Reconciling Shareholder Primacy and the Interests of People and Planet

Law Working Paper N° 825/2025

January 2025

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ECGI Working Paper Series in Law

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We are grateful to Marc Moore, Graham Penn, Narine Lalafaryan, Elizabeth Howell, Clara Martins Pereira, Edoardo Martino, the participants of the 3rd Annual Conference on Financial Law and Regulation, and the anonymous

Abstract

The starting premise of this article is that general company law duties of directors and sustainability-related regulatory requirements can play a complementary role in accelerating the closer convergence between corporate actions and the interests of people and planet. The article considers how regulatory initiatives that work within the existing pro-shareholder company law framework can contribute to achieving this objective, especially given cases such as the UK Supreme Court's decision in BTI v Sequana and its strong reaffirmation of shareholder primacy in the law of directors' duties. The article considers how regulatory requirements interact with directors' duties to define the perimeters of lawful corporate activity and discusses the role of regulation as a driver for learning and increased accountability, including via the implementation of more sophisticated risk management approaches. The article also reflects on how private and public enforcement can contribute to increasing such complementarity between regulatory requirements and company law.

Keywords: Shareholder Primacy, Sustainability, BTI v Sequana, Corporate Law, Financial Regulation, Enforcement, Directors' Duties, FSMA, Companies Act 2006, NGFS, ClientEarth v Shell plc, Disclosures, Transition Plans, TCFD, ISSB

JEL Classifications: K22, K23, K20

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Legal Studies Research Paper Series

UNIVERSITY OF CAMBRIDGE
Faculty of Law

PAPER NO. 1/2025

JANUARY 2025

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Eilís Ferran & Pedro Schilling de Carvalho

Reconciling Shareholder Primacy and the Interests of People and Planet

Eilís Ferran[*] *and Pedro Schilling de Carvalho*[**]

1. Introduction

Lord Browne, the former CEO of BP, was recently quoted as saying that 'The hard truth is that we've done a poor job of reconciling corporate actions with the interests of society and the planet in a balanced way. Yet the urgent need to do so is undiminished'.[1] The starting premise of this article is that general company law duties of directors and sustainability-related regulatory requirements can play a complementary role in accelerating the closer convergence between corporate actions and the interests of people and planet that Browne and others have called for. The article considers how regulatory initiatives that work within the existing pro-shareholder company law framework can contribute to achieving this objective. The article also reflects on how private and public enforcement can contribute to increasing such complementarity between regulatory requirements and company law.

Shareholder primacy remains deeply entrenched in UK company law and would be hard to displace. At the same time, we are already well past the point of it being credible to argue that this pro-shareholder orientation is a licence to boards to pay no more than lip

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♦ This is a pre-copyedited, author-produced version of an article accepted for publication in the Law Quarterly Review following peer review. The definitive published version will be available online on Westlaw UK. We are grateful to Marc Moore, Graham Penn, Narine Lalafaryan, Elizabeth Howell, Clara Martins Pereira, Edoardo Martino, the participants of the 3rd Annual Conference on Financial Law and Regulation, and the anonymous peer reviewers for their insightful comments and suggestions. All errors that remain are our own.

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[1] Kenza Bryan and Attracta Mooney, 'How Companies are Starting to Back Away from Green Targets' Financial Times 21 June 2024.

service to sustainability concerns; the nexus between climate risk and financial/business risk is now impossible to ignore.[2] More concretely, sustainability-related regulatory obligations can focus the minds of directors, forcing them to pay attention to what might previously have been blind spots, affecting what they need to do to ensure proper risk management, exposing their actions to more public scrutiny, and ultimately potentially increasing the risk of liability for breach of directors' duties where corporate actions are not compatible with a reasonable view of the applicable science.

Exactly how regulatory requirements reinforce fiduciary duties is not a new question, and experience from other contexts teaches us to expect some frictions between directors' duties and overlapping sustainability-related regulatory requirements that suitable test cases can usefully help to clarify.[3] Shareholder primacy means that enforcement of directors' duties generally depends on shareholders being willing to hold them accountable. This prompts questions about shareholders' incentives to take action against directors who are underperforming from a societal perspective.[4] The recent 'enlightened shareholder activism'

[2] Mark Carney, 'Breaking the Tragedy of the Horizon – Climate Change and Financial Stability (Speech, Lloyd's of London, 29 September 2015) https://www.bankofengland.co.uk/speech/2015/breaking-the-tragedy-of-the-horizon-climate-change-and-financial-stability.

[3] The topic was the subject of an important Law Commission study some years ago: Law Commission, 'Fiduciary Duties and Regulatory Rules' (Law Com 236, 1995). While the review was in progress, some of the issues under consideration were clarified by case law: *Kelly v Cooper* [1993] AC 205, HL. Hence why it is important for the courts not to be too hasty in condemning shareholder derivative actions as nuisance claims: Lord Robert Carnwath, 'ClientEarth v Shell: What Future for Derivative Claims?' (The Grantham Research Institute on Climate Change and the Environment 2024).

[4] Andrew Keay, 'The Public Enforcement of Directors' Duties: A Normative Inquiry' (2014) 43 Common Law World Review 89; Andrew R Keay and Michelle Welsh, 'Enforcing Breaches of Directors' Duties by a Public Body and Antipodean Experiences' (2015) 15 Journal of Corporate Law Studies 255.

trend, which has seen major asset managers, whose investment strategies operate at portfolio rather than individual company level, use their powerful influence to encourage boards to adopt more stakeholder-friendly business practices, makes it easier to characterise shareholder primacy as a force that is simultaneously focused on profit and positive social good. There is growing interest in using litigation – including shareholder derivative claims, investor claims under section 90A of the Financial Services and Markets Act 2000 for misleading disclosures, and misfeasance claims in insolvency – as a corporate disciplining mechanism.[5] The number and variety of claims brought against companies is increasing.[6] While such claims have met with varying degrees of success in the courts thus far, the greater transparency that is fostered by mandatory sustainability disclosure requirements and instruments such as corporate transition plans may help claimants to find evidence of breach of duty through manifest error or failure to take account of relevant considerations.

However, there are legitimate reservations about how much enlightened shareholder activism can achieve given that, in the end, it is bounded by shareholder self-interest and intermediaries' fiduciary responsibilities to generate returns for end-investors. Shareholder

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[5] *ClientEarth v Shell plc* [2023] EWHC 1897 (Ch) (failure to establish a prima facie case for a derivative claim relating to climate risk management); *Wright v Chappell* [2024] EWHC 1417 (Ch) (successful misfeasance and wrongful trading claim against directors of failed company); *Various Claimants v Serco Group Plc* (claim under section 90A, settled one week into trial, amount undisclosed); *Re RBS (Rights Issue Litigation)* (section 90 Financial Services and Markets Act 2000 (false prospectus) claim settled in 2018 for £800M); *SL Claimants v Tesco plc* (section 90A claim settled in 2020 for £193M).

[6] Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2024 Snapshot' (Grantham Research Institute 2024).

and stakeholder interests will not always coincide.[7] Activist shareholders face the risk of having their motivations challenged, of being accused of having goals other than advancing the corporate interest, and being deemed, therefore, to be acting otherwise than in good faith.[8] Sustainability is also acknowledged as an area of increased complexity, meaning that investors can have a hard time appropriately considering their options and understanding their risks.[9] There is also the concern that the 'social turn' in investment could prove to be quite transient due to pressures on asset managers from end investors.[10] The current reassessment of sustainability goals by the corporate and financial sectors is susceptible to a range of explanations: just a blip, a necessary correction of unrealistic over-ambition, an insincere effort to avoid accusations of greenwashing, or a reflection of eroding confidence in the sustainability business case in the face of geopolitical shocks that create new short term pressures. Such considerations make the conclusion that shareholder primacy leaves open some enforcement gaps unavoidable.[11]

Recognising enforcement gaps does not require us to give up on sustainability-related regulation's capacity to change the operation of directors' duties for the benefit of all. Private

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[7] Dorothy S Lund, 'Enlightened Shareholder Value, Stakeholderism, and the Quest for Managerial Accountability' in Elizabeth Pollman and Robert B Thompson, *Research Handbook on Corporate Purpose and Personhood* (Edward Elgar, 2021); Dorothy S Lund and Elizabeth Pollman, 'Corporate Purpose' ECGI Law Working Paper 711/2023; Dorothy S Lund and Elizabeth Pollman, 'The Corporate Governance Machine' (2021) 121 Columbia Law Review 2563.

[8] The 'collateral motivation' of the claimant was a factor in *ClientEarth*, n 5.

[9] Luca Enriques, Alessandro Romano and Andrew F Tuch, 'Green Gatekeepers' (2024) 109 Minn. L. Rev.

[10] William W. Bratton, 'Shareholder Primacy versus Shareholder Accountability' (2023) ECGI Law WP 716/2023.

