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Treating Employees Respectfully: The Role of Transparency in Improving the Corporate Behaviour

Mehmet Ozyurek

Thesis submitted in fulfilment of the requirement for the degree of Doctor of Philosophy

Durham Law School

Durham University

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Abstract

It is, or ought to be, uncontroversial to assert that corporations have an enormous impact upon the lives of employees. Countless incidents over the last decades have demonstrated that some corporations behave in unacceptable ways towards their employees.

This thesis analyses the role of transparency may have in ensuring corporations behave better towards their employees. It presents four main arguments:

First, it asserts that companies must take the interests of their employees seriously, by treating them with genuine respect. This assertion is theoretically built upon deontological ethics. The thesis claims that employees should be treated as ends in themselves, rather than as a means in others' ends.

Second, in order to ensure that corporations treat employees with respect, the thesis claims that corporations must be, or be made to be, transparent. Two points are developed in favour of this emphasis. The first focuses on the intrinsic value of transparency. Being open and honest is good in and of itself, and this applies forcefully to corporations in their treatment of their employees. The second point focuses on the strategic value of transparency. It is conceded that there is often a choice of means as to how corporations behave better, however, the thesis argues that transparency is often a better choice, or a better strategy, for delivering good corporate behaviour, compare to the alternatives available.

The third argument addresses the best avenues for ensuring companies exhibit a sufficient degree of transparency. It is conceded that companies will often have, purely from self-interest, reasons for being transparent. Nevertheless, this prudent incentive is insufficient. As a result, the work argues some degree of compulsion is necessary to ensure that companies act in a transparent manner.

Lastly, the thesis claims that although national/regional initiatives can achieve meaningful improvements in compelling the use of transparency, they may fall short of achieving the level of transparency this thesis advocates. Therefore, it is argued a sufficient degree of transparency can only be achieved through regulatory initiatives on an international level.

Declaration

I hereby declare that no portion of the work that appears in this study has been used in support of an application of another degree in qualification to this or any other university or institutions of learning.

Statement of Copyright

The copyright of this thesis rests with the author. No quotation from it should be published without the author's prior written consent and information derived from it should be acknowledged.

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Trade Union and Labour Relations (Consolidation) Act 1992

UK Statutory Instruments

Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013

Control of Substances Hazardous to Health Regulations 2002 (COSHH)

Corporate Responsibility HC Bill (2003-2004) [29]

Health and Safety Information for Employees Regulations 1989

Information and Consultation of Employees Regulations 2004

Management of Health and Safety at Work Regulations 1999

Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015

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Occupational Pension Schemes (Investment) Regulations 2005

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Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L 183/1

Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L 80

Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L 80/29

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65

Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330

International Legislation

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

UNCHR (Sub-Commission), 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2

United Nations, Statute of the International Court of Justice (18 April 1946)

UNHRC Res 17/4 (2011) A/HRC/RES/17/4

List of Abbreviations

ABI	Association of British Insurers
ACAS	Accounting Standards Board Advisory, Conciliation and Arbitration Service for employers
BITC	Business in the Community
BP	British Petroleum
BR	Business Review
CAC	Central Arbitration Committee
CBI	Confederation of British Industry
CCGC	Codes Created by Group of Companies
CERES	Coalition for Environmentally Responsible Economies
CHRB	Corporate Human Rights Benchmark
COP	Communication on Progress
CORE	Corporate Responsibility Coalition
COSHH	Control of Substances Hazardous to Health Regulations
COVERCO	Commission for the Verification of Corporate Codes of Conduct
CRT	Caux Round Table
CTSCA	California's Transparency in Supply Chains Act
ECHR	European Convention on Human Rights
EEC	European Economic Community
EMS	Entity Maximisation and Sustainability Model
ERRA	Enterprise and Regulatory Reform Act 2013
ESOP	Employee Stock Ownership Plans
ESV	Enlightened Shareholder Value
ETI	Ethical Trading Initiative

EU	European Union
EU-OSHA	European Agency for Safety and Health at Work
FDI	Foreign Direct Investment
FLA	Fair Labor Association
FOI	Freedom of Information
GRI	Global Reporting Imitative
ICC	International Chamber of Commerce
ICE	Regulations Information and Consultation of Employees Regulations 2004
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICGN	International Corporate Governance Network
IGO	Inter-governmental Organisation
ILO	International Labour Organisation
IOE	International Organisation of Employers
IR	Integrated Report
ISO	International Organisation for Standardisation
IST	Instrumental Stakeholder Theory
KPI	Key Performance Indicators
NCL	National Consumers League
NGO	Non-governmental organisations
NGPF	Norwegian Government Pension Fund Global
OECD	Organisation for Economic Co-operation and Development
OFR	Operating Financial Review
OGC	Office of Government Commerce
ORC	International Opinion Research Corporation
OSH	Occupational Safety and Health

PEPPER	Promotion of Employee Participation in Profits and Enterprise Results
PIDA	Public Interest Disclosure Act 1998
PUWER	Provision and Use of Work Equipment Regulations 1998
RIDDOR	Reporting of Injuries, Diseases and Dangerous Occurrences Regulations
SAAS	Social Accountability Accreditation Services
SAI	Social Accountability International
SAIP	Self-Assessment and Improvement Process
SEC	Securities Exchange Commission
SICP	Self-imposed Codes of Practice
SOC	State Owned Companies
SOMO	Centre for Research on Multinational Corporations
SRDRR	Strategic Report and Directors' Report Regulations 2013
SRI	Socially Responsible Investment
SRPP	Social Responsible Public Procurement
SSE	Social Stock Exchange
SVT	Shareholder value theory
TEC	Treaty Establishing the European Community
TNC	Transnational Corporations
TPT	Team Production Theory
TULRCA	Trade Union and Labour Relations (Consolidation) Act 1992
UNCHR	United Nations Human Rights Council
UNCTC	Commission on Transnational Corporations and the United Nations Centre on Transnational Corporations
UNEP	United Nations Environment Program
UNGC	United Nations Global Compact

UNRISD	United Nations Research Institute for Social Development

To my mother...

Chapter 1

Introduction

Introduction

In this day and age, national economies of most countries find themselves dominated by major corporate entities, the likes of whom increasingly operate internationally.[1] Many such corporations carry out their operations, either directly, or indirectly, through their subsidiaries, doing so across several countries, whilst others conduct their operations in the midst of complex supply chains that are located beyond national borders.

It is surely uncontroversial to assert that sometimes such companies behave in unacceptable ways. Corporations have a negative impact on human rights, and employees are one of the most significant groups of people affected by this impact. [2] A cursory look at any newspaper reveals countless examples of companies acting in ways that impact adversely on a variety of their employees. Corporations are blamed for causing a number of incidents like factory fires,[3] factory building collapses,[4] inhumane working conditions,[5] child labour,[6] and

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[1] John G Ruggie, *Just Business: Multinational Corporations and Human Rights* (W W Norton & Company 2013) xxv.
[2] ibid 23-24.
[3] Syed Zain Al-Mahmood, 'Bangladesh Garment Industry Scrambles to Save Reputation after Fires' *The Guardian* (10 January 2013) <http://www.theguardian.com/global-development/2013/jan/10/bangladesh-garment-industry-reputation-fires> accessed 28 June 2016.
[4] Associated Press, 'Bangladesh Factory Collapse Blamed on Swampy Ground and Heavy Machinery' *The Guardian* (23 May 2013) <https://www.theguardian.com/world/2013/may/23/bangladesh-factory-collapse-rana-plaza> accessed 28 June 2016.
[5] Hannes Koch, 'Miserable Working Conditions: Human Rights Group Condemns Computer Manufacturers' (*Spiegel Online*, 16 December 2008) <http://www.spiegel.de/international/business/miserable-working-conditions-human-rights-group-condemns-computer-manufacturers-a-596712.html> accessed 28 June 2016.

the repression of union members.[7] Indecent working conditions at garment factories in the developing world might be one aspect of this corporate misbehaviour.[8] Many incidents that have happened in Bangladesh over the last few years can demonstrate how employees are being treated by corporations or their suppliers. In November 2012, Tazreen factory fire killed more than 100 workers.[9] There was clear lack of basic safety regulations and locked emergency exits causing the death of many workers in Tazreen.[10] Only a few months after this fire the collapse of a factory building called Rana Plaza killed more than a thousand workers.[11] Indeed, there were visible large cracks in the walls of Rana Plaza before the collapse. However, the threat of unemployment imposed by the employer, motivated the employees to continue to work under these conditions.[12] The garment factories located in Rana Plaza were suppliers to many western corporations, such as H&M, Mango, Primark, the Gap and Walmart.[13] In addition to the garment sector, electronics suppliers such as Foxconn, which supply big technology companies like Apple, Dell and Hewlett-Packard, can also be

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[6] Reuters, 'Apple Linked to Child Labor: Report' (19 January 2016) <http://www.reuters.com/video/2016/01/19/apple-linked-to-child-labor-report?videoId=367091924> accessed 18 July 2016.

[7] Sibylla Brodzinsky, 'Coca-Cola Boycott Launched after Killings at Colombian Plants' *The Guardian* (24 July 2003) <https://www.theguardian.com/media/2003/jul/24/marketingandpr.colombia> accessed 6 July 2016.

[8] For a detailed discussion on Garment industry in Bangladesh, see Sarah Labowitz and Dorothée Baumann-Pauly, 'Business as Usual is Not an Option: Supply Chains and Sourcing after Rana Plaza' (Center for Business and Human Rights, New York University Stern School of Business April 2014) <http://www.stern.nyu.edu/sites/default/files/assets/documents/con_047408.pdf> accessed 23 July 2016.

[9] Jason BS Hammadi, 'Bangladesh Textile Factory Fire Leaves More than 100 Dead' *The Guardian* (25 November 2012) <https://www.theguardian.com/world/2012/nov/25/bangladesh-textile-factory-fire> accessed 6 July 2016.

[10] Olivier Cyran, 'Bangladesh's Exploitation Economy' (*Le Monde Diplomatique*, 1 June 2013) <http://mondediplo.com/2013/06/06bangladesh> accessed 6 July 2016.

[11] Labowitz and Dorothée (n 8) 9.

[12] Tansy Hoskins, 'Reliving the Rana Plaza Factory Collapse: A History of Cities in 50 Buildings, Day 22' *The Guardian* (23 April 2015) <https://www.theguardian.com/cities/2015/apr/23/rana-plaza-factory-collapse-history-cities-50-buildings> accessed 6 July 2016.

[13] Amy Westervelt, 'Two Years after Rana Plaza, Have Conditions Improved in Bangladesh's Factories?' *The Guardian* (24 April 2015) <https://www.theguardian.com/sustainable-business/2015/apr/24/bangladesh-factories-building-collapse-garment-dhaka-rana-plaza-brands-hm-gap-workers-construction> accessed 22 July 2016.

analysed in terms of their misbehaviour towards employees.[14] For example, many workers attempted to commit suicide at Foxconn in 2010, and 14 of them died.[15] Workplace and living conditions at the supplier were seen as the main reasons drove employees to commit suicide.[16] The supplier was criticised for having long working hours and strict discipline rules.[17]

Indeed, not only in developing but also in developed countries, employees are not treated with respect. For instance, the British retailer SportsDirect was criticised as having sweatshop like conditions at its warehouses.[18] In fact, Mike Ashley, the owner of SportsDirect, admitted how the 'company had broken the law by failing to pay staff the national minimum wage'.[19]

The thesis forms part of the voluminous literature that addresses such corporate misconduct towards employees, and looks for ways of encouraging or compelling companies to act better. Within that context, its specific contribution is to analyse, and to argue in favour of, the use of one particular strategy to improve corporate behaviour. This strategy is through increased transparency.

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[14] David Barboza, 'After Foxconn Suicides, Scrutiny for Chinese Plants' *The New York Times* (6 June 2010) <http://www.nytimes.com/2010/06/07/business/global/07suicide.html> accessed 22 July 2016.
[15] Jenny Chan, 'A Suicide Survivor: The Life of a Chinese Worker' (2013) 28 New Technology, Work and Employment 84, 85.
[16] Barboza (n 14).
[17] Chan (n 15) 88.
[18] Simon Goodley and Jonathan Ashby, 'A Day at "the Gulag": What It's like to Work at Sports Direct's Warehouse' *The Guardian* (9 December 2015) <https://www.theguardian.com/business/2015/dec/09/sports-direct-warehouse-work-conditions> accessed 22 July 2016.
[19] Simon Goodley, 'Mike Ashley Admits to Problems at Sports Direct Warehouse' *The Guardian* (6 June 2016) <https://www.theguardian.com/football/2016/jun/06/mike-ashley-admits-to-problems-at-sports-direct-warehouse> accessed 22 July 2016.

Transparency is widely recognised as one strategy, amongst many, that might be employed to force changes in corporate behaviour.[20] However, it is often treated rather dismissively.[21] Such treatment too often fails to examine, with precision, important strengths enjoyed by transparency. Part of the purpose (and thus the contribution to existing literature) of this thesis, then, is to provide such an analysis, and thereby to defend the merits of transparency against its critics. Yet, more specifically, it is argued that transparency is both strategically useful in promoting the interests of employees and intrinsically desirable.

Transparency can be seen as one way of improving how well companies promote the interests of employees. Therefore, its comparative strengths and weaknesses can, and should, be examined. The thesis certainly focuses on such advantages and disadvantages of transparency compared to other strategies.

Yet, transparency is not only strategically, but also intrinsically desirable. In other words, transparency can be defined as *an end in itself*.[22] In some circumstances, companies are morally obliged to be transparent towards their employees and other stakeholders. This might not be in order to achieve some further objectives. Thus, the critics focusing on comparative effectiveness of transparency, and those who argue that alternative strategies

---

[20] eg John Parkinson, 'Disclosure and Corporate Social and Environmental Performance: Competitiveness and Enterprise in a Broader Social Frame' (2003) 3 Journal of Corparate Law Studies 3; Don Tapscott and David Ticoll, *The Naked Corporation: How the Age of Transparency Will Revolutionize Business* (Simon and Schuster 2003); Archon Fung and others, 'The Political Economy of Transparency: What Makes Disclosure Policies Effective?' (December 2004) Ash Institute for Democratic Governance and Innovation, John F Kennedy School of Government OP-03-04, 9 <http://ssrn.com/abstract=766287> accessed 20 July 2016; Tessa Hebb, 'The Economic Inefficiency of Secrecy: Pension Fund Investors' Corporate Transparency Concerns' (2006) 63 Journal of Business Ethics 385; David Hess, 'Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency' (2007) 17 Business Ethics Quarterly 453; Larry C Backer, 'From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations' (2008) 39 Georgetown Journal of International Law 591 etc.

[21] eg Amitai Etzioni, 'Is Transparency the Best Disinfectant?' (2010) 18 Journal of Political Philosophy 389.

[22] For details see 3.3 below.

will better protect the interests of employees, miss this essential, intrinsic desirability of transparency.

Having made the case for transparency in this way, the thesis then argues that some degree of compulsion will be necessary to ensure that companies adopt appropriate transparency regimes. In this respect, on the one hand, modest compulsion could be through the terms of *soft law*, more rigorous compulsion, on the other hand, could be achieved through mandatory legal norms imposed on companies. Whilst individual states can ensure their own national transparency requirements go some way towards ensuring appropriate levels of transparency, this would fail to recognise the increasingly international context in which companies operate, and in which transparency must function. Thus, the thesis claims that effective compulsion inevitably requires international co-operation and the promulgation of international norms.

In summary, the thesis aims at convincing the reader that a sufficient level of transparency, which can only be fully achieved through regulatory initiatives at international level, can ensure that companies treat employees appropriately.

Having briefly outlined, the essential argument of the thesis, the remainder of the chapter does the following: First, section 1.1 clarifies the aims of the thesis. Then section 1.2 lists specific research questions. In section 1.3, the research methodology of the thesis is explained. Lastly, in section 1.4, the structure of the thesis is outlined.

1.1 Aims and Objectives

In essence, the main objectives of the thesis are, first, to argue that corporations must be transparent to and about employees, and second, to show that such necessary transparency can only be fully achieved through regulatory initiatives at international level.

These two overarching objectives require proving, and pursuing, a number of subsidiary purposes. First, the thesis intends to show that companies must take the interests of their employees seriously, by giving them genuine respect. Surely, a number of different arguments can be advanced in this respect. However, this thesis shall show that employees have intrinsic value. Thus, they should be treated as ends in themselves. For this end, it addresses Kantian deontological ethics.[23]

The thesis, then, favours transparency, amongst different regulatory strategies that may be employed to ensure that companies behave accordingly. It shall argue why someone who accepts that companies must treat their employees with genuine respect – should also accept the claim that companies must be, or be made to be, transparent.

Having favoured transparency for ensuring companies behave better towards employees, the thesis aims at answering two questions: should companies be compelled to be transparent or can they possibly choose to be transparent without any compulsion? The main objective in this regard is to answer whether companies can be relied on to choose, out of self-interest, to be transparent or whether some degree of compulsion is necessary to ensure that companies achieve a sufficient level of transparency.

With respect to the examination of actual transparency regimes, the thesis aims at showing that national/regional initiatives can indeed achieve meaningful improvements in compelled transparency, yet they fall well short of achieving that at the international level.

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[23] Indeed, some scholars also focus on the intrinsic value of stakeholders. Evan and Freeman, for instance, highlight Kantian *respect for persons* principle in order to demonstrate the intrinsic value of stakeholders. William M Evan and R Edward Freeman, 'A Stakeholder Theory of the Modern Corporation: Kantian Capitalism' (1988) in George D Chryssides and John H Kaler, An Introduction to Business Ethics (South-Western Cengage Learning 2010). Evan and Freeman emphasise that managers should balance the interests of different stakeholders such as owners, employees, suppliers, customers and members of the local community. According to them, in order to create a stakeholder management, one of the structural mechanism is to be 'the Stakeholder Board of Directors' in which the representatives of various stakeholders are represented on the board.

In essence, as having been stated earlier, the thesis concludes with the argument that sufficient level of corporate transparency with regard to employees can only be fully achieved through international regulatory initiatives.

1.2 Research Questions

Along with the objectives mentioned above, the thesis looks for an answer to the following research questions:

1. What should be the corporate objective, and how do employees' interests feature in that objective?

2. Assuming that corporations are obliged to pursue the interests of their employees, what, then, are the potential regulatory tools that might be employed to ensure companies behave in that way?

3. What are the theoretical advantages and disadvantages of transparency obligations, imposed on companies to promote the intrinsic interests of employees, in comparison to alternative strategies?

4. To what extent must companies be compelled by regulation to be transparent?

5. How far can any individual country, acting independently, ensure its companies establish sufficient transparency?

6. How do, or could, transparency strategies in international law or international soft law regime can improve the interests of employees?

1.3 Methodology

This thesis is grounded in a qualitative and interdisciplinary approach. It is conducted through a library-based research by observing information from a myriad of sources such as books, journal articles, legislation, legal, quasi-legal and soft law documents, case comments and regulation commentaries, company reports and codes of conduct. It draws on a number of different disciplines and sub-disciplines such as company law, labour law, international law, law and economics, and some of the sub-fields of economics such as behavioural economics etc.

The first part of the thesis primarily uses library-based information, such as books and journal articles. In this regard, the thesis begins with a normative question by asking *what the objective of the corporation should be*. Kantian Deontological Ethics formulates how employees' interests feature in that objective. Even though this formulation predominantly highlights the concept of human dignity, which constitutes the fundamental element of *human rights*, the thesis depicts the human rights of employees from a normative and philosophical viewpoint rather than a legal perspective.

Secondly, the thesis constructs the theoretical foundations of transparency. In this way, the thesis benefits from many disciplines. For example, in terms of analysing what sort of factors play a role in effectiveness of transparency, or undermine its effectiveness, different disciplines, such as law and economics are used to demonstrate the economic efficiency of transparency, and behavioural economics is used in order to explain some limits of transparency.

Finally, chapter 5 and chapter 6 of the thesis examine hard and soft law requirements. Thus, the analyses presented in these chapters are based upon both primary and secondary

sources such as laws, regulations as well as academic literature. For instance, transparency regulations in the UK are examined by analysing different legal sources such as company law, employment law and other regulations under different laws. Along with the issues raised by national/domestic transparency rules, the thesis also benefits from international soft and hard law in terms of 'global' aspects of transparency.

1.4 Provisional Structure of the Thesis

Chapter 1 sketches out the context of the thesis, expands on the description of the research questions and seeks to answer, and provide a brief account of the method to be employed.

