effect of the early versions of the Stewardship Code have been modest, shareholder stewardship continues to be supported through the lens of achieving the foregoing, albeit on the basis of embracing wider ESG criteria as material for its facilitation. This has been evident in the introduction of SRDII and the transposition of its rules and the update of the Stewardship Code in 2020.[15]

The introduction of these rules is aspired that it will lead shareholders and intermediaries towards adopting practices that lead to shareholder engagement that promotes not only the financial prosperity of end investors and investee companies, but also the upholding of all practices that would ensure companies' sustainable

---

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf accessed 13 March 2018.

[13] ibid.

[14] FRC, The UK Stewardship Code 2010, https://www.frc.org.uk/getattachment/e223e152-5515-4cdc-a951-da33e093eb28/UK-Stewardship-Code-July-2010.pdf accessed 02 February 2020; FRC, The UK Stewardship Code 2012, https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf accessed 02 February 2020.

[15] Directive of the European Parliament and of the Council 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L 132 (SRD II); FRC, The UK Stewardship Code 2020 https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf accessed 02 February 2020.

development that can lead to ensuring aggregate social welfare as well.[16] Despite the aspirations, Chapter 3 argued that policymakers endeavour to uphold shareholder stewardship's objectives without reflecting effectively on what shareholders and their intermediaries can do through shareholder engagement to achieve this objective relative to the functional and legal capacity they have to undertake practices to this end.[17] Regardless, the Chapter acknowledged that shareholders engagement can take place in two key respects. The first comes from the ability to vote in the general meeting, which renders shareholders capable of acting collectively as decision-makers in companies to discharge any powers bestowed on the general meeting. The second is found in shareholders' and their intermediaries' ability to express their voice in corporate governance formally in the general meeting or informally outside of it, which allows them alongside the exercise of voting rights to secure their interests as investors in companies.

Chapter 3 outlined that the combination of both capacities can be particularly influential on directors' control in corporate governance, and to a certain extent, being legally binding when the powers bestowed on the general meeting are discharged. Having these in mind, the Chapter identified that shareholder engagement can be undertaken in either of these capacities with a view to be responsive to directors' standard of management, or proactive to it, in the sense that shareholders or their intermediaries will endeavour through shareholder engagement to signal any changes in need to be made in companies. Having in mind the effect of shareholder engagement and the

[16] Iris H-Y Chiu, Dionysia Katelouzou, 'Making a Case for Regulating Institutional Shareholders' Corporate Governance Roles' (2018) (1) Journal of Business Law 67.

[17] On the extent to which the shareholder empowerment arguments holds in light of shareholder power as a matter of law see, in general, Daniel Attenborough, 'The Vacuous Concept of Shareholder Voting Rights' (2013) 14(2) European Business Organisation Law Review 147.

transition of the objectives of shareholder stewardship to embrace ESG considerations at a greater level as part of the efforts to ensure the creation of shareholder value in the long-term, Chapter 3 justified shareholder stewardship's existence.[18] In comparison to current aspirations to pursue the latter end however, the Chapter clarified that such justification should only be founded based on ensuring that shareholder engagement will be undertaken with a view to promote or contribute to the facilitation of companies' sustainable development.

6.4. The Challenges Shareholder Stewardship Must Address

Despite justifying its existence, the Thesis acknowledged in Chapter 4 that shareholder stewardship will only be able to achieve its objectives relative promoting or contributing to the facilitation of companies' sustainable development through shareholder engagement if it can address several challenges inherent in the current standard of shareholder engagement. Chapter 4 identified that currently, should it is evident, shareholder engagement tends to be undertaken with a view to create shareholder value in what is deemed to be in the short-term, an orientation that is closely associated with the unsustainable management of companies and their contribution to the environmental, social and economic challenges humanity currently faces.[19] Should this is not the case, the Chapter identified that shareholders and intermediaries factor ESG criteria in the course of adopting practices that lead to

[18] Cf Lorraine E. Talbot, 'Polanyi's Embeddedness and Shareholder Stewardship: A Contextual Analysis of Current Anglo-American Perspectives on Corporate Governance' (2011) 62(4) Northern Ireland Legal Quarterly 451.

[19] Marc T. Moore, Edward Walker-Arnott, 'A Fresh Look at Stock Market Short-Termism' (2014) 41 Journal of Law and Society 416

shareholder engagement when there is a business case for it.[20] Given however that this may lead to the promotion of companies' sustainable development that can lead economies to facilitate aggregate sustainable development that conforms to the paradigm of weak, instead that of strong, sustainability, the Chapter argued that shareholder engagement oriented by this end may prove ultimately detrimental both for companies and societies in general.[21]

While the particular characteristics and business models of several types of shareholders and intermediaries are fundamentally contributory to the calibration of this standard, Chapter 4 attributed its existence on a threefold parameter. From a normative perspective, the Chapter argued that the effect and dominance of shareholder primacy and supporting theories like that of ECMH over current corporate and investment practices contribute massively in the calibration of shareholders' and intermediaries' incentives, regardless of the effect that this may have on companies' longevity, or their ability to adopt more sustainable practices.[22] Because of this, and by factoring the current nature of the institutional investment community and its regulation by the law, shareholders and intermediaries are entering into a capital market that is systemically oriented towards the creation of shareholder value as a

---

[20] Benjamin J. Richardson, Maziar Peihani, 'Universal Investors and Socially Responsible Finance: A Critique of a Premature Theory' (2015) 30 Banking & Finance Law Review 405.

[21] Jay Cullen, Jukka Mähönen, 'Taming Unsustainable Finance: The Perils of Modern Risk Management' in Beate Sjåfjell, Christopher M. Bruner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019).

[22] Beate Sjåfjell et al. 'Shareholder Primacy: The Main Barrier to Sustainable Companies' in Beate Sjåfjell, Benjamin J. Richardson (eds) *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP, 2015).

priority, even if doing so often leads to pressuring companies and markets to misappreciate ESG considerations.[23]

Addressing shareholders' and intermediaries' incentives to adopt practices that lead to shareholder engagement is of paramount importance. But in addition to this, shareholder stewardship must also be capable of addressing all such challenges that accrue from the functional capacity of shareholders and intermediaries to adopt practices that lead to shareholder engagement that promotes or contributes to the facilitation of companies' sustainable development. Informed by the argument made in Chapter 2 for the promotion of companies' sustainable development on the basis of corporate governance for sustainability, Chapter 4 identified these issues through the lens of the need for shareholders and intermediaries to adopt a collective action for the undertaking of shareholder engagement, and the need to overcome several collective action problems to achieve this.[24] Such collective action problems were identified to revolve around the identification of cost-effective means of undertaking shareholder engagement, the co-ordination of shareholders' interests relative to promoting companies' sustainable development and the need to alleviate the effect of free-riding behaviour.

The Chapter argued that the extent to which shareholders and intermediaries will overcome these collective action problems will depend on multiple factors that can exacerbate their severity. While these factors include the number of shareholders required to facilitate a collective action to engage in corporate governance and the

[23] Chiu, Katelouzou (n 16).

[24] Rafael Savva, 'Shareholder Power as an Accountability Mechanism: The 2017 Shareholder Rights Directive And The Challenges Towards Enhancing Shareholder Rights' (2018) 5(2) Journal for the International and European Law, Economics and Market Integrations 277.

enormity of costs related to achieving it, the Chapter identified the need of credible information about the performance of companies at various levels as an important factor that may not assist shareholders to adopt appropriate corporate practices. In addition, the Chapter noted the calibration of the incentives of shareholders and their asset managers in terms of expanding the intermediation to engage in corporate governance and the management of their investment strategies as important to mitigating the severity of collective action problems as well.

6.5. The Potential Effect of the 2020 Stewardship Code and a Call to Reconceptualise Shareholder Stewardship

Policymakers appear to be informed by the severity and multiplicity of these issues, and expect through the rules that transposed SRDII and the 2020 Stewardship Code to address them effectively. While it is too early to deduct their effectiveness, Chapter 5 has identified that both the rules transposing SRDII and the 2020 Stewardship Code will probably prove an inadequate means of achieving this objective, especially when companies' sustainable development is seen through the context outlined in Chapter 2. The reason for this twofold. Primarily, Chapter 5 outlined that the reliance on disclosure rules and self-regulation will not be able to ensure that the current standard of shareholder engagement is going to change, let alone signify how shareholders and their intermediaries adopted practices that go beyond the satisfaction of their self-interest.[25] Secondly, the overarching objective imposed on shareholders and

[25] An argument to this end was made by reference to SRD II by several authors in the literature. See, for example, Hanne S. Birkmose, 'Duties Imposed on Specific Shareholders Only, and Enforcement Implications' in Hanne S. Birkmose, Konstantinos Sergakis (eds) *Enforcing Shareholders' Duties* (EE, 2019.

intermediaries to pursue in the course of adopting their practices in compliance with rules that transposed SRDII and the 2020 Stewardship Code may not assist in setting the normative premises required to meaningfully promote companies' sustainable economic development, at least when this is seen through the context identified in Chapter 2.[26] If anything, it will be able to steer shareholders and their intermediaries towards adopt practices that will satisfy their interests in profit as a priority, without necessarily ensuring that this will be made out of practices that effectively promote or contribute to the development of corporate governance for sustainability.