[11] Virginia Harper Ho, 'The Limits of Enlightened Shareholder Activism' [2022] 4 International Journal for Financial Services.

law formal mechanisms of enforcement and accountability do not have to do all the heavy lifting in changing corporate actions. There are other factors that are not always given as much attention in the literature as they deserve. Regulation opens the door to public enforcement, which can ultimately raise the standard of conduct in a market, with consequential implications for expectations regarding directors' performance. Maintaining high standards in regulatory compliance is an important board responsibility and there are strong personal and professional motivations for those who take on directorships to take this responsibility seriously. It is not just about minimising the risk of unwelcome attention from the public or from public enforcement bodies that are charged with investigating regulatory failures. Growing, and more detailed, regulatory requirements paired with heightened public scrutiny of the impact of corporate actions on people and planet are increasing the demand for board level sustainability competency. Russell Reynolds, a leading board recruitment search firm, has explained that a new breed of sustainable board directors is being sought after by best-in-class companies around the world.[12] This trend reflects perceptions about sustainability expertise being a source of competitive advantage and not just risk management. Those keen to make their mark in the boardroom will want to upgrade their sustainability literacy to advance their own careers. These incentives for directors – existing and aspiring – to develop new skills and expertise and to treat navigating a growing body of sustainability-related requirements as a valuable learning experience can compensate at least to some extent for enforcement gaps in improving the quality of corporate decision-making. The fact that the market for directors is global – and that directors will not confine their career aspirations to one jurisdiction – further reinforces the incentives for increased

[12] Kurt Harrison, Emily Meneer, Sylwia Zieba and Vanessa Di Matteo, 'Next-Generation Sustainable Board Directors' (16 June 2022) https://www.russellreynolds.com/en/insights/articles/next-generation-sustainable-board-directors.

sustainability expertise, while also lessening the impacts of sustainability backtracking in specific jurisdictions.[13]

Awareness raising matters in other ways as well. As Lord Leggatt said in *Finch v Surrey County Council* 'promoting education [..] in environmental matters does not guarantee that greater priority will be given to protecting the environment. But the assumption is that it is likely to have that result, or at least that it is a prerequisite'.[14] Improving sustainability knowledge and understanding can give directors (and shareholders) greater confidence that their personal inclinations to 'do the right thing' are aligned with their professional responsibilities. This includes having the confidence to set credible targets and strategies that reflect scientific data and the corresponding risks. At times, this will mean that directors will be able to be more detailed and thoughtful about a given company's trajectory in minimising its sustainability-related risks. On occasion, this might mean rowing back from earlier commitments when the scientific data shows that they cannot be met, or when geopolitical developments require difficult trade-offs to be made, in a more informed manner. But, without appropriate guidance, it might often be difficult to separate situations where shareholder primacy and pro-sustainability goals might be aligned, from scenarios that will involve trade-offs. Thus, the personal ethics of directors, as well as their interest in self-advancement, together with commercial drivers such as needing to retain employees that want to work for companies with strong sustainability records and in protecting the company's reputation, can also contribute to filling the enforcement gap.

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[13] Steven A Bank, Brian R Cheffins and Harwell Wells, 'Executive Pay: What Worked?' (2016) 42 Journal of Corporation Law 44–55.

[14] [2024] UKSC 20 [21].

The article proceeds as follows. After this introductory part, Part 2 reflects on the decision of Supreme Court in *BTI v Sequana*[15] to discuss the state of shareholder primacy in the UK. *Sequana* is famous for deciding that directors' duties to their company include a creditor-facing duty when a company is insolvent or bordering on insolvency. This article does not seek to add to the burgeoning literature on the implications of *Sequana* for claims against directors of insolvent companies.[16] Instead, it shifts the focus to the contrast in the *Sequana* opinions between the duty to *have proper regard* to creditor interests and the mere *have regard* to stakeholder interests in section 172(1) of the Companies Act 2006.[17] The *Sequana* opinions confirm a strong shareholder bias in UK company law that is not significantly qualified by section 172(1). Part 3 grapples with the implications of the deeply entrenched pro-shareholder bias in UK company law and develops the claim that this is not an insurmountable barrier to progress on convergence between corporate actions and the interests of people and planet. This part moves away from *Sequana* by situating shareholder primacy within a broader context of increased societal and regulatory expectations with respect to sustainability that affect risk management. It argues against any urgent need to reform section 172(1), a major undertaking that would require potentially years of discussion to build consensus and that would carry a high risk of failure. Instead, since directors' general duties are pliant, adaptable to changing circumstances and shifting regulatory requirements,

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[15] *BTI 2014 LLC v Sequana SA* [2022] UKSC 25.

[16] Literature examining the creditor-facing duty recognised in *Sequana* includes Pedro Schilling de Carvalho and Bobby V Reddy, 'Credit Where Credit's Due: The Supreme Court's Take on Directors' Duties and Creditors' Interests' (2023) 82 Cambridge Law Journal 17.

[17] On *proper* regard: *Sequana* [207] and [242] (Lord Hodge). Lady Arden describes the creditor-facing duty as 'an obligation *properly to consider* the creditors' interests': *Sequana* [336] (author emphasis added). Also, *Bilta (UK) Ltd v Nazir (No 2*) [2015] UKSC 23 [123] (Lord Hodge and Lord Toulson), endorsed by Lord Reed in *Sequana* [79].

priority should be given to advancing the sustainability regulatory agenda as a quicker way to deliver effective granular solutions to societal problems. Part 4 considers how regulatory requirements interact with directors' duties to define the perimeters of lawful corporate activity. It then considers the role of private and public enforcement in the UK, examining current trends in claims beyond narrow financial concerns. Part 5 discusses the role of regulation as a driver for learning and increased accountability, including via the implementation of more sophisticated risk management approaches. Part 6 reflects critically on placing faith in the power of sustainability-related regulation to drive corporate behaviour within a shareholder primacy system of company law. Part 7 briefly concludes.

2. Shareholder primacy

Section 172(1) of the Companies Act 2006 is held out in the literature as 'a prominent example implementing the ESV [enlightened shareholder value] approach', by which is meant a focus on 'the treatment of stakeholders as a way to achieve long-term shareholder value'.[18] Yet despite its express reference to certain stakeholders, section 172(1) was never meant to displace shareholders from their position of primacy.[19] The reading of section

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[18] Both quotes are from Lucian A Bebchuk, Kobi Kastiel and Roberto Tallarita, 'Does Enlightened Shareholder Value Add Value?' (2022) 77 The Business Lawyer 731.

[19] David Kershaw and Edmund Schuster, 'The Purposive Transformation of Corporate Law' 69 American Journal of Comparative Law 478; Christopher M Bruner, Corporate Governance in the Common Law World: The Political Foundations of Shareholder Power (Cambridge University Press 2013); Georgia Tsagas, 'Section 172 of the Companies Act 2006: Desperate Times Call for Soft Law Measures' in Nina Boeger and Charlotte Villiers (eds), Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity (Hart Publishing 2018) (describing s 172 as creating the illusion that stakeholder interests are acknowledged in corporate decision-making); Richard Williams, 'Enlightened Shareholder Value in UK Company Law' (2012) 35 UNSW Law Journal 360.

172(1) as being fundamentally about shareholder primacy and offering little by way of protection for stakeholder interests is strongly supported by the opinions in *Sequana*.

Section 172(1) of the Companies Act 2006 requires directors to act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members. Section 172(1) sets out six factors to which directors are required to have regard in discharging their success duty: the likely consequences of any decision in the long term; the interests of the company's employees; the need to foster the company's business relationships with suppliers, customers and others; the impact of the company's operations on the community and the environment; the desirability of the company maintaining a reputation for high standards of business conduct, and the need to act fairly as between members of the company. It is for the directors themselves to determine the weight to be attached to the factors.[20]

Having regard to the six factors mentioned in section 172(1) does not relieve directors of the responsibility to consider other matters as well: the statutory have regard list is not exclusive or exhaustive.[21] It is incumbent on a properly run board to consider issues from different angles before coming to a view on what will best promote corporate success.[22] Staying informed is an imperative for any board.[23] Conceptually, the 'company' whose success the directors are required to promote is more than just the shareholders' collectively,[24] and it is therefore for the directors in accordance with their duties to decide what other matters are relevant to the decision they are proposing to take. Creditors' interests

[20] *ClientEarth*, n 5, [25].

[21] *Sequana* [141] (Lord Briggs).

[22] *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch).

[23] *Sequana* [90] (Lord Reed) and [304] (Lady Arden); *re Barings plc (No 5)* [1999] 1 BCLC 433 (Ch).

[24] *Sequana* [139] (Lord Briggs).

are only partially covered by the stated have regard factors[25] but since a well-run board would not treat the six factors as a comprehensive checklist, consideration could also be given to wider creditors' interests (or other matters) that the board regards as also being relevant to forming a view on the best choice for promoting corporate success.

The section 172(1) duty is generally subjective[26] but directors who fail to take account of a relevant matter take a greater risk of liability because the test that is applied in that situation is whether an intelligent and honest person in the position of the director concerns could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company.[27] Directors who fail to take account of relevant matters also risk being held to be in breach of their duty of care and skill under section 174 of the Companies Act 2006.[28] Keeping comprehensive checklists and records can help to mitigate the risk of liability based on failure to take account of relevant matters.

What do we learn about section 172(1) from *Sequana*? Lord Briggs (with whom Lord Kitchin and Lord Hodge agreed, with Lord Hodge also delivering his own opinion) acknowledges section 172(1) as part of a historical evolution away from regarding a company as an abstract equivalent of its shareholders only: 'This provision recognises that, as a separate entity from its shareholders, a company has responsibilities of a legal, societal, environmental and, in a loose sense, moral or ethical nature, compliance with which is likely

[25] '[B]oth employees and suppliers are likely to form important classes of a company's creditors as it approaches insolvency' *Sequana* [141] (Lord Briggs).

[26] *Regentcrest v Cohen* [2001] 2 BCLC 80.

[27] *Charterbridge v Lloyds* [1970] Ch 62, 74 (Pennycuick J); *HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch) [92] (John Randall QC).

[28] *Roberts v Frohlich* [2011] EWHC 257 (Ch) [98] (Norris J); *Wright v Chappell*, n 5, [546]. Potentially also their duty to act for proper purposes (Companies Act 2006, s 171) although this is not explored further.

to secure rather than undermine its success'.[29] However, the development of thinking about corporate personality and responsibilities is said to be 'reflected in section 172(1)' rather than driven by it.[30] For Lord Briggs and Lord Hodge, section 172(1) is simply 'a modern formulation of the well-established duty of directors to act bona fide in what they consider to be in the interests of the company'.[31] The famous have regard requirement in section 172(1) is merely about taking account of considerations 'to the extent only that this may assist in securing the success of the company for the benefit of its members'[32]; this is 'no more than an aspect of the directors' general duty to manage the company for the benefit of its shareholders'.[33] According to Lord Hodge, section 172(1) when considered on a standalone basis, imposes an *unqualified*[34] (author emphasis) duty on directors to promote the success of the company for the benefit of its shareholders.[35] Lord Reed, meanwhile, discusses the old common law duty to act in the interests of the company at some length but considers it unnecessary to undertake a detailed analysis of section 172(1), which, in his view, carries forward the 'common law approach of shareholder primacy'[36] subject to the secondary have regard obligation, which 'is not a novel idea'[37] in the Companies Act 2006 because the relevance of the interests of employees and other stakeholders to the fulfilment of the

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[29] *Sequana* [140] (Lord Briggs).