Chapter 2 examines how the interests of employees feature in the corporate objective. The chapter relies on normative concepts, in the sense that it is concerned with what the objective *ought* to be – what arguments have been put in favour of, and against, the different contenders for the corporate objective, and what the most compelling arguments can be. It searches for an answer to *what kind of corporate governance model can be defensible from deontological perspective?* Two main contenders for the corporate objective, namely *shareholder primacy* and *stakeholder theory* are considered in this regard. Along with these main approaches, the chapter also mentions some other theories, such as *enlightened shareholder value* and *team production theory.* All the approaches are critiqued from deontological perspective. Eventually, the chapter concludes that the most compelling arguments are, in fact, those in favour of stakeholder theory.

This chapter does not try to identify and describe what different companies themselves may, in practice, take their own objectives to be, nor does it identify what the law

of any particular country currently happens to say what its companies' objectives are. Those empirical/descriptive questions will arise only in later chapters.

In fact, it is worth emphasising why it is necessary to have a foundational chapter examining the corporate objective, given that the focus is on disclosure obligations, which will be analysed in the remainder of the thesis. Admittedly, it is likely that the effectiveness of disclosure, as a strategy for improving corporate behaviour, raises many issues that are independent from the objective of the corporation. To that extent, an analysis of the effectiveness of disclosure does not require a prior discussion of the corporate objective. However, some issues of disclosure do depend, fundamentally, on what the corporate objective should be. Different understandings of the corporate objective might give us very different prescriptions of what corporate disclosure should be, and therefore the criteria by which it will be judged effectively. That in turn will have a substantial impact on how an effective disclosure regime should be designed. A *shareholder-primacy* account of the corporate objective will require a very different disclosure regime, designed with a view to maximising shareholder wealth, to the regime required to give effect to a *stakeholder* account of the corporate objective. That, then, is why it is necessary for this thesis to discuss the different accounts of the corporate objective, and to defend the account (*stakeholder theory*) on which the discussion of disclosure then builds.

Furthermore, having analysed what the corporate objective ought to be, and in particular having argued in favour of *stakeholder theory*, chapter 3 turns to the regulatory mechanisms that might be employed by a governance/regulatory system to ensure that companies promote the interests of employees in ways that are appropriate.

Chapter 3 aims at clarifying the range of potential strategies available, and their essential distinguishing features in terms of improving the interests of employees. The chapter focuses on *transparency* as a regulatory strategy to protect and improve the interests of employees. At the beginning, the chapter deals with the definition of transparency by scrutinising whether or not transparency is about more than just the release of all necessary, accurate information. It investigates the relationship between transparency, openness, information disclosure and accountability.

Additionally, the chapter develops two points in favour of transparency. The first point emphasises the intrinsic value of transparency. According to this point, being transparent demands openness and honesty, which is good in and of itself, and this applies forcefully to corporations in their treatment of their employees. The second point emphasises the strategic value of transparency. Accordingly, transparency is often a better choice, or a better strategy, for delivering good corporate behaviour, in comparison to available alternatives. Thus, chapter 3 also looks at theoretical strengths and weaknesses of transparency as a strategy to improve the behaviour of corporations towards employees.

A part of the chapter identifies what sorts of conditions need to be reached to improve transparency. This chapter constitutes the foundation by producing a list of *design features* that a good transparency regime would have, and *design errors* a good regime would avoid in order to be used when the next chapters come to look at actual regimes that currently exist. In short, the chapter demonstrates what the potential of transparency is, and identifies some of the qualities of an ideal regime of information disclosure, the best regulatory option to ensure companies meet such an ideal of transparency.

Chapter 4 turns from theory/normative questions, to issues of strategy. This chapter focuses on the best avenues for ensuring companies exhibit a sufficient degree of transparency. In the chapter, first, the pure voluntary incentive of companies to be transparent is analysed. The incentive arising from market pressure for transparency, such as the desire to foster company profitability will be the major issue. Secondly, the chapter looks at the role of *Self-imposed Codes of Practice (SICP)* in encouraging companies for more transparency than pure voluntary/self-interest is likely to deliver. Third, the chapter focuses on externally created voluntary codes. Then, all these voluntary avenues for transparency are critiqued in terms of the pressure they exert on companies. Lastly, the chapter considers the case for legal measures that mandate disclosure obligations, backed up by legal sanctions for non-compliance by looking at why these may be preferred to voluntary mechanisms defined earlier, but perhaps also conceding that legal obligations suffer disadvantages of their own. In essence, the chapter concludes that there is a substantial need for some degree of compulsion on companies for delivering greater transparency.

The last two chapters examine the most appropriate geographical level at which to compel corporate transparency. In this regard, chapter 5 analyses whether effective transparency norms are achievable through national and/or regional initiatives. The chapter specifically focuses on the UK transparency regime as a national/domestic case study. In addition, its membership of the EU shall provide the regional dimension of the chapter. The chapter examines what disclosure duties corporations have towards their employees. Whereas the first part of the chapter analyses the transparency requirements in the country, the second part mostly highlights the drawbacks of national/domestic transparency obligations. According to the chapter, national efforts do not match onto the global scope of the operations of transnational corporations (TNC)s. Therefore, whilst national/regional

initiatives play a role in compelled transparency, they fall well short of achieving a sufficient degree of transparency at international level.

In chapter 6, however, the analysis is expanded to the broader, international/global, requirements**.** This chapter embraces the global transparency schemes driven by international, inter-governmental and hybrid institutions. The analysis in this chapter comprises *codes of conduct* and *disclosure* requirements by regulatory bodies, including public and private institutions. In this regard, for example, the strategies by the United Nations (UN), Organisation for Economic Co-operation and Development (OECD), Global Reporting Initiative (GRI) etc. are investigated.

Chapter 6 analyses potentially emerging new common governance standards by these institutions that seek to create, publicise and enforce rules of disclosure, and monitor corporate practices with respect to employee matters. It scrutinizes what these pressures for disclosure have already achieved in terms of improving the behaviour of corporations towards employees, and what they potentially are able to achieve. The chapter draws all the strands together and sketches out a theoretical foundation for transparency, and links this to the theory of private governance through disclosure. In short, chapter 6 concludes that a sufficient degree of transparency can only be fully achieved through regulatory initiatives at international level.

Ultimately, chapter 7 draws together the conclusions from all previous chapters in order to answer the research questions asked above.

Chapter 2

Reconsidering the Corporate Objective

Introduction

The introductory chapter has already provided some pertinent examples of the corporate misconduct and, more specifically, examples of how corporations have sometimes failed to respect the interests of employees. This chapter aims to advance upon the previous one by offering an analysis that shall address the following question *what the corporate objective should be,* so it may then be determined how best employees are to be treated with respect.

There are, of course, a number of different arguments that have been advanced in response to such question; the majority of which have been built upon a range of different theoretical positions.[1] Conversely, this chapter shall attempt to outline the argument that the most ideal, normative, approach to realising the corporate objective can be found within stakeholder theory. Stakeholder theory has various strands, and can be categorised under a number of different headings. However, the non-consequentialist approaches – namely those seeing stakeholders as intrinsically important – shall be the main focus of this chapter. In order to justify this preference, section 2.1 shall briefly examine non-consequentialism,

[1] eg Anant K Sundaram and Andrew C Inkpen, 'The Corporate Objective Revisited' (2004) 15 Organization Science 350; Michael C Jensen, 'Value Maximisation, Stakeholder Theory and the Corporate Objective Function' (2001) 7(3) European Financial Management 297; R Edward Freeman, Andrew C Wicks and Bidhan Parmar, 'Stakeholder Theory and 'The Corporate Objective Revisited' (2004) 15 Organization Science 364.

otherwise an aspect of Kantian deontological ethics. In fact, Kantian deontological ethics has already been applied in the context of business corporations by those scholars examining corporate governance,[2] business ethics,[3] the moral foundation of employee rights etc.[4] Thus, in addition to Kant's original notion, the work of other scholars also guides us to examine the objective of the corporation from a normative perspective. Such an analysis shall be an essential foundation upon which to build the proceeding sections and chapters, detailing the pre-eminent theories with respect to the purpose of the corporation.

Although there will be a number of theories discussed within this chapter,[5] the two to majorly feature in our analysis for purpose of examining the corporate objective shall be *shareholder value* and *stakeholder theory*, which shall dominate the chapter's discussion. At first, section 2.2 will analyse and criticise the main elements of shareholder value theory. The notion which sees the corporation as *private property*, and the theories of transaction cost and incomplete contracts and the agency theory will be scrutinised alongside shareholder value theory itself. In the proceeding section 2.4, stakeholder theory shall be examined from both economic and non-economic perspectives. In this respect, team production theory, at 2.4.1, will be approached as a strong model in favour of instrumental stakeholder theory. The chapter will conclude the analysis with non-consequentialist stakeholder theory by highlighting its potential to improve the intrinsic interests of stakeholders.

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[2] Evan and Freeman apply Kantian ethics to stakeholder theory. William M Evan and R Edward Freeman, 'A Stakeholder Theory of the Modern Corporation: Kantian Capitalism' (1988) in George D Chryssides and John H Kaler (eds), An Introduction to Business Ethics (South-Western Cengage Learning 2010).

[3] For instance, Bowie gives a detailed conceptualisation of the application of Kantian ethics to corporations. Norman E Bowie, *Business Ethics: A Kantian Perspective* (Blackwell Publishers 1999).

[4] John R Rowan, 'The Moral Foundation of Employee Rights' (2000) 24 Journal of Business Ethics 355, 355.

[5] In addition to these two main approach theories, the Enlightened Shareholder Value (ESV), the 'Entity Maximisation and Sustainability Model' (EMS), Team Production Theory (TPT) etc. will also be examined.

2.1 Non-Consequentialism: A Brief Look at Deontological (Kantian) Ethics

Deontology is a concept grounded in moral duties.[6] Thus it does not pay attention to consequences. According to deontological ethics, 'some actions are right or wrong for reasons other than their consequences'.[7] Therefore, deontological ethics differs from consequentialist ethical theories such as utilitarianism which evaluates an ethical act depending on a favourable outcome.[8]

Immanuel Kant is one of the most important philosophers of modern deontological ethics. Kant argues that the act of a person should not be guided by self-interest, but it should be from her/his duty.[9] Thus, one needs not to be altruistic, or to be satisfied by treating others respectfully, but her/his behaviour should stem from a sense of duty.[10]

According to Kant, there were two types of duties or, in his own words – *imperatives.* The first type of duty is called, hypothetical imperative; referring to the action, which 'is good for some possible or actual purpose'.[11] For instance, if one wishes to develop her career, she must study and work for this. Thus, hypothetical imperatives are dependent on persons and their goals. Secondly, the categorical imperatives refer to 'the action to be of itself objectively necessary without reference to any purpose'.[12] In other words, the categorical imperative does not depend on any good or unpleasant consequences. It does not vary person to person. It refers to universal duties that every rational human being can have, such as truth telling, or keeping promises.

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[6] Kevin Gibson, 'The Moral Basis of Stakeholder Theory' (2000) Journal of Business Ethics 245, 248.
[7] Tom L Beauchamp and Norman E Bowie, *Ethical Theory and Business* (5th edn, Prentice Hall 1997) 33.
[8] Utilitarianism can be one of the most significant consequentialist ethical theories. According to a Utilitarian, for example, happiness is the only desirable end. See John S Mill, *On Liberty and other Essays* (Oxford University Press 1991) 168.
[9] Beauchamp and Bowie (n 7) 37.
[10] Chryssides and Kaler (n 2) 97.
[11] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary J Gregor and Jens Timmermann trs, German-English edn, Cambridge University Press 2011) 57.
[12] ibid 59.

In spite of the above categorisations, Kantian ethics per se has been predominantly shaped by the elements of the categorical imperative alone. The categorical imperative can be grounded in three main formulations. The first is based upon the notion of *universality*. To illustrate this, Kant implores the reader to 'act only according to that maxim through which [he/she] can at the same time will that it become a universal law'.[13] He further articulates this by saying that 'so act as if the maxim of your action were to become by your will a universal law of nature'.[14] From this perspective, the maxim of an act or rule should be *universalisable* in order to be ethical. This universality formulation requires consistency.[15] It should be applicable to everyone, without exception, in order so it may be deemed a valid moral rule. Therefore, it can be seen as a test for an ethical act from Kantian perspective.

As will be apparent, the maxim of some actions definitely exists which cannot be universalized. However, these actions – called immoral actions – are viewed as self-defeating from the viewpoint of Kantian ethics. For example, if a maxim that permitted an immoral action such as theft by employees, managers, or customers is universalized, it would be self-defeating.[16] As Bowie posited, if one universalized a maxim that permits the breach of a contract, no contract would exist, since people would not enter into a contract which they believe that the other party would have no intention of honouring.[17] Therefore, for an ethical act to be deemed as such, the universalization of a maxim are requires it to be logically coherent.

There is no doubt, other ethical theories, such as utilitarianism can also be universalised and be consistent. However, in terms of utilitarianism, the measure of utility

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[13] ibid 71.
[14] ibid.
[15] Andrew Crane and Dirk Matten, *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (Oxford University Press 2010) 101.
[16] Bowie (n 3) 16.
[17] ibid.

can change, for example, the assessment of 'consequences as pleasure or pain might depend heavily on the subjective perspective of the person'.[18] However, moral duties under Kantian ethics are absolute, and apply to everyone.

The second formulation of categorical imperative is based upon the intrinsic value of human beings or, put differently, *respect for persons* – the subject of which is a central feature of this work. The notion of *respect for persons* refers to the idea advanced by Kant arguing that *the person* has the right to be treated as an end in itself. Indeed, one must be treated with respect and moral dignity.[19] The dignity that human beings possess stems from their capability as autonomous and self-governing beings.[20] As Kant suggested, people, as responsible beings, can distinguish the right from wrong by themselves.[21] Human beings differ from objects, which have instrumental value,[22] and should not be treated as things. Human beings also differ from animals since they are capable of making rational choices.[23] To this end, the ethos of Kantian ethics advanced the view that people need to be free to develop their 'rational and moral capacities'.[24] In summary, individuals should be treated as ends in themselves, and not as means to others' ends.

The second formulation of the categorical imperative, in particular, can also be applied to corporate activities. For example, viewed from a Kantian perspective, Arnold and Bowie define the ethical obligations of employers as to 'refrain coercion, meet minimum

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[18] Crane and Matten (n 15) 99.
[19] Beauchamp and Bowie (n 7) 38.
[20] Bowie (n 3) 43-44.
[21] Gibson (n 6) 248.
[22] Chryssides and Kaler (n 2) 99.
[23] Shannon A Bowen, 'Autonomy in Communication: Inclusion in Strategic Management and Ethical Decision-Making, a Comparative Case Analysis' (2006) 10 Journal of Communication Management 330, 335.
[24] Denis G Arnold and Norman E Bowie, 'Sweatshops and Respect for Persons' (2003) 13 Business Ethics Quarterly 221, 223.

safety standards, and provide a living wage for employees'.[25] From this angle, it can be claimed that employees should not merely be treated as things to the ends of the corporation.[26] Hence, corporate governance approaches that see stakeholders as means in the ends of a limited number of people, such as in the ends of shareholders, may simply be rejected from this angle.[27]

The third formulation of the categorical imperative is called *the kingdom of ends*. This formulation may be seen as the combination of the first and second. Accordingly, the interactions among the community of human beings should be shaped by the laws, based upon the notion of *universalizability* and *respect for persons* as outlined above.[28] Every human being in the community has equal interests since they possess human dignity.

Autonomy is the main element in this formulation, to which 'members of the kingdom' are at the same time seen as subject and sovereign legislators of.[29] From this perspective, to be autonomous 'is to have the mode of self-control that takes account of others' like moral status'.[30] In fact, autonomy enables rational human beings to take ethical decisions. This constitutes the fundamental root of Kantian ethics since the ethical act is based upon the reason. For example, the corporation can be seen as a moral community made up of human beings. Therefore, corporations need to respect the autonomy of stakeholders, such as employees.[31]

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[25] ibid 222.
[26] Rowan (n 4) 357.
[27] It is significant to note that Kantian deontological ethics also requires directors to treat shareholders as ends in themselves. See James J Brummer, 'Accountability and the Restraint of Freedom: A Deontological Case for the Stricter Standard of Corporate Disclosure' (1986) 5 Journal of Business Ethics 155.
[28] Bowie (n 3) 88.
[29] ibid 87-88.
[30] Onora O'Neill, 'Kantian Ethics' in Peter Singer (ed), *A Companion to Ethics* (Blackwell Publishing 1991) 179.
[31] Bowie (n 3) 41-81.

Nevertheless, Kantian deontological ethics has also attracted some criticism.[32] One of the most important critiques can be related to the treatment of employees in the corporation. For example, how should directors treat different stakeholders with different ends? For instance, 'a company's shareholders may want profits, while some of the workers within a firm may be striving for higher wages, increased leisure, or perhaps the pursuit of a religious life'.[33] Should directors favour shareholders to other stakeholders in this situation? One answer to this question can be that even in a situation in which stakeholders are treated as means in others' ends they 'should have the choice between sacrificing their own personal goals in favour of the company's collective ones, or else leaving the firm'.[34] Section 2.4.2 below will return to this issue again.

In short, although it seems that all three formulations of the categorical imperative can potentially improve the behaviour of the corporations, it is the second formulation which requires 'respect for persons' that best fits the present work in terms of how employees are treated with respect by their employers. The remainder of this chapter shall therefore examine the notion, positing the suggestion, that treating individuals, or employees, as a means to an end should not be the objective of the corporation. It shall argue that directors should not treat stakeholders, specifically employees, as mere tools in the maximization of shareholder value. For this purpose, the following sections shall examine how prominent corporate governance approaches address the question of the corporate objective. After having investigated this, section 2.4.2 shall turn once again to consider the 'respect for persons', concluding its analysis of non-consequentialist stakeholder theory.

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[32] For a brief list of criticisms of Kant's ethics, see O'Neil (n 30) 181-183.

[33] Chryssides and Kaler (n 2) 511.

[34] ibid.

2.2 Shareholder Value as the Objective of the Corporation

Corporations (in the UK) is governed by the board of directors, which usually comprises of executive directors, non-executive directors and a company secretary.[35] Shareholders are the investors who hold stocks or shares that are issued or sold by the corporation.[36] Shareholder value theory (SVT)[37] states that the objective of the corporate governance should be the maximisation of shareholder-wealth.[38] Indeed, by following this theory, directors may also consider the interests of non-shareholder stakeholders.[39] But the crucial point to consider is that under the notion of shareholder value maximization, directors are bound to consider the interests of other stakeholders, merely as a means to maximise shareholder value.[40] Stakeholders are not *intrinsically* given weight, at least not as something to be pursued in their own right. Rather, their input is only given weight instrumentally - that is in order to realise the true, higher goal, of maximising shareholder value.[41] Thus the SVT may be regarded as functionalist or consequentialist. The corporate objective, from this perspective, is also expected to be consequentialist. However, in order to see how the SVT addresses the question of the corporate objective, the following sections will examine the main justifications behind and in favour of the theory.

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[35] Organisation for Economic Co-operation and Development (OECD), *Board Practices: Incentives and Governing Risks, Corporate Governance (*OECD Publishing 2011) 113.

[36] Margaret M Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (The Brookings Institution Press 1995) 20.

[37] The theory is also called as 'shareholder primacy' or 'shareholder value principle,' or 'shareholder wealth maximisation norm'. Andrew R Keay, 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' (2008) 71 Modern Law Review 663, 665.

[38] Stephen M Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' (2003) 97 Northwestern University Law Review 547, 549; Melvin A Eisenberg, 'The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm' (1999) 24 Journal of Corporation Law 819, 832.

[39] Andrew R Keay, *The Corporate Objective* (Edward Elgar Publishing 2011) 45.

[40] ibid.

[41] Gedeon JD Rossouw, 'The Ethics of Corporate Governance: Crucial Distinctions for Global Comparisons' (2009) 51 International Journal of Law and Management 5, 8.

2.2.1 Arguments in Favour of Shareholder Value Theory

2.2.1.1 Property Rights

Property rights require that property must be used solely in the interests of its owners. The notion, in which companies are viewed as property, sees the company as a fictional instrument through which the company effectively becomes the property of its shareholders.[42] It is claimed that property rights 'give the owner full and absolute disposition rights over the object of ownership'.[43] And so, the corporation is seen as legally obliged to serve the interest of its shareholders. It may then be argued that one justification in favour shareholder value derives from property rights.