The amalgamation of these led Chapter 5 to argue that shareholder stewardship through the rules that transposed SRDII and the 2020 Stewardship Code will at best steer shareholders and their intermediaries towards adopting practices that are prone to promote or contribute to the facilitation of companies' sustainable development in a manner that can lead economies towards facilitating aggregate sustainable development that conforms to the paradigm of weak sustainability. Given the potentially detrimental effects of this however, the Chapter argued that the criticism made about shareholder engagement and the effect of shareholder stewardship in alleviating it holds considerable validity. Having in mind the effect of shareholder engagement on corporate governance though, and the efforts to ensure its undertaking with a view to promote companies' sustainable development, the Chapter argued that the time is ripe to consider how to attribute shareholders and their

[26] A similar argument was made in the literature in light of the SRD II's objective promoted for shareholders to comply. See, for example, Rafael Savva, 'Regulating Institutional Shareholders in the Medium to the Long-term: An Analysis of the 2017 Shareholder Rights Directive's Shareholders' Duties' (2020) 14 (1) International Company and Commercial Law Review 1.

intermediaries the responsibility to adopt practices that lead to shareholder engagement that meaningfully achieves the foregoing.

Chapter 5 argued that shareholder stewardship has the potential to act as the means that can attribute such responsibility. The Chapter outlined this provided that shareholder stewardship will do so in a manner that is relative to the functional and legal capacity of shareholders and intermediaries to adopt practices that lead to shareholder engagement with a view to promote or contribute to companies' sustainable development through corporate governance for sustainability.[27] Future research will be required to determine how shareholder stewardship's objectives can be upheld in light of this argument posed by this Thesis. Regardless, Chapter 5 signified the potential of company law in contributing to this end through the possible imposition of a fiduciary duty on shareholders owed to the company to collectively discharge the powers bestowed on the general meeting for its best interests.[28] While it outlined the possible reasons behind its introduction, the Chapter signified that this will be an endeavour that will require considering multiple issues that relate both to shareholders' practices and the wider regulation of companies as a matter of law. These span across the scope and application of such a duty as well as the interpretation of the best interests of companies in a manner that can lead to ensuring that sustainable value is created for companies to ensure their longevity and resilience.

[27] This was established based on the capacity of shareholders to engage in corporate governance. See Chapter 3, above.

[28] A brief discussion of this was made in light of promoting corporate governance for sustainability in Beate Sjåfjell, 'Achieving Corporate Sustainability: What is the Role of the Shareholder?' in Hanne S. Birkmose (ed), *Shareholders' Duties in Europe* (Kluwer Law International, 2017).

6.6. Time for a (Necessary) Systemic Debate?

The Thesis supports similar arguments made in the literature for identifying the potential contribution of shareholder stewardship in promoting or contributing to companies' sustainable development.[29] Taking into account shareholders' and intermediaries' functional and legal capacity to adopt practices that lead to shareholder engagement, the Thesis seeks to contribute to the literature that supports this account by indicating that the institutional investment community have a role to play in the development of corporate governance that seeks to promote this end. It furthermore seeks to contribute to the literature supporting the cultivation of the understanding that shareholder stewardship's objectives must be upheld by factoring the regulation of shareholders' practices as an issue that should extend beyond the confines of the soft-law regulation of their investment and engagement practices within a context informed by facilitating aggregate and corporate sustainable development.

But amidst the mainstreaming and increasing support of shareholder stewardship, it is the aspiration of this Thesis that the analysis made herein will showcase that the time is ripe to reconsider how the support of the foregoing is to be established. This primarily relates to the way the regulation and analyses on shareholder engagement are approached and made respectively by reference to their regulation by the law. Given the effect of shareholder engagement, the consideration of the means by which shareholders and intermediaries can promote companies' sustainable development, and how regulation will achieve this, should not be made in light of providing shareholders the means to control the company. Rather, shareholder stewardship and the facilitation of its objectives should be approached as a consideration of configuring

[29] See for example, Katelouzou, 'Shareholder Stewardship' (n 6).

how the exercise of shareholder rights and voice will be made in a manner that is ancillary to directors' efforts to ensure that companies are steered on a more sustainable path.

In light of this, it is possible to understand the frequency and objectives of shareholder engagement to take place in a manner that is informative of the foregoing, with the law through shareholder stewardship endeavouring to ensuring that this role will be facilitated relative to ensuring companies' sustainable development. The analysis made in this Thesis showcases that the opposite may lead to depreciate the centrality and capacity of the directors and the board to commit to the facilitation of companies' longevity and resilience based on ensuring their sustainable development, and how the law recognises that centrality by attributing the authority to control companies on directors to ensure achieving this purpose relative to the efforts to facilitate aggregate sustainable development. It may furthermore extend understandings and rationales of seeing shareholder stewardship as tautological with postulates that support shareholder primacy's rationale, which, as have been argued by this Thesis, it fails to provide the normative premises required to ensure the longevity of companies on a more sustainable basis that is informed by the foregoing effectively.

This furthermore relates to the calibration and upholding of the overall objectives of shareholder stewardship. The analysis made in this Thesis seeks to contribute to arguments made in the literature that the imposition of self-regulatory, market-driven and self-interest-focused frameworks will prove of minimum effect, especially when shareholders are systematically calibrated to pursuing objectives that often see the integration of ESG considerations as mere externalities to creating greater profits for

them as a priority.[30] Several movements are made to rectify this, but the analysis made in this Thesis showcased that a more rigorous consideration of shareholders' and intermediaries' practices across multiple levels and areas of law is required, both with regards to the standard of their practices and their systemic calibration towards disregarding ESG considerations.

Having in mind the multitude of issues in need to factor, it is integral to acknowledge that the contribution of shareholder stewardship to cultivating consciousness for ensuring companies' sustainable development as a gateway to facilitating aggregate sustainable development is still premature, and in need of further research in the future. The analysis and main arguments made in this Thesis therefore can only be considered as a starting point to considering how shareholder engagement can be regulated to this end. Given however that this research will be in need to be made within the wider context of ensuring aggregate sustainable development, it is the hope of this Thesis that the arguments made herein will contribute to initiating the consideration of these issues as part of the systems and functions that will lead business to appreciate that its contribution to having a sustainable future is pivotal. The future of humanity's prosperity depends on humans' co-existence with the environment that accommodates them in a socially beneficial way, and the consideration of achieving this through adopting business conducive to promoting this end is integral.

[30] Chiu, Katelouzou (n 16).

Bibliography, Table Of Legislation, And Table Of Cases

Table of Legislation and Codes of Good Practices

Australian Corporations Act 2001.

Canada Business Corporations Act.

Companies (Directors' Remuneration Policy and Directors' Remuneration Report) Regulations 2019 (SI 2019/970).

Companies (Shareholders' Rights to Voting Confirmations) Regulations 2020 (SI 2020/717).

Companies Act 2006.

Conduct of Business Sourcebook (COBS).

Directive 2007/36/EC of the European Parliament and of The Council of 11 July 2007 on the Exercise of Certain Rights of Shareholders in Listed Companies [2007] OJ L184/17.

Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330.

Directive of the European Parliament and of the Council 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L 132.

FCA Handbook Instrument: Listing and Disclosure Sourcebooks (Shareholder Rights Directive) Instrument 2019 (FCA 2019/73).

FCA, 'Handbook Instrument: Shareholder Rights Directive (Asset Managers and Issuers) Instrument 2019' (FCA 2019/68).

Financial Services and Markets Act 2000.

Financial Services (Miscellaneous Amendments) (EU Exit) Regulations 2020 (2020/628).

FRC, The UK Corporate Governance Code 2018 https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF accessed 02 February 2020.

FRC, The UK Stewardship Code 2010, https://www.frc.org.uk/getattachment/e223e152-5515-4cdc-a951-da33e093eb28/UK-Stewardship-Code-July-2010.pdf accessed 02 February 2020.

FRC, The UK Stewardship Code 2012, https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf accessed 02 February 2020.

FRC, The UK Stewardship Code 2020, https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf accessed 02 February 2020.

Insolvency Act 1986, ss 213-214. But see Corporate Insolvency and Governance Act 2020, Modern Slavery Act 2015.

Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013

Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019,

Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations 2018.

Occupational Pension Schemes (Investment) Regulations 2005 SI 2005 No 3378, Reg 4(2).

Occupational Pension Schemes (Investment) Regulations 2005.

Pensions Act 1995, Pensions Act 2004.

Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks (2019) OJ L 317.

Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (2019) OJ L 198.

Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (2020) OJ L 198.

Senior Management Arrangements, Systems and Controls Sourcebook (SYSC),

The City Code of Takeovers

The Combined Code: Principles of Good Governance and Code of Best Practice (June 1998) https://www.frc.org.uk/getattachment/53db5ec9-810b-4e22-9ca2-99b116c3bc49/Combined-Code-1998.pdf accessed 02 February 2020.

The Companies (Model Articles) Regulations 2008 (SI2008/3229).

The Proxy Advisors (Shareholders’ Rights) Regulations 2019.

Table of Cases

Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch. 656 (CA).

Assenagon Asset Management SA v Irish Bank Resolution Corp Ltd [2012] EWHC 2090 (Ch).

Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame [1906] 2 Ch 34 (CA).

Bligh v Brent (1837) 160 E.R. 397.

Borland's Trustee v Steel Brothers & Co Ltd [1901] 1 Ch 279 (Ch).