[30] *Sequana* [151] (Lord Briggs).

[31] *Sequana* [226] (Lord Hodge).

[32] *Sequana* [163] (Lord Briggs).

[33] *Sequana* [163] (Lord Briggs).

[34] *Sequana* [230] (Lord Hodge) (emphasis added).

[35] *Sequana* [230] (Lord Hodge) (emphasis added).

[36] *Sequana* [65] (Lord Reed).

[37] *Sequana* [66] (Lord Reed). This refers to the Companies Act 1985, which imposed a have regard with respect to the interests of employees.

directors' common law shareholder primacy duty was already recognised in legislation and caselaw. Lord Reed treats the corporate interest as *equivalent to the interests of its members as a whole*' (author emphasis),[38] largely glossing over the carefully-crafted attempt in section 172(1) to make a conceptual distinction between 'the company' and 'its members'.[39]

Members 'as a whole' implies a whole class, extending to future shareholders as well as present ones,[40] and in theory directors are supposed to avoid 'showing undue favouritism to one group or other another within that body';[41] this brings us to the fantasy figure of the 'hypothetical member'[42] or the 'hypothetical reasonable shareholder' as 'the best embodiment of the company when shareholders as a class have too many varied interests within that class'[43] (even though, among all those heterogeneous preferences, those of future shareholders are unlikely to have a strong claim on directors' attention except where they provide useful justification for decisions whose full value will only be realised in the longer

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[38] *Sequana* [11] (Lord Reed). Also at [59]. Also equating the interests of a company with the interests of its members: *Stanford International Bank v HSBC Bank plc* [2022] UKSC 34 [82] and [97] (Lord Leggatt) and [102]-[103] (Lord Sales).

[39] Company Law Review Steering Group, Modern Company Law for a Competitive Economy: Developing the Framework (URN 00/656, DTI 2000) para 3.51: 'We believe there is value in inserting a reference to the success of the company, since what is in view is not the individual interests of members, but their interests as members of an association with the purposes and the mutual arrangements embodied in the constitution; the objective is to be achieved by the directors successfully managing *the complex of relationships and resources which comprise the company's undertaking* (author emphasis added).

[40] *Gaiman v National Association for Mental Health* [1971] Ch 317, 330 (Megarry J).

[41] *Stanford*, n 38, [97] (Lord Leggatt).

[42] *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, 291 (Lord Evershed MR).

[43] Discussing further the problems of divergent preferences and time horizons within the 'members as a whole' formulation: Hans Tijo, 'Sustainable Directors' Duties and Reasonable Shareholders' (2024) 25 European Business Organization Law Review 333.

term). The issue of long-term considerations has particular relevance in the climate context because of the time horizons for the full impact of risks to materialise.

Only Lady Arden's opinion conveys a sense of section 172(1) as an important innovation. For Lady Arden, ESV is the foundational principle' of the statement of duties.[44] This is a 'form of shareholder primacy', not a pluralist model.[45] While the section 172(1) success duty is the successor to the common law duty to act bona fide in what the directors consider is in the interests of the company,[46] in Lady Arden's view, the have regard obligation *is* (author emphasis) a break with tradition because there was previously no such extensive obligation.[47] ESV is 'modified shareholder primacy'.[48] It is a matter of obligation rather than mere discretion to take account of stakeholder interests and likely long term consequences.[49] Lady Arden is at pains to stress that a company is more than just a term for its shareholders' collectively and that its success is to be framed accordingly. Overall, Lady Arden's reading of the section presents section 172(1) as more than just a 'nuance' or 'slight modification' compared to the common law.[50]

From a narrow formal enforcement perspective, Lady Arden's assessment of the impact of section 172(1) looks somewhat overstated. In the hands of activist shareholders, the derivative action *could* become a mechanism to ensure 'the fulfilment of obligations of social

[44] *Sequana* [265] and [372] (Lady Arden).

[45] *Sequana* [265] (Lady Arden).

[46] *Sequana* [363] (Lady Arden).

[47] *Sequana* [386] (Lady Arden).

[48] *Sequana* [386] (Lady Arden).

[49] *Sequana* [386] (Lady Arden).

[50] Compare Luh Luh Lan and Walter Wan, 'ESG and Director's Duties: Defining and Advancing the Interests of the Company' (2023) 23(2) Journal of Corporate Law Studies 537.

responsibility'[51] but this potential remains largely unrealised at this point. There is an unfavourable comparison in this respect between the section 172(1) *have regard* and the creditor-facing *proper regard* duty, which has a fit for purpose enforcement mechanism in the form of the misfeasance claim in section 212 of the Insolvency Act 1986 that has already shown its teeth.[52] The differences in the governance implications of the creditor-facing *proper regard* duty and the section 172(1) *have regard* further underline this point.

There is a major governance shift when the creditor-facing duty is engaged, which is that shareholders can no longer ratify directorial wrongdoing. The creditor-facing duty and the ineffectiveness of shareholder ratification in insolvency are separate legal principles but they share the same rationale, which is based on the location of economic interests in the company.[53] Shareholder primacy is ultimately about 'entitlement to control and to profits'[54] but the governance rights that flow from this become asymmetric when the economic positions of shareholders and creditors change because of insolvency.[55] The principles have to work in sync with each other because the shareholder ratification principle and the creditor-facing duty 'cannot sensibly co-exist at the same time in relation to the same company'.[56] The 'trigger for the engagement of the creditor duty must sensibly coincide with the moment when the ratification principle ceases to apply'.[57] If it did not, the directors' incentives would

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[51] LS Sealy, 'Directors' Wider Responsibilities - Problems Conceptual, Practical and Procedural' (1987) 13 Monash UL Rev 164, 176.

[52] The main defendant in *Wright v Chappell*, n 5, was held liable to make payments totalling more than £50M including £21.5m for wrongful trading and £17.5m for breach of fiduciary duty and other additional costs.

[53] *Sequana* [42] and [96] (Lord Reed); [246] (Lord Hodge); [256] (Lady Arden).

[54] *Sequana* [332] (Lady Arden).

[55] *Sequana* [256] and [374] (Lady Arden).

[56] *Sequana* [149] (Lord Briggs).

[57] *Sequana* [196] (Lord Briggs).

be skewed towards shareholders' interests for so long as those shareholders retained the power to forgive wrongdoing. The section 172(1) *have regard* does not have a governance impact: shareholders remain free to exercise their powers to authorise or ratify what would otherwise be a breach of duty by the directors. Section 172(1) is, essentially, about reminding directors to look at issues from all angles before deciding what will best promote the success of the company for the benefit of its shareholders; unlike the creditor-facing duty, its underlying rationale does not rest on stakeholders having an economic interest in the company.

While it was aimed at the ESV concept in general, Bebchuk, Kastiel and Tallarita's comment that 'to the extent that capitalism is facing 'a world on fire' moving from shareholder value to ESV 'cannot be expected to have a major effect on the height of the flames', is a fair assessment of section 172(1) viewed through the *Sequana* lens. However, recognising the weaknesses of section 172(1) does not mean writing it off completely. Not everything comes down to formal enforcement, as was noted in the introductory part of this article.

Section 172(1) has been usefully described as a well-intentioned moral compass[58] and, as such, its enactment both reflected and amplified a cultural conversation about standards of managerial conduct and the societal purpose of companies in a world threatened by existential risks. It has been part of a movement that has shifted the extent to which society expects companies to take responsibility for the advancement of social and environmental solutions. Section 172(1)'s role in informing and educating directors about good business

[58] Nicholas Grier, 'Directors Deliver - Just Not Very Much: Further Reflections on Section 172 of the Companies Act 2006' (2022) 4 Juridical Review 212.

practice was identified right from the time of enactment.[59] The importance of measures that help to raise awareness continues to be noted.[60] Section 172(1) can also be credited with serving a useful purpose by providing a set of criteria for the framing of disclosure obligations, thereby contributing something to better corporate accountability.[61] That said, an empirical study finding that section 172(1)-related disclosure obligations did not have much effect on the reporting practices of the sample companies cautions against exaggeration of its direct disclosure impact.[62]

3. Options for driving convergence of corporate actions and the interests of people and planet

There is considerable frustration with the limitations of section 172(1). Groups across society seeking a greener, clearer, fairer form of capitalism have been campaigning for changes to section 172(1) for some time.[63] Section 172(1) has been described as a 'flawed artefact' and

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[59] Company Law Review Steering Group, 'Modern Company Law for a Competitive Economy: Developing the Framework' (DTI URN 00/656) para 2.23 (adopting ESV would reflect best practice, imposing no burdens on the best but helping to raise the standards of the rest).

[60] *Finch*, n 14.

[61] See Companies Act 2006, s 414CZA and UK Corporate Governance Code, Principles A-E and related provision 5. More broadly: Lund, n 7.

[62] AR Keay and T Iqbal, 'The Impact of Enlightened Shareholder Value' [2019] Journal of Business Law 304.

[63] Colin Mayer, *Firm Commitment: Why the Corporation is Failing Us and How to Restore Trust in It* (OUP 2013) and Colin Mayer, *Prosperity* (OUP 2018) are among the seminal texts of the corporate purpose movement. There is now a very large body of scholarship on corporate purpose in the law, finance and management literature: Brian R Cheffins, 'The Past, Present and Future of Corporate Purpose' (2023) Delaware Journal of Corporate Law.

as a ‘compromise or “fudge” that reflected political necessity’.[64] Reform efforts acquired a prominent focus point in 2021 with the launch of the Better Business Act, a high profile campaign to amend section 172 by removing shareholder primacy and replacing it with a duty to promote the purpose of the company and operate the company in a manner that benefits its members, wider society and the environment.[65] An important scholarly contribution to the reform debate is the British Academy’s Future of the Corporation project led by Professor Colin Mayer, which since 2017 has been examining the purpose of business and its role in society.[66] This project also includes calls for section 172(1) to be amended to align directors’ duties with corporate purpose, which would be required to represent a variety of interests.