A defender of the notion seeing the *company as a property* (while justifying the SVT) might well wish to argue that, in fact, respecting the rights of shareholders to have their interests given primacy is also likely to promote greater overall social wealth,[44] which they may wish to claim is the second advantage of this approach. This consequentialist notion, as an idea of moral philosophy, can be traced back to the ideology of Adam Smith, who argued that the individual acts of economic self-interest through the 'invisible hand' of market forces serve the best interests of society at large.[45] Accordingly, a free competitive market, in which individuals pursue their own private goals, functions better for the public interests.[46] However, for the defender of the 'company as property' justification for the SVT, the fact that the SVT may also happen to maximise overall social wealth is a mere fortunate by-product of respecting shareholders' private property rights. For the property rights advocate,

[42] Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' (The New York Times Magazine, September 13 1970) <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html> accessed 8 August 2016.
[43] Ewald Engelen, 'Corporate Governance, Property and Democracy: A Conceptual Critique of Shareholder Ideology' (2002) 31 Economy and Society 391, 395.
[44] John Parkinson, 'Models of the Company and the Employment Relationship' (2003) 41 British Journal of Industrial Relations 481, 482.
[45] Karen Ho, *Liquidated: An Ethnography of Wall Street* (Duke University Press 2009) 172-173.
[46] Parkinson (n 44) 482.

the SVT is a necessity, as property rights must be respected, and only the SVT achieves that.[47] Thus, if the SVT maximises social welfare, all well and good, but the SVT would be a necessity whether it happened to maximise social welfare in this respect or not.

Following the above notions, individual freedom has been regarded as having high moral value. In this respect, traditional inherent property rights continue to allow corporate property to be treated as a private association.[48] Assigning control rights to shareholders in the manner described has been associated, by moral philosophy, as generating the greatest good for all. In other words, maximizing share value is regarded as the maximisation of the social value and welfare too.[49] Indeed, this perception creates a theory under which the corporation is regarded not only as a profit-oriented entity, but one that is also benefiting the society as whole.[50] Yet, the important point is that the property argument is distinct from, and ultimately not dependent on, such a happy consequentialist outcome. Property rights can be regarded as deontological rights since protecting property rights is grounded in deontological ethics.[51] However, this in itself does not justify shareholder value maximisation, because of the good consequences (for instance, maximising overall wealth, happiness or whatever) that shareholder value will generate.

The Critique

In light of the above, the property rights approach in favour of the Shareholder Value Theory (SVT) can be critiqued from a number of different perspectives.

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[47] ibid 483.

[48] ibid; Gavin Kelly, Dominic Kelly and Andrew Gamble, *Stakeholder Capitalism* (Macmillan Press 1997) 111.

[49] Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 Georgetown Law Journal 439, 441.

[50] See Brendan McSweeney, 'Maximizing Shareholder-Value: A Panacea for Economic Growth or a Recipe for Economic and Social Disintegration?' (2008) 4(1) Critical Perspectives on International Business <http://ssrn.com/abstract=1286743> accessed 5 August 2016.

[51] Irene van Staveren, 'Beyond Utilitarianism and Deontology: Ethics in Economics' (2007) 19 Review of Political Economy 21, 23.

First, the SVT states that shareholders, as owners of the company, are entitled to determine in whose interests the company should be run. Typically, this will be in the interest of themselves. However, it does not insist that the company must be run for the interests of shareholders alone. Shareholders may, for example, decide that the company is to be run in the interests of employees. Yet, this result would even depend on shareholders choosing to sacrifice their own interests in favour of other stakeholders instead; that is to say, this is not an outcome that could be imposed upon shareholders, in contravention of their moral, equitable or legal rights as property owners. However, for proponents of shareholder value, who rely on the *company as property* argument, it is generally assumed that shareholders do not want to incur such a voluntary sacrifice of their own interests, so shareholder value does indeed flow seamlessly from the assumption that the company itself is the property of shareholders.

Second, even if shareholders are named as owners, the property rights they possess are not unlimited. To this end, it is crucial to define the limits of the concept of ownership. One can, for instance, use Honoré's example in order to demarcate the limits of ownership rights.[52] According to Honoré, there is 'a substantial similarity in the position of one who 'owns' an umbrella in England, France, Russia, China'.[53] Yet, he underlines the significant limits of ownership rights by pointing out nowhere one has the right 'to poke his neighbour in the ribs or knock over his vase'.[54] Furthermore, Donaldson and Preston emphasise that 'property rights are embedded in human rights' and they are restricted against harmful uses.[55]

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[52] Anthony M Honoré, 'Ownership' in Jules L Coleman (ed) *Readings in the Philosophy of Law* (Garland Publishing 1999).
[53] ibid 558.
[54] ibid.
[55] Svetozar Pejovich, *The Economics of Property rights; Towards a Theory of Comparative Systems* (Kluwer Academic Publishers 1990) cited in Thomas Donaldson and Lee E Preston, 'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications' (1995) Academy of Management Review 65, 83.

They cite Pejovich who states that ‘‘it is wrong to separate human rights from property rights’’ in order to depict the arguments that bring stakeholder interests into the conception of the property.[56] In addition to the specific rights, property ownership creates some duties for the owners.[57] For instance, ‘a property owner cannot burn noxious trash in her backyard’.[58] In short, property rights cannot justify harmful activities. And so, one can claim that the concept of the corporation as property ‘does not support the popular claim that the responsibility of managers is to act solely as agents for [and in the interests of] the shareowners’ alone’.[59]

Third, one may opt to argue that shareholders, technically, cannot be said to be the *owners* of the corporation, since they are owners in equity, and do not own the corporation as a whole. As such, they do not always have direct control of the corporation's assets. The property of the corporation belongs to the company itself as a separate entity, and shareholders do not have direct proprietary rights to it.[60] Rather than shareholders themselves, it is the board of directors within a corporation that has the right to control the corporate assets.[61]

In summary, even though the *property rights* argument may be used as a justification in favour of the shareholder value theory (SVT), it is evident this possesses some weaknesses. Nevertheless, in addition to property rights, there are also economic arguments that can be in favour of the SVT which shall be addressed in the following section.

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[56] ibid.
[57] Kent Greenfield, ‘Place of Workers in Corporate Law’ (1997) 39 Boston College Law Review 283, 293.
[58] ibid 293.
[59] Donaldson and Preston (n 55) 84.
[60] Paul L Davies and Sarah Worthington, *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell 2012) para 2-7,42.
[61] Lynn A Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler 2012) 42.

2.2.1.2 Contractual Theories

2.2.1.2.1 The theory of transaction cost and incomplete contracts

Most of the justifications made in favour of shareholder theory are based upon economic justifications. In order to appreciate the weight of these justifications, it may be beneficial to begin our analysis from the work of Ronald Coase.[62] According to Coase, firms can perform better than the market since it is the market that minimizes transaction costs.[63] This minimization occurs due to the authority within the firm to affect such costs.[64] Even though the price mechanism determines the allocation of factors in the market, in the firm, if an employee 'moves from department *y* to department *x*, he does not go because of a change in relative prices, but because he is ordered to do so'.[65] Therefore, from the perspective of Coase, the authority in the firm reduces the costs which may be possible in the market.

However, according to Alchian and Demsetz, the essence of the firm is based upon contracts, rather than authority.[66] Yet, it is also argued that contracting creates transaction costs within the firm.[67] Indeed, following this argument, it may be impossible to write a complete contract since 'a contract that anticipates all the events that may occur and the various actions that are appropriate in these events' cannot be written.[68] Thus, 'any contract written within a firm or between independent firms will be incomplete'.[69] Because of this contractual incompleteness, 'governance structure can be seen as a mechanism for making

[62] Ronald H Coase, 'The Nature of the Firm' (1937) 4 Economica 386.
[63] ibid 388.
[64] ibid 392.
[65] ibid 387.
[66] Armen A Alchian and Harold Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62 The American Economic Review 777, 794.
[67] Christopher A Riley, 'Understanding and Regulating the Corporation' (1995) 58 The Modern Law Review 595, 598.
[68] Oliver D Hart, 'Incomplete Contracts and the Theory of the Firm' (1988) 4 Journal of Law, Economics, & Organization 119, 123.
[69] Oliver Hart, 'An Economist's View of Authority' (1996) 8 Rationality and Society , 372.

decisions that have not been specified in the initial contract'.[70] In turn, the firm may be seen as a governance structure.[71] One solution in terms of incomplete contracts can be that 'assigning property rights to one of the parties to the contract'.[72] Yet, which party should be assigned these rights? The SVT answers this question by addressing justifications made under the '*agency theory'* and the concept of the *Nexus of Contracts*.

2.2.1.2.2 Agency theory and the concept of the nexus of contracts

Agency theory constitutes a strong justification in favour of the SVT. According to *agency theory*, corporate managers are called to act as the agents of the shareholders, and shareholders are the principals of the managers.[73] According to this theory, the agency relationship also creates an '*agency cost'* where there exists a risk of agents evading transactions, or acting in their self-interest [74] Indeed, anything that reduces shareholder value, arising from the agency relationship, constitutes *agency cost.* For example, agents may create additional costs if they consider the interests of other stakeholders instead of the interests of shareholders. *Agency cost* includes direct transfer of value to the agent such as excessive salaries. It also includes *monitoring costs* incurred by shareholders trying to prevent such transfers of value. As a consequence, the objective of the corporate board needs to be 'reducing *agency costs* and maximising shareholder wealth'.[75]

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[70] Oliver Hart, 'Corporate Governance: Some Theory and Implications' (1995) 105 Economic Journal 678, 680.
[71] Christine A Mallin, *Corporate Governance* (Oxford University Press 2010) 17.
[72] Margaret M Blair and Lynn A Stout, 'A Team Production Theory of Corporate Law' (1999) Virginia Law Review 247, 260.
[73] Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journal of financial economics 305, 308.
[74] ibid 308.
[75] Philip Stiles and Bernard Taylor, *Boards at Work: How Directors View Their Roles and Responsibilities: How Directors View Their Roles and Responsibilities* (Oxford University Press 2001) 14.

The agency relationship between principals and agents constitutes a contract.[76] *Agency theory,* therefore, views the corporations as a *nexus of contracts*.[77] From this perspective, the corporation is not real, but rather defined as a complex set of contracts among managers, workers, and the contributors of its capital.[78] For instance, Easterbrook and Fischel argue that the corporation is made up of a web of contracts in which people who voluntarily agreed to participate.[79] In this context, shareholders are seen as the sole *residual claimants* and *risk bearers* because it is they that differ from other stakeholders such as employees who contract for a fixed return.[80] For instance, a contract specifies how much an employee will be paid or how much a creditor will be repaid. Yet shareholders, who possess no such contracts, are seen as less protected than other corporate constituencies.[81] As such, they are regarded as risk bearers in comparison with other stakeholders, such as employees, who enjoy such protection under guise of their contracts and various laws.[82] Williamson further contends that shareholders cannot renegotiate the terms of their contracts.[83] In this vein, shareholders are seen as constituents, who do not have the 'guarantee of any return'.[84]

In light of the above, shareholder theory sees shareholders as the most eager participants in terms of risk taking. For example, one can ask whether it is possible to give shareholders a fixed dividend, for instance, 5% of the value of their investment each year. And assume employees get all the surplus. However, the answer to this question is based on

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[76] Jensen and Meckling (n 73) 308.
[77] Mallin (n 71) 18-19.
[78] Frank H Easterbrook and Daniel R Fischel, 'Limited Liability and the Corporation' (1985) 52 The University of Chicago Law Review 89, 89.
[79] Frank H Easterbrook and Daniel R Fischel, 'The Corporate Contract' (1989) 89 Columbia Law Review 1416, 1426 and 1428.
[80] ibid 1446-1447.
[81] Stephen Bainbridge, *The New Corporate Governance in Theory and Practice* (Oxford University Press 2008) 68-70.
[82] Easterbrook and Fischel, 'The Corporate Contract' (n 79) 1446-1447.
[83] Oliver E Williamson, 'Corporate Governance' (1984) 93 Yale Law Journal 1197, 1210.
[84] Andrew Keay, 'Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?' (2010) 7 European Company and Financial Law Review 369, 398.

the fact that shareholders can diversify their investments, but employees are risk averse. As a result, shareholders accept more risk and employees want the security of a guaranteed salary. Accordingly, shareholders become *residual claimants* and *risk bearers* by purchasing stocks. Hence, the concept of the nexus of contracts, based upon 'the existence of divisible residual claims on the assets and cash flows of the organisation,'[85] can be seen as an important justification for shareholder value maximisation.

Lastly, it may be argued there are some other supposedly economic benefits by guaranteeing shareholders alone retain the right to have their interests considered above all others, rather than requiring a balancing of the shareholder and non-shareholder claims to profit and corporate assets. For instance, Jensen argues that the corporation should not maximise both shareholder value and any other stakeholder value at the same time, since this method cannot be efficient.[86] This perspective is grounded in that shareholder value is more certain than other theories in decision making, since corporate managers do not need to balance different and complicated interests of other stakeholders in decision making.[87] Therefore, it is argued that corporations should have a single-valued objective for efficiency since multiple objectives may confuse the managers while they are taking decisions.[88] In this respect, it is argued that the SVT is certain and clear for managers.[89]

The critique

First, this present work posits the view which argues that shareholders are the only residual claimants to corporate profits has a crucial flaw. In contrast to such view, one may depict the company as mutual assets of the team members who make firm-specific

[85] Jensen and Meckling (n 73) 311.
[86] Jensen (n 1) 297.
[87] ibid.
[88] ibid 301.
[89] Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2012) 25.

investments; thus these firm-specific investments can hardly be protected by a contract and they are of 'little or no value outside the firm'.[90] For example, shareholders can be compared to employees. In effect, not only shareholders, but also other stakeholders, such as employees, bear residual risk-specific investments.[91] By making firm-specific investment in the firm, employees become a valid and legitimate risk bearer for residual claims.[92] Employees may then suffer losses or receive dividends along with shareholders, depending on the performance of the firm.[93]

Limited liability protects only the assets of the shareholders from large losses, regardless of their cause.[94] Under such protection, shareholders are not liable for more than the nominal amount they invest. Furthermore, shareholders can renegotiate their contracts in the stock market, and can sell their shares whenever they wish to.[95] However, others may not have such an exit option. For example, employees bear risks as much as shareholders bear.[96] They cannot change their job easily.[97] Employees can be seen as residual claimants since their income depends upon a hazardous quasi rent.[98] This notion will be analysed further below. Hence, it is problematic to say that shareholders are the '*only risk bearers'*.[99]

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[90] Margit Osterloh and Bruno S Frey, 'Shareholders Should Welcome Knowledge Workers as Directors' (2006) 10(3) Journal of Management & Governance 325, 328.
[91] Blair and Stout (n 72) 297.
[92] Alexander Brink, 'Enlightened Corporate Governance: Specific Investments by Employees as Legitimation for Residual Claims' (2010) 93(4) Journal of Business Ethics 641, 648.
[93] Lynn A Stout, 'Bad and Not-So-Bad Arguments for Shareholder Primacy' (2001) 75 Southern California Law Review 1189, 1194-1195.
[94] Reinier Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press 2009) 9-10.
[95] R Edward Freeman and William M Evan, 'Corporate Governance: A Stakeholder Interpretation' (1991) 19(4) Journal of Behavioral Economics 337, 341-342.
[96] Sumantra Ghoshal, 'Bad Management Theories are Destroying Good Management Practices' (2005) 4 Academy of Management Learning & Education 75, 80.
[97] Margaret M Blair, 'Value, Corporate Governance and Corporate Performance: A Post-Enron Reassessment of the Conventional Wisdom' in Peter K Cornelius and Bruce Kogut (eds), *Corporate Governance and Capital Flows in a Global Economy* (Oxford University Press 2003) 58.
[98] Brink (n 92) 641.
[99] According to Sharplin and Phelps, the corporation may be conceptualised as a nexus for contracts among stakeholders and the management can act as an agent for each stakeholder group, who can all be

Second, whereas the SVT sees shareholders as constituents who always share identical interests, this assumption may not be true in some circumstances. Although some shareholders may possess short-term profit driven interests, others may be interested in the long-term success and sustainability of the firm.[100] For instance, they may 'prefer their companies not earn profits by harming third parties or breaking the law'.[101]

Third, even if some claim that shareholder value is efficient, shareholder value maximization may not always necessarily be efficient.[102] When it comes to the costs created by corporate externalities for stakeholders other than shareholders, the SVT may not be justified by the efficiency argument.[103]The SVT, through share price maximisation, often leads directors to externalise the costs on to other stakeholder groups.[104] Therefore, the SVT may be one of the contributory factors leading to plant closures, unsafe products, and polluted environments.[105] Hence, in order to justify the SVT from an efficiency perspective, the cost created to other stakeholders must also be considered.[106]

Fourth, share prices as performance indicators in favour of the SVT can and have been criticised. Share prices may not represent accurate indicators, these may increase or decrease without any change in the corporation's fundamental values.[107] Thus, share prices may not evaluate corporate performance holistically or accurately. For instance, in some

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treated as residual claimants. Arthur Sharplin and Lonnie D Phelps, 'A Stakeholder Apologetic for Management' (1989) 8 Business and Professional Ethics Journal 41, 50 (emphasis added).

[100] See 4.1.1.1.3 below.

[101] Lynn A Stout, 'The Problem of Corporate Purpose' (2012) 48 Issues in Governance Studies 1, 9.

[102] Ian B Lee, 'Efficiency and Ethics in the Debate about Shareholder Primacy' (2006) 31(2) Delaware Journal of Corporate Law 533, 569.

[103] Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (n 89) 24.

[104] Simon Deakin, 'The Coming Transformation of Shareholder Value' (2005) 13 Corporate Governance: An International Review 11, 15-16.

[105] Lawrence E Mitchell, *Corporate Irresponsibility: America's Newest Export* (Yale University Press 2002). 5.

[106] Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (n 89) 25.

[107] Steve Letza, James Kirkbride and Xiuping Sun, 'Shareholding versus Stakeholding: A Critical Review of Corporate Governance' (2004) 12 Corporate Governance: An International Review 242, 249.

circumstances, whereas the company performs poorly, executive compensation may continue increasing.[108]

Lastly, the SVT and one of its justifications, namely the notion of *nexus of contracts*, draws most of its support from economic efficiency. However, this consequentialist approach subordinates non-shareholder stakeholder interests. It is essential to note that the SVT, which relies upon some of the arguments examined above, could not be deemed acceptable according to deontological ethics since all the arguments advanced fail to treat the other stakeholders as their ends in themselves. Indeed, even if it is claimed that maximising shareholder value results in efficiency of corporations and leads to the indirect improvement of other stakeholders' interests, this does not change the instrumentalist characteristics of the SVT.[109] In other words, from this viewpoint, the interests of stakeholders can only enjoy 'instrumental' value. Thus, the interests of non-shareholder stakeholders in the SVT are constrained, and limited by the functionalist perspective. This behaviour cannot be regarded as ethically right from a deontological perspective.

2.2.2 Dismissing Enlightened Shareholder Value

Within the current section, we shall move to briefly consider – although only to dismiss – the Enlightened Shareholder Value (ESV).[110] The ESV may be thought of constituting another version of the corporate objective, and a variation on the Shareholder Value Theory (SVT). However, as the following paragraphs shall try to illustrate, as an approach, it does not really provide an alternative, and rather should be understood as a

[108] George W Dent, 'Corporate Governance: Still Broke, No Fix in Sight' (2005) 31 Journal of Corporation Law 39, 58.
[109] Rossouw (n 41) 8.
[110] The concept of the ESV was first used by the Company Law Review Steering Group in the UK. Company Law Review Steering Group, 'Modern Company Law for a Competitive Economy: The Strategic Framework: A Consultative Document' (Department of Trade and Industry 1999) para 5.1.11.

clearer and explicit depiction of what is already implicit in any clear understanding of the SVT.

The ESV was put forward by the Companies Act (CA) 2006.[111] In light of this, some commentators conceptualised the ESV as a third way, and with it the move towards a more stakeholder-driven corporate governance model.[112] The ESV essentially refers to long-term shareholder wealth maximisation.[113] Accordingly, stakeholder interests are seen as material in maximising financial performance and the creation of long-term value. The ESV in turn requires directors to promote the success of the company in the interests of all stakeholders.[114]

With the ESV, shareholder value maintains its primary role as the objective of the corporation. However, a subtle difference can be outlined between the SVT and ESV.[115] The ESV may be seen as a way of complying with shareholder interests, without neglecting legitimate stakeholder claims. Whereas the SVT claims that maximizing 'the wealth of shareholders' improves the value of the firm, according to the ESV, maximizing the long-term value of the firm improves 'the wealth of shareholders'.[116]

The critique

As with the SVT, the ESV may also be critiqued from a number of similar perspectives. Firstly, the market driven nature of this theory can be criticised for making it

[111] As has analysed in depth in chapter 5, s 172 of the Companies Act 2006 in the UK states that directors must have regard to the interests of other stakeholders 'such as the interests of the company's employees' in order to 'promote the success of the company for the benefit of its members as a whole'.
[112] Cynthia A Williams and John M Conley, 'An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct' (2005) 38 Cornell International Law Journal 493; David Millon, 'Enlightened Shareholder Value, Social Responsibility and the Redefinition of Corporate Purpose Without Law' in PM Vasudev and Susan Watson (eds), *Corporate Governance After the Financial Crisis* (Edward Elgar Publishing 2011).
[113] Millon (n 112) 68.
[114] Companies Act 2006, s 172.
[115] Virginia EH Ho, 'Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) 36 Journal of Corporation Law 59, 79.
[116] ibid 99.

insufficient with respect to long-term sustainability.[117] As Millon highlights in his research, even if requirements upon companies to avoid wrongdoing towards its stakeholders result in some improvements, the market driven nature of the ESV – where shareholders create pressure to achieve short-term results – constitutes a significant weakness to the approach.[118] Secondly, whilst the ESV touches upon issues such as long-termism, and the consideration of stakeholders' interests, ultimately it fails to provide a direction such as 'to what degree management should or may deviate from shareholder wealth maximization'.[119] Thus the management of the corporation may fail to balance the interests of all stakeholders, since even though the theory requires the consideration of all stakeholders in terms of corporate governance, it does not propose 'how and when that is to be done'.[120] Lastly and most importantly, much like the SVT, the ESV considers stakeholder interests as merely instrumental. It focuses upon how the interests of employees can be used to improve efficiency and profitability. The ESV, by highlighting long-term shareholder value, can even be interpreted as if to provide 'guidance on how to discriminate between the interests of different stakeholders' in order maximize shareholder value.[121] Therefore, one conclusion can be that employees, along with other stakeholders, are expected to be treated instrumentally, rather than being given intrinsic weight or value in the ESV.