Bradbury v English Sewing Cotton Co Ltd [1923] AC 744 (HL).

BTI LLC v Sequana SA and others [2019] EWCA Civ 112.

CAS (Nominees) Ltd v Nottingham Forest FC plc [2002] 1 BCLC 613 (Ch).

Chirnside v Fay (2006) NZSC 68.

Citco Banking Corp NV v Pusser's Ltd [2007] B.C.C. 205.

Cowan v Scargill [1985] Ch 270.

Edge v Pensions Ombudsman [2000] Ch 602 (CA).

Gaiman v National Association for Mental Health [1971] Ch 317 (Ch).

Greenhalgh v Arderne Cinemas Ltd [1951] Ch 286 (CA).

Hunter v Senate Support Services Ltd [2004] EWCH 1085 (Ch).

John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113 (CA).

Lac Minerals Ltd v International Cororna Resources Ltd (1989) 61 DLR (4th) 14.

Lee v Lee's Air Farming Ltd [1960] UKPC 33.

Lonrho v Shell Petroleum [1980] 1 WLR 627 (HL).

Percival v Wright [1902] 2 Ch 401 (Ch).

Peters' American Delicacy Co v Heath (1939) 61 C.L.R. 457.

Prest v Petrodel Resources Ltd [2013] UKSC 34

Re Charterhouse Capital Ltd [2015] B.C.C. 574.

Salomon v Salomon [1897] A.C. 22 (HL).

Sidebottom v Kershaw Leese and Co Ltd [1920] 1 Ch 154 (CA).

Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd [2019] UKSC 50.

Books

Andenas, M, Chiu, I. H-Y, *The Foundations and Future of Financial Regulation: Governance for Responsibility* (Routledge, 2014).

Bainbridge, S. M, *Corporate Governance After the Financial Crisis* (OUP, 2012).

Bakan, J, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable, 2004).

Barker, R. M, Chiu, I H-Y, *Corporate Governance and Investment Management: The Promises and Limitations of the New Financial Economy* (EE, 2017).

Berle, A. A, Means, G. C, *The Modern Corporation & Private Property* (Reprint, Routledge, 2017).

Blair, M. M, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (Brookings Institute, 1995).

Boltanski, L., Chiapello, E., *The New Spirit of Capitalism* (Verso, 2018).

Bruner, C. M, *Corporate Governance in the Common Law World: The Political Foundations of Shareholder Power* (CUP, 2013).

Chandler, A, *Scale and Scope: The Dynamics of Industrial Capitalism* (HUP, 1990).

Charkham, J. P, *Keeping Good Company: A Study of Corporate Governance in Five Countries* (OUP, 1995).

Cheffins, B. R, *Company Law: Theory, Structure and Operation* (OUP, 1997).--, *Corporate Ownership and Control* (OUP, 2008).

Cooke, C. A, *Corporation, Trust and Company* (HUP. 1951).

Daly, H,, *Beyond Growth- The Economics of Sustainable Development* (Beakon Press, 1997).
--, *From Uneconomic Growth to a Steady State Economy* (EE, 2015).

Dean, J., *Directing Public Companies* (London, Cavendish Publishing, 2001), 155.

Easterbrook, F. H, Fischel, D. R, *The Economic Structure of Corporate Law* (HUP, 1991).

Edmans, A, *Grow the Pie: How Great Companies Deliver Both Purpose and Profit* (CUP, 2020).

Freeman, R. E, *Strategic Management: A Stakeholder Approach* (Boston, Pitman, 1984).

Friedman, M, *Capitalism and Freedom* (40th Anniversary edn, Chicago University Press, 2002).

Golding, T, *The City: Inside the Great Expectation Machine : Myth and Reality in Institutional Investment and the Stock Market* (FT Prentice Hall, 2002).

Greenfield, K, *Corporations are People Too (And they Should Act Like it)* (PUP, 2019).

Griffiths, A, *Contracting with Companies* (Hart, 2005).

Goyder, G., *The Responsible Company* (1961, Blackwell Publishers).

Gunthree, G, *The Firm Divided: Manager-Shareholder Conflict and the Fight for Control of the Modern Corporation* (2017, OUP), 3-14, 28-42.

Hansmann, H, *The Ownership of the enterprise* (HUP, 1996), 53-65.

Hardin, R, *Collective Action* (Baltimore, 1983);

Hawley, J. P, & Williams, A. T, *Rise of Fiduciary Capitalism: How Institutional Investors Can Make Corporate America More Democratic* (UPP, 2000).

Hirschman, A. O, *Exit, Voice, And Loyalty: Responses to Decline In Firms, Organizations, And States* (HUP, 1970).

Katelouzou, D, *Institutional Shareholders and Corporate Governance: The Path to Enlightened Stewardship* (CUP, 2021 forthcoming).

Kay, J, *Foundations of Corporate Success: How Business Adds Value* (OUP, 1993).
--, *Other Peoples Money: Masters of the Universe or Servants of the People* (Profile Books, 2016).

Keay, A, *The Corporate Objective* (EE, 2011).

Kraakman, R. et al, *The Anatomy of Corporate Law* (3rd edn, OUP, 2017)

Macey, J, *Corporate Governance: Promises Kept, Promises Broken* (PUP, 2008).

Martin, R. L, *Fixing the Game: Bubbles, Crashes, and What Capitalism Can Learn from the NFL* (HUP, 2011).

Mayer, C, *Firm Commitment: Why the Corporation is Failing Us and How to Restore Trust in it* (OUP, 2013).
--, *Prosperity: Better Business Makes the Better Good* (OUP, 2018).

Meadows, D, *Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (2nd edn, Earth Island, 1972).
--, *Thinking in Systems: A Primer* (Chelsea Green, 2017).

Micklethwait, J, Wooldridge, A, *The Company: A short History of a Revolutionary Idea* (Phoenix, 2003).

Milman, D, *The Company Share* (EE, 2018).

Moore, M. T, *Corporate Governance in the Shadow of the State* (Hart Publishing, 2013).

--, Petrin, M, *Corporate Governance: Law, Regulation and Theory* (Palgrave, 2017).

Neumeyer, E. *Weak Versus Strong Sustainability: Exploring the Limits of two Opposing Paradigms* (3rd edn, EE, 2013).

Olson, M, *The Logic of Collective Action* (HUP, 1965);

Orts, E, *Business Persons: A Legal Theory of the Firm* (OUP, 2013).

Ostrom, E, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP, 1990).

Parkinson, J. E, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (OUP, 1993).

Polanyi, K, *The Great Transformation: The Political and Economic Origins of Our Time* (2nd ed., MA: Beacon, 2001).

Quiggin, J, *Zombie Economics: How Dead Ideas Still Walk Among Us* (PUP, 2011).

Raworth, K, *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist* (Penguin Random House, 2017).

Rickets, M, *The Economics of the Business Enterprise* (EE, 2003) Chapter 5.

Roe, M. J, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance* (PUP, 1994).

Rawls, J, *A Theory of Justice* (Revised Edition, HUP, 1999).

Sandler, T, *Collective Action: Theory and Applications* (UMP, 1992).

Schrader, D, *The Corporation as Anomaly* (CUP, 1993).

Shleifer, A, *Inefficient Markets: An Introduction to Behavioral Finance* (2000 OUP).

Smith, A, *The Wealth of Nations* (first published 1777, Everyman, 1993).

Sternberg, E, *Corporate Governance: Accountability in the Marketplace* (IEA, 1998).

Stout, L. A, *Cultivating Conscience: How Good Laws Make Good People* (PUP, 2010)

--, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler, 2012).

Talbot, L, *Progressive Corporate Governance for the 21st century* (Routledge, 2013).

Tricker, B, *Corporate Governance: Principles, Policies and Practices* (4th edn, OUP, 2019).

UNEP, *Global Environment Outlook GEO-6* (CUP, 2019).

Useem, M, *Investor Capitalism: How Money Managers are Rewriting the Rules of Corporate America* (Basic Books, 1999).

Waller, D., Younger, R., *The Reputation Game: The Art of Changing How People See You* (Oneworld, 2018).

Wen, S, *Shareholder Primacy and Corporate Governance* (Routledge, 2013).

Wheeler, S, *Corporations and the Third Way* (Hart Pub, 2002).

Williamson, O. E, *The Mechanisms of Governance* (OUP, 1999).

Articles

Abantawi, I, Stout, L. A, 'Fiduciary Duties for Activist Shareholders' (2007) 60 Stanford Law Review 1255.

Ahern, D, 'The Mythical Value of Voice and Stewardship in the EU Directive on Long-Term Shareholder Engagement: Rights Do Not an Engaged Shareholder Make' (2018) 20 Cambridge Yearbook of European Legal Studies 88.

--, 'Turning Up the Heat? EU Sustainability Goals and the Role of Reporting under the Non-Financial Reporting Directive' (2016) 13(4) European Company and Financial Law Review 599.

Alchian, A. A, Demsetz, H, 'Production, information costs, and economic organization' (1972) 62(5) American Economic Review 777.

Amalric, F, 'Pension Funds, Corporate Responsibility and Sustainability' (2006) 59(4) Ecological Economics 440.

Anderson, R, 'The Long and Short of Corporate Governance' (2015) 23 Georgetown Mason Law Review 19.