However, the opinions in *Sequana* read as a stark reminder of just how tightly shareholder primacy is woven into the fabric of company law in the UK and therefore of the immensity of the challenge involved in advocating for its reform. The legal difficulties involved in loosening the grip of shareholder primacy within core company law would be formidable.[67] This goal could not be achieved simply by redrafting section 172(1) in a

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[64] Jeff Twentyman and George Murray, ‘A Bridge to Better Business: The Positive Case for Updating Directors' Duties’ (2022) <https://my.slaughterandmay.com/insights/briefings/a-bridge-to-better-business-the-positive-case-for-updating-directors-duties> (accessed 17 July 2024).

[65] ‘About the Better Business Act’ <https://betterbusinessact.org/about/#thestory> (accessed 17 July 2024).

[66] D Palombo, ‘The Future of the Corporation: The Avenues for Legal Change’ (2022) 10(S5) Journal of the British Academy 43.).

[67] Davies has comprehensively demolished the idea of a ‘quick fix’ via a targeted change to s 172: Paul L Davies, ‘Shareholder Voice and Corporate Purpose: The Purposelessness of Mandatory Corporate Purpose Statements’ in Luca Enriques and Giovanni Strampelli (eds), *Board-Shareholder Dialogue: Policy Debate, Legal Constraints and Best Practices* (CUP 2024. The challenge involved in displacing shareholder primacy is not unique to the UK: Klaus J Hopt, ‘Corporate Purpose and Stakeholder Value - Historical, Economic and

stakeholder direction. A broader reconsideration of shareholder rights would be needed for any changes to section 172(1) to achieve their desired effect. Some proponents of reform of the pro-shareholder bias in the current law have recognised this.[68] A shift from shareholder to stakeholder governance would require recent policy choices to treat investor (shareholder) stewardship as the key to better corporate governance and relatedly, to confer specific decision-making rights on shareholders (eg say on pay rights or rights to appoint and remove directors) to be revisited. New remedies for stakeholders would have to be considered and radical governance reform to facilitate stakeholder representation on boards might also be needed. The implications of new remedies and governance models for D&O insurance premiums would require consideration. Accountability and incentives questions abound: 'too many masters … but servants of none' is a familiar objection to stakeholder models of directors' duties.[69] Issues of profound economic and policy significance, such as the implications for the capital markets and for companies' cost of capital of the diminution of shareholder rights and the introduction of alternative governance models, would need to be thought through. The global competitiveness of the UK as an incorporation location could even be called into question. [70] The evidence of German companies reincorporating as

Comparative Law Remarks on the Current Debate, Legislative Options and Enforcement Problems ECGI Law WP 690/2023'; Stephen M Bainbridge, *The Profit Motive: Defending Shareholder Value Maximization* (CUP 2023) (US).

[68] Kershaw and Schuster, n 19, for example, put reform of s 172 within an ambitious agenda for a new approach to corporate law based on optionality and choice, and which gets away from the status quo pro-shareholder bias.

[69] Lucian A Bebchuk and Roberto Tallarita, 'The Illusory Promise of Stakeholder Governance' (2020) 106 Cornell Law Review.

[70] Grier, n 58.

European SEs ‘primarily to avoid board codetermination or mitigate its effects’ is telling on this point. [71]

In short, to embark on a law reform exercise to displace shareholder primacy would be a risky and major undertaking requiring potentially years of discussion to build consensus around design choices. There is no obvious political appetite in the UK to take on the challenge of a complex reform exercise that is divisive and has the potential to be harmful to its economy. Even in view of the July 2024 General Election’s results, the Labour Party seems very unlikely to want to jeopardise the relationship with business that it carefully rebuilt after a lurch to the left between 2015 and 2020 under its previous leadership by antagonising the giant asset managers and funds that now dominate the ownership of the corporate sector. Not to be overlooked is that when a government last set aside proper time for holistic reform of company law, that is in in the extended period of review leading up to the Companies Act 2006, radical reform options for directors’ duties were canvassed but in the end conservatism prevailed. So even if we assumed more political willingness to consider reform of core company law than is envisaged here, it would be unwise to have high expectations for transformative change to result from it. Taking the bold reform pathway could involve spending a lot of time to achieve very little in a moment where short and medium-term reforms will have significant long-term impacts on people and planet. The UK’s ‘corporate governance machine’ is likely to prove as effective as Lund and Pollman assess the US one to be in ensuring that there is no ‘true paradigm shift away from shareholderism’, that corporate governance change occurs within ‘the existing shareholderist model’ and that ‘stakeholderism is unlikely to dethrone shareholder primacy’.[72]

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[71] Jens Dammann and Horst Eidenmueller, ‘Codetermination: A Poor Fit for U.S. Corporations’ (2020) Columbia Business Law Review 870.

[72] Lund and Pollman, ‘The Corporate Governance Machine’, n 7, 2567-8 and 2634.

We do not seek here to enter the debate on whether as a matter of principle radical change to core company law that displaces shareholder primacy in order to oblige companies to address societal concerns more effectively would be preferable to adopting more regulation with that aim in mind.[73] Our point is a more practical one related to the vicissitudes of political and legislative processes in view of the urgency of sustainability-related concerns.[74] Put simply, when the recent progress on societal issues that has been made via the sustainability regulatory agenda is compared with the lengthy yet ultimately unproductive debate about reforming section 172(1) in favour of a more stakeholder, purpose-led alternative, approach, there is no contest: the regulatory agenda delivers. While reshaping what directors need to do to discharge their general company law duties via regulation may be a second-best choice for those who would prefer more radical reform of core company law, we take a more positive view of the duty-shaping impact of regulatory requirements. We develop this point in Part 4 by considering how advances in the regulatory realm can (and have already begun to) inform the application of directors' duties.

It is not however, a stark choice between one or the other. A likely unintended side effect of an attitude that refuses to recognise the role that regulation can play in helping firms to address sustainability risks is the intensification of regulation to ensure that 'bare

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[73] For instance, there are important debates on alternative stakeholder-oriented models that also offer an important contribution in framing shareholder-primacy not as an inevitability, but as a choice. See: Mariana Pargendler, 'Corporate Law in the Global South: Heterodox Stakeholderism' (2024) 47 Seattle University Law Review; Cheffins, n 63. On government regulation as a second best but necessary choice: Dhammika Dharmapala and Vikramaditya S Khanna, 'Controlling Externalities: Ownership Structure and Cross-firm Externalities' (2023) 23 Journal of Corporate Law Studies.

[74] Jeffry Frieden, 'The Political Economy of Economic Policy' IMF Finance & Development June 2020 https://www.imf.org/en/Publications/fandd/issues/2020/06/political-economy-of-economic-policy-jeff-frieden (accessed 17 July 2024).

minimum' compliance by the private sector does not generate significant transition risks and prevent a "soft landing", with potential systemic impacts to financial stability.[75] Inertia in the realm of company law can mean that these same risks will be addressed by regulatory changes elsewhere – e.g., environmental law, tax law, tort law, and so on – which could have significant effects over the core attributes of the corporate form.[76] Ultimately, incorporating these considerations into the operation of company law – as further explored in Parts 4 and 5 – tries to exploit complementarities to accomplish the shift to a more long-term mentality that has long been pursued as one of the goals of corporate governance.[77]

In advocating for a positive assessment of the power of complementarity, we acknowledge that corporate and investor attitudes towards the sustainability agenda are

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[75] The Bank of England defines physical risks as those related to 'more frequent or severe weather events like flooding, droughts and storms (…) that impact our society directly and have the potential to affect the economy', transition risks as occurring 'when moving towards a less polluting, greener economy' as that 'could mean that some sectors of the economy face big shifts in asset values or higher costs of doing business', and liability risks as 'people or businesses seeking compensation for losses they may have suffered from the physical or transition risks from climate change outlined above'. See: Bank of England, 'Climate Change: What Are the Risks to Financial Stability?' (2019) <https://www.bankofengland.co.uk/explainers/climate-change-what-are-the-risks-to-financial-stability> (accessed 17 July 2024).

[76] Mariana Pargendler, 'How Universal Is the Corporate Form? Reflections on the Dwindling of Corporate Attributes in Brazil' (2020) 58 Columbia Journal of Transnational Law; Dalia Palombo, 'Business, Human Rights and Climate Change: The Gradual Expansion of the Duty of Care' [2024] Oxford Journal of Legal Studies.

[77] Bernard S Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (2001) 48 UCLA Law Review.

diverse.[78] Some need no convincing that a transition is inevitable and that their businesses will suffer if they do not get on board with the changes. Some do not want to think about sustainability issues presently because of the transaction costs in acquiring the necessary expertise but would be otherwise happy to free-ride on information if it was readily available. Some may worry about first mover disadvantage. Others just do not see the problem and often might think that the sustainability agenda itself is the problem. For those at the extreme ends of the spectrum, regulation may not make a significant impact, either because, at one end, they are already pursuing more ambitious sustainability-related agenda than that which is publicly mandated, or, at the other, because the private incentives in favour of bare minimum (or even non) compliance outweigh other considerations. Divergence between private costs/benefits and public costs/benefits, at least to some extent, is unavoidable. But attitudes in between will be shaped by a host of factors including limited awareness/understanding of the threat; inexperience in dealing with novel risks with long time horizons; poor data; short-termism; and agency problems. The business sector and nature of operations is also relevant – as climate risks will be more relevant to some businesses than others, underlining the need for regulation to be appropriately calibrated. As further explored in Part 5, we argue that regulation – and particularly the more iterative, bespoke regulation that has emerged in relation to sustainability – can help to accelerate these

[78] Sirio Aramonte and Frank Packer, 'Information Governance in Sustainable Finance' (Bank for International Settlements 2022) BIS Papers 132; Wolf-Georg Ringe, 'Investor-Led Sustainability in Corporate Governance' (European Corporate Governance Institute 2021) Law Working Paper 615; Philipp Krueger, Zacharias Sautner and Laura T Starks, 'The Importance of Climate Risks for Institutional Investors' (2020) 33 The Review of Financial Studies 1067; Samuel M Hartzmark and Abigail B Sussman, 'Do Investors Value Sustainability? A Natural Experiment Examining Ranking and Fund Flows' (European Corporate Governance Institute 2019) Finance Working Paper 565; Cynthia Assaf and others, 'ESG Investing: Does One Score Fit All Investors' Preferences?' (2024) 443 Journal of Cleaner Production 141094.

processes and help investors and directors to more appropriately learn and consider the sustainability risks they might want to address.