[117] Millon (n 112) 70.
[118] ibid.
[119] Gail Henderson, 'The Possible Impacts of 'Enlightened Shareholder Value on Corporations' Environmental Performance' (LLM thesis, University of Toronto 2009) 27.
[120] Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (n 89) 290.
[121] Sarah Kiarie, 'At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder Value: Which Road Should the United Kingdom Take?' (2006) International Company and Commercial Law Review 329, 340.

2.3 Entity Maximisation as the Corporate Objective: The Entity Maximisation and Sustainability Model

According to Andrew Keay, the current corporate governance approaches, such as the SVT and stakeholder theory have some shortcomings.[122] Keay claims that although shareholder value is seen as more pragmatic and workable, it is not as attractive as stakeholder theory with respect to normative values, such as trust and fairness.[123] However, he also asserts that stakeholder theory is not practical since it is less certain than the SVT.[124] Thus, Keay's response has been to suggest that there is a need for a new model to be developed, which he has termed the Entity Maximisation and Sustainability Model (EMS) as a form of corporate governance.

The new model depicts the corporation as a distinct legal entity, in which it is separate from its constituencies and responsible for its own acts.[125] Keay highlights that a company, established many decades ago, can still exist today with different shareholders and stakeholders, even though it is the same company in the eye of the law.[126] In effect, EMS is built upon this perpetual nature of the corporate entity.

As Keay describes elsewhere, with legal personality, companies are able to 'own property, enter into contracts, and commence legal proceedings in their own name', as if they were an individual.[127] The corporation, as a legal person, can sue or be sued in its own name. This can be seen 'as an attribute of an entity'.[128] The EMS model further asserts that even though corporate personality is a fiction, the entity itself is not a fiction, since the corporation,

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[122] Keay, 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' (n 37) 678.
[123] ibid 679.
[124] ibid.
[125] ibid.
[126] ibid 679-685.
[127] Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (n 89) 5.
[128] Robert W Hamilton, 'The Corporate Entity' (1970) 49 Texas Law Review 979, 981.

which has a legal standing, is separate from its contractors and it cannot be a fiction.[129] With this, Keay rejects the concept which sees the corporation as a nexus of contracts.[130] For example, he addresses the CA 2006, section 33, in which it is stated that 'members are bound to each other and to the company,' in order to exemplify the notion that the firm is a separate entity.[131]

In short, the EMS primarily focuses on enhancing the wealth of the company, which 'is not always measured by how much profit it has made'.[132] In this respect, it differs from both the SVT and other corporate governance theories, all of which focus upon those in whose interests the managers should act. The EMS contends that the importance of long-term wealth creating capacity of the company, and its survival, should be regarded as its objectives, rather than balancing stakeholder interests or maximising shareholder wealth.[133] Thus the name '*sustainability'* in the title of the theory fundamentally refers to the long-term financial strength of the corporation.[134] Indeed, the EMS model is such that it may also consider the issues in relation to social and environmental sustainability, as long as they have an impact on the survival of the company.[135]

From the standpoint of the EMS, even if the objective of the corporation is not balancing the interests of stakeholders, the interests of stakeholders may be considered if they are crucial to success of the entity. For instance, in some circumstances, instead of paying high dividends to its shareholders, employees may be rewarded, since employee loyalty plays

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[129] Keay, 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' (n 37) 680.
[130] ibid 684.
[131] ibid.
[132] ibid 679.
[133] ibid 695.
[134] ibid 691.
[135] ibid 691-694.

a role in the company's success.[136] Another example can be that the EMS rejects the idea of ignoring employee conditions in low-wage countries for the sake of profit maximisation, since this kind of corporate behaviour may damage the brand and the corporate reputation, or in the EMS terms, its long term sustainability.[137]

In order to further support his theory, Keay addresses the Companies Act 2006, s 172, which defines the duty of directors to ensure the success of the company as entity. [138] From this perspective, Key highlights that shareholders can be better off if the company is successful. In other words, the success and the benefit of the members of the company cannot be separated. Although Keay highlights that the notion of maximising corporate wealth leads to improving shareholder wealth, the EMS also considers the distributional justice of the company's success. [139] For example, according to the EMS, corporate profits should be distributed among strategic stakeholders by the directors in order to enhance the wealth and the future sustainability of the company.[140]

The critique

In light of the above evidence, the EMS too has some aspects that may be critiqued. First critique can be levied towards the reification of the corporation as an *entity* within the EMS model. There is no doubt, individuals, such as those who conduct a business, or share in its profit or loss, constitute the main elements of the corporation.[141] As Hamiltons points out:

> …flesh-and-blood people underlie every corporation and are essential to everything a corporation does. Some individual must decide what the corporation is to do; some individual must actually do the required act on behalf

[136] ibid 695.
[137] ibid 685.
[138] ibid 695.
[139] ibid.
[140] ibid.
[141] Hamilton (n 128) 980.

> of the corporation, because manifestly a "legal person" has no arms, legs, mouth, or eyes; some individual will ultimately reap any profits earned by the corporation; and some person must ultimately bear any loss.[142]

Therefore, as Hamilton points out, even if one can conceptualise the corporation as having a legal personality, that personality affects and is affected by some individuals.[143]

Secondly, and more pertinently here, the interests of corporate stakeholders within the EMS model are subordinated to the interests of the entity, namely the corporation itself. The EMS sees corporate stakeholders as means to the corporate ends. Thus, the EMS is simply founded on consequentialist roots. The objective of the corporation gives only instrumental value to stakeholders. For example, if one of the factories of a company is able to make more long-term profit in another location, it can be closed down.[144] Even if this decision affects the interests of stakeholders, such as employees who work in the factory, the EMS favours the interests of the company. Therefore, the EMS, as a corporate objective, is unlikely to offer genuine respect to stakeholders by paying ultimate regard to their intrinsic value.

2.4 Stakeholder Theory

Stakeholder theory constitutes the most important competitor to the SVT. The theory's chief claim is that corporations should give weight to the interests of non-shareholder stakeholders, as well as those of shareholders. Thus, stakeholder theory, can be seen as a more comprehensive approach to that of shareholder theory, encompassing all relevant parties to the corporation.[145]

[142] ibid.
[143] For details, see Freeman's definition of stakeholders in 2.4 below.
[144] Keay, 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' (n 37) 690.
[145] Joan Fontrodona and Alejo JG Sison, 'The Nature of the Firm, Agency Theory and Shareholder Theory: A Critique from Philosophical Anthropology' (2006) Journal of Business Ethics 33, 36.

Before analysing the main concepts of stakeholder theory, exactly who it is that the stakeholders in the present context require identification. Scholars have advanced suggestions in this regard. According to Dodd, three groups of people have interests in the corporation as stakeholders.[146] The first are its stockholders, with their capital, the second are its employees, who provide labour and invest their lives into the operation and business of the company, and the third group are its customers, and the general public.[147] By contrast, Freeman defines stakeholders from a much broader perspective. In his definition, stakeholders refer to 'any group or individual who can affect or is affected by the achievement of the organization's objectives'.[148] According to Clarkson, 'stakeholders are [those] persons or groups that have, or claim, ownership rights, or interests in a corporation and its activities, past, present, or future'.[149] Similarly, according to Donaldson and Preston, 'stakeholders [can be] identified by their interests in the corporation, whether the corporation has any corresponding functional interest in them'.[150]

Having defined such parameters, it is noteworthy that one of the key concepts advanced within stakeholder theory is that corporate managers ought to balance the interests of stakeholders in terms of decision making.[151] As such, the corporate objective, as previously highlighted in this chapter, is part based upon a measure of satisfaction for all corporate stakeholders, rather than just shareholders.

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[146] E Merrick Dodd, 'For whom are Corporate Managers Trustees?' (1932) 45 Harvard Law Review 1145, 1154.
[147] ibid.
[148] R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Pitman Boston 1984) 46.
[149] Max E Clarkson, 'A Stakeholder Framework for Analysing and Evaluating Corporate Social Performance' (1995) 20 Academy of Management Review 92, 106.
[150] Donaldson and Preston (n 55) 67.
[151] H Jeff Smith, 'The Shareholders vs. Stakeholders Debate' (2003) 44 MIT Sloan Management Review 85, 86.

In the SVT, although non-shareholder stakeholders can create value as shareholders, value distribution tends only to favour the latter.[152] However, stakeholder theory contends that the philosophy of the corporate governance should be based upon creating 'as much value as possible for stakeholders'.[153] This may be thought of as very different kind of values, such as *remuneration*, *career promotion* or *psychological job satisfaction,* which stakeholders may seek from the company depending upon their position.[154] Hence a key factor in stakeholder theory is the recognition and importance of stakeholders' interests, rather than only paying attention to mere shareholder value maximization. However, crucially here, for stakeholder theory, the corporation needs to be responsible, and this at least in part accounts for its shareholders too.

A stakeholder theory may specifically be examined from a descriptive, instrumental or normative perspective.[155] From a descriptive perspective, a stakeholder theory can 'be used to describe, and sometimes explain, specific corporate characteristics and behaviours'.[156] Alternatively, stakeholder theory may be justified by employing *instrumentalist* arguments, such as highlighting the role of stakeholder management in the profitability of the corporation.[157] Lastly, a stakeholder theory may be grounded in normative arguments that focus upon intrinsic value of stakeholders.[158] In this respect, one may ask 'why corporations ought to consider stakeholder interests, even in the absence of any apparent benefit'.[159]

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[152] Ghoshal (n 96) 80.
[153] R Edward Freeman and others, *Stakeholder Theory: The State of the Art* (Cambridge University Press 2010) 28.
[154] Antonio Argandoña, 'Stakeholder Theory and Value Creation' (2011) University of Navarra, IESE Business School Working Paper 922, 8.
<http://www.fundacionseres.org/Lists/Informes/Attachments/676/Stakeholder%20theory%20and%20value%20creation.pdf> accessed 19 July 2016.
[155] Donaldson and Preston (n 55) 69.
[156] ibid 70.
[157] ibid 71.
[158] eg Evan and Freeman (n 2).
[159] Gibson (n 6) 245.

However, the examination of stakeholder theories, in the following sections 2.4.1 and 2.4.2, will be based upon two main stakeholder models namely *strategic stakeholder theories* and *non-consequentialist stakeholder theory.*

2.4.1 Strategic Stakeholder Theories

As outlined in earlier sections that discuss the shareholder value theory (SVT), the major argument in favour of the theory are the supposed economic benefits it exhibits by producing ever greater social wealth. [160] Indeed, some instrumentalist proponents of stakeholder theory have also sought to use economic justifications to defend stakeholding.[161] However, the major justification of instrumental stakeholder theories is ‘that companies practising stakeholder management will maximise their financial performance’.[162] Moreover, if the corporation considers the interests of its stakeholders, then profit maximisation may be more stable, long-lasting and effective than in the SVT.

A corporation’s performance can be affected by a variety of stakeholder groups, such as consumers, employees, or suppliers. The interests of stakeholders have an importance in relation to the maximisation of the firm’s performance, as its profitability relies upon cooperation among all constituents.[163] As Jensen points out in order to maximise long-term value, the corporation should not ‘ignore or mistreat any important constituency’.[164]

Changes in the relative importance of capital, and (at least in part) labour in generating value for companies, constitute a strong argument in which to favour strategic/instrumental stakeholder theories. Indeed, nobody can deny the accelerated change

[160] For details see 2.2.1.1 above.
[161] For example, Thomas M Jones, 'Instrumental Stakeholder Theory: A Synthesis of Ethics and Economics' (1995) 20 Academy of Management Review 404.
[162] Niklas Egels-Zandén and Joakim Sandberg, 'Distinctions in Descriptive and Instrumental Stakeholder Theory: A Challenge for Empirical Research' (2010) 19 Business Ethics: A European Review 35, 38.
[163] Lee (n 102) 576.
[164] Michael C Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' (2002) 12 Business Ethics Quarterly 235235, 246.

from a physical to a knowledge-based economy with recent decades - making human intelligence a crucial factor in today's corporate world, which has improved the position of stakeholders in relation to the capital supplier shareholders. As Drucker had observed, technological devices (purchased with shareholders' capital) are not productive tools without qualified employee users.[165] Thus, in addition to shareholders who ensure financial investment in the firm, other stakeholders, such as employees, gain importance by making firm-specific investments.[166] Therefore, the concept of ownership based upon financial investment would appear to, in part, be losing significance. Indeed, in addition to the 'buildings and machinery', it is 'the skills and experience of workforce' that play a vital role in the value of the company.[167] Thus, in this environment, 'when workers leave, their information and skills-the corporation's permanent capital-do go with them'.[168]

The instrumental stakeholder theory (IST) finds some of its economic justifications in strategic management.[169] One such justification in favour of the IST can be related to its competitive advantage.[170] For instance, the IST may specifically depict the role of trust and cooperation as improving the competitive advantage of the firm.[171] According to Jones, for example, the firms pay attention to trust and cooperation 'will experience reduced agency costs, transaction costs, and costs associated with team production'.[172]

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[165] Peter F Drucker, *Post-Capitalist Society* (HarperCollins 1994).
[166] Heli C Wang and Jay B Barney, 'Employee Incentives to Make Firm-Specific Investments: Implications for Resource-Based Theories of Corporate Diversification' (2006) The Academy of Management Review 466, 466.
[167] Charles Handy, 'What's a Business For?' (2002) 80 Harvard Business Review 49, 51-52.
[168] Lawrence E Mitchell, 'Trust and Team Production in Post-Capitalist Society' (1998) 24 Journal of Corporation Law 870, 873.
[169] Freeman and others (n 153) 95.
[170] Jones (n 161).
[171] ibid 404.
[172] ibid 422.

The work of Turnbull further examines the role of stakeholder governance in terms of competitive advantage.[173] In this respect, he reformulates Coase's theory of the firm[174] According to Turnbull, 'firms exist because markets fail to provide information to govern productive activities as efficiently as authority systems or teams'.[175] However, he points out that the authority in the firm should not limit '…operating behaviour of humans which include the ability to receive, process, store and communicate information…' [176] It is here that Turnbull emphasizes the role of stakeholder governance towards ensuring the corporation remains efficient and effective.[177]

Interestingly, stakeholder involvement in corporate governance can increase the market value of the corporation.[178] The empirical research of Fauvera and Fuersta on the German corporate governance system, for example, shows how employee representation on the board may improve the value of the firm, by emphasising its positive role in monitoring of managers, and the communication between the employees and the board.[179] The communication between the employees and the board, on the one hand, ensures that employees draw operational matters to the attention of the board, and this in turn improves the board's decision making. Similarly, such communication reduces the possibility of strikes against the firm, since it engages in an active role of informing employees of the firm's priorities and financial state of health, for example.[180]

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[173] Shann Turnbull, 'Stakeholder Governance: A Cybernetic and Property Rights Analysis' (1997) 5 Corporate Governance: An International Review 11, 16.
[174] According to Coase, firms exist since they are more efficient than the market. For details see 2.2.1.2.
[175] Turnbull (n 173) 16.
[176] ibid.
[177] ibid 17-18.
[178] Larry Fauver and Michael E Fuerst, 'Does Good Corporate Governance Include Employee Representation? Evidence from German Corporate Boards' (2006) 82 Journal of Financial Economics 673.
[179] ibid 703.
[180] ibid.

Another argument in favour of the instrumental role of stakeholders can be connected to reputation of the company in question. Indeed, stakeholder management may improve the reputation of the company.[181] The ethical reputation of the corporation may play a role in terms of competitive advantage and profit maximisation;[182] since the choices of investors, consumers, and prospective employees may be directed by ethical consideration and reputation.[183] As such, if the interests of stakeholders are ignored, this may result in negative financial consequences for the company. [184] A pertinent example here is where the company ignores safety procedures in order to maximize shareholder value,[185] which may then in turn result in substantial negative effects on its profits and reputation.[186]

Apart from the benefits outlined, a stakeholder driven company may also reduce some of the costs and risks that may stem from 'such as legal suits, adverse regulation, consumer boycotts, strikes, walkouts, and bad press'. [187] In fact, there may be further benefits of stakeholder oriented corporate governance.[188] However, the focus of this section has been to merely demonstrate how the corporate objective is shaped by the IST, rather than listing all the benefits of stakeholder theories. In order to understand the theoretical arguments in which strategic/instrumental stakeholder theories are grounded, section 2.4.1.1 will expand upon the

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[181] Freeman and others (n 153) 96.
[182] James Kirkbride and others, 'Corporate Governance Theorising: Limits, Critics and Alternatives' (2008) 50 International Journal of Law and Management 17, 20.
[183] For further examination of how stakeholders can sanction companies according to their non-financial performance, see 4.1.1.1.
[184] The BP oil drill explosion in the Gulf of Mexico in 2010 killed eleven workers, and after the explosion hundreds of million gallons of oil spilled into the Gulf. Henry Fountain, 'Gulf Spill Sampling Questioned' *New York Times* (US edn, 19 August 2013) <http://www.nytimes.com/2013/08/20/science/earth/new-analysis-of-gulf-oil-spill.html?_r=0> accessed 18 June 2013.
[185] 'After months of investigation, the National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling concluded the Macondo blowout could be traced to multiple decisions by BP employees and contractors to ignore standard safety procedures in the attempt to cut costs'. Stout *The Shareholder Value Myth: How Putting Shareholders First Harms Investors* (n 60) 2.
[186] After the BP oil spill in the Gulf of Mexico, BPs stock price decreased from $60 to $30 per share. ibid 1-2.
[187] Freeman and others (n 153) 96.
[188] For broader examination of the role of stakeholders in corporate performance see James E Post, Lee E Preston and Sybille Sauter-Sachs, *Redefining the Corporation: Stakeholder Management and Organizational Wealth* (Stanford University Press 2002) 35-56.

analysis of instrumental stakeholder theories with a specific focus upon the model called the *Team Production Theory*, as noted below.

2.4.1.1 The Team Production Theory

Although Blair and Stout examined the Team Production Theory (TPT),[189] the theory can be traced back to the study of Alchian and Demsetz which emphasized the role of the team production within the firm.[190] Whereas Coase asserted the hierarchical authority of the corporation constitutes the substantial basis of the firm, [191] Alchian and Demsetz opposed this notion.[192] According to them, the relationship between the employer and employee is not different from the relationship between grocer and customer in daily life.[193] A consumer can fire a 'grocer by stopping purchases from him or sue him for delivering faulty products'.[194] This relationship also constitutes the foundation of the TPT demonstrated by Alchian and Demsetz.