Armour, J, 'Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment' (2008) ECGI - Law Working Paper No. 106/2008 https://ssrn.com/abstract=1133542 05 November 2020.

--, 'Shareholder Rights' (2020) 36(2) Oxford Review of Economic Policy 314.

--, et al., 'Shareholder Primacy and the Trajectory of UK Corporate Governance' (2003) 41 British Journal of Industrial Relations 531.

--, J, Whincop, M. J, 'The Proprietary Foundations of Corporate Law' (2007) 27(3) Oxford Journal of Legal Studies 429.

--, Gordon, J. N, 'Systemic Harms and Shareholder Value' (2014) 6(1) Journal of Legal Analysis 35.

Arsalidou, D, 'Institutional Investors, Behavioural Economics and the Concept of Stewardship' (2012) 6 Law and Financial Markets Review 410.

--, 'Shareholders and Corporate Scrutiny: The Role of the UK Stewardship Code' (2012) 9(3) European Company and Financial Law Review 342.

Asplund, A, 'Lost in Accountability. 'Comply or Explain', 'Apply or Explain' and 'Apply and Explain' in a test: The Barriers to Company Benefit?' (2020) 13(3) International and Comparative Corporate Law Journal 111.

Attenborough, A, 'The Vacuous Concept of Shareholder Voting Rights' (2013) 14(2) European Business Organisation Law Review 147.

Bainbridge, S. M, 'Director Primacy: The Means and Ends of Corporate Governance (2003) 97(2) Northwestern University Law Review 547.

--'Corporate Governance in a Populist Era' (2020) UCLA School of Law, Law-Econ Research Paper No. 18-09, https://ssrn.com/abstract=3237107 accessed 01 December 2020.

Balp, G, Strampelli, G, 'Institutional Investor Collective Engagements: Non-Activist Cooperation vs Activist Wolf Packs' (2019) Bocconi Legal Studies Research Paper No. 3449989 https://ssrn.com/abstract=3449989 accessed 10 January 2021.

Bansal, P, 'The Corporate Challenges of Sustainable Development (2002) 16(2) Academy of Management Executive 122.

Barberis. N, Thaler, R, ‘A survey of Behavioural Finance’ in George M. Konstantinides et al. (eds) *Handbook of the Economics of Finance* (Vol 1A, North Holland: Elsevier, 2003).

Baumgartner, R. J, Ebner, J, ‘Corporate Sustainability Strategies: Sustainability Profiles and Maturity Levels’ (2010) 18(2) Sustainable Development 76.

Bebchuk, L. A, ‘The Case for Increasing Shareholder Power’ (2005) 118(3) Harvard Law Review 833.

--.‘The Myth of the Shareholder Franchise’ (2007) 93(3) Virginia Law Review 675.

--,’ The Myth that Insulating Boards Serves Long-Term Value’ (2013) 113 Columbia Law Review 1637.

--, et al. ‘The Agency Problems of Institutional Investors’ (2017) 31 Journal of Economic Perspectives 89.

--, Hirst, S, ‘Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy’ (2019) 119 Columbia Law Review 2029.

--, Tallarita, R, ‘The Illusory Promise of Stakeholder Governance’ (2020) 106 Cornell Law Review 91.

Becht, M, et al., ‘Corporate Governance Through Voice and Exit’ (2019) ECGI Finance Working Paper No. 633/2019 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3456626 accessed 09 May 2020.

Becker-Blease, J. R, ‘Corporate Socially Responsible Investing’ in H. Kent Baker, John R. Nofsinger (eds) *Socially Responsible Finance and Investing: Financial Institutions, Corporations, Investors and Activists* (Wiley, 2012).

Bhagat, S, et al., ‘The Promise and Peril of Corporate Governance Indices’ (2008) 108(8) Columbia Law Review 1803.

Birkmose, H. S, ‘European Challenges for Institutional Investor Engagement: Is Mandatory Disclosure the Way Forward?’ (2014) 11(2) European Company and Financial Law Review 214.

--, ‘Forcing Shareholder Engagement: Theoretical Underpinning and Political Ambitions’ (2018) 29(4) European Business Law Review, 613.

--, ‘From Shareholder Rights To Shareholder Duties – A Transformation of EU Corporate Governance In a Sustainable Direction?’ (2018) 5(2) Journal for the International and European Law, Economics and Market Integrations 69.

--, ‘Duties Imposed on Specific Shareholders Only, and Enforcement Implications’ in Hanne S. Birkmose, Konstantinos Sergakis (eds) *Enforcing Shareholders’ Duties* (EE, 2019).

Black, B. S, ‘Agents Watching Agents: The Promise of Institutional Investor Voice’, (1992) 39 UCLA Law Review 811.

--, Coffee, J. C, ‘Hail Britannia? Institutional Investor Behavior Under Limited Regulation’ (1994) 92 Michigan Law Review 1997.

Blair, M. M, 'Boards of Directors and Corporate Performance under a Team-Production Model' in Jennifer G. Hill, Randall S. Thomas (eds) *Research Handbook on Shareholder Power* (EE, 2015).

--, Stout, L. A, 'A Team Production Theory of Corporate Law' (1999) 85(2) Virginia Law Review 247.

--, Stout, L. A, 'Director Accountability and the Mediating Role of the Corporate Board' (2001) 79(2) Washington University Law Quarterly 403.

--, Stout, L. A, 'Trust, Trustworthiness and the Behavioural Foundations of Corporate Law' (2001) 149 University of Pennsylvania Law Review 1735.

Bowley, T, Hill, J. G, 'Stewardship and Collective Action: The Australian Experience' (2020) ECGI Law Working Paper No. 491/2020, https://ssrn.com/abstract=3530402 accessed 10 May 2020.

Bratton, W. W, 'The New Economic Theory of the Firm' (1989) 41(6) Stanford Law Review 1471.

--, 'Hedge Funds and Governance Targets' (2010) 95 Georgetown Law Journal 1375, 2007.

Brav, A et al, 'Hedge Fund Activism, Corporate Governance, and Firm Performance' (2008) 63(4) Journal of Finance 1729.

Brewer, M, 'Slow Fashion in a Fast Fashion World: Promoting Sustainability and Responsibility' (2019) 8(4) Laws 24.

Broccardo, E, et al, 'Exit vs. Voice' (2020) University of Chicago, Becker Friedman Institute for Economics Working Paper No. 2020-114 https://ssrn.com/abstract=3680815 accessed 29 September 2020.

Bushee, B. J, 'The Influence of Institutional Investors on Myopic R&D Investment Behaviour' (1998) 72(3) The Accounting Review 305.

Campbell, D, Griffin, S, 'Enron and the End of Corporate Governance?' in Sorcha MacLeod (ed) *Global Governance and the Quest for Justice: Volume II* (Hart Publishing, 2006).

Carney, M, 'Breaking the tragedy of the horizon - climate change and financial stability' (Bank of England, 29 September 2015) https://www.bankofengland.co.uk/speech/2015/breaking-the-tragedy-of-the-horizon-climate-change-and-financial-stability accessed 20 October 2019.

Cheffins, B. R, 'The Stewardship Code's Achilles' Heel' (2010) 73(6) The Modern Law Review 1004.

--, 'Stop Blaming Milton Friedman!' (2020) ECGI - Law Working Paper No. 523/2020.

--, 'The Team Production Model as a Paradigm' (2015) 38 Seattle University Law Review 397.

--, 'What Jensen and Meckling Really Said About the Public Company' (2020) University of Cambridge Faculty of Law Research Paper No. 29/2020, https://ssrn.com/abstract=3679405 accessed 01 September 2020.

--, 'Stop Blaming Milton Friedman!' (2020) University of Cambridge Faculty of Law Research Paper No 9/2020.

--, Armour, J, 'The Past, Present and Future of Shareholder Activism by Hedge Funds' (2012) 37 Journal of Corporation Law 51.

Chiu, I. H-Y, 'Reviving Shareholder Stewardship: Critically Examining the Impact of Corporate Transparency Reforms in the UK' (2014) 38 Delaware Journal of Corporate Law 983.

--, 'Private vs Public Enforcement of Shareholder Duties' in Hanne S. Birkmose, Konstantinos Sergakis (eds) *Enforcing Shareholder Duties* (EE, 2019).

--, Katelouzou, D, 'From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?' in Hanne Birkmose (ed), *Shareholders' Duties* (Kluwer Law International, 2017).

--, Katelouzou, D, 'Making a Case for Regulating Institutional Shareholders' Corporate Governance Roles' (2018) (1) Journal of Business Law 67.

Coase, R. H, 'The Nature of the Firm' (1937) 4(16) Economica 386.

Coffee, J. C, 'Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance' (1984) 84 Columbia Law Review 1163.

--, 'Preserving the Corporate Superego in a Time of Activism: An Essay on Ethics and Economics' (2016) https://ssrn.com/abstract=2839388 accessed 02 March 2018.

--, Palia, D, 'The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance' (2016) 41 Journal of Corporation Law 545.

Cook, J, 'Political Action Through Environmental Shareholder Resolution Filing: Applicability to Canadian Oil Sands?' (2012) 2(1) Journal of Sustainable Finance and Investment 26.

--, et al, 'Consensus on Consensus: A Synthesis of Consensus Estimates on Human-Caused Global Warming' (2016) 11(4) Environmental Research Letters 1.