But before turning to the discussion on the facets of the interrelationship between regulation, directors' duties, and company law, it is appropriate to acknowledge that a regulatory approach is not a panacea and has its own limitations. First, as Lipton has noted, 'we cannot rely solely on legal prohibitions to curb all antisocial corporate activity, because it is impossible to specify in advance—let alone enforce laws against—every potential form of corporate misbehavior'.[79] Secondly, the adoption of new regulatory requirements is typically not a simple task as both content and scope of application can be hotly contested. The watering down of the technical screening criteria of the EU Taxonomy Regulation,[80] the significant reduction of the scope of the Corporate Sustainability Due Diligence Directive (CSDDD),[81] and the removal of Scope 3 emissions from many disclosure regimes[82] are recent examples of reining-in of regulatory (over-)ambition. Thirdly, public enforcement has its own weaknesses and challenges.[83] But regulation that applies only a sub-set of the corporate

[79] Ann M Lipton, 'Not Everything is About Investors: The Case for Mandatory Stakeholder Disclosure' (2020) 37 Yale Journal on Regulation 499, 505.

[80] Mehreen Khan, 'EU Faces Down Critics Over Green Investment Label for Gas and Nuclear Power' *Financial Times* (22 February 2022). The EU taxonomy framework is provided by 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 [2020] OJ L198/13.

[81] Jon McGowan, 'After Delays, EU Approves Corporate Sustainability Due Diligence Law' *Forbes* (13 March 2024).

[82] Jon McGowan, 'To Survive Legal Challenges, SEC Must Remove Scope 3 From Sustainability Reporting Rule' *Forbes* (23 February 2024).

[83] The proposed establishment of a new enforcement body, the Audit, Reporting and Governance Authority (ARGA), is a response to existing weaknesses in enforcement against directors. ARGA and the background to it

population such as publicly-traded companies or (better) companies of sufficient size and scale (or operating in critical market segments) to generate significant social, economic and environmental impact and risk, and that is backed by functioning – if somewhat imperfectly – public mechanisms of enforcement, is still progress. It is simply not possible to do everything everywhere all at once. Where the aim is to tackle an urgent problem, prioritising fundamental and more general reform of section 172(1) over advancing to more granular and substantive discussions related to the regulation of sustainability impacts and risks would be a poor choice. And potentially even an unnecessary one given the ways in which regulatory requirements can affect how directors go about discharging their general duties.

4. Using regulation to drive convergence within the shareholder primacy framework – the role of enforcement

Regulatory requirements interact with directors' duties in various ways. Fundamentally, regulatory requirements define the perimeters of lawful corporate activity. Directors cannot use their general duties to justify corporate wrongdoing.[84] Regulation forces companies to

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is discussed further in Part 4. In terms of challenges, public enforcement bodies must contend with limited resources and sometimes unwieldy procedures. The ruling by the US Supreme in *SEC v Jarksey* (2024) on the unconstitutionality of certain aspects of the SEC's civil penalties regime may be the catalyst for similar challenges in other countries based on constitutional and/or human rights considerations.

[84] *Lifestyle Equities CV v Ahmed* [2024] UKSC 17 [39] (Lord Leggatt). Discussing the debate in Australia on the company's inherent interest in acting lawfully and the duty of directors to cause their company to act properly: Tim Connor and Andrew O'Beid, 'Clarifying Terms in the Debate Regarding Shareholder Primacy' (2020) 35 Australian Journal of Corporate Law 276.

internalise costs.[85] Having effective risk management processes and control functions is a board level corporate governance expectation for publicly-traded companies[86] and can be a mandatory requirement in regulated sectors.[87] The potential for directors to be held personally liable for failures in risk management oversight and control is considerable.[88] Serious and/or persistent compliance failures could indicate systemic weaknesses that are not compatible with the duty of directors to promote the success of their company, notwithstanding the subjective fault standard of that duty. Directors who do not give adequate attention to risk and control functions run an even greater risk being in breach of their duty to exercise reasonable care, skill and diligence.[89]

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[85] Guido Ferrarini, 'Redefining Corporate Purpose: Sustainability as a Game Changer' in Danny Busch, Guido Ferrarini and Seraina Grunewald (eds), *Sustainable Finance in Europe* (Palgrave MacMillan 2021); Dharmapala and Khanna, n 73.

[86] UK Corporate Governance Code 2024, sec 4.

[87] eg, FCA Handbook, SYSC 3 (Systems and Controls) & SYSC 7 (Risk Control); PRA Rulebook, Risk Control <https://www.prarulebook.co.uk/pra-rules/risk-control/28-06-2024> & Internal Control <https://www.prarulebook.co.uk/pra-rules/conditions-governing-business/4-internal-control/23-06-2024?p=1> (accessed 17 July 2024).

[88] Scholars have highlighted this point in relation to the *Caremark* duty in US corporate law: Roy Shapira, 'Mission Critical ESG and the Scope of Director Oversight Duties' (2022)(2) Columbia Business Law Review. Notwithstanding the failure of the *ClientEarth* case in the English courts, the rising interest in private litigation as a mechanism of corporate governance accountability seems likely to produce other test cases.

[89] Companies Act 2006, s 174. *Brumder v Motornet Service and Repairs Ltd* [2013] EWCA Civ 195. See also Philip Sales, 'Directors' Duties and Climate Change: Keeping Pace with Environmental Challenges' Speech to Anglo-Australian Law Society, Sydney, 27 August 2019 <https://www.supremecourt.uk/docs/speech-190827.pdf> (accessed 17 July 2024), considering whether failure to have regard as required by s 172 could have implications for corporate negligence liability and, in turn, ramifications for the directors that caused their company to incur such liability.

While private enforcement plays a limited role in UK company law in general,[90] this gap is not special or unique to sustainability. There are, moreover, signs of a growing private litigation culture. Major institutional investors like investment funds, sovereign wealth funds, and pension funds have begun to use section 90 and section 90A FSMA claims to seek compensation for misleading disclosures relating to a broader range of corporate misconduct than narrow financial concerns, including drawing on public investigations into regulatory compliance failures for evidence to support their claims.[91] There are claims before the English courts relating to (mis)management of a range of risks, including bribery and corruption and economic sanctions, and there are credible expectations that this trend, which is now being driven by major investors and asset managers, will soon extend to sustainability, nature, and other social and governance risks as well. [92] Internationally, the influential

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[90] Andrew Keay, 'Assessing and Rethinking the Statutory Scheme for Derivative Actions Under the Companies Act 2006' (2016) 16 Journal of Corporate Law Studies 39; A Keay and J Loughrey, 'Derivative Proceedings in a Brave New World for Company Management and Shareholders' [2010] The Journal of Business Law; John Armour and others, 'Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States' (2009) 6 Journal of Empirical Legal Studies 687.

[91] *Aabar Holdings v Glencore plc* [2024] EWHC 1556 (Comm); FT, 'Big Investors Seek Damages from Glencore Over "Untrue Statements" in Prospectuses' (31 August 2023) <https://www.ft.com/content/6e1e447a-fe5c-49c7-a393-e7e57a1c6ccb> accessed 29 September 2024. The *Glencore* case relates to alleged (and in some cases admitted) bribery and corruption within the Glencore Group and alleged oil price manipulation.

[92] Debevoise & Plimpton, 'Subject Matter of S90/S90a FSMA Claims' (2024) <https://www.debevoise.com/-/media/files/insights/publications/2024/05/subject-matter-of-s90s90a-fsma-claims.pdf > accessed 29 September 2024; Herbert Smith Freehills, 'Global Perspectives on Climate Disputes – a Recent History of Shareholder Claims' (2023) <https://www.herbertsmithfreehills.com/notes/esg/2023-11/global-perspectives-on-climate-disputes-a-recent-history-of-shareholder-claims> accessed 29 September 2024; Pinsent Masons, 'Risk of Climate-Related Shareholder Litigation in UK Grows' (2023) <https://www.pinsentmasons.com/out-law/analysis/climate-related-shareholder-litigation-uk-grows> accessed 29 September 2024.

Network for Greening the Financial System (NGFS) has observed that 'climate-related litigation is growing rapidly, not only in terms of the volume of cases being initiated, but also crucially in terms of the legal arguments being used, and the diversity of addressees of such claims' [93] The NGFS study examines climate-related litigation against states, public entities, non-financial entities, and financial entities. Regarding non-financial entities, documented claims range from energy, mining, and transportation companies to the agriculture, food, plastics, and construction sectors.[94]

It is well-known that derivative suits have high thresholds to success and at first glance the high-profile failure of the *ClientEarth v Shell plc*[95] derivative claim looks like a sharp reminder of weaknesses and gaps in private litigation. However, on closer examination a more positive lesson can be extracted about how the setting of clearer expectations via regulation can help to guide courts and corporations in more technically-challenging subjects. Giving a very critical view of *ClientEarth v Shell plc*, Lord Carnwath suggests that '*the issue was whether* [Shell] *had any credible policies for achieving* [reductions]' but '*the judgement fails entirely to address that point*' even if '*the essential issues here were not technical issues dependent on expert evidence, but related to the directors' decision making*'.[96] As further explored on Part 5, increased granularity in regulation that lessens the gaps between science and its legal consequences can inform the substance of what can be expected out of a director discharging their duties.

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[93] NGFS, 'Climate-Related Litigation: Recent Trends and Developments' (NGFS 2023) 2; Setzer and Higham (n 6).

[94] NGFS, ibid.