Firstly, within TPT, horizontal relationships among team members play a great role 'to produce more than the sum of their individual inputs'.[195] In addition to financial capital, human capital such as employees, executives and local community are supposed to make essential contribution to the success of the public corporation.[196] Therefore, TPT rejects the notion that principal and agent relationship that originates from hierarchical superiority of shareholders. Blair and Stout argue that shareholders, who do not own the public corporation,

[189] Blair and Stout (n 72).
[190] Alchian and Demsetz (n 66) 779.
[191] See 2.2.1.2.1 above.
[192] Alchian and Demsetz (n 66) 777.
[193] ibid 777-778.
[194] ibid.
[195] Blair and Stout (n 72) 270.
[196] ibid 250.

are not the principals.[197] According to them, directors should not be under the control of shareholders or any other stakeholders. [198]

By contrast, directors can consider legal and ethical issues, while pursuing long term profitability of the corporation.[199] Yet, the board is required to act in the best interests of the corporation, rather than balancing all stakeholder interests. In this respect, Blair and Stout put emphasis on 'the business judgment rule [which] often explicitly authorizes directors to sacrifice shareholders' interests to protect corporate constituencies'.[200]

Secondly, in TPT, the public corporation is seen as a nexus of firm-specific contracts.[201] Thus, the issue of 'contractual incompleteness'[202] examined above continues its importance within TPT. However, unlike the arguments advanced in favour of the Shareholder Value Theory (SVT), addressing the lack of contractual protection of shareholders, the TPT argues that non-shareholder stakeholders cannot protect their firm-specific investments ex-ante.[203] Hence, not only shareholders but also other stakeholders are in a vulnerable position, since '[t]heir firm-specific investment is of little or no value outside the firm'.[204] Due to this vulnerability they give control over surplus division to an outsider board.[205] Team members submit themselves to the board, namely '*mediating hierarchs'*, for their self-interests.[206] Blair and Stout explain this motivation in terms of Hobbesian theory,[207]

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[197] ibid 289.
[198] ibid 254.
[199] Peter C Kostant, 'Team Production and the Progressive Corporate Law Agenda' (2001) 35 UC Davis Law Review 667, 671.
[200] Blair and Stout (n 72) 303.
[201] ibid 275.
[202] For details see 2.2.1.2.1 above.
[203] Margit Osterloh, Bruno S Frey and Hossam Zeitoun, 'Corporate Governance as an Institution to Overcome Social Dilemmas' in Alexander Brink, *Corporate Governance and Business Ethics* (Springer 2011) 56.
[204] Osterloh and Frey (n 90) 328.
[205] John C Coates IV, 'Measuring the Domain of Mediating Hierarchy: How Contestable are US Public Corporations' (1998) 24 The Journal of Corporation Law 837, 838.
[206] Blair and Stout (n 72) 274.

which urges people to cede their power to a hierarch for their survival in a state of nature.[208] Similarly, within TPT, control rights and use of corporate assets are assigned to the board, which has a mediating power over other constituencies. This constitutes the key aspect of the TPT, called as '*mediating hierarchy'*.[209]

According to Blair and Stout, the board itself hires team members to control shirking and try to balance the interests of team members.[210] This perspective subtly differs from the TPT theorised by Alchian and Demsetz in which hierarchical and vertical relationships play a role in terms of monitoring. According to Alchian and Demsetz '*a member of the team'* needs to be specialized to check the performance of team members and prevent shirking.[211] This member as a high authority can hire and fire team members.[212] However, rather than this vertical hierarchical relationship 'between a principal and monitor', Blair and Stout highlight the importance of horizontal relationship 'among team members'. [213]

Third, TPT claims that corporate governance issues do not originate from reducing agency cost, but stem from the different constituents of the corporation, whom make firm-specific investments to produce a non-separable output.[214] According to TPT, the output is

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[207] This refers to the Social Contract theory. Hobbes, and various philosophers such as Jean-Jacques Rousseau and John Rawls wrote on the social contract theory. Social Contract theory refers to that there is such a contract between people and the ruler. According to this theory, on the one hand people promise obedience, on the other, the ruler promises the protection of people who are in a state of nature, in other words in a state of anarchy. Patrick Riley, 'The Social Contract and Its Critics' in Mark Goldie and Robert Wokler (eds), *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge University Press 2006) 347-375.
[208] Blair and Stout (n 72) 274.
[209] ibid 250-254.
[210] Alchian and Demsetz (n 66) 780-781.
[211] ibid 781.
[212] Margaret M Blair, 'Corporate Law and the Team Production Problem' (2012) Vanderbilt Law and Economics Research Paper 12-12, 4 <http://ssrn.com/abstract=2037240> accessed 19 July 2016.
[213] Blair and Stout (n 72) 269-270.
[214] Kostant (n 199) 672.

composed of marginal products of the team, but not of each team member.[215] Thus, it could be difficult to determine *each* individual's contribution to team production.[216]

Finally, although the TPT plays an important role as a normative model in rejection of the SVT, shareholder value continues to form as a determining factor, since the model affords voting rights to shareholders.[217] Thus, shareholders in the eyes of the TPT, still maintain 'ultimate control [over the] the directors'. [218]As a consequence, even though TPT recognizes the interests of stakeholders, it fails to give genuine respect to them.

The critique (of instrumental stakeholder theories)

Team Production Theory (TPT), and other instrumental stakeholder theories, would appear to suffer from several apparent weaknesses. Firstly, much like shareholder value theory, instrumental stakeholder theories also apply economic justifications, and address the issue of efficiency. Whilst these justifications can mean profit maximisation, they do not mean value creation for all stakeholders. [219] In effect, one can even interpret the instrumental aspect of stakeholder theories as using stakeholder management in shareholder value.[220]

Secondly, even if corporations maximise profit by considering the interests of stakeholders, they may still externalise some costs placed upon them. From the perspective of instrumental stakeholder theories, companies need to be affected financially when they act badly. Nevertheless, sometimes their misdemeanour may not affect companies in the long

[215] Alchian and Demsetz (n 66) 780.
[216] ibid.
[217] Blair and Stout (n 72) 288.
[218] Michel Aglietta and Antoine Rebérioux, *Corporate Governance Adrift: A Critique of Shareholder Value* (Edward Elgar Publishing 2005) 39.
[219] Robert Phillips, *Stakeholder Theory and Organizational Ethics* (Berrett-Koehler Publishers 2003) 24.
[220] Stuart Cooper, *Corporate Social Performance: A Stakeholder Approach* (Ashgate 2004) 21.

run.[221] Indeed, in some circumstances, when market actors are inadequate to sanction companies, then companies may not be eager to give respect to the interests of stakeholders.[222] Thus, from an instrumental perspective, where there is no business case to consider the interests of stakeholders, then it would seem unlikely to expect companies to offer genuine respect to stakeholders.[223] However, 'ethical duties are mandatory, not optional'.[224]

Thirdly, even where there may be strategic value with respect to stakeholders' interests, one may argue that instrumental approaches may not be as successful as non-instrumental ones.[225] Conversely, instrumental and strategic thinking may even result in detrimental effects upon ethics.[226] For example, if employees, or other stakeholders, realise that ethical policies are justified, instrumentally, such as in terms of the self-interests of the corporation, or its shareholders, they may act in the same way.[227] Thus, one can argue that intrinsic approaches, rather than instrumental ones, may result in better outcomes even for the corporation.[228]

In summary, consequentialist/strategic stakeholder theories, without substantial empirical evidence, do not seem as robust as normative arguments in order to justify stakeholder theory.[229] However, these theories are also morally problematic from an ethical (deontological) point of view, since the respect offered to stakeholders in these theories is

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[221] 'For instance, although Ford may have acted badly in the Pinto affair, and Exxon probably failed to be a moral exemplar in the *Valdez* tanker crash in Alaska, neither company has been badly hurt in the long run'. Gibson (n 6) 245.

[222] For example, in some circumstances the bargaining power of stakeholders might be inadequate. Or the company might be the only supplier in the market (if the market is a monopoly). See 4.1.1.1.5 below.

[223] eg see the 'limits of the business case' in 4.1.1.1.5 below.

[224] Dennis P Quinn and Thomas M Jones, 'An Agent Morality View of Business Policy' (1995) 20 Academy of Management Review 22, 31.

[225] ibid 27–30.

[226] Gibson (n 6) 246.

[227] Quinn and Jones (n 224) 28–29.

[228] ibid 29.

[229] Donaldson and Preston (n 55) 81.

dependent upon good consequences. Even though these theories differ from shareholder value oriented approaches, by considering the interests of other stakeholders, they do not see the moral value of stakeholders as ends in themselves. When stakeholders are approached instrumentally, their interests are considered ‘only if they have strategic value to the firm’.[230] Nevertheless, aside from the instrumental arguments in favour of stakeholder theory, in other words strategic stakeholder theories, other proponents of stakeholder theory may suggest differently – typically advancing non-economic arguments in its favour.

2.4.2 Non-Consequentialist Stakeholder Models

The beneficial outcomes of considering stakeholder interests have been the central focus of corporate governance theories (including stakeholder theory) so far discussed. However, a normative theory can also ask why the corporation should consider the interests of stakeholders even if there are no beneficial outcomes.[231]

If the corporation is seen as 'a community of persons' by placing emphasis upon ‘the nodes of relationships’, intrinsic worth and human dignity can be recognized instead of the instrumental value of what a person does for the firm.[232] As Donaldson and Preston quoted in section 2.4 above, stakeholders can be defined ‘by their interests in the corporation’, rather than their functional outcomes for the corporation.[233] Accordingly, Donaldson and Preston note: ‘…each group of stakeholders merits consideration for its own sake and not merely because of its ability to further the interests of some other group, such as the shareowners’.[234]

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[230] Shawn L Berman and others, ‘Does Stakeholder Orientation Matter? The Relationship Between Stakeholder Management Models and Firm Financial Performance’ (1999) 42 Academy of Management Journal 488, 492.
[231] Gibson (n 6) Page 245.
[232] Fontrodona and Sison (n 144) 39.
[233] Donaldson and Preston (n 55) 67.
[234] ibid.

Non-consequentialist deontological ethics, as introduced in 2.1, can help us to develop such notion of intrinsic value towards stakeholders. Most importantly, from the perspective of deontological ethics, the interests of stakeholders should not be treated as a means in increasing corporate ends.[235] Among the early scholars applying Kantian arguments to stakeholder theory were Evan and Freeman.[236] According to them, stakeholder rights are seen as a key element that needed to be ensured by the corporation and its managers.[237] Indeed, Evan and Freeman had contended that the corporation and its managers should not act to 'violate the legitimate rights of others [in order] to determine their own future'.[238] 'If the modern corporation insists on treating others as a means to an end, then at minimum they must agree to and hence participate (or choose not to participate) in the decisions to be used as such'.[239] Evan and Freeman assert that the objective of the corporation must be redefined in favour of the Kant's principle of *respect for persons*.[240]

Even though the work of Evan and Freeman addresses Kant's *respect for persons* principle, it is the work of Norman Bowie that discusses other formulations of categorical imperatives, namely *universalizability* and *kingdom of ends* as these relate to business practices. According to Bowie, business practices should be consistent with the three formulations of the categorical imperative.[241] However, as Bowie himself emphasises, in terms of the relationship between the corporation and its stakeholders, the second formulation of the categorical imperative, namely *respect for persons* has a more important role.[242]

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[235] Evan and Freeman (n 2) 258.
[236] ibid.
[237] ibid 262.
[238] ibid 259.
[239] ibid 258.
[240] ibid 262.
[241] Bowie (n 3).
[242] ibid 38.

According to Evan and Freeman, stakeholders should have a say in decision making that has a significant impact upon their lives.[243] In their work, they suggest that some stakeholder groups should participate in decision making through their representatives,[244] on 'the stakeholder board of directors'.[245] While Evan and Freeman categorise stakeholder participation in the corporation as a prerequisite for the Kantian *respect for persons* principle, this principle can also be interpreted as 'no stakeholder may be forced to deal with the corporation without his or her consent'.[246] This point of view 'entails not treating [employees] as things, objects, or tools in an effort to achieve one's own goals (as a manager, say) or the goals of the corporation'.[247]

Thus, corporate managers should respect the autonomy of persons.[248] In this regard, Bowie interprets the relationship between the managers and employees at the workplace from a Kantian perspective. Here, he highlights how *coercion* and *deception* are important obstacles in treating employees as ends in themselves since, once it is the case that employees are coerced or deceived, they by virtue intended to be used as a means.[249] Hence, one conclusion from a Kantian perspective can be that managers should not coerce or cheat anyone in any form and instead should work 'to develop the humane, rational and moral capacities of people' within the corporation'.[250]

There are certainly many corporate practices that may be considered questionable in relation to the *respect for persons* principle. For example, can we say child labour is ethical?

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[243] Evan and Freeman (n 2) 263.
[244] '[R]epresentatives of five stakeholder groups, including employees, customers, suppliers, stockholders and members of the local community…' Evan and Freeman (n 2) 263.
[245] ibid.
[246] H Jeff Smith and John Hasnas, 'Ethics and Information Systems: The Corporate Domain' (1999) 23 Management Information Systems Quarterly 109, 116.
[247] Rowan (n 4) 357.
[248] Campbell Jones, Martin Parker and Rene ten Bos, *For Business Ethics* (Routledge 2005) 45.
[249] Bowie (n 3) 48.
[250] Jones, Parker and Bos (n 248) 45.

In fact, one cannot easily say that it is children's 'autonomous decision' to work.[251] Thus itself child labour can be seen as in contradiction with the principle. Or, one can ask 'Is it ethical for managers to fire employees in order to maximise profits?' The answer to this question may be somewhat more complicated than the previous one. As Bowie highlights, if the answer is given from Williamson's point of view,[252] layoffs can be ethical since employees as rational actors accept the risk of being dismissed by agreeing their employment contracts.[253] However, if the managers deceive employees as to the corporation's management policies, without providing the necessary information, they simply violate the principle of *respect for persons.*[254] And so, for this purpose, if no other, employees should not be misled with respect to the nature of their labour contracts.[255]

Nevertheless, even if employees are informed of all the management policies, and agree with the terms of their employment contracts as free persons, in some circumstances these choices may be made with a lack of bargaining power, rather than by free will.[256] As highlighted in the critique of shareholder value theory, employees cannot renegotiate their contracts as shareholders.[257]

Moreover, the existence of asymmetrical information between the management and employees may result in the deception of 'employees regarding the necessity of certain management policies'.[258] Thus, even if employees accept the prospect of being made unemployed through a clause in their contracts – if a manager dismisses an employee for

[251] Crane and Matten (n 15) 102.
[252] According to Oliver Williamson, 'the risks of layoff have been incorporated in the salary contract' Bowie (n 3) 49.
[253] ibid.
[254] ibid 53.
[255] ibid.
[256] ibid.
[257] See section 2.2.2 above.
[258] Bowie (n 3) 53.

profit maximisation purposes, for example – this act can be viewed as being in breach of the *respect for persons* principle.

However, even in such circumstances, employees should be informed. For instance, they should be informed on issues such as the financial situation of the firm.[259] With that sort of information, *deception* and *coercion* could be avoided, and employees can take more rational decisions. Next chapter will further elaborate this intrinsic aspect of information disclosure.[260]

In short, the principle of respect for persons offers us a prescription for the normative questions posed at the beginning of this chapter, *what the corporate objective ought to be.* From the perspective of non-instrumental stakeholder theory, the interests of stakeholders should be treated as ends in themselves, and thus shareholders' interests should not be privileged above those of any other constituent group.[261] Even if treating stakeholders as ends in themselves may result in profit maximisation, the corporate objective should not be to focus upon instrumental value. As the evidence outlined would appear to suggest, corporate managers should offer genuine respect to employees.

Conclusion

This chapter has focused its analysis upon examining what the objective of the corporation ought, in order so it may determine what may be required to improve the interests of employees. Its main focus has been to outline, and critique the instrumental perspective of the key corporate governance approaches. Whilst a number of different corporate governance models were examined, the main debate here was between the *shareholder value theory (SVT)* and stakeholder theories. Two main approaches in favour of the SVT, namely the

[259] ibid.
[260] See 3.3.1 below.
[261] Gamble, Kelly and Kelly (n 48) 151.

property ownership theory and contractual theories were discussed. In this respect, most of the justifications of the SVT (including the *Enlightened Shareholder Value Theory* and *Entity Maximisation Theory*) were predominantly economic and instrumental towards stakeholders, and therefore employees also. The chapter then sought to rebut those arguments for *shareholder value*, before turning its attention to stakeholding, and setting out the arguments in its favour. However, as the chapter has also noted, some of the arguments in favour of stakeholder theory are themselves economic, especially those which are based upon *team production theory* (TPT) and the importance of fostering productive relationships with valuable employees. Other arguments moved beyond the economic realm to consider the importance of such values as participation within decision-making structures, which significantly affect the life of the employee, the protection of human rights, and so forth.

Within the final area of analysis, the chapter argued that the objective of the corporation should be redefined from the perspective of non-consequentialist stakeholder theory. In this respect, intrinsic value of persons had provided with the fundamental basis upon which we may argue for the elevation of employee interests. However, Kant himself does not specify how this elevation of employee interests is to be achieved, such as what strategies are required or ought to be employed. His work merely gives weight better regarding the interests of employees, but leaves open to the reader the best way of achieving this.

Furthering the analysis offered here, chapter 3 shall now turn to focus on a key issue within this work: transparency. The chapter will argue that transparency must be a core part of any attempt to deliver upon the appropriate treatment of employees, which this chapter has thus far sought to defend. Chapter 3 shall also demonstrate more specifically, that there are two central reasons why transparency has this role to play.

The first reason shall be that transparency has *intrinsic* value. Transparency is good *in and of itself*. Thus a necessary, and 'non-substitutable' part of the very requirement that companies treat employees with genuine respect and that they must treat employees honestly and openly. The second reason shall be that transparency has *strategic* value. In other words, transparency (besides having its own intrinsic value) is also a good, effective, strategy for ensuring that companies accomplish the other things that are part and parcel of ensuring employees are treated with genuine respect. In this case, since the argument is not that transparency is necessary, but only that it is strategically valuable, this second argument shall highlight its vulnerability to the claim that transparency is a rather poor strategy, compared to alternative means of forcing companies to treat employees well. Of course, in recent years many have sought to belittle transparency precisely from this perspective, comparatively speaking. Thus much of the following chapter, then, shall be devoted to examining and rejecting those criticisms, highlighting that quite apart from its intrinsic value, transparency is often a better strategy too.

Chapter 3

Transparency and the Interests of Employees

Introduction

That employees deserve genuine respect from the corporation by whom they are employed was the overarching view and conclusion advanced within the previous chapter. However, what exactly it is that is required in order to ensure companies exhibit such respect towards their employees remains a persistent consent, and one that is yet to be determined.

As suggested in the conclusion to the preceding chapter, ensuring that companies treat employees appropriately means ensuring that they are transparent towards and about their employees. To this end, this chapter shall advance the view that there are two major reasons for advocating the use of transparency.

The first reason shall posit the view that transparency is *intrinsically* desirable. If part of treating employees with genuine respect is about treating them honestly and openly, then this in and of itself *necessitates* transparency towards them as individuals.[1] Transparency then is not merely one way among a number of potential ways to ensure companies behave well, but rather it would appear the only means by which to satisfy this requirement; honestly, openly and effectively. Accordingly, this chapter shall examine evidence in support of this view.

The second reason is that transparency also has *strategic* value. Therefore, respecting the interests of employees may not only *necessarily require* transparency. Indeed, on

[1] See 2.4.2 above.

occasions, there may be more than one way – or *strategy* – to ensure the respectful treatment of employees. However, the argument here shall be that transparency, even when it is not mandatory, will provide a comparatively good strategy – and a comparatively better one, when compared to alternative strategies – to ensure companies deliver upon their obligations insofar as respecting employees' interests are concerned.

The suggestion that transparency is a better – even superior – strategy for changing corporate behaviour is a controversial proposal, which has been the subject of widespread academic debate. Transparency is often perceived as weak, ineffectual and easy way for companies to pretend to be good, whilst actually doing bad.[2] This chapter, in part, aims to challenge this criticism. It accepts that transparency is not a perfect solution in all circumstances, but asserts that transparency possesses more strengths, and fewer weaknesses, as a strategy than most critics are prepared to acknowledge; often comparing favourably to alternative strategies.

As the preceding analysis has alluded, the defence of transparency is based upon both its intrinsic and comparative strategic value. The distinction – between intrinsic value and strategic worth – is fundamental to the analysis in this chapter, and is worthy of pausing to illustrate, by reference, with simple example.

Imagine a company, Parent (P). P owns a Subsidiary (S), which is based in a foreign country, where S manufactures a product. To make that product, S employs workers who must process a chemical (C). Because of its properties, C has the potential to cause harm to the workers concerned. However, precautions can be taken to reduce (although not entirely eliminate) the risks of harm arising. Some precautions are taken by S, however, accidents do

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[2] See Joan Fontrodona and Antonino Vaccaro, 'Academic View: The Myth of Corporate Transparency' (*The Economist,* 7 September 2010) <http://www.economist.com/blogs/newsbook/2010/09/myth_corporate_transparency> accessed 19 September 2016.

happen, and workers, from time to time, are injured. S makes a large profit, the proceeds of which are paid up to P.

For now, rather than considering what transparency would require either P or S to do in the given circumstances, it is worth pointing out how the intrinsic and strategic value of transparency applies differently to each scenario.

First, S, and arguably P, have obligations towards those working with C, which derive from the *'intrinsic value'* of transparency.[3] In this respect, they must be open and honest with employees about what they are being asked to do within the frame of their work for S. However, if they fail, they may try to 'make up' for this failure by treating the workers well in other ways. For example, S may be opaque or even lie to the employees about the dangers of C. It may then justify such lies by pointing out that the employees are paid a premium to handle C and thus this should exceed what any reasonable employee, in that particular country, having been fully informed about C, would expect to command in return. In such a case, looked as a whole, S's employees would be treated 'well' given the premium they earn. But openness has an intrinsic value, which must necessarily be respected.[4] In this respect, S, and perhaps P, must be transparent towards the affected employees, so *employees* can decide if the (apparently generous) premium they are to be paid sufficiently justifies the risks to their health, and so take precautions or decide against it, as appropriate.