Cullen, J, Mähönen, J, 'Taming Unsustainable Finance: The Perils of Modern Risk Management' in Beate Sjåfjell, Christopher M. Bruner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019).

Dallas, L. L, 'Short-Termism, the Financial Crisis, and Corporate Governance' (2011) 37 Journal of Corporation Law 264.

Daly, H, 'Allocation Distribution And Scale: Towards An Economics That Is Efficienct, Just And Sustainable' (1992) 6(3) Ecological Economics 185.

Davies, P, 'Institutional Investors: A U.K. View' (1991) 51(1) Brooklyn Law Review 129.

--, 'Shareholders in the United Kingdom' in Jennifer G. Hill, Randall S Thomas, *Research Handbook on Shareholder Power* (EE, 2015).

--, 'The UK Stewardship Code 2010-2020 from Saving the Company to Saving the Planet?' (2020). ECGI Law Working Paper No. 506/2020 https://ssrn.com/abstract=3553493, accessed 15 June 2020.

Deakin, S, 'Against Shareholder Empowerment' in Janet Williamson, Ciaran Driver and Peter Kenway (eds), *Beyond Shareholder Value: The Reasons and Choices for Corporate Governance Reform* (Trades Union Congress, 2014).

Del Guercio, D, Tran, H, 'Institutional Investor Activism' in H Kent Baker, John R Nofsinger (eds) *Socially Responsible Finance and Investing: Financial Institutions, Corporations, Investors and Activists* (Wiley, 2012).

Dent, G. W, 'The Essential Unity of Shareholders and the Myth of Investor Short-Termism' (2010) 35 Delaware Journal of Corporate Law 97.

Dignam, A, 'The Future of Shareholder Democracy in the Shadow of the Financial Crisis' (2013) 36 Seattle University Law Review 639.

Doidge, C, et al, 'Collective Action and Governance Activism' (2019) 23(5) Review of Finance 893.

Dyllick, T., Hockerts, K. 'Beyond the Business Case for Corporate Sustainability' (2002) 11 Business Strategy and the Environment 130.

Eisenberg, M. A, 'Corporate Law and Social Norms' (1999) 99 Columbia Law Review 1253.

--, 'The Conception that the corporation is a nexus of contracts and the dual nature of the firm' (1999) 24 Journal of Corporation Law 819.

Ekins, P, et al., 'A Framework for the Practical Application of the Concepts of Critical Natural Capital and Strong Sustainability' (2003) 44 Ecological Economics 165.

Elkington, J, 'Accounting for the Triple Bottom Line' (1998) 2 Measuring Business Excellence 18.

Enriques, L, 'Pandemic-Resistant Corporate Law: How to Help Companies Cope with Existential Threats and Extreme Uncertainty During the Covid-19 Crisis' (2020) ECGI Law Working Paper No. 530/23020, https://ssrn.com/abstract=3641505 or http://dx.doi.org/10.2139/ssrn.3641505 accessed 23 November 2020.

Fama, E. F, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25(2) The Journal of Finance 383.

--, Jensen, M. C, 'Separation of Ownership and Control' (1983) 26(2) The Journal of Law and Economics 301.

--, Jensen, M. C., 'Agency Problems and Residual Claims' (1983) 26 Journal of Law & Economics 327.

Fisch, J. E, ‘The Uncertain Stewardship Potential of Index Funds’ (2020) ECGI Law Working Paper No. 490/2020 https://ssrn.com/abstract=3525355 accessed 19 September 2020.

--, Sepe, S. M, ‘Shareholder Collaboration’ (2018) 98 Texas Law Review 863.

--, et al, ‘The New Titans of Wall Street: A Theoretical Framework for Passive Investors’ (2019) 168 University of Pennsylvania Law Review 17.

Fischel, D. R, “Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers” (1978) 57(1) Texas Law Review 1.

--, ‘The Corporate Governance Movement’ (1982) 35(6) Vanderbilt Law Review 1259.

Flannigan, R, ‘Fiduciary Duties of Shareholders and Directors’ (2004) (1) Journal of Business Law 277.

--, ‘Shareholder Fiduciary Accountability’ (2014) (1) Journal of Business Law 1.

Franks, J, ‘Institutional ownership and governance’ (2020) 36(2) Oxford Review of Economic Policy 258.

Friedman, M, “The Social Responsibility of Business Is to Increase Its Profits,” N.Y. Times [Magazine], September 13, (New York, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html accessed 06 March 2018.

Gary, S. N, ‘Best Interests In The Long Term: Fiduciary Duties And ESG Integration’ (2019) 90 Colorado Law Review 731.

Gifford, E. J. M, ‘Effective Shareholder Engagement: The Factors that Contribute to Shareholder Salience’ (2010) 92 Journal of Business Ethics 79.

Gifford, J, “Measuring the Social, Environmental and Ethical Performance of Pension Funds” (2004) 53 Journal of Australian Political Economy 139.

Gillan, S. L, Starks, L. T, ‘The Evolution of Shareholder Activism in the United States’ (2007) 19(1) Journal of Applied Corporate Finance 55.

Gilson, R. J, Kraakman, R. H, `The Mechanisms of Market Efficiency' (1984) 70 Virginia Law Review 549.

--, Gordon, J,, ‘The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights’ (2013) 113 Columbia Law Review 863.

--, Gordon, J, ‘Agency Capitalism: Further Implications of Equity Intermediation’ in Jennifer G. Hill, Randall S Thomas (eds) *Research Handbook on Shareholder Power* (EE, 2015).

Gond, J-P, Piani, V, ‘Enabling Institutional Investors’ Collective Action: The Role of the Principles for Responsible Investment Initiative’ (2013) 52(1) Business & Society 64.

Greenfield, K, ‘The Puzzle of Short-Termism’ (2011) 46 Wake Law Forest Law Review 627.

--, ‘New Principles for Corporate Law’ (2015) 1(1) Hastings Business Law Journal 87.

Griggs, D, et al, ‘Policy: Sustainable Development Goals for People and Planet’ (2013) 495 Nature 305.

--, et al, ‘An Integrated Framework for Sustainable Development Goals’ (2014) 19(4) Ecology and Society 49.

Hahn, T, et al, ‘Tensions in Corporate Sustainability: Towards an Integrative Framework’ (2015) 127 Journal of Business Ethics 297.

Hansmann, H, Kraakman, R, ‘The End of History for Corporate Law’ in Jeffrey N. Gordon, Mark J. Roe (eds) *Convergence and Persistence in Corporate Governance* (CUP, 2004).

Harper Ho, V., "Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder - Stakeholder Divide (2010) 36 The Journal of Corporation Law 59

Hart, O, Zingales, L, ‘Companies Should Maximize Shareholder Welfare Not Market Value’ (2017) 2(2) Journal of Law, Finance, and Accounting 247.

Hartwick, J. M, ‘Intergenerational Equity and the Investing of rents of exhaustible resources’(1977) 67(5) American Economic Review 972.

Hawley, J. P, Williams, A. T, ‘The Universal Owner’s Role in Sustainable Economic Development’ (2002) 9(3) Corporate Environmental Strategy 284.

--‘Shifting Ground: Emerging Global Corporate-Governance Standards and the Rise of Fiduciary Capitalism’ (2005) 37(11) Environment and Planning A: Economy and Space 1995.

Hendry, J, et al. ‘Responsible Ownership, Shareholder Value and the New Shareholder Activism’ (2007) 11(3) Competition and Change 223.

Hill, J. G,, Visions and Revisions of Shareholders in Corporate Governance (2000) 48(1) The American Journal of Comparative Law 39.

--, ‘Good Activist/Bad Activist: The Rise of International Stewardship Codes’ (2018) 41 Seattle University Law Review 497.

Ireland, P, ‘Company Law and the Myth of Shareholding Ownership’ (1999) 62(1) Modern Law Review 32.

--, ‘Financialisaton and Corporate Governance’ (2009) 60(1) North Ireland Law Quarterly 1.

--, ‘Limited Liability, Shareholder Rights and Corporate Irresponsibility’ (2010) 34(5) Cambridge Journal of Economics 837.

Jensen, M. C, ‘The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems’ (1993) 48(3) Journal of Finance 831.

--, ‘Value Maximisation, Stakeholder Theory, and the Corporate Objective Function’ (2002) 7(3) European Financial Management 297.

--, `Agency Costs of Overvalued Equity' (2005) 34 Financial Management 5.

--, Meckling, W, ‘Managerial Behaviour, Agency Costs, and Ownership Structure’ (1976) 3 Journal of Financial Economics 305.

--, Murphy, K. J, ‘Performance-Pay and Top-Management Incentives’ (1990) 98 Journal of Political Economy 225.

Johnston, A, ‘The Shrinking Scope of CSR in UK Corporate Law’ (2018) 74(2) Washington and Lee Review 1001.

--, ‘Market-Led Sustainability through Information Disclosure: The UK Approach’ in Beate Sjåfjell, Christopher M. Bruner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019).

--, Morrow, P, ‘Fiduciary of European Institutional Investors: Legal Analysis and Policy Recommendations’ (2016) University of Oslo Faculty of Law Research Paper No. 2016-04 https://ssrn.com/abstract=2783346 accessed 10 September 2019.

--. et al, ‘Corporate Governance for Sustainability’ (2019) https://ssrn.com/abstract=3502101 accessed 02 February 2020.