[95] *ClientEarth*, n 5, [25].

[96] Carnwath, n 3, 5.

Enforcement of regulatory requirements by public authorities supplements and fills gaps in the private enforcement of directors' duties.[97] Recently, the FCA opened its first enforcement investigation over a climate-related issue,[98] and is consulting on climate-related disclosures in the new prospectus regime.[99] Regulators elsewhere – like the Australia Securities & Investments Commission and United States Securities and Exchange Commission – have already issued fines in greenwashing cases.[100] Bespoke sustainability regulation can both expand the ability of regulators to pursue enforcement when necessary, but also create clearer expectations related to what companies and boards ought to do in order to avoid prosecution.

The incorporation of sustainability disclosures into the corporate reporting framework for financial disclosures also paves the way for the application of the proposed new civil enforcement regime to be administered by the Audit, Reporting and Governance Authority (ARGA).[101] ARGA's proposed establishment is a response to a number of corporate

[97] John Armour and others, 'Supervision and Enforcement of Financial Regulation', *Principles of Financial Regulation* (Oxford University Press 2016); Jennifer G Hill, 'Corporations, Directors' Duties and the Public/Private Divide' in Arthur B Laby and Jacob Hale Russell (eds), *Fiduciary Obligations in Business* (CUP 2021).

[98] Norton Rose Fulbright, 'FCA Opens Its First ESG-Related Investigation' (*Global Regulation Tomorrow*, 2024) <https://www.regulationtomorrow.com/eu/fca-opens-its-first-esg-related-investigation/> accessed 29 September 2024.

[99] FCA, 'New Public Offers and Admissions to Trading Regulations Regime' (CP24/12, FCA 2024).

[100] ClientEarth, 'UK Financial Regulator Opens One Climate Investigation, Lawyer-Led FOI Reveals' (2024) <https://www.clientearth.org/latest/press-office/press/uk-financial-regulator-opens-one-climate-investigation-lawyer-led-foi-reveals/> accessed 29 September 2024.

[101] Department for Business, Energy & Industrial Strategy, 'Restoring Trust in Audit and Corporate Governance: Government Response' (May 2022). The fate of these proposals post the 2024 July General

collapses that exposed inadequacies in holding directors to account for failing to discharge reporting obligations responsibly. ARGA investigations and enforcement proceedings will be able to run in parallel with claims by shareholders seeking redress through the claims.[102] The scarcity of private law claims by shareholders was a factor behind the proposed establishment of ARGA.[103] The government of the time was unconvinced by arguments that ARGA enforcement might in some way undermine enforcement of directors' duties in company law, pointing to the limited number of company law cases for its conclusion that it was 'not obvious … that the new civil enforcement regime risks displacing a great body of expertise'.[104]

Limitations in private and public enforcement exist and can become part of the cost of doing business. However, condemning a regulatory approach as ineffective is not helpful when lacking a better alternative. Regulation's role in defining the perimeters of lawful corporate activity and facilitating enforcement – public and private – is therefore part of the mix that facilitates a complementary interrelationship between shareholder primacy and the interests of people and planet. But enforcement is not the only element.

5. Regulation as a driver for learning and increased accountability

Aside from defining the perimeters of lawful corporate activity, there are other potential benefits from a regulatory-driven approach and its complementarity in relation to

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Election was unclear at the time of writing, although the Labour Government hinted at a new audit regulator. See: Michael O'Dwyer and Sam Fleming, 'Labour's UK Economic Safety Net: a New Audit Regulator and No More Bank Bailouts' *Financial Times* (17 July 2024).

[102] Ibid para 5.1.48.

[103] Ibid, executive summary (p 11).

[104] Ibid, para 5.1.50.

company law that should be emphasised. Regulation fosters better understanding and allows for more sophisticated risk management approaches, ultimately contributing to core functions of company law even with its pro-shareholder bias. It also facilitates public monitoring and understanding of corporate activity and its effective impacts.

Regulation and associated regulatory guidance can reduce the learning curve for boards by reducing blind spots, establishing valuable frameworks for risk-based decision-making, and guidance for measuring and assessing issues of concern. Unless directors are simply going through the motions, the rising awareness that comes from exposure to this material must seep into how directors discharge their obligations related to corporate risk management (which is particularly relevant when several of those risks were not previously captured at all).[105] The centrality of the language of risk in discussions related to sustainability is a smart choice because it acknowledges that many of the matters pertinent to the sustainability regulatory agenda have an impact on shareholders themselves. In other words, a risk-based approach builds on the existing underlying pro-shareholder orientation of company law but tries to correct its deficiencies. Data on blind spots such as the estimates demonstrating the significance of stranded asset risks[106] also uncover the potential systemic risks associated with the sustainability regulatory agenda, which can then prompt more focused interventions (be it by boards of directors, shareholders or regulators) or social monitoring.[107]

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[105] David Millon, 'Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law' in PM Vasudev and Susan Watson, *Corporate Governance after the Financial Crisis* (Edward Elgar, 2012); John E Parkinson, *Corporate Power and Responsibility* (OUP, 1993) 366-369, 372-383.

[106] BIS, 'The Green Swan - Central Banking and Financial Stability in the Age of Climate Change' (BIS 2020).

[107] Parkinson n 105.

Regulation in the form of mandatory disclosure obligations has already put physical, transition, and liability risks pertaining to climate change on board agendas to an unprecedented extent. The obligations for UK companies include the Climate-related Financial Disclosure Regulations 2022, which introduce climate-change reporting requirements for large private companies and limited liability partnerships as well as publicly-owned companies and banks and insurance companies,[108] sustainability-related disclosure requirements in to the Listing Rules[109] and the Sustainability Disclosure Requirements for funds and asset managers.[110] Risks should be distinguished by type (physical/transition) where appropriate.[111] The reporting entity should provide an assessment of the resilience of its business model and strategy in the light of risks arising in the event of different climate change using scenario projections that include disclosure of assumptions and estimates.[112] There are expectations that scenario analyses will become more complex and sophisticated as reporting entities become more familiar with the processes involved.[113]

There is a pattern emerging of sustainability regulatory initiatives progressively gaining more granularity as they become more familiar. The advances in transition plans and transition finance provide a good example here. Transition plans – corporate documents that 'explain how an organisation will meet climate targets, manage climate-related risks, and contribute to the economy-wide climate transition'[114] – are being increasingly deployed on a

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[108] The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022 SI 2022/31.

[109] See UK Listing Rules, UKLR 6.6.6R(8).

[110] FCA PS23/16 (Sustainability Disclosure Requirements) of November 2023.

[111] Ibid.

[112] Ibid.

[113] Ibid.

[114] Transition Plan Taskforce, 'Disclosure Framework' (TPT 2023) <https://transitiontaskforce.net/wp-content/uploads/2023/10/TPT_Disclosure-framework-2023.pdf> (accessed 17 July 2024).

(currently) voluntary basis by boards of directors that want to signal the credibility and substance of their sustainability commitments and strategy. Organisations such as the Organisation for Economic Co-operation and Development (OECD) and United Nations Environment – Finance Initiative (UNEP FI) have singled-out transition plans as a fundamental element to facilitate a whole-of-economy climate transition.[115] There are also increasing acknowledgments that appropriate regulatory guardrails are necessary to ensure that transition plans are credible.[116]

In the UK, the work of the Transition Plan Taskforce (TPT) provides a good example of an evolutionary approach that has built on the UK's longstanding tradition of self-regulation. The TPT Disclosure Framework aims to set out good practice for credible transition plan disclosure, which includes supporting material on good practices and actionable insights for boards of directors willing to consider transition plan disclosures for finance and the real economy. In addition to the TPT's Disclosure Framework – which is sector neutral – the TPT created a Sector Summary and Sector Deep Dives, with detailed guidance for a number of specific sectors (including for energy, mining, and food). Elsewhere, certain taxonomies already cover (or are set to cover) transition activities, with the likes of the ASEAN, EU, and Singapore taxonomies providing an example of what

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[115] OECD, *OECD Guidance on Transition Finance: Ensuring Credibility of Corporate Climate Transition Plans* (Organisation for Economic Co-operation and Development 2022); OECD, *Mechanisms to Prevent Carbon Lock-in in Transition Finance* (Organisation for Economic Co-operation and Development 2023); OECD, 'Better Regulation for the Green Transition' (OECD 2023) OECD Public Governance Policy Papers; UNEP FI, 'Developing Metrics for Transition Finance' (UNEP FI 2023). Similarly, the Network for Greening the Financial System released a Transition Plan Package in April 2024.

[116] Alex Lombos, 'Guardrails to Address Greenwashing of Climate Transition Finance' (ClientEarth 2024) <https://www.clientearth.org/media/timligrn/guardrails-to-address-greenwashing-of-climate-transition-finance.pdf> (accessed 17 July 2024).

increased sector-specific granularity looks like. All of those taxonomies include, for example, criteria for the use of hydrogen-based fuels covering lifecycle emissions.[117]

Clarity on the preparation and content of transition plans directly affects planning and decision-making at the board level, while making commitments clearer to shareholders and other stakeholders. Such regulatory guardrails have a dual function: providing guidance to boards of directors trying to make sense of how to best navigate new and emerging types of risks; but also enabling closer substantive scrutiny over non-credible technologies and questionable offsetting strategies by shareholders and relevant stakeholders. They pave the way for potential findings of non-compliance with legal and regulatory compliance obligations when boards fail to follow science.[118]

The role of regulation in improving standards of sustainability literacy at board level is thus both good and bad news for individual directors. On the positive side, 'on the job' learning should help directors to develop and deepen in-demand knowledge, skills and experience. On the negative side, rising standards come with a greater risk of liability for those who fail to keep up. For directors' duties, increased granularity in regulation that lessens the gaps between science and its legal consequences can inform the substance of what can be expected out of a director discharging their duties under section 172 or section 174 of

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[117] ASEAN Taxonomy for Sustainable Finance of 9 June 2023; Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021; and Singapore-Asia Taxonomy for Sustainable Finance of December 2023.