Second, it is also possible to provide other grounds upon which one may impose further obligations upon S, and upon P, to ensure openness, not because of any intrinsic requirement, but because this may, in a good way, offer an effective strategy towards improving S's treatment of employees. Suppose that S is recording too many accidents in respect of work with chemical C. The premium S pays its workers ensures that there are

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[3] See 2.4.2 above and 3.3.1 below.

[4] For further details, see 3.3.1 below.

always enough who are willing to take the risk of working with C but, in spite of this, the accident rate remains worryingly high. There may be many ways[5] to force S into introducing greater safety precautions. For example, P and S can be required to ensure greater transparency with respect to the accident rate relating to the use of C, the levels of compensation secured by its workers, the steps the companies have taken to reduce accidents, and the levels of profit earned from the continued production of the product, and so on. Of course, information may already be demanded by a range of actors beyond the company's employees.[6] Customers or shareholders, for example, may be the recipients of such information by virtue of their status. Indeed, it may be claimed that giving such information to such groups is not intrinsically – or necessarily – required. Nevertheless, requiring such a disclosure will sometimes better achieve the goal desired – for example, accident rates, which may improve safety measures and thus a reduction in the number of injuries sustained by workers – when compared to alternative strategies, such as formally regulating or banning the use of the chemical.

Having clarified the fundamental difference between intrinsic value and strategic worth in relation to transparency, the remainder of this chapter shall now address the following areas within its analysis: Within section, 3.1, the theoretical features of transparency in this context shall be examined, in order so we may better understand its meaning and objectives. Section 3.2 shall draw a typology of regulatory strategies that may be employed to improve the interests of employees. Following on from this, section 3.3 shall turn to consider the advantages and disadvantages of transparency when compared to the potential regulatory strategies that were analysed in 3.2. In this section, the arguments

[5] For instance, the use of C may be controlled, that is the regulation of the processes by which C may be used may be prescribed, or the use of C may be banned. Alternatively, the civil remedies available to employees may be enhanced, enabling injured workers to secure appropriate compensation etc.

[6] See 4.1.1.1 below.

detailing the intrinsic and strategic aspects to transparency, which may help us to see it superior to other regulatory strategies, shall be discussed alongside the limits of transparency.

3.1 Conceptualising Transparency

The term 'transparency' derives its meaning from the combination of the words 'trans' (*trough*) and 'parere' (*appear*) in mediaeval Latin.[7] and is mainly used to refer to 'the quality of being done in an open way without secrets'.[8]

However, when transparency is seen as mere *openness*, it may be demonstrated as a 'passive attribute' rather than an active one. [9] In order to depict this passivity, the scholar Schauer addresses Isaiah Berlin's distinction between 'positive and negative liberties',[10] by demonstrating how transparency fits in the concept of negative liberty. According to him:

> A more positive conception of transparency might undergird efforts to make information easily usable rather than simply available—the difference between a requirement of publication and a requirement of access, for example—but most existing conceptions of transparency are far more about availability than about actual usability.[11]

This chapter, however, demonstrates transparency as *a more positive conception*. This conceptualisation of transparency shall refer to the usability of information without any request by the end user, rather than mere availability. It should be conceptualised as the consistent disclosure of usable information, rather than mere answerability upon a request.[12]

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[7] 'Transparent', (*Oxford Dictionaries,* Oxford University Press 2016*)* <http://www.oxforddictionaries.com/definition/english/transparent> accessed 13 June 2016.

[8] 'Transparency', (*Cambridge Dictionary,* Cambridge University Press 2016) <http://dictionary.cambridge.org/dictionary/english/transparency> accessed 21 July 2016.

[9] Frederick Schauer, 'Transparency in Three Dimensions' (2011) University of Illinois Law Review 1339, 1343.

[10] According to Berlin, negative liberties refer to a situation in which a person(s) is free from any intervention in his/her activities. In positive liberty, on the other hand, the individual is governed by someone or an authority for 'one prescribed form of life'. Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press 1969) 131.

[11] Schauer (n 9) 1344.

[12] This refers to 'a more positive conception of transparency' described by Schauer, ibid.

From this perspective; even if a corporation is open and answerable, this may not be sufficient to meet the requirements of transparency. The information offered by the corporation must also be 'complete and easily located (visible), and the extent to which it is usable and verifiable (inferable)' made obvious in order for requirement of transparency to be met.[13]

It is also crucial to note that transparency differs in subtle ways from the mere act of disclosure. Although both concepts share similar meanings, and describe similar acts, transparency refers to a much broader concept than disclosure. In this respect, the concept of the 'right to know' or 'freedom of information' could be a good analogy to demonstrate the difference between transparency and disclosure. *Freedom of information* paves the way for a transparent environment. However, *freedom of information*, is primarily about the *right* to ask an organisation for the information one is entitled to.[14] Yet, this idea of information *availability* is not sufficient for the broader requirement of transparency, since in some circumstances individuals may not be capable of managing, or indeed interested, in dealing with demanding information.[15] Indeed, to fulfil the requirement of transparency, information should 'travel instantly and without obstruction, [such that it is] equally clear and perceptible to everyone'.[16]

In short, though transparency is a broader concept than information disclosure, and requires more than mere disclosure, disclosure itself still constitutes a significant aspect of transparency. Crucially, it should be noted that information disclosure must possess certain

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[13] Greg Michener and Katherine Bersch, 'Conceptualizing the Quality of Transparency' (1st Global Conference on Transparency, Rutgers University, Newark, 17-20 May 2011) 8. http://gregmichener.com/Conceptualizing%20the%20Quality%20of%20Transparency--<Michener%20and%20Bersch%20for%20Global%20Conference%20on%20Transparency.pdf> accessed 29 September 2016.

[14] For instance, according to the Freedom of Information Act 2010 in the UK, persons can make a request for information from public sector organisations. For further information, see 4.3.4 and 5.1.5.1 below.

[15] Some of these circumstances are analysed in details in 3.3.3 below.

[16] Mia De Kuijper, *Profit Power Economics: A New Competitive Strategy for Creating Sustainable Wealth* (Oxford University Press 2009) 42.

vital elements to contribute to ensuring transparency is effective, such elements are: accuracy, completeness, relevancy and simplicity, dialogue and participation by relevant actors and finally, historical and forward looking information. These elements are examined in turn below.

3.1.1 Accuracy

The accuracy of information is one of the key elements of transparency. [17] Even where a corporation discloses voluminous amounts of information, the content of the disclosure may be inaccurate. Verification can however make certain disclosures more usable, visible and inferable.[18] Thus, the information should be verified and monitored by internal and external mechanisms.[19] These may include mechanisms such as 'audit requirements, public penalties, [or exercising] a private right of action', all of which can play a significant part to ensuring transparency is upheld.[20]

3.1.2 Completeness

Information disclosure should not be incomplete since 'incomplete disclosure leaves people ignorant'.[21] For instance, a company may only disclose positive information publicly for strategic purposes. Indeed, some companies are prone to avoiding the disclosure of information on the performance of the company and its activities which it feels may have a negative effect upon its reputation.[22] In fact, evidence suggests that companies generally may use information disclosure as an 'impression management' tool, only disclosing the

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[17] Michener and Bersch (n 13) 1; William BT Mock, 'On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency' (1999) 17 Journal of Computer & Information Law 1069, 1081.
[18] Michener and Bersch (n 13) 2.
[19] Such internal and external mechanisms will be further examined in chapter 4, 5 and 6.
[20] William M Sage, 'Regulating Through Information: Disclosure Laws and American Health Care' (1999) Columbia Law Review 1701, 1822.
[21] Omri Ben-Shahar and Carl E Schneider, 'The Failure of Mandated Disclosure' (2011) University of Pennsylvania Law Review 647, 688.
[22] Allison M Snyder, 'Holding Multinational Corporations Accountable: Is Non-Financial Disclosure the Answer' (2007) Columbia Business Law Review 565, 605.

information they feel is appropriate.[23] Such behaviour can only be regarded as 'pseudo-transparency'.[24] Therefore, to attain full transparency, companies should disclose a comprehensive range of information, rather than 'cherry-pick' the data they share.

3.1.3 Relevancy and Simplicity

Information needs to be relevant to the needs of the users.[25] Individuals with irrelevant and unproductive information are likely to make poorer decisions than those individuals with no information at all.[26] Being misinformed is therefore a major issue.

Moreover, where a company discloses a plethora of complex information, this does not necessarily result in overall transparency. As Henriques notes that, 'transparency is a function of communication, not a function of the quantity of information technically disclosed'.[27] Research has also found that although increasing the amount of information disclosed eventually enables information users make better decisions at some point, too much information may result in a decrease in the effectiveness of the decisions.[28]

In keeping with this requirement, clear and understandable presentation of information plays a great role in transparency.[29] The discloser should use plain language.[30] In some circumstances, disclosure may be through the use of simplified labelling schemes. It

[23] Reggy Hooghiemstra, 'Corporate Communication and Impression Management–New Perspectives Why Companies Engage in Corporate Social Reporting' (2000) 27 Journal of Business Ethics 55.
[24] Don Tapscott and David Ticoll, *The Naked Corporation: How the Age of Transparency Will Revolutionize Business* (Simon and Schuster 2003) 39-40.
[25] Paula J Dalley, 'Use and Misuse of Disclosure as a Regulatory System' (2006) 34 The Florida State University Law Review 1089, 1115.
[26] ibid 1120.
[27] Adrian Henriques, *Corporate Truth : The Limits to Transparency* (Earthscan 2007)163.
[28] Kevin L Keller and Richard Staelin, 'Effects of Quality and Quantity of Information on Decision Effectiveness' (1987) 14 Journal of Consumer Research 200, 211.
[29] Mock (n 17) 1081.
[30] For this purpose, for instance, the regulatory authority may require the discloser party to use plain language. One example in this regard can be the requirements of the Securities Exchange Commission (SEC) in the United States. Dalley (n 25) 1104.

may be through the use of signs or symbols, rather than language,[31] whilst 'third-party mediators' may also improve the simplicity and usefulness of information.[32]

3.1.4 Dialogue and Participation by Relevant Actors

The conceptualisation of full transparency should not be limited to mere disclosure, but should also include two-way dialogue, such as listening to recipients and their enquiries. Two-way dialogue ensures that the information disclosers understand the actual needs of the information users.[33] If the company consult with its stakeholders, this consultation makes the content of its disclosure more legitimate and credible.[34] Therefore, companies, for example, must 'consult with their employees' for proper disclosure.[35]

Furthermore, greater transparency may require a learning process, based upon feedback from the recipient, and a response from the disclosing party.[36] For example, Fung *et al*. use the term 'Transparency Action Cycle' to describe the relationship that stems from the dialogue between the information discloser and the information user.[37] According to them, such a cycle may lead to improved behaviour on the part of both the information user and the discloser.[38]

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[31] Ryan Calo, 'Against Notice Scepticism in Privacy (and Elsewhere)' (2011) 87 Notre Dame Law Review 1027.
[32] Dalley (n 25) 1125.
[33] For example, two-way dialogue can help companies see '[w]hat do employees want from their place of work'. See Department of Trade and Industry (DTI), 'High Performance Workplace—Informing and Consulting Employees', (Consultation Document July 2013) para 2.7-2.9 <http://library.umac.mo/ebooks/b13615178.pdf> accessed 16 August 2016.
[34] Carol A Adams, 'The Ethical, Social and Environmental Reporting- Performance Portrayal Gap' (2004) 17 Accounting, Auditing & Accountability Journal 731,733.
[35] Janet Williamson, 'A Trade Union Congress Perspective on the Company Law Review and Corporate Governance Reform since 1997' (2003) 41 British Journal of Industrial Relations 511, 524.
[36] This process is defined as 'transparency action cycle' by Fung *et al*. Archon Fung and others, 'The Political Economy of Transparency: What Makes Disclosure Policies Effective?' (December 2004) Ash Institute for Democratic Governance and Innovation, John F Kennedy School of Government OP-03-04, 9 <http://ssrn.com/abstract=766287> accessed 20 July 2016.
[37] ibid 16.
[38] ibid.

3.1.5 Historical and Forward-Looking Information

Some of the information to be disclosed by the corporation may relate to the past performance of the company in terms of employee issues, such as the rate of employee injuries, for example. This kind of information can prove useful in analysing the performance of the companies in a particular country or sector.

However, transparency must be based upon both historical and forward-looking information. For example, information on future health and safety risks should be disclosed to employees before they start their job, in order to protect employees against accidents, reduce injuries and save lives.

Another example is the information disclosure related to continued job security. Where the company's management decides to change the company's location or close one of its sites and transfer staff, such information should be conveyed to employees since they may suffer from the alteration in working arrangements.[39]

In summary, to achieve greater transparency, information disclosure should be accurate, complete and made relevant and simple. Those disclosing information should also be prepared to engage in dialogue with its end users (such as employees) and include both historical and forward-looking information for their use.

3.2 Towards a Typology of Control Mechanisms with respect to Employee Interests

In order to better understand what is distinctive about transparency as a strategy, and how transparency can ensure that corporations respect the interests of employees, it is useful to situate transparency in the frame of a larger typology of strategies; which shall allow us consider the comparative strengths and weaknesses of transparency as a whole. Furthermore,

[39] See 5.1.3.4 below.

to make it more useful, some 'structuring' or 'ordering' of the different strategies making up such typology is needed. To be sure, there may be many different orderings in this respect. One useful way to think about such ordering is the extent to which strategy may interfere with, or impinge upon, the free market such that, in a sense, all forms of regulation do with an aim of control.[40]

For the benefit of illustration, we may begin our analysis by considering the effect of *an unregulated market regime*. In the frame of an '*unregulated market regime*', companies are free to contract for the inputs they require from suppliers, and in turn, to supply the outputs they produce on to their own consumers. Thus the relationships with these suppliers or consumers is governed by the terms of the contracts negotiated with such party, whilst the terms themselves will reflect the market conditions in which contract exists, including, for example, the relative bargaining power of the respective parties.

Such relationships already depend, to degree, upon the law of contract to enforce such contractual terms where the same are not met. In this respect, the *free market* is already built upon a body of law, but a law limited to enforcing the obligations of each party, which they have themselves made.[41] However, a key question in this context is: What strategies, then, might be sought to control or alter the outcomes which this free market generates? The following typology attempts to identify the most obvious strategies, beginning with transparency.

[40] In this respect, transparency/disclosure regulations may be seen as 'less intrusive' than other regulations. See Charlotte Villiers, *Corporate Reporting and Company Law*, vol 5 (Cambridge University Press 2006) 30.

[41] In a longer work, one might explore how far features of the law of contract such as its readiness to imply terms into the parties' contracts based on 'trade custom' or 'common standards of fair dealing' challenge this limited view of the law of contract, but that is beyond this thesis.

3.2.1 Transparency and Disclosure Obligations

In the market model discussed above, relationships are largely based on the bargains those dealing with the company were able to strike, whilst such bargains themselves will have been built upon the principle of *caveat emptor*.[42] In accordance with this principle, active *misrepresentation* is outlawed, however, beyond this, any party (including a company dealing an employee or a consumer, for example) is not required to reveal information they feel may be of advantage to the party with whom they are attempting to bargain.[43]

Transparency and disclosure obligations clearly move beyond the above baseline requirements. Such obligations require positive openness, not merely to refraining from the act of misleading or not revealing to the other part relevant information.[44] Transparency obligations, for example, may require the discloser 'to reveal unfavourable news about public risks or faulty performance that would not otherwise be made public'.[45] Although concepts pertaining transparency and disclosure have been introduced in 3.1, further elaboration upon them is required as this relates to the typology of regulatory strategies. Of primary importance here is the consideration of the distinguishable ways in which this form of regulation may improve the position of employees.

First, transparency, as a regulatory strategy, may result in behavioural change.[46] Owing to the visibility of others, people will often discipline their own conduct according to

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[42] The concept of 'caveat emptor' 'tells buyers to beware of sellers'. Gerrit D Geest, 'The Death of Caveat Emptor' (University of Chicago Law School Law and Economics Workshop, 18 February 2014) http://www.law.uchicago.edu/files/files/degeest_paper_0.pdf> accessed 20 July 2016.

[43] For a brief history on the concept of Caveat Emptor see Marco Pistis, 'Italy: From Caveat Emptor to Caveat Venditor - A Brief History of English Sale of Goods Law' (*Mondaq,* 4 June 2006) <http://www.mondaq.co.uk/x/40206/Arbitration+Dispute+Resolution/From+Caveat+Emptor+to+Caveat+Venditor+a+Brief+History+of+English+Sale+of+Goods+Law> accessed 20 July 2016.

[44] For example, companies must disclose specific information with respect to health and safety issues in accordance the employment law. See 5.1.3.2 below.

[45] Fung and others (n 36) 16.

[46] ibid.

how they think will ‘see [or] judge their conduct’.[47] Transparency may affect the behaviour of a company’s directors, for example, since the feeling of ‘being watched’ or monitored may alter the behaviour of individuals in a position of responsibility.[48] Indeed, harbouring a sense of shame may play a role in this regard. In some circumstances, public exposure, namely *shaming*, may further constitute a type of sanction.[49] Assuming, for example, that a woman convicted drug possession is ordered to stand in a public space and wear a t-shirt stating she had been found to possess cocaine.[50] Using this example, it is indicative that shame and public evaluation can be said to play a major role in behavioural change, since the behaviour of a person can be affected by the evaluative views of others, which is not restricted to a personal context.[51] For instance, shame in a corporate context may play a vital role in ‘enforcing social norms against excessive CEO pay [awards]’.[52] Indeed, a related benefit may be an improvement in the behaviour of corporations themselves, since such shame may have financial implications.[53]

Second, improved transparency may strengthen the bargaining position of those dealing with the company. Such a strategy may not confer upon one additional rights, but may make it more likely one is able to bargain for better rights themselves; or at the least will

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[47] John Roberts, 'The Manufacture of Corporate Social Responsibility: Constructing Corporate Sensibility' (2003) 10 Organization 249, 254.
[48] For example, according to a research conducted by Newcastle University, ‘the feeling of being watched makes people act more honestly, even if the eyes are not real’. BBC News, ‘’Big Brother Eyes 'Boost Honesty'’ (28 June 2006) <http://news.bbc.co.uk/1/hi/health/5120662.stm> accessed 20 July 2016.
[49] Stephen P Garvey, 'Can Shaming Punishments Educate?' (1998) 65 The University of Chicago Law Review 733.
[50] ibid 734.
[51] Mark R Leary and Robin M Kowalski, 'Impression Management: A Literature Review and Two-Component Model' (1990) 107 Psychological Bulletin 34, 34.
[52] Sandeep Gopalan, 'Shame Sanctions and Excessive CEO Pay' (2007) 32 Delaware Journal of Corporate Law 757, 762.
[53] New York University, ‘Shame 2.0’ (NYU Stories, 6 April 2015) <https://www.nyu.edu/about/news-publications/nyu-stories/jennifer-jacquet-on-shame.html> accessed 20 July 2016.

be better placed to enforce such rights, as they are made available to bargain for.[54] Transparency can thereby inform and educate employees.[55] For example, information with respect to the health and safety risks or hazardous chemicals facing employees within the course of their work will allow for employees to demand a *risk premium*.[56] As results, such risks and any related premium can be negotiated as a part of an employee's 'wages and benefits'.[57]

Once information is received and processed by relevant stakeholders, this may naturally affect their perception of a corporation.[58] Information can influence the choices of individuals make, which may constitute a business case for companies.[59] Informed individuals such as consumers, employees and investors can thereby place pressure upon corporations in respect of their performance, especially as this relates to employees and conditions therein.[60]

Furthermore, one may also ask what are the advantages and disadvantages of transparency to the strategies that may be alternative to transparency? The remainder of the chapter will particularly focus on this question. However, before proceeding, those possible strategies will be examined briefly.

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[54] Era Dabla-Norris and Elisabeth Paul, 'What Transparency Can Do When Incentives Fail: An Analysis of Rent Capture' (International Monetary Fund (IMF) Working Paper WP/06/146 June 2006) 19 <https://www.imf.org/external/pubs/ft/wp/2006/wp06146.pdf> accessed 17 August 2016.

[55] Philip Lewis, Adrian Thornhill and Mark Saunders, *Employee Relations: Understanding the Employment Relationship* (Financial Times Prentice Hall 2002) 264.

[56] Dalley (n 25) 1121.

[57] ibid.

[58] David Weil, 'The Benefits and Costs of Transparency: A Model of Disclosure Based Regulation' (2002) Boston University School of Management Working Paper 2004-12, 7 <http://ssrn.com/abstract=316145> accessed 20 July 2016.