--, Sjåfjell, B, ‘The EU’s Approach to Environmentally Sustainable Business: Can Disclosure Overcome the Failings of Shareholder Primacy?’ in Marjan Peeters, Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (EE, 2020).

Juravle, C, Lewis, A, ‘Identifying Impediments to SRI in Europe: a Review of the Practitioner and Academic Literature’ (2008) 17(3) Business Ethics: A European Review 285.

Kahan, M, Rock, E. B, ‘Hedge Funds in Corporate Governance and Corporate Control’ (2007) 155(5) University of Pennsylvania Law Review 1021.

--, ‘Index Funds and Corporate Governance: Let Shareholders Be Shareholders’ (2020) 100 Boston University Law Review 1771.

Katelouzou, D, ‘Myths and Realities of Hedge Fund Activism: Some Empirical Evidence’ (2013) 7 Virginia Law & Business Review 459.

--, ‘Reflections on the Nature of the Public Corporation in an Era of Shareholder Activism and Shareholder’ in Barnali Choudhuri, Martin Petrin (eds) *Understanding the Company: Corporate Governance and Theory* (CUP, 2017).

--, ‘Shareholder Stewardship: A Case of (Re)Embedding Institutional Investors and the Corporation?’ in Beate Sjåfjell, Christopher M. Bruner (eds) *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP 2019).

--, Micheler, E, ‘The Market for Stewardship and the Role of the Government’ (2020) ECGI Law Working Paper 556/2020, https://ssrn.com/abstract=3704258 accessed 13 October 2020.

--, Klettner, A, ‘Sustainable Finance and Stewardship: Unlocking Stewardship's Sustainability Potential (2020) ECGI Law Working Paper No. 521/2020 https://ssrn.com/abstract=3578447 accessed 12 May 2020.

--, Sergakis, K, ‘Shareholder Stewardship Enforcement’ (2020) ECGI Law Working Paper No.514/2020 https://ssrn.com/abstract=3564266 accessed 15 May 2020.

--, Sergakis, K, ‘When Harmonization is Not Enough: Shareholder Stewardship in the European Union’ (2021) European Business Organisation Law Review https://link.springer.com/article/10.1007/s40804-020-00198-5 accessed 10 February 2021.

--, Zumbansen, P, ‘The New Geographies of Corporate Governance’ (2020) 42 University of Pennsylvania Journal of International Law 51.

Keay, A, ‘Company Directors Behaving Poorly: Disciplinary Options for Shareholders’ (2007) (1) Journal of Business Law 656.

--, ‘An assessment of private enforcement actions for directors' breaches of duty’ (2014) 33(1) Civil Justice Quarterly 76.

--, ‘Board Accountability and the Entity Maximization and Sustainability Approach’ in Barnali Choudhury and Martin Petrin (eds) Understanding the Company: Corporate Governance and Theory (CUP, 2017), 286.

--, ‘Enlightened Shareholder Value, the Reform of the Duties of Company Directors and the Corporate Objective’ [2006] Lloyds Maritime and Commercial Law Quarterly 335

--, ‘Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach’ (2007) 29 Sydney Law Review 577.

--, ‘Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom’s “Enlightened Shareholder Value Approach” (2007) 29 Sydney Law Review 577.

--, Loughrey, J, ‘The Framework for Board Accountability in Corporate Governance’ (2015) 35(2) Legal Studies 252.

--, Zhang, H, ‘An Analysis of Enlightened Shareholder Value in Light of Ex Post Opportunism and Incomplete Law (2011) 8(4) European Company and Financial Law Review 445.

Kershaw, D, ‘The Rule in Foss v Harbottle is Dead: Long Live the Rule in Foss v Harbottle’ (2015) (3) Journal of Business Law 274.

Kesten, J. B, ‘Towards a Moral Agency Theory of the Shareholder Bylaw Power’ (2013) 85(3) Temple Law Review 485.

Kiernan, M. J, ‘Universal Owners and ESG: Leaving Money on the Table?’ (2007) 15(3) Corporate Governance 478.

Klettner, A, ‘The Impact of Stewardship Codes on Corporate Governance and Sustainability’ (2017) 23 New Zealand Business Law Quarterly 259.

Koutsias, M, 'The Fallacy of Property Rights' Rhetoric in the Company Law Context: From Shareholder Exclusivity to the Erosion of Shareholders' Rights' (2017) 28(6) International Company and Commercial Law Review 216.

Kraik, A, ‘Environmental, Social, and Governance Issues: An Altered Shareholder Activist Paradigm’ (2019) 44(3) Vermont Law Review 493.

Krüger Andersen, P, et al., ‘Response to the Study on Directors’ Duties and Sustainable Corporate Governance by Nordic Company Law Scholars’ (2020) Nordic & European Company Law Working Paper No. 20-12 https://ssrn.com/abstract=3709762 accessed 15 November 2020.

Kurtz, L, ‘Socially Responsible Investment and Shareholder Activism’ in Andrew Crane et al. (eds) *The Oxford Handbook of Corporate Social Responsibility* (OUP, 2008).

La Porta, R, et al. 'Corporate Ownership Around the World' (1999) 54(2) Journal of Finance 471.

Lafarre, A, Van der Elst, C, 'Blockchain Technology for Corporate Governance and Shareholder Activism' (2018) ECGI Law Working Paper No. 390/2018, https://ssrn.com/abstract=3135209 accessed 10 January 2019.

--, 'Corporate Sustainability and Shareholder Activism in the Netherlands' in in Beate Sjåfjell, Christopher M. Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019).

Larcker, D. F, Tayan, B, 'Seven Myths of Corporate Governance' (2011) Stanford University Closer Look Series No.CGRP-16, https://ssrn.com/abstract=1856869 accessed 23 January 2018.

Lazonick, W, 'Profits Without Prosperity: How Stock Buybacks Manipulate the Market, and Leave Most Americans Worse Off (2014) Institute for New Economic Thinking https://www.ineteconomics.org/research/research-papers/profits-without-prosperity-how-stock-buybacks-manipulate-the-market-and-leave-most-americans-worse-off accessed 21 June 2020.

Leach, M, et al., 'Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity' in 'World Social Science Report 2013, Changing Global Environments' (Paris: OECD Publishing, 2013).

Lee Hazen, T, ‘The Short-Term/Long-Term Dichotomy and Investment Theory: Implications for Securities Market Regulation and for Corporate Law’ (1991) 70 North Carolina Law Review 137.

Lin, L-W, ‘Corporate Social and Environmental Disclosure in Emerging Securities Markets’ (2009) 35 North Carolina Journal of International Law and Commercial Regulation 1.

Lipton, M, Sevvitt, W, ‘The Many Myths of Lucian Bebchuk’ (2007) 93(3) Virginia Law Review 733.

Lund, D. S, ‘The Case Against Passive Shareholder Voting’ (2018) 43 Journal of Corporation Law 493.

MacNeil, I, Li, X, ‘Comply or Explain: Market Discipline and Non-Compliance with the Combined Code’ (2006) 14 Corporate Governance: An International Review 486.

Mallin, C, ‘Institutional Investors: The Vote as a Tool of Governance’ (2012) 16 Journal of Management & Governance 177.

Manne, H. G, ‘Mergers and the Market for Corporate Control’ (1965) 73(2) Journal of Political Economy 110.

Manne, H. G, ‘Some Theoretical Aspects of Share Voting: An Essay in Honor of Adolf A. Berle (1964) 64 Columbia Law Review 1427.

Mathew, S, Sivaprasad, S, ‘Corporate Governance Practices in the Context of the Pandemic Crisis’ (2020), https://ssrn.com/abstract=3590253 accessed 18 November 2020.

Mayer, C, ‘Conceiving Commitment: Creation and Confirmation’ in Jennifer G. Hill, Randall S. Thomas (eds) *Research Handbook on Shareholder Power* (EE, 2015).

--, ‘The Future of the Corporation: Towards Humane Business’ (2018) 6(s1) Journal of the British Academy 1, https://doi.org/10.5871/jba/006s1.001 Accessed 02 September 2019.

--, ‘Ownership, Agency, and Trusteeship: An Assessment (2020) 36(2) Oxford Review of Economic Policy 223.

--, ‘Shareholderism Versus Stakeholderism – a Misconceived Contradiction. A Comment on 'The Illusory Promise of Stakeholder Governance' by Lucian Bebchuk and Roberto Tallarita’ (2020) ECGI Law Working Paper No. 522/2020, https://ssrn.com/abstract=3617847 accessed 02 December 2020.

McGaughey, E, ‘Does Corporate Governance Exclude the Ultimate Investor?’ (2015) 16(1) Journal of Corporate Legal Studies 221.

Micheler, E, ‘Facilitating Investor Engagement and Stewardship (2013) 14(1) European Business Organization Law Review 29.

Millon, D, Shareholder Social Responsibility, 36 Seattle University Law Review 911 (2013) 924-925.

--, ‘Corporate Social Responsibility and Environmental Sustainability’ in Beate Sjåfjell, Benjamin J. Richardson (eds) *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP, 2015).

--, ‘New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law’ (2000) 86 Virginia Law Review 1001.

--, ‘Theories of the Corporation’ (1990) 1990 (2) Duke Law Journal 201.