[118] Discussing the implications of overreliance on questionable offsetting strategies and its consequences for international obligations, see Rupert F Stuart-Smith and others, 'Legal Limits to the Use of CO2 Removal' (2023) 382 Science 772. Discussing the role of attribution on climate cases, see Rupert Stuart-Smith, Friedereke EL Otto and Thom Wetzer, 'Liability for Climate Change Impacts: The Role of Climate Attribution Science' in Elbert R De Jong (ed), *Corporate Responsibility and Liability in Relation to Climate Change* (Intersentia 2022).

the Companies Act 2006.[119] *ClientEarth v Shell plc*[120] adopted a fairly orthodox approach that relied on an examination of 'whether the decision falls outside the range of decisions *reasonably available* to the directors at the time' (author emphasis added).[121] But what is required of directors to discharge this duty is context-driven.[122] Alongside its role in improving board-level sustainability, the evolution of regulation and regulatory guidance is simultaneously also lessening the learning curve for analysing whether a given board of directors is pursuing 'credible policies for achieving [reductions]'.[123]

This leads us the third facet of the interrelationship between regulation and directors' duties, namely, the extent which regulatory requirements increase public awareness of corporate actions and their consequences and the implications of this for how directors act. The broadening of mandatory disclosure and frameworks such as green taxonomies enables greater 'social control over business activity', as corporate transparency on issues with broad societal implications that previously were often dismissed as externalities can increase.[124] Lord Sales, writing extra-judicially, has noted the importance of societal expectations: 'the

[119] A recent decision by the Supreme Court of New Zealand on *Smith v Fonterra &* [2024] NZSC 5(especially at [100]-[101 and [153]-[173]) hints at that notion, while also discussing the interrelationship between regulation and litigation.

[120] *ClientEarth*, n 5, [25].

[121] The case law is clear that directors do not risk liability for mere errors of commercial judgment and that the test is whether the decision was outside the range that a reasonable director could have entertained: *Sharp v Blank* [2019] EWHC 3096 (Ch) [627] (Sir Alastair Norris); *Optaglio Ltd v Tethal* [2015] EWCA 1002 [23] (Floyd LJ).

[122] In reviewing directors' decisions the courts will take account of 'the material and the time available' at that moment: *Sharp v Blank*, ibid.

[123] Carnwath, n 3.

[124] Lipton, n 79; Parkinson, n 105.

effect of directors' legal obligations cannot be understood simply by referring to the bald statement of them in the relevant legislation. An assessment of the practical implications of those duties has to take account of the general environment of expectation created by initiatives by regulators and in civil society'.[125] Lord Sales' reference to the expectations of civil society takes the point one step beyond the need to comply with legally-enforceable obligations: expectations that are non-binding but meant to be taken seriously – what Kershaw and Schuster describe as 'lower order' norms, with corporate governance codes being an obvious example – can also have a duty-influencing effect.[126] While their impact is unavoidably weaker due to their non-binding status, corporate governance expectations can (and do) also contribute towards embedding more purpose-led thinking in board deliberations and decision-making, at least where, and so long as, this aligns with shareholder preferences.[127] The UK Corporate Governance Code 2024 reinforces the responsibilities of boards with respect to risk management and internal controls, including a requirement, effective from 2026, for boards to provide a declaration as to the effectiveness of material controls as at the balance sheet date.[128] According to the Financial Reporting Council, which

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[125] Sales, n 89.

[126] Kershaw and Schuster, n 19 discuss the UK Corporate Governance Code 2018, which introduced revisions specifically relating to corporate purpose. They identify points of potential incompatibility between how the Code uses 'purpose' and the Companies Act 2006, s 172. But they also see room for s 172 to be interpreted in ways that are 'supportive rather than inimical to purposeful companies'. See also: Brian R Cheffins and Bobby V Reddy, 'Thirty Years and Done - Time to Abolish the UK Corporate Governance Code' ECGI Law Working Paper No 654/2022.

[127] Kershaw and Schuster, n 19; Lund and Pollman, 'Corporate Purpose', n 7; Guido Ferrarini, Michele Siri and Shanshan Zhu, 'The EU's Proposed Reform of Directors' Duties and the Missing Link to Soft Law' (2024) 25 European Business Organization Law Review 359.

[128] UK Corporate Governance Code 2024, provision 29.

administers the Code, this declaration should relate to the controls that are 'most material 'to the long-term sustainability of their company'.[129] This is echoed in the 2023 G20/OECD Principles of Corporate Governance, which for the first time include a series of principles on sustainability and resilience.[130] Such inclusion on the G20/OECD Principles further suggests that the trend of incorporating additional data points arising from the sustainability regulatory agenda into decision-making processes of boards of directors is likely to spread across other high-income countries and increase pressures on corporations to take them seriously.

6. Regulation as a driver for embedding sustainability in directors' duties: reflection

Is it wise, given the recent backlash against "woke" capitalism, to place so much faith in the power of sustainability-related regulation to change the behaviour of boards and the standards against which they are judged while still affording pride of place in company law to shareholder primacy? Our contention is that the sustainability regulatory agenda is progressing swiftly,[131] notwithstanding some setbacks, and that it is maintaining

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[129] FRC, 'UK Corporate Governance Code 2024 Mythbuster' (2024) <https://media.frc.org.uk/documents/UK_Corporate_Governance_Code_2024_Mythbuster_BdCPGoq.pdf> (accessed 17 July 2024).

[130] OECD, 'G20/OECD Principles of Corporate Governance 2023OECD 2023) <https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2023_ed750b30-en> (accessed 17 July 2024).

[131] OECD, *Global Corporate Sustainability Report* (OECD 2024); Iris HY Chiu, Lin Lin and David Rouch, 'Law and Regulation for Sustainable Finance' (2022) 23 European Business Organization Law Review; Professor Virginia Harper Ho, 'Corporate Climate Governance' (ECGI 2024) Law Working Paper 804/2024; Merryn Somerset Webb, 'Doubts About ESG Funds Aren't Slowing Their Spread' *Bloomberg* (8 October 2024)

momentum.[132] For instance, the UK's prudential regulator, the Prudential Regulation Authority, has made it clear in its 2024 priorities letter to the CEOs of international banks that financial risks arising from climate change continue to present an increasingly material risk to firms and the financial system, that it will continue to assess firms' progress in managing climate-related financial risks and that it expects firms *to increase their efforts now* (author emphasis added).[133] The increased involvement of central banks and prudential supervisors in discussions about climate-related risks has important ripple effects to corporate behaviour via the debt markets. As prudential regulation forcing banks and insurers to hold more capital against climate risks kicks in, there are wider repercussions on the availability and cost of capital generally.[134]

Some of the backlash stem from the immaturity of the sustainability regulatory agenda itself. There are still challenges with the quality and consistency of disclosures, and broader issues such as weak investor demand for long term risk assessment, insufficient firm-

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<https://www.bloomberg.com/opinion/articles/2024-10-08/why-doubts-about-esg-aren-t-slowing-funds-spread> accessed 20 October 2024.

[132] With the letter sent by US Attorneys General to Blackrock providing a palpable example of the tensions around "woke" capitalism. See: US Attorneys General, 'Attorneys General Letter, Dated August 4, 2022'.

[133] Bank of England, 'International Banks Supervision: 2024 Priorities' (2024) <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/letter/2024/artis-2024-priorities.pdf> (accessed 17 July 2024).

[134] Pietro Calice and Dimitri G Demekas, 'Just Transition: Issues for Central Banks and Financial Regulators' (The World Bank 2024) <http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-10685> accessed 3 March 2024; Chiara Colesanti Senni, Maria Sole Pagliari and Jens van 't Klooster, 'Central Banks' Targeted Refinancing Operations and the Climate Transition'; Daniela Gabor and Benjamin Braun, 'Green Macrofinancial Regimes' <https://osf.io/4pkv8> accessed 9 January 2024; J Rickman and others, 'The Challenge of Phasing-Out Fossil Fuel Finance in the Banking Sector' (2024) 15 Nature Communications 7881.

level data, and insufficient managerial incentives.[135] There are also significant coordination issues arising from the plethora of sustainability-related regulation being implemented across different markets, and which are not sufficiently addressed by high-level international standards.

Some would argue that compared to the challenges posed by climate change (and evidenced by sources such as the Global Stocktake[136] and latest IPCC Reports),[137] international bodies have been slow to react. But in comparison to historical standards in which regulatory change was a slow process, often precipitated by acute crashes and crisis,[138] the current sustainability regulatory agenda has moved more rapidly and has been able to advance through an iterative process. The quick development of the Task Force on Climate-Related Financial Disclosures (TCFD) disclosure requirements with the support of the Financial Stability Board (FSB)[139] alongside the private sector – and their evolution to a more granular version in the form of the International Sustainability Standards Board (ISSB) standards[140] – provide an example. International standards such as the TCFD and ISSB often serve as a starting point for establishing enforceable legal requirements at national or regional

[135] Madison Condon, 'Market Myopia's Climate Bubble' (2022) 2022 Utah Law Review 63.

[136] UNFCCC, '2023 Synthesis Report on GST Elements' (UNFCCC 2023).

[137] IPCC, 'AR6 Synthesis Report: Climate Change 2023' (IPCC 2023); IPCC, 'Global Warming of 1.5 ºC' (IPCC, 2023).

[138] David Zaring, *The Globalized Governance of Finance* (Cambridge University Press 2019); Eric Helleiner, 'Reregulation and Fragmentation in International Financial Governance' (2009) 15 Global Governance.

[139] Enrico Bernardini and others, 'Central Banks, Climate Risks and Sustainable Finance' (Banca D'Italia 2021) Occasional Papers; Barnali Choudhury, 'Climate Change as Systemic Risk' (2021) 18 Berkeley Business Law Journal 52.

[140] The ISSB standards are available via the International Sustainability Standards Board website: https://www.ifrs.org/groups/international-sustainability-standards-board/ (accessed 17 July 2024).