[59] For a more detailed analysis on the Business Case for transparency see 4.2.1.1 below.

[60] See 4.1.1.1 below.

3.2.2 Employee Participation

The interests of employees may be improved through the availability of participation rights. Participation rights may take two forms; first, that employees may be given some financial rights or, second, employees may be offered some rights with respect to operational participation in the governance of the corporation.[61] These participation rights shall be addressed in turn.

First, the financial participation of employees can be achieved through a variety of schemes such as profit sharing, cash bonuses, the distribution of stock options or shares, or through employee stock ownership plans (ESOP)s.[62] Employees could earn cash bonuses in addition to their fixed salaries through profit sharing schemes, or the remuneration could be paid by way of corporate equity.[63] In short, some fraction of the ownership of the corporation may be distributed to employees and thus the employee's interests can be improved economically.

Employee Stock Ownership Plans (ESOP)s in particular have been implemented across the UK, US and within a number of European countries over recent decades.[64] For example, the European Union (EU) has been promoting the concept of *employee share ownership* following the publication of the 'Promotion of Employee Participation in Profits and Enterprise Results (PEPPER)' report in early 1990s.[65] Indeed, *employee share ownership* continues growing in popularity as the most preferred strategy in the EU insofar as improving

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[61] Andrew Crane, Dirk Matten and Jeremy Moon, 'Stakeholders as Citizens? Rethinking Rights, Participation, and Democracy' (2004) 53 Journal of Business Ethics 107, 112.
[62] Milica Uvalic, 'Workers' Financial Participation in the European Community' (1993) 14 Economic and Industrial Democracy 185, 187-188.
[63] Daniel Vaughan-Whitehead and others, *Workers' Financial Participation: East-West Experiences* (Labour –Management Relationship Series No 80, International Labour Office 1995) 2.
[64] Andrew Pendleton, *Employee Ownership, Participation and Governance: A Study of ESOPs in the UK,* vol 4 (Routledge 2002) 4-5.
[65] Milica Uvalic, *Social Europe, the Pepper Report: Promotion of Employee Participation in Profits and Enterprise Results* (Supplement 3/91, Commission of the European Communities, Directorate-General for Employment, Industrial Relations and Affairs 1991).

the interests of employees is concerned. The European Commission recently published a study focusing on this in particular, namely 'the Promotion of Employee Ownership and Participation' in which it highlights the benefits of employee financial participation.[66] According to the study, the future of employee financial participation is 'associated with a more equitable distribution of wealth and support social cohesion'.[67]

Second, either as an alternative to or as an addition to financial rights, employees may be given a separate right to participate in the corporate decision making process. In this respect, they may be included as actors within the governance of the corporation.[68] For instance, they might have a right to elect members of the board of directors, have representatives on the board, or directors' fiduciary duties can be expanded to encapsulate employees.[69] Board elections, for example, can be ratified by a majority of employees of the firm.[70] For this purpose, employees may have codified rights to participate in board decisions.[71] An example of such a co-determination system operates in Germany, where employees participate in the decision-making process.[72] Using the present example, employee participation occurs via workers councils at the plant, and by employee representation on the firm's supervisory board.[73]

In summary, employee participation can be seen as a strategy to improve the interests of employees in the corporation. 'Increased employee wealth and wages' can be one of the

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[66] Jens Lowitzsch and Iraj Hashi, 'The Promotion of Employee Ownership and Participation' (Study Prepared for European Comission's DG MARKT, October 2014) <http://ec.europa.eu/internal_market/company/docs/modern/141028-study-for-dg-markt_en.pdf> accessed 20 July 2016.

[67] ibid 106.

[68] For instance, Greenfield suggests that workers should have some roles in corporate governance. See Kent Greenfield, 'Place of Workers in Corporate Law' (1997) 39 Boston College Law Review 283 283, 287.

[69] ibid.

[70] See Dennis M Ray, 'Corporate Boards and Corporate Democracy' (2005) 20 The Journal of Corporate Citizenship 93, 93.

[71] Crane, Matten and Moon (n 61) 112.

[72] Michael Poole, Russell Lansbury and Nick Wailes, 'A Comparative Analysis of Developments in Industrial Democracy' (2001) 40 Industrial Relations: A Journal of Economy and Society 490, 505-510.

[73] ibid 505.

positive consequences of ESOPs.[74] However, being able to have a say in the issues that most affect their interests, through a means of operational participation rights in the governance of the corporation, is also seen to be crucial.[75] Conversely, it is worth observing, in some circumstances, employee participation may not always improve, and may even reduce, the interests of employees. For example, if an employee ownership plan is poorly designed, it may affect the interests of employees negatively.[76]

In this respect, employees may 'lose not only their jobs and careers, but their retirement stakes [too], where the company leads to bankruptcy.[77] Interestingly, share ownership plans might result in reduced rights in some areas. Recent legislation in this area, for example, in some instances will require employees to '[give] up some of their employment rights in exchange for shares'.[78]

3.2.3 Tort Law and Privately Enforceable Rights

Through the domain of tort law, individuals are empowered with a range of rights through which they may frame their interactions with the corporation. In our own case, this means employees can identify the rights conferred upon them, and ensure the way a company

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[74] Steven F Freeman, 'Effects of ESOP Adoption and Employee Ownership: Thirty Years of Research and Experience' (2007) Organizational Dynamics Working Papers 07-01, 6. <http://repository.upenn.edu/cgi/viewcontent.cgi?article=1001&context=od_working_papers> accessed 20 July 2016.

[75] For example, Strauss argues that 'participation helps satisfy employees' nonpecuniary needs including those for creativity, achievement and social approval. It contributes to a sense of competence, self-worth and self-actualization. It makes use of the whole person'. George Strauss, 'An Overview' in Frank Heller and others (ed), *Organizational Participation: Myth and Reality* (Oxford University Press 1998) 8.

[76] ibid 9

[77] ibid 9.

[78] One example can be the Enterprise and Regulatory Reform Act 2013 in the UK. For a discussion on this issue see Graeme Dickson and Chris Allan, 'Selling your rights... for what?' (The Journal of the Law Society of Scotland, 19 August 2013) <http://www.journalonline.co.uk/Magazine/58-8/1012941.aspx> accessed 20 July 2016.

treats them is correct; whereupon a failure to do so may result in some form of enforcement against the company. [79]

From a *libertarian perspective*,[80] tort law may well be seen as one of the most preferable controlling strategies when compared to regulatory law, which intentionally '…places constraints on people's lives and [, in a commercial context,] how they run their businesses…'[81] Tort law as a strategy relies heavily upon the use of *private action* by the employee, that is to say, without the state responsible for the enforcing the requisite standard of behaviour.

Within the sphere of such private action, two types of rules, namely *property rules* and *liability rules,* can be discerned.[82] According to Calabresi and Melamed, these two types of rules interfere with the market to differing degrees.[83] A *property rule* requires minimum state intervention, since it is based upon a market solution, namely an actual agreement by the parties – to permit conduct, other than that which the law may prescribe.[84] From this perspective, a company may negotiate with the employee to secure the agreement, permitting itself to act in particular manner, which may be tantamount to a breach of the usual standard required.[85] A liability rule, on the other hand, is one whereby the law specifies what behaviour is expected, and what compensation individuals are entitled to as a result of a given

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[79] John R Boatright, 'Ethics and Corporate Governance: Justifying the Role of Shareholder' in Norman E Bowie (ed), *The Blackwell Guide to Business Ethics* (Blackwell 2002) 38.
[80] Libertarian perspective favours less state intervention with the free market, Nicholas A Barr, *The Economics of the Welfare State* (Stanford University Press 1998) 47.
[81] Carl Cranor, 'The Regulatory Context for Environmental and Workplace Health Protections: Recent Developments' in Norman E Bowie (ed), *The Blackwell Guide to Business Ethics* (Blackwell 2002) 76.
[82] Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089, 1092-1093.
[83] Indeed, Calabresi and Melamed mention three different entitlements, namely 'entitlements protected by property rules, entitlements protected by liability rules, and inalienable entitlements'. ibid 1092.
[84] ibid.
[85] See also *the Coase theorem* in 3.3.2.6. Coase examines the environment, where the externalities created by a company can be compensated for through bargaining. According to him, the pollution created by a company can be compensated by negotiations between parties in the light of private property rights. Ronald H Coase, ''The Problem of Social Cost' (1960) 3 Journal of Law and Economics 41.

breach, which gives the employee the right to insist that the requisite standard of behaviour.[86] In light of *liability rules*, the employee may possess the right to compensation, if and where the company fails to act in accordance with the prescribed standard or rule enshrined by law.

Tort law, then, can make good, by way of compensation, claims made by an employee for any breach that s/he may suffer, caused by a corporation.[87] However, it is the threat of litigation may also mean that a corporation is more likely to internalize the expectation of social harm and the need to protect from it.[88] In this respect, the corporate behaviour towards employees can be improved duo to the following reasons. First, the threat of liability, which arises if the right is indeed breached, and action is taken, should provide an incentive for companies to improve their behaviour, in order to avoid such liability. The presence of substantive rights may result in deterrence, and make companies more respectful of employees' rights and interests.[89] Second, if such threat of legal action fails to be effective, then injured employees may be able to secure compensation for the harm they have suffered. Thus, where in this case the state was to allocate liability rights, this may in turn influence the corporation's social behaviour and awareness, owing to the risk of non-compliance, where the damage would create costs.[90]

Having considered tort law from this perspective, it is noteworthy that such a regulatory strategy may not always be adequate in all circumstances. The difficulties arising with this are relatively well-rehearsed within extant literature, especially insofar as

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[86] Calabresi and Melamed (n 82) 1092.

[87] See Peter Cane, *Atiyah's Accidents, Compensation and the Law* (Cambridge University Press 2013).

[88] Charles D Kolstad, Thomas S Ulen and Gary V Johnson, 'Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?' (1990) 80 The American Economic Review 888, 888.

[89] From the perspective of tort law, one can assume that 'if the legal damages can be lain at the feet of the responsible actor, [sh/e] is likely to adapt by changing her behaviour in the future. Christopher D Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (Harper & Row 1975) 103.

[90] Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press 2012) 126.

discussions regarding the shortcomings of the tortious liability are concerned.[91] However, some other of these require outlining.

First, in order to harness the use of tort law tools, there needs to be a cause of action. In other words, corporations can only be penalised after an act of misconduct or breach has occurred.[92] Therefore, tortious liability can be seen as *ex post facto* regulation that is triggered when corporate wrongdoing becomes apparent.[93]

Second, such a regulatory strategy adopts the price theory to law. However, from a price theory perspective, a company may consider the level of safety according to the cost of and the lack of safety in a given situation.[94] Therefore, the interests of employees may not then be protected if the company will be better off breaching and compensating.

Third, the limited capacity of the courts to collect and process information in comparison to regulatory agencies may be another shortcoming of tort law. In this respect, courts may be seen as an ineffective duo to the 'lack of expertise, inadequate staffing, and procedures ill-suited to the discovery of scientific truth'.[95]

Fourth, employees who are exposed to hazardous effects of particular products produced by a company, which results in occupational disease, may not have the opportunity to sue a company at the time.[96] Occupational diseases may be regarded as invisible, or hidden epidemics, since their effect may 'have long latency periods and can often go undiagnosed

[91] See Susan Rose-Ackerman, 'Regulation and the Law of Torts' (1991) 81 The American Economic Review 54.
[92] Katharina Pistor and Chenggang Xu, 'Incomplete Law - A Conceptual and Analytical Framework and its Application to the Evolution of Financial Market Regulation' (2002) Columbia Law and Economics Working Paper No 204, 12 <http://ssrn.com/abstract=310588> accessed 20 September 2016.
[93] Rose-Ackerman (n 91) 54.
[94] Robert Cooter, 'Law and Unified Social Theory' (1995) 22 Journal of Law and Society 50, 52.
[95] Rose-Ackerman (n 91) 55.
[96] William K Viscusi, 'Structuring an Effective Occupational Disease Policy: Victim Compensation and Risk Regulation' (1984) 2 Yale Journal on Regulation 53, 63.

and unreported'.[97] An example of this may be the carcinogenic effects of a particular product, which may only become visible several years after exposure.[98] In this respect, one challenge facing the compensation of occupational diseases may sometimes be determining the true source or cause of the disease.[99] In all claims, the claimant must prove sufficient *causation*.[100] Unfortunately, this may not always be easy. For example, despite evidence that would suggest lung cancer may be caused by asbestos, smoking could be claimed to be a contributory factor.[101] Thus, the interests of employees may not be properly protected through the use of tort law.

Fifth, in some circumstances, it may be difficult to determine the responsibility, and to whom the liability for compensation may be directed.[102] Workers killed on a construction site owing to negligence may be a good example.[103] In this case, there may be several companies such as contractors and subcontractors. Here it may be difficult to determine who is responsible for the tragedy, what went wrong, and who has the right to claim what and against whom.[104]

Finally, in terms of injuries, the tort compensation may not be an easy process for an individual, simply because of the high cost of litigation and lack of alternative remedy.[105]

In summary, tort law is undoubtedly among the most important avenues providing employees with a means of compensating themselves against losses incurred at the hands of a

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[97] International Labour Organization (ILO), *The Prevention of Occupational Diseases: World Day for Safety and Health at Work 28 April 2013* (ILO Publications 2013) 5 <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_208226.pdf> accessed 21 July 2016.
[98] Viscusi (n 96) 54.
[99] See *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 (HL)
[100] In other words, the claimant must prove that her harm was caused by the defendant's breach, See Richard W Wright, 'Causation in Tort Law' (1985) 73 California Law Review 1735.
[101] ibid.
[102] Stone (n 89) 103-106.
[103] ibid 105.
[104] ibid 105-106.
[105] Henry A Tombari, *Business & Society: Strategies for the Environment and Public Policy* (Dryden Press 1984) 259.

corporation. However, it also falls short of offering employees the protection and improvement in their interests across a number of circumstances. Accordingly, the next section shall pay attention to tax and rewards.

3.2.4 Taxation and Government Rewards

The misconduct and social harms of a company can also be addressed through taxation imposed by the government.[106] An example of such a system may be where companies are required to pay taxes according to their safety and health record. As the leading regulatory scholar Braithwaite has proposed:

> [The s]anctioning of occupational safety and health violations is replaced with "injury taxes" whereby the company pays the government so much for each work-related injury of a given severity which occurs in the course of the financial year. Culpability is not an issue. The tax is paid in proportion to the number and severity of injuries, irrespective of corporate fault.[107]

On the one hand, a regulatory body may opt to persuade corporations by taxing their externalities. This method aims to create a deterrence to minimise social harm.[108] On the other hand, companies with good social and environmental standing may further be rewarded. A regulatory body, for example, may provide tax reductions to some companies in light of annual performance. Tax deduction could also be used to encourage the use of other regulation strategies that improve employee interests overall. Such preferential tax treatment could potentially be implemented as part of employee share-ownership profit-sharing schemes, discussed elsewhere.[109]

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[106] John Braithwaite, 'Limits of Economism in Controlling Harmful Corporate Conduct' (1981) 16 Law & Society Review 481, 485.
[107] ibid.
[108] ibid 487.
[109] Uvalic, 'Workers' Financial Participation in the European Community' (n 62) 188

Irrespective of the means employed, taxation as a strategy is mostly grounded in the price theory as from an economic perspective, taxes can be seen as prices.[110] If the rate of a particular tax increases in proportion to the amount of carbon-dioxide the company emits to the atmosphere, for example, then this tax may be seen as a price the company must pay.[111]

However, whilst corporate regulation through the mode of taxation is mostly related to environmental matters, as highlighted above, tax deduction or exemption could also be deployed in relation to employee rights. An example of this may be that a company may be taxed with regard to its record over the treatment of employees. A company which promotes and creates a safe and healthy working environment could be offered exemption from tax or tax deduction.[112]European countries such as Latvia, the Netherlands, Germany and France, have already started using strategies such as tax reduction and rewards, to encourage companies to improve their standards of health and safety, particularly in response to the European Union strategy on occupational safety and health (OSH).[113]

In short, the taxation of companies in respect of employee related matters may be seen as a less prohibitive strategy than other strategies which attempt to sanction the company through *command and control* regulations.[114] As such, although taxation may offer a number of options as a strategy, with a view to deterring companies from infringing employee interests, such an approach also suffers from a number of shortcomings. Indeed, taxation may in some respects be a limited strategy insofar as improving particular employee interests are concerned, such as health and safety. In this respect, much like compensation through the

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[110] Cooter (n 94) 52.
[111] Joseph E Aldy and Robert N Stavins. 'The Promise and Problems of Pricing Carbon: Theory and Experience' (2012) 21 The Journal of Environment & Development (2012) 152, 155-156.
[112] D Esler (ed), *'Economic Incentives to Improve Occupational Safety and Health: A Review from the European Perspective'* (European Agency for Safety and Health at Work (EU-OSHA) 2010) 65-66 <https://osha.europa.eu/en/tools-and-publications/publications/reports/economic_incentives_TE3109255ENC > accessed 21 July 2016.
[113] ibid 66.
[114] See 3.2.6 below.

avenue of tort law, taxes, if paid yearly, for example, may also fall short of protecting the interests of employees with occupational diseases, which may of course take several years to develop.[115] On a general note, improving the behaviour of companies through taxation may demand a significant period of time, especially when compared to other, stricter, more immediate, regulatory regimes, such as blanket ban on the use of certain types of chemical linked to causing cancer.[116]

3.2.5 Government Purchasing and Procurement

Another strategy in improving the corporate behaviour towards employees may be social public procurement. Although public procurement may be viewed as a form of government regulation, it can also be approached, and viewed, from a market-based strategy, 'in which government acts as a purchaser'.[117] Typically, the state, which buys the goods and/or the services of a particular company, may indirectly utilise its power to impose upon a supplier or contractor behavioural standards it expects of the company. An example of this may be that it may pay attention to the rights of employees when purchasing goods and services from a corporation. This is usually regarded as the domain of public procurement.

Employee rights in the frame of public procurement have a much broader meaning than in the case of mere public purchasing. Governments may use public contracts in order to ameliorate the treatment of employees.[118] In this respect, when a government outsources aspects of its core duty or responsibility to an external provider, such as a company providing good and services, then the company may be under certain pressure from the government to ensure it

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[115] Braithwaite (n 106) 489.
[116] ibid.
[117] Christopher McCrudden, 'Corporate Social Responsibility and Public Procurement' in Doreen J McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 117.
[118] See Christopher McCrudden, 'Using Public Procurement to Achieve Social Outcomes' 28 Natural Resources Forum 257.

guarantees or improves the rights and interests of its employees.[119] In many cases, a government's contracting policy may require a firm to pay particular attention to employee conditions, as these relate to children, women, ethnic minorities and disabled people.[120] In this respect, for example, companies may not be given contracts if they are in breach of employee rights.[121] Moreover, if contracting companies do not respect certain issues with respect to employees, they may 'be excluded from the procurement process'. [122]

In practice, the policies adopted by government agencies in the UK, such as Greater London Authority's Sustainable Procurement Policy, are significant examples of how employee issues relating to matters such as forced labour, working hours and discrimination are viewed in public procurements terms.[123] Similar examples of 'social public procurement' may be drawn from the EU. In 2011, the EU Commission published a guide on 'Socially Responsible Public Procurement (SRPP)'.[124] The guide on SRPP highlights the importance of employee considerations, such as issues relating to supply-chain management, and how these may be considered from a public procurement perspective.[125]

Nevertheless, improving the interests of employees through public procurement means has some shortcomings. First, this strategy has the limitation of only affecting those companies opting to do business with the government, or provide services therefore, and thus a limited number of the employees and corporations. Second noteworthy point can be related to the short-term economic interests of the governments as such interests may result in ignoring employee rights where public procurement is concerned. For example, although

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[119] ibid 258.
[120] ibid 257.
[121] Christopher McCrudden, 'Corporate Social Responsibility and Public Procurement' (n 117) 116.
[122] Christopher McCrudden, 'Using Public Procurement to Achieve Social Outcomes' (n 118) 262.
[123] ibid 14.
[124] European Commission, *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement* (Publications Office of the European Union 2010) <http://buysocialdirectory.org.uk/sites/default/files/eul14136_socconsidpubprocu_1012101.pdf> accessed 21 July 2016.
[125] ibid 47.

developed countries are more inclined to consider social rights in public procurement,[126] the public procurement contracts in developing countries may only focus upon economic benefits without considering the employees' interests.[127] As a result, employee interests may be regarded as subordinate to economic benefits. Indeed, this is also true for developed countries such as the US, who often face criticism for paying too much attention to the *best price* rather than employee conditions in terms of public procurement.[128]

3.2.6 Command and Control (C&C) Strategies

As alluded to earlier in the chapter, substantive law requirements that criminalise corporate misconduct can also be deployed as a strategy to improve the way in which corporations treat employees. Command-and-control (C&C) regulations, which is predominately grounded in impositions and sanctions,[129] can also improve the interests of employees. This type of regulatory approach 'prohibits unacceptable behaviour immediately'.[130] Through the use of C&C strategies, 'the rules are predominantly 'activity-based' [that is to say, they directly control] what individuals or firms do, rather than the outcomes of those activities'[131] Thus, as a strategy, C&C can be viewed as active intervention by the government to ensure positive social outcomes, such as the protection of employees' interests. However, such intervention relies upon specific 'standards backed by criminal sanctions'.[132]

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126 Lisa Mastny, *Purchasing Power: Harnessing Institutional Procurement for People and the Planet*, vol 166 (Worldwatch Institute 2003) 5.
127 Khi V Thai, 'Public Procurement Re-examined' (2001) 1 Journal of Public Procurement 9, 36.
128 Ian Urbina, 'U.S. Flouts Its Own Advice in Procuring Overseas Clothing' New York Times (22 December 2013) <http://www.nytimes.com/2013/12/23/world/americas/buying-overseas-clothing-us-flouts-its-own-advice.html?_r=0> accessed 20 July 2016.
129 Anthony Ogus, 'Comparing Regulatory Systems: Institutions, Processes and Legal Forms in Industrialised Countries' in Colin Kirkpatrick Paul Cook, Martin Minogue and David Parker (ed), *Leading Issues in Competition, Regulation and Development* (Edward Elgar Publishing 2004) 158.
130 Baldwin, Cave and Lodge (n 90) 134.
131 Ogus (n 128) 158.
132 Robert Baldwin, 'Regulation After 'Command and Control'' in Keith Hawkins (ed), *The Human Face of Law* (Clarendon Press 1997) 65.