Milman, D., ‘Coronavirus: Concessions Extended’ (2020) 34(2) Insolvency Intelligence.

Moore, M. T, ‘Understanding the Modern Company through the Lens of Quasi-Public Power’ in Barnali Chouduri, Martin Petrin (eds) *Understanding the Company: Corporate Governance and Theory* (CUP, 2017).

--, ‘Shareholder Primacy, Labour and the Historic Ambivalence of UK Company Law’ in Harwell Wells (ed) *Research Handbook on the History of Corporate and Company Law* (EE, 2018).

--, Rebérioux, A, ‘Revitalizing the Institutional Roots of Anglo-American Corporate Governance’ (2011) 40 Economy and Society 84.

--, Walker-Arnott, E, ‘A Fresh Look at Stock Market Short-Termism’ (2014) 41 Journal of Law and Society 416.

Mukwiri, J, ‘The Myth of Shareholder Primacy in English Law’ (2013) 24(4) European Business Law Review, 217.

Posner, R. A., 'Utilitarianism, Economics and Legal Theory' (1979) 8 Journal of Legal Studies 103.

Post, F. 'A Response to "The Social Responsibility of Corporate Management: A Classical Critique' (2003) 18 Mid-American Journal of Business 25.

Richardson, B. J, 'Financial Markets and Socially Responsible Investing' in Beate Sjåfjell, Benjamin J. Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP, 2015).

--, 'Aligning Social Investing with Nature's Timescales' in Beate Sjåfjell, Christopher M. Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019).

--, Cragg, W, 'Being Virtuous and Prosperous: SRI's Conflicting Goals' (2010) 92 Journal of Business Ethics 21.

--, Peihani, M, 'Universal Investors and Socially Responsible Finance: A Critique of a Premature Theory' (2015) 30 Banking & Finance Law Review 405.

Rock, E. B, 'The Logic and (Uncertain) Significance of Institutional Shareholder Activism' (1991) 79 Georgetown Law Journal 445.

Rockström, J, et al, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) 14(2) Ecology and Society 31.

Roe, M. J, 'Corporate Short-Termism- In the Boardroom and in the Courtroom' (2013) 68 The Business Lawyer 977.

--, et al., ‘The European Commission's Sustainable Corporate Governance Report: A Critique’ (2020) ECGI Law Working Paper 553/2020 https://ssrn.com/abstract=3711652 accessed 10 October 2020.

--, Shapira, R., ‘The Power of the Narrative in Corporate Lawmaking’ (2020) ECGI-Law Working Paper 554/2020 https://ssrn.com/abstract=3703882.

Roome, N, ‘Looking Back, Thinking Forward: Distinguishing Between Weak and Strong Sustainability’ in Pratima Bansal, Andrew J. Hoffman (eds), *The Oxford Handbook of Business and the Natural Environment* (2011, OUP).

Rose, R, Sharfman, B. S, ‘Shareholder Activism as a Corrective Mechanism in Corporate Governance’ (2015) 2014(5) Brigham Young University Law Review 1015.

Sáez, M. I, Riaño, D, ‘Corporate Governance and the Shareholders' Meeting: Voting and Litigation’ (2013) 14(3) European Business Organisation Law Review 343.

Sandler, T, ‘Collective Action: Fifty Years Later’ (2015) 164 Public Choice 195.

Savva, R, ‘Regulating Institutional Shareholders in the Medium to the Long-term: An Analysis of the 2017 Shareholder Rights Directive's Shareholders' Duties’ (2020) 14 (1) International Company and Commercial Law Review 1.

--, ‘Shareholder Power As An Accountability Mechanism: The 2017 Shareholder Rights Directive And The Challenges Towards Enhancing Shareholder Rights’ (2018) 5(2) Journal for the International and European Law, Economics and Market Integrations 277.

Schrader, D., ‘The Corporation and Profits’ (1987) 6 Journal of Business Ethics 589, 590.

Sergakis, K, ‘The UK Stewardship Code: Bridging the Gap Between Companies and Institutional Investors (2013) 47(1) Revue juridique Thémis de l’Université de Montreal 109.

Serafeim, G, ‘Public Sentiment and the Price of Corporate Sustainability’ (2020) 76(2) Financial Analysts Journal 26.

--, ‘Legal vs Social Enforcement of Shareholder Duties’ in Hanne S. Birkmose, Konstantinos Sergakis (eds*), Enforcing Shareholders’ Duties* (EE, 2019).

Sharfman, B. S, ‘Activist Hedge Funds in A World Of Board Independence: Creators Or Destroyers Of Long-Term Value?’ (2016) 2015(3) Columbia Law Review 813.

Sheehy, B, ‘Shareholders, Unicorns and Stilts: An Analysis of Shareholder Property Rights’ (2006) 6(1) Journal of Corporate Law Studies 165.

Sjåfjell, B, ‘Why Law Matters: Corporate Social Irresponsibility and the futility of voluntary climate change mitigation’ (2011) 8(2) European Company Law 56.

--, ‘Achieving Corporate Sustainability: What is the Role of the Shareholder?’ in Hanne Birkmose (ed), *Shareholders’ Duties in Europe* (Kluwer Law International, 2017).

--, 'Regulating for Corporate Sustainability: Why the Public-Private Divide Misses the Point' in Barnali Chouduri, Martin Petrin (eds) *Understanding the Company: Corporate Governance and Theory* (CUP, 2017).
--, 'Redefining Agency Theory to Internalize Environmental Product Externalities. A Tentative Proposal Based on Life-Cycle Thinking' in Eleonore Maitre-Ekern et al. (eds), *Preventing Environmental Damage from Products: An Analysis of the Policy and Regulatory Framework in Europe* (CUP, 2018).
--, et al. 'Shareholder Primacy: The Main Barrier to Sustainable Companies' in Beate Sjåfjell, Benjamin J. Richardson (eds) 'Company Law and Sustainability' (CUP, 2015).
--, Taylor, M. B, 'A Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose' (2018) 13 International and Comparative Corporate Law Journal 40.
--, Bruner, C. M, 'Corporations and Sustainability' in Beate Sjåfjell, Christopher M. Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019).

Sneirson, J. F, 'The History of Shareholder Primacy, from Adam Smith through the Rise of Financialism' in Beate Sjåfjell, Christopher M. Bruner (eds) T*he Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019).

Sparkes, R, Cowton, C. J, 'The Maturing of Socially Responsible Investment: A Review of the Developing Link with Corporate Social Responsibility' (2004) 52 Journal of Business Ethics 45.

Spender, P, 'Guns, Greenmail: Fear and Loathing after Gamboto' (1998) 22 Melbourne University Law Review 96.

Stapledon, G. P, ‘Disincentives to Activism by Institutional Investors in Listed Australian Companies’ (1996) 18 Sydney Law Review 152.

Starik, M, Rands, G. P, ‘Weaving an integrated web: Multilevel and Multisystem Perspectives of Ecologically Sustainable Organizations (1995) 20(4) Academy of Management Review 908.

Steffen, W, et al., ‘Planetary boundaries: Guiding human development on a changing planet’ (2015) 347 Science.

Stokes, M, ‘Company Law and Legal Theory’ in M Twinning (ed) *Legal Theory and Common Law* (Wiley-Blackwell, 1986).

Stout, L. A, ‘Bad and Not-so-Bad Arguments for Shareholder Primacy’ (2002) 75(5) Southern California Law Review 1189.

--, ‘The Mechanisms of Market Inefficiency: An introduction to the New Finance’ (2003) 28 The Journal of Corporation Law 635.

--, ‘The Mythical Benefits of Shareholder Control (2007) 93(3) Virginia Law Review 789.

Strand, T, ‘Short-Termism in the European Union’ (2015) 22 Columbia Journal of European Law 15.

Strine, L. E, ‘Toward a True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America’ (2006) 119 Harvard Law Review 1759.

--, ‘One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long-Term Unless Their Powerful Electorates Also Act and Think Long-Term?’ (2010) 66 Business Lawyer 1.

--, ‘Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System’ (2017) 126 Yale Law Journal 1870.

Sunstein, C. R, et al, ‘Behavioural Approach to Law and Economics’ (1998) 50 Stanford Law Review 1471.

Talbot, L. E, ‘Polanyi's Embeddedness and Shareholder Stewardship: A Contextual Analysis of Current Anglo-American Perspectives on Corporate Governance’ (2011) 62(4) Northern Ireland Legal Quarterly 451.

--, ‘Why Shareholders Shouldn't Vote: A Marxist-progressive Critique of Shareholder Empowerment’ (2013) 76(5) Modern Law Review 791.

--, ‘Corporate Governance and the Political Economy of the Company’ in Beate Sjåfjell, Christopher M. Brunner (eds) *Cambridge Handbook of Corporate Law and Sustainability* (CUP, 2019).

Tilba, A., McNulty, T. ‘Engaged Versus Disengaged Ownership: The Case of Pension Funds in the UK’ (2013) 21(2) Corporate Governance: An International Review 165.

Thomas, R. S, et al., 'The Second Wave of Hedge Fund Activism: The Importance of Reputation, Clout, and Expertise' (2016) 40 Journal of Corporate Finance 296.

Tjin Yi Tan, P, 'Institutional Investor Stewardship in the UK and Malaysia: Functionally Similar, Contextually Challenged' (2019) 14(2) Asian Journal of Comparative Law 279.