(EU) level. As such, international standards can help to build a gradual process that raises the floor in terms of global regulation and make information across different markets (and expectations regarding boards of directors) more comparable.[141]

At the domestic level, the UK, which already had some mandatory non-financial disclosure requirements as a legacy of EU membership, was one of the first jurisdictions worldwide to align its regulatory regime with the TCFD recommendations.[142] However, the UK's head start in leading the sustainability regulatory agenda has narrowed in recent years, with advances in Europe and in the Asia Pacific becoming relevant global benchmarks. For instance, in the UK, a decision to require transition plans has been deferred and there is no firm date for the delivery of the UK's own green taxonomy.[143] The UK has fallen behind the

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[141] Subodh Mishra, 'A Global Baseline? How to Navigate Interoperability Across Sustainability Reporting Rules' *The Harvard Law School Forum on Corporate Governance*, 28 March 2024 https://corpgov.law.harvard.edu/2024/03/28/a-global-baseline-how-to-navigate-interoperability-across-sustainability-reporting-rules/ (accessed 17 July 2024); Charlotte Gardes-Landolfini and Fabio Natalucci, 'Achieving Net-Zero Emissions Requires Closing a Data Deficit' IMF Blog 23 August 2022 https://www.imf.org/en/Blogs/Articles/2022/08/23/achieving-net-zero-emissions-requires-closing-a-data-deficit (accessed 17 July 2024).

[142] Andreas Hösli and Rolf H Weber, 'Climate Change Reporting and Due Diligence: Frontiers of Corporate Climate Responsibility' (2021) 18 European Company and Financial Law Review 948. The US Securities and Exchange Commission's (SEC) encountered strong domestic headwinds that are obliging it to move more slowly. Implementation of the rules that it finally managed to adopt in 2024 ('The Enhancement and Standardization of Climate-Related Disclosures: Final Rules' (SEC 2024) is on hold pending completion of various judicial review proceedings.

[143] Although the Labour Party's winning manifesto signalled that one of its priorities will be to mandate '*UK-regulated financial institutions – including banks, asset managers, pension funds, and insurers – and FTSE 100 companies to develop and implement credible transition plans that align with the 1.5°C goal of the Paris*

EU's sustainability regulatory policy agenda in a number of notable respects such as mandating the use of double-materiality in mandatory disclosures,[144] in the use of taxonomies,[145] and in reflecting about nature-related financial risks.[146] While the UK has a number of 'supply chain' type legislation in areas such as modern slavery and anti-bribery – *i.e.*, which demand corporations to adopt pro-active steps to prevent, mitigate and remedy reproachable and/or illegal conducts, interacting with directors' duties – there are currently no government plans for the adoption of a CSDDD-equivalent measure.

Multiple factors lie behind this shift in pace, ranging from the challenging economic and geopolitical conditions (war in Ukraine, energy insecurity, the cost of living crisis…) through to growing cynicism about greenwashing. A slowing regulatory agenda does not undermine our thesis, which is rooted in policy pragmatism, not regulatory zealotry. It would be unrealistic to imagine the path to net zero being anything other than winding, and for progress along it to proceed in anything other than fits and starts. Regulators do need to take a

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Agreement'. See: UK Labour Party, Labour Party Manifesto (2024) <https://labour.org.uk/change/> (accessed 17 July 2024).

[144] Under the Corporate Sustainability Reporting Directive, "*companies have to report not only on how sustainability issues might create financial risks for the company (financial materiality), but also on the company's own impacts on people and the environment (impact materiality)*". See: European Commission, 'Sustainable Finance' (2022) <https://ec.europa.eu/newsroom/fisma/items/754701/en> (accessed 17 July 2024).

[145] Alessio M Pacces, 'Will the EU Taxonomy Regulation Foster a Sustainable Corporate Governance?' (2021) European Corporate Governance Institute - Law Working Paper 611/2021.

[146] NGFS, 'Nature-Related Financial Risks: A Conceptual Framework to Guide Action by Central Banks and Supervisors' (NGFS 2023) <https://www.ngfs.net/sites/default/files/medias/documents/ngfs_conceptual-framework-on-nature-related-risks.pdf> (accessed 17 July 2024); European Central Bank, 'Climate and Nature Plan 2024-2025' (ECB 2024) <https://www.ecb.europa.eu/ecb/climate/our-climate-and-nature-plan/html/index.en.html> (accessed 17 July 2024).

step back and learn from experience from time to time.[147] The implementation of the first wave of reforms arising from the sustainability regulatory agenda has brought opportunities for refinement – and particularly to become more vigilant in allowing only real and credible action to use the sustainable/ESG moniker. Regulation such as taxonomies, anti-greenwashing rules, and stronger labelling are important to remove free-riders from the market and make the incentives for sustainability clearer.[148] Discussions on the regulation of ESG rating providers, which are taking place both in the UK and the EU, are a way to further inject credibility and maturity into the market.[149] Likewise, the adoption of more robust labelling regulation such as the European Green Bond Standard,[150] which restrict the "European Green Bond" and "EuGB" labels to use of proceeds issuances which are aligned with the EU Taxonomy.

The possibility of targeted interventions to adjust the pro-shareholder orientation of company law is not inconsistent with our thesis.[151] It is also part of our thesis to accept that in some areas, neither regulation or fundamental change to directors' duties may be the right option. Armour, Enriques, and Wetzer suggestion of "green pills" to enshrine credible

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[147] Especially in view of the challenges that market-based solutions face. See: Philipp Golka, 'Epistemic Gerrymandering: ESG, Impact Investing, and the Financial Governance of Sustainability' [2024] Review of International Political Economy; Alex Edmans, Tom Gosling and Dirk Jenter, 'Sustainable Investing: Evidence From the Field' (2024).

[148] Enriques, Romano and Tuch (n 9).

[149] HM Treasury, 'Future Regulatory Regime for Environmental, Social, and Governance (ESG) Ratings Providers' (HM Treasury 2024); David Ramos Muñoz and Agnieszka Smoleńska, 'The Governance of ESG Ratings and Benchmarks (Infomediaries) as Gatekeepers: Exit, Voice and Coercion' (2023) European Banking Institute Working Paper Series 149.

[150] Regulation (EU) 2023/2631 of the European Parliament and of the Council of 22 November 2023.

[151] On suggestions for which: Kershaw and Schuster, n 19.

commitment is a good example of measures outside company law and public regulation that could strengthen the current evolving regimes.[152] After pointing out that conventional mechanisms such as climate disclosures and corporate governance reforms can have important limitations to generate credible climate commitments when used as standalone solutions, the authors discuss how contractual mechanisms could help firms to further internalise climate targets and clearly define the extent and limits of a company's commitments. The policy interventions to drive the sustainability agenda that are available to governments properly include 'carrots', such as subsidies and tax rebates, as well as regulatory 'sticks'.

But, returning to our main point, in a direct contest between trying to change multiple assumptions of core company law at the same time and deferring important and more detailed discussions regarding sectoral and firm-level regulation until after a broader reform of directors' duties and regulatory reforms, the choice is clear. Regulatory developments can achieve progress within a system that is anchored to shareholder primacy by reworking incentives, eliminating blind spots and improving board sustainability literacy. Shifting everything at once – instead of trying to improve the current and quickly evolving elements of regulation that are translating scientific consensus into actionable expectations – might generate all sorts of noise and coordination problems.[153] And those coordination problems ultimately compromise what jurisdictions and companies are able to accomplish in the short and medium-term, with potentially very serious consequences for the achievement of objectives that are mission-critical with regards to climate change.

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[152] John Armour, Luca Enriques and Thom Wetzer, 'Green Pills: Making Corporate Climate Commitments Credible' (2023) 65 Arizona Law Review.

[153] Roza Nurgozhayeva and Dan W Puchniak, 'Corporate Purpose Beyond Borders: A Key to Saving Our Planet or Colonialism Repackaged?' (2023) ECGI Working Paper Series in Law 744/2023.

7. Conclusions

This article has discussed the centrality of shareholder primacy in the law of directors' duties in the UK and the implications of this for the reconciliation of corporate actions and the interests of people and panel. It has pointed argued that shareholder primacy remains deeply entrenched in UK company law and would be hard to displace. This argument is bolstered by consideration of the reasoning of the Supreme Court in *Sequana*, which while being a decision that is famous for its recognition of a creditor-facing duty, also demonstrates the strong shareholder primacy-orientation of directors' duties outside insolvency. The conclusion that the article has drawn from this assessment is that urgent reconciliation of corporate actions and the interests of people and planet is not best served by seeking fundamental reform of directors' duties (and company law more generally) to displace shareholder primacy, as this would be a major undertaking that would require potentially years of discussion to build consensus and that would carry a high risk of failure. The article has focused on regulation as a more productive and politically feasible way to achieve the aim of better complementarity between corporate actions and the interests of people and planet, even when considering the shortcomings of a regulatory approach. Regulation and shareholder primacy can sometimes pull in opposite directions but they can also complement each other. The focus on complementarities is a distinctive feature of this paper.

Drawing on developments in the sustainability regulatory agenda as illustrative examples, the article has argued, first, that advances in regulation are helping to reduce blind spots related to sustainability factors and to bring in risk-based elements of the sustainability agenda into the decision-making processes of boards of directors with an increased focus on the sub-sets of the corporate population that are critical to societal goals.

Second, that regulation opens the door to public enforcement, while the increased granularity in terms of expectations in relation to boards of directors can also lessen the barriers to private enforcement. Alongside the learning and accountability elements facilitated by regulation, enforcement can play an important role.

Third, that improvements in board sustainability literacy driven by the need to cope with a demanding regulatory landscape will lead to increased awareness and understanding that should drive up the quality of board decision-making and more sophisticated risk management approaches, accompanied by a greater risk of liability for those who fail to keep up.

Fourth, that as regulation becomes more granular, it is likely to gain greater influence as a source of guidance on whether a board of directors' decisions fall outside a range of decisions reasonably available to the directors at the time, especially in view of new and emerging kinds of risks.

If regulation continues to improve in an iterative process, supported by adequate guardrails and mandatory frameworks where they are needed, there is room to be optimistic about the progress towards the aim of advancing the reconciliation that that is so sorely needed that can be achieved without displacing shareholder primacy.

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