Tsagas, G, 'Section 172 of the Companies Act 2006: Desperate Times Call for Soft Law Measures' in Nina Boeger, Charlotte Villiers (eds), *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart, 2018).

--, Villiers, C, 'Why 'Less is More' in Non-Financial Reporting Initiatives: Concrete Steps Towards Supporting Sustainability' (2020) 10(2) The Journal of Accounting, Economics and Law: A Convivium 1.

Van der Elst, C, 'Shareholder Engagement and Shareholder Voting Modes: Two of a Different Kind' (2019) ECGI Law Working Paper No. 435/2019 https://ssrn.com/abstract=3323848 accessed 22 April 2019.

--, Lafarre, A, 'Bringing the AGM to the 21st Century: Blockchain and Smart Contracting Tech for Shareholder Involvement' (2017) ECGI Law Working Paper No. 358/2017 https://ssrn.com/abstract=2992804 accessed 09 January 2019.

--, Lafarre, A, 'Shareholder Stewardship in the Netherlands: The Role of Institutional Investors in a Stakeholder Oriented Jurisdiction' (2020) ECGI Law Working Paper 492/2020 https://ssrn.com/abstract=3539820 accessed 09 December 2020.

Van Duuren, E, et al, 'ESG Integration and the Investment Management Process: Fundamental Investing Reinvented' (2016) 138(3) Journal of Business Ethics 525.

Veldman, J, Jansson, A, 'Planetary Boundaries and Corporate Reporting: The Role of the Conceptual Basis of the Corporation (2020) 10(2) Accounting, Economics, and Law: A Convivium 1.

Verstegen Ryan, L, Schneider, M, 'The Antecedents of Institutional Investor Activism' (2002) 27(4) The Academy of Management Review 554.

Vildåsen, S. S, et al, 'Clarifying the Epistemology of Corporate Sustainability' (2017) 138 Ecological Economics 40.

Villiers, C, 'Sustainable Companies: Barriers and Possibilities in UK Company Law' (2013) 11 International Comparative Corporate Law Journal 105.

Watson, S. M, 'How the Company Became an Entity: A new understanding of Corporate Law' (2015) (2) Journal of Business Law 120.

--, 'The Corporate Legal Entity as a Fund' (2018) (6) Journal of Business Law 467.

--, 'The Corporate Legal Person' (2019) 19(1) Journal of Corporate Law Studies 137.

--, 'The Taxonomy of the Modern Company' in Innovations in Susan Watson, P. M. Vsudev (eds), *Corporate Governance: Global Perspectives* (EE, 2017).

Winter, J. W, 'Shareholder Engagement and Stewardship: The Realities and Illusions of Institutional Share Ownership' (2011) https://ssrn.com/abstract=1867564 accessed 23 December 2017.

Wong, S C-Y, 'Why Stewardship is Proving Elusive for Institutional Investors' (2010) Butterworths Journal of International Banking and Financial Law 406.

Wu, B.(H.T.) et al, 'Say on Pay' Regulations and Director Remuneration: Evidence from the UK in the Past Two Decades' (2020) 20(2) Journal of Corporate Law Studies 54.

Reports, Consultation Papers and Law Commission Reports

BEIS, 'Insolvency and Corporate Governance: Government Response (August 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version__with_Minister_s_photo_and_signature__AC.pdf, accessed 30 September 2020.

BEIS, 'Restoring Trust in Audit and Corporate Governance: Consultation on the Government's Proposals' (March 2021).

BIS, 'The Kay Review of UK Equity Markets and Long-Term Decision Making' (Final Report, 2012). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf accessed 13 March 2018.

BIS, 'Metrics and Models Used to Assess Company and Investment Performance' (2014) BIS Research Paper No 190.

Business Roundtable, Statement on the Purpose of a Corporation' (2019) https://system.businessroundtable.org/app/uploads/sites/5/2021/02/BRT-Statement-on-the-Purpose-of-a-Corporation-Feburary-2021-compressed.pdf, accessed 21 February 2021.

Cadbury, A, 'Report of the Committee on the Financial Aspects of Corporate Governance' (Gee, 1992).

Communication From the Commission, Action Plan: Financing Sustainable Growth (2018) COM(2018) 97 final.

De Larosière, J, 'Report of the High Level Group on Financial Supervision in the EU' (25 February 2009), https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf, accessed 05 May 2018.

DTI Consultation, Company Law Reform White Paper (Cm 6456, 2005).

DWP, 'Clarifying and Strengthening Trustees' Investment Duties' (June 2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739331/response-clarifying-and-strengthening-trustees-investment-duties.pdf, accessed 02 February 2021.

EU High Level Group on Sustainable Finance, 'Financing a Sustainable European Economy: Final Report' (January 2018) https://ec.europa.eu/info/sites/info/files/170713-sustainable-finance-report_en.pdf, accessed 20 February 2021.

EU High Level Group on Sustainable Finance, 'Financing a Sustainable European Economy: Final Report' (January 2018) https://ec.europa.eu/info/sites/info/files/170713-sustainable-finance-report_en.pdf, accessed 20 February 2021.

European Commission, 'Action Plan: Financing Sustainable Growth' (Communication) COM (2018) 97/F1.

European Commission, EY, 'Study on directors' duties and sustainable corporate governance (Final Report, 2020) https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en accessed 15 November 2020.

FCA, 'Building a regulatory Framework for Effective Stewardship: Feedback to DP19/1' (FS19/7, 2019) https://www.fca.org.uk/publication/feedback/fs19-7.pdf accessed 10 May 2020.

FCA Handbook Instrument: Shareholder Rights Directive (Asset Managers and Issuers) Instrument 2019 (FCA 2019/68).

FRC, 'Developments in Corporate Governance and Stewardship 2015' (January 2016) https://www.frc.org.uk/getattachment/a0a980b7-17bc-43b5-adcc-b2096a1528ae/Developments-in-Corporate-Governance-and-Stewardship-2015-FINAL.pdf accessed 10 May 2020.

--, 'Developments in Corporate Governance and Stewardship 2016' (January 2017) https://www.frc.org.uk/getattachment/ca1d9909-7e32-4894-b2a7-b971b4406130/Developments-in-Corporate-Governance-and-Stewardship-2016.pdf accessed 28 June 2019.

--, 'Annual Review of Corporate Governance And Reporting 2017/2018 (October 2018) https://www.frc.org.uk/getattachment/f70e56b9-7daf-4248-a1ae-a46bad67c85e/Annual-Review-of-CG-R-241018.pdf accessed 10 May 2020.

--, Proposed Revision to the UK Stewardship Code (January 2019) https://www.frc.org.uk/getattachment/8caa0e9c-58bb-41b2-923e-296223755174/Consultation-on-Proposed-Revisions-to-the-UK-Stewardship-Code-Jan-2019.pdf accessed 10 January 2020.

--, FCA, 'Building a Regulatory Framework for Effective Stewardship' (Discussion Paper DP 19/1, January 2019) https://www.fca.org.uk/publication/discussion/dp19-01.pdf accessed 10 January 2020.

Global Sustainable Investment Alliance, '2018 Global Sustainable Investment Review' (April 2019) https://www.ussif.org/files/GSIR_Review2018_3_28(2).pdf accessed 20 February 2020.

Hampel Committee, 'Committee on Corporate Governance: Final Report' (Gee, 1998) (Hampel Report).

HM Treasury, Institutional Investment in the United Kingdom: A Review' (2001) (The Myners Report).

HM Treasury, BEIS, Green Finance Strategy: Transforming Finance for a Greener Future (July 2019).

HM Treasury, Greening Finance: A Roadmap To Sustainable Investing (October 2021).

Implementation Taskforce, 'Growing a Culture of Social Impact Investing in the UK: Final Report' (June 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811914/Final_report_by_the_Implementation_Taskforce_Growing_a_culture_of_social_impact_investing_in_the_UK_2019.pdf accessed 02 February 2021.

Kingman, J, 'Independent Review of the Financial Reporting Council' (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767387/frc-independent-review-final-report.pdf accessed 10 January 2020.

Law Commission, 'Fiduciary Duties of Investment Intermediaries' (Law Com No.350, 2014).

Moxey, P, Berendt, A, ‘Corporate Governance and the Credit Crunch’ (2008) ACCA Discussion Paper http://www.accaglobal.com/content/dam/acca/global/PDF-technical/corporate-governance/cg_cc.pdf accessed 10 September 2017.

The Investor Forum, Annual Review 2020 (January 2021) https://invforumdev.wpengine.com/wp-content/uploads/_pda/securepdfs/2021/01/TIF-Annual-Review-2020-FINAL.pdf accessed 20 February 2021.

UN World Commission on Environment and Development, ‘Report of the World Commission on Environment and Development: Our Common Future’ (1987) http://www.un-documents.net/our-common-future.pdf%20accessed accessed 01 December 2019.

United Nations General Assembly resolution 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, A/RES/70/1 (25 September 2015) www.undocs.org/A/RES/70/1 accessed 10 September 2019.

UNCED, ‘Agenda 21, Rio Declaration, Forest Principles’ (1992).

Walker, D, ‘A Review of Corporate Governance in UK Banks and Other Financial Industry Entities: Final Recommendations’ (26 November 2009). https://ecgi.global/sites/default/files/codes/documents/walker_review_261109.pdf accessed 01 March 2021.