C&C regulations, on the whole, may aim to improve employee interests in the corporations. There are several examples in this respect. For instance, the UK Workplace Health, Safety and Welfare Regulations 1992,[133] made clear the duty upon companies to comply with basic health, safety and welfare requirements such as ventilation, heating or lighting in the workplace. Similarly, the government's foundational attempt to improve the health, safety and working conditions of employees through statutory intervention, such as the Health and Safety at Work etc. Act 1974. [134]

Notwithstanding its success, there appeared to be some *backlash* in response to the use of C&C regulation within recent decades, which may be accounted for on several fronts.[135] In effect, one of the most important factors that have played a role in this backlash can be seen as the economic liberalism and trend regarding the concept termed 'small government', fashioned from the 1970s onwards[136] However, several evident weaknesses within the C&C approach and regulatory strategies can be cited as a key factor.

First, one of the primary weaknesses apparent within C&C regulations can be its deficiency in determining the scope of the rules that cover the conduct of corporations.[137] For example, the regulation 'may be too narrow or too broad in scope'.[138] Companies with different profiles may not be regulated effectively by a one-size-fits all C&C regulation.[139]

Second, the nature of C&C, which 'does not inspire excellence', may be seen inefficient in terms of encouraging corporations to act innovatively to ensure their compliance with the

[133] The Workplace (Health, Safety and Welfare) Regulations 1992, SI 1992/3004.
[134] Health and Safety at Work etc. Act 1974.
[135] UK can be given as an example in this regard. Jennifer A Zerk, Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law (Cambridge University Press 2006) 36.
[136] ibid.
[137] Baldwin, Cave and Lodge (n 90) 110.
[138] ibid.
[139] John Palmisano and Carole Neves, *The Environment Goes to Market: The Implementation of Economic Incentives for Pollution Control*. (National Academy of Public Administration 1994) 8.

laws in question.[140] For example, through the use of a C&C approach, even where a company invests in research and development projects and environmentally friendly technologies, say to reduce its waste or carbon emissions, it is required to comply with the same standards as any other company.[141]

Third, C&C regulations are likely to be captured by regulated companies.[142] In terms of enforcing C&C regulations, the regulator requires some degree of cooperation with the regulated company, which likely to result in capture.[143] There may also be other factors, such as political influence on regulatory staff or bribery, which leads to such capture.[144]

Fourth, in some circumstances even where a company apparently complies with a C&C strategy, such compliance may only be 'creative compliance'.[145]As McBarnet has argued, 'enforcement can only be exercised where a law [has been] broken not where its, arguably, [been] complied with'.[146] Thus, as long as the company complies with the C&C regulation, the sanctions imposed upon poor behaviour are limited or non-existent.

Fifth, the high cost of compliance is often seen as another weakness associated with C&C strategies.[147] In some circumstances, although such strategies have high cost, they may not always be effective at improving the interests of employees in workplace.[148]

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[140] Zerk (n 98) 37.
[141] For example, Sunstein highlights the negative role of the C&C type regulations, namely the best available technology (BAT), in innovation. Cass R Sunstein, 'Paradoxes of the Regulatory State' (1990) 57 The University of Chicago Law Review 407,420-421.
[142] Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press 2002) 10.
[143] Baldwin, Cave and Lodge (n 90) 108.
[144] ibid.
[145] Creative compliance refers to 'the practice of avoiding the intention of the law without breaking the terms of the law'. Baldwin, Cave and Lodge (n 90) 110.
[146] Doreen J McBarnet, 'Corporate Social Responsibility beyond Law, through Law, for Law' in Tom Campbell, Doreen J McBarnet and Aurora Voiculescu (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 48.
[147] Parker (n 142) 9.
[148] In terms of examining high cost regulations, Sunstein gives an example of the vinyl chloride regulation in the US (by the US Occupational Safety and Health Administration). See Cass R Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press 1993) 82.

In addition to the aforementioned factors, complex and inflexible rules,[149] legalistic[150] and bureaucratic regulations[151] can also be highlighted as among the other problems associated with C&C strategies.

3.2.7. State Ownership

The state may also aim to control a corporation by taking a stake in the ownership of a company, and then later using its rights as an owner to influence its behaviour.

Historically, the state has played a great role within macroeconomic issues through the nationalization of public resources such as electricity, gas and water during the 20th century.[152] Despite increasing privatisation and economic liberalization over recent decades, state owned companies (SOC)s are still important players in the economy.[153]

Therefore, in such a position, the government may control the behaviour of its own companies, while also doing business in particular industries.[154] More specifically, public ownership may lead to an improvement in employee interests. For instance, in some countries, SOCs pay crucial attention to employee interests such as remuneration and pension rights.[155]

To recap, all of the aforementioned strategies may assist in improving corporate behaviour to varying degrees. Having outlined these different strategies, the chapter shall

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[149] Baldwin (n 132) 67.
[150] Parker (n 142) 9.
[151] Jodi L Short, 'From Command-and-Control to Corporate Self-Regulation: How Legal Discourse and Practice Shape Regulatory Reform. (PhD Thesis University of California, Berkeley 2008) 92.
[152] Joel Mokyr, *The Oxford Encyclopedia of Economic History* (Oxford University Press 2003) 57.
[153] For example, the state is one of the most significant employers Canada, where it employs 224,000 people. See Naoko Kubo, "Public Agency Sustainability Reporting—A GRI Resource Document in Support of the Public Agency Sector Supplement Project' (Global Reporting Initiative (GRI) January 2004) 2 <https://www.globalreporting.org/resourcelibrary/Public-Agency-Sustainability-Reporting.pdf> accessed 21 July 2016.
[154] In this regard, the Norwegian government, which lead the way in terms of socially responsible state-owned enterprises, may be one of the best examples. Norwegian Ministry of Foreign Affairs, Corporate Social Responsibility in a Global Economy (Report No 10 to the Storting, 2008-2009) 11 <http://oecdwatch.org/publications-en/Publication_3112> accessed 21 July 2016.
[155] Organisation for Economic Co-operation and Development (OECD), 'Corporate Governance of State-Owned Enterprises' (OECD Publishing 2015) 19 <http://www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf> accessed 21 July 2016.

now proceed to analysis their advantages and disadvantages respectively. The main aim here shall not be to identify any single strategy as ideal, such as transparency, or to argue that all other approaches should be rejected. Every strategy has its merit in each particular context, and no doubt may have an important role to play in a well-balanced regulatory regime. Hence, the aim here shall be to demonstrate the strengths and weaknesses of transparency when compared to the qualities of the other regulatory strategies.

3.3 Evaluating Transparency: Intrinsic and Strategic Merits

As discussed elsewhere in the thesis, the main arguments in favour of transparency have been built upon two pillars. The first is the intrinsic value of transparency. According to this perspective, transparency is necessary because it is one of the prerequisites to ensuring employees are treated with respect. The second pillar is the strategic/instrumental value of transparency, as one mechanism (albeit not the only mechanism) concerned with ensuring employees are generally well treated by their companies. These arguments shall therefore be discussed when examining the strengths and weaknesses of this approach in comparison with other strategies.

3.3.1 Intrinsic Value of Transparency

Transparency possesses a number of unique features which makes it more advantageous when compared with other regulatory strategies, as shall be discussed in 3.3.2. However, one of its primary features, namely intrinsic value, makes transparency as a unique strategy.

The intrinsic aspect of transparency has been examined by many scholars under different subjects, such as Elia mentions the intrinsic value of transparency in terms of ‘the

right to know' issue,[156] Brummer highlights how transparency has an importance in the rational choices of shareholders,[157] Buijze touches upon the intrinsic worth of transparency in EU law,[158] and Plaisance investigates the Kantian roots of transparency in 'media ethics'. [159]

As emphasized earlier in chapter 2, moral judgement in Kantian ethics is based upon the categorical imperatives.[160] According to categorical imperatives, one should 'act only according to that maxim through which you can at the same time will that it become a universal law'.[161] From this stand point, the maxim can be seen as a test for ethical acts. If the maxim is not *universalisable*, the act is self-defeating and morally wrong.[162] There can be many unethical acts that may pass this test. With respect to transparency, lying may be one example. In this respect, Plaisance stated:

> Imagine a world in which everyone could freely communicate with anyone, but no one could ever be sure that what one was told was truthful or accurate, or even whether anyone ever actually cared about such things. If it served people's whim or interest to lie or to give deliberately false or misleading information, they would so at every opportunity. If that were the norm, our very society would collapse.[163]

Plaisance demonstrates that lying cannot be ethically right as it is not *universalisable.* Thus in the case of transparency, from this perspective, we may refer to individuals who tell the truth – who are transparent – as being ethically right, as opacity hinders the truth.

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[156] John Elia, 'Transparency and the Right to Know' in Antonino Vaccaro, Hugo Horta and Peter Madsen (eds), *Transparency, Information and Communication Technology: Social Responsibility and Accountability in Business and Education* (Philosophy Documentation Center 2008) 5.
[157] James J Brummer, 'Accountability and the Restraint of Freedom: A Deontological Case for the Stricter Standard of Corporate Disclosure' (1986) 5 Journal of Business Ethics 155.
[158] Anoeska Buijze, 'The principle of transparency in EU law' (PhD Thesis, Ultrecht University 2013) 225.
[159] Patrick L Plaisance, 'Transparency: An Assessment of the Kantian Roots of a Key Element in Media Ethics Practice' (2007) 22 Journal of Mass Media Ethics 187.
[160] See 2.1 above.
[161] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary J Gregor and Jens Timmermann trs, A German-English Edition, Cambridge University Press 2011) ch 1/ 9, 71.
[162] See 2.1 above.
[163] Plaisance (n 159) 191.

However, in order to fully comprehend intrinsic value of transparency, the principle of *respect for persons*[164] must also be examined. As discussed in chapter 2, the second formulation of Kantian ethics is based upon this principle.[165] Accordingly, human beings need to be treated as ends in themselves, not as means to others' ends. Thus in order to treat human beings respectfully, one must avoid deception since the act of 'deception' or falling 'short of full disclosure' may be said to hinder treating others with dignity and respect.[166] In short, 'lying and acts of deception' can be seen as an assault on human dignity.[167]

Another key aspect to the Kantian understanding is that human beings need to be fully informed in order to make autonomous (and thus ethically correct) decisions.[168] Thus true information, in other words transparency, may well constitute a fundamental requirement in respect of being autonomous, as a lack of transparency may constrain the freedom of rational actors.[169] Evidence suggests that a lack of transparency may reduce the capacity of individuals to choose and make them act 'in a manner that is more inconsistent with their values'.[170]

For instance, the work of Brummer has addressed how the lack of transparency constrains the rational choices of shareholders.[171] According to him, '…the policy of management misstating or omitting material facts in an intentional or knowing manner is that it leads to treating the shareholders as mere instruments of the will of the managers'.[172] However, the motivation of corporate disclosure that only aims to inform shareholders is problematic since lack of information may also restrain rational decisions taken by other

[164] For the principle of *respect for persons* see 2.1 above.
[165] ibid.
[166] Plaisance (n 159) 188.
[167] ibid 204.
[168] ibid 189.
[169] ibid.
[170] Brummer (n 157) 159.
[171] Brummer (n 157).
[172] ibid 160.

stakeholders, such as employees. The truth cannot be described by only the financial matters of shareholder. Employees are human beings and rational actors as well. Therefore, for example, employees should be informed about matters relating to 'the conditions of their employment'.[173] As Bowie has argued, employees should not be coerced or deceived.[174]

However, conceptualisation of the intrinsic value of transparency from Kantian perspective may be seen as unconditional.[175]As discussed in chapter 2, Kantian ethics has no exceptions.[176] Thus if transparency is viewed from this perspective, employees may be adversely affected in some circumstances. For example, disclosing confidential information may violate privacy which is essential to 'human rights'.[177] Thus, the company should respect the confidentiality of personal data of employees. Section 3.3.3.3 shall return to consider some of these issues as these relate to the limits of transparency.

Nonetheless, the intrinsic argument in favour of transparency is largely based upon that requiring companies not to mislead, rather than ensuring full transparency. Hence, it is likely that an intrinsic argument for transparency is fairly modest. Therefore, the next section shall turn to strategic arguments about whether more transparency is an effective strategy.

3.3.2 Strategic Value of Transparency

Disclosure as a regulatory mechanism may embrace a number of distinctive advantages. In the following section, instrumental arguments that may be in favour of transparency are analysed. Whilst some of these arguments shall be examined more extensively in the following chapters, it is helpful to consider some of the essential merits in the present section.

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[173] Norman E Bowie, *Business Ethics: A Kantian Perspective* (Blackwell Publishers 1999) 49.
[174] ibid 48.
[175] Elia, 'Transparency and the Right to Know' (n 156) 5.
[176] See 2.1 above.
[177] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) art 8, 1950.

However, one difficulty that arises when making a comparison between transparency and the other regulatory strategies is that transparency is not, in essence, always an alternative to the other strategies.[178] Many of the supposed alternatives to transparency may in fact themselves depend on transparency to be effective.[179] In other words, alternative strategies also need to incorporate transparency to some extent. Thus a distinct comparison between transparency and alternative strategies may not be an easy task. However, how this study approaches the strengths and weaknesses of *transparency alone* as a strategy for improving the behaviour of companies can still be addressed. In particular, the following sub-sections focus upon identifying how far the benefits of transparency outweigh its costs, assuming no further regulation is employed to control a corporation. Here it will be important to measure the extent to which *transparency alone* is likely to yield sufficient benefits to justify its imposition and to ask whether transparency, in conjunction with other regulatory regimes, delivers sufficient benefits as to outweigh its costs.

3.3.2.1 Autonomy

> Transparency requires that parties in the discourse make their positions, goals, and interests known to other members. Hidden or distorted information works

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[178] In order to create an effective regulatory strategy, many legislative sanctions may depend upon transparency as transparency may support, and more effectively deploy other regulatory strategies.
For example, transparency plays an important role in employee participation schemes. In such schemes, without transparency, information asymmetry may result in difficulties for employees '…to determine whether rewards under variable pay systems are being calculated correctly and fairly by management…' Fidan Ana Kurtulus, Douglas Kruse and Joseph Blasi, 'Worker Attitudes Towards Employee Ownership, Profit Sharing and Variable Pay' (2011) University of Massachusetts- Anherst, Economics Department Working Paper Series 123, 6 <http://scholarworks.umass.edu/econ_workingpaper/12> accessed 22 July 2016. Another example can be in relation to tort law. Transparency on the foreseeable risks of harm is a legal obligation in most legal systems. Such as information disclosure requirements under health and safety law. See 5.1.3.2 below.

[179] For example, all the steps taken in a public procurement programme should be transparent to all stakeholders. Sussane Kühn and Laura B Sherman, *Curbing Corruption in Public Procurement: A Practical Guide* (Transparency International 2014) 12 <https://issuu.com/transparencyinternational/docs/2014_anticorruption_publicprocureme?e=2496456/8718192> accessed 22 July 2016.

> against transparency objectives. Only with full disclosure can participants develop rational agreements that take the interests of all parties into account.[180]

Working on this assumption, it is apparent that reliance upon transparency better promotes the value of autonomy than alternative regulatory strategies may be able to. As such, autonomy may also be analysed from a number of different perspectives.

First, one perspective could be the correlation of autonomous assumptions with those of neoclassical economics. Neoclassical economics is mostly grounded in the principles of rational choice theory, referring to individuals as autonomous and having the ability to make the best choices for themselves.[181] In this respect, transparency allows individuals to make autonomous choices. Unlike other strategies, such as banning products, or taxing companies, transparency, through the medium of information disclosure, enables individuals to 'take the ultimate decision of what to consume'.[182] For instance, disclosure via labelling may help consumers to opt for a more nutritious food option,[183] and so individuals are likely to make more autonomous decisions according to their own personal diet and preferences.[184] Similarly, information on issues relating to employees may affect the choices of corporate stakeholders. Stakeholders (including employees themselves) that pay attention to employee interests may configure their preferences in accord with a transparency regime, whilst employees' interests may benefit from this change.[185] For example, such as wage bargaining,

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[180] Mary A Reynolds and Kristi Yuthas, 'Moral Discourse and Corporate Social Responsibility Reporting' (2008) 78 Journal of Business Ethics 47, 57.
[181] M Teresa Lunati, *Ethical Issues in Economics: From Altruism to Cooperation to Equity* (MacMillan Press 1997) 17.
[182] Alberto Alemanno and Amandine Garde, 'the Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets' (2013) 50 Common Market Law Review 1745, 1753.
[183] ibid 7-8.
[184] K Nordström and others, 'Values at Stake: Autonomy, Responsibility, and Trustworthiness in Relation to Genetic Testing and Personalized Nutrition Advice' (2013) 8 Genes & nutrition 365.
[185] For details on why stakeholders demand employee related transparency, see 4.1.1.1 below.

where the provision of information may enable employees to better formulate how to bargain.[186]

Second, neoclassical economics is predominantly against the idea of any state intervention/regulation in the markets.[187] In this respect, 'minimalist form[s] of government intervention' can be seen as the 'great advantage of disclosure-based strategies'.[188] From this perspective, disclosure can be preferred, with less distortion in the market, since it creates a lower degree of intrusion upon the autonomy of economic actors.[189] Disclosure differs from most of other regulatory strategies, since it does not require any limitation upon individual choice.[190] It does not exclude market entrants as other regulations may do[191]

Disclosure through the means of corporate codes of conduct, for example, may be seen as one such avenue which is less disruptive than other traditional regulatory strategies that may interfere with corporate activities while monitoring and enforcing the said requirements.[192] Regulation through codes of conduct is based upon *self-regulation* which refers to disciplining the conduct of individuals or any collective bodies by themselves.[193] In this respect, in place of any external state regulation, corporate entities may regulate

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[186] PF Pope and DA Peel, 'Information Disclosure to Employees and Rational Expectations' (1981) 8 Journal of Business Finance & Accounting 139, 140.
[187] Janet Dine, *The Governance of Corporate Groups*, vol 1 (Cambridge University Press 2000) 109.
[188] Howell E Jackson, 'Regulation in a Multi-Sectored Financial Services Industry: An Exploratory Essay' (1999) Harvard Law School Discussion Paper 258, 344 <http://ssrn.com/abstract=166651> accessed 23 July 2016.
[189] Klaus J Hopt, 'Modern Company and Capital Market Problems: Improving European Corporate Governance after ENRON' (2003) 3 Journal of Corporate Law Studies 221, 241.
[190] Stephen G Breyer, *Regulation and its Reform* (Harvard University Press 1982) 161.
[191] Although they are not mentioned here, there may be some regulation techniques that excludes some market players while regulating them. For example, in terms of licensing systems, a public resource or utility is regulated through allocation of the licences. ibid 71. The licences that give the companies the operation rights are allocated by the government through bidding. Under this approach, the possibility of renewal or non-renewal of licenses constitutes the control mechanism on the provider company. Baldwin, Cave and Lodge (n 90) 166.
[192] Harvey L Pitt and Karl A Groskaufmanis, 'Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct' (1989) 78 Georgetown Law Journal 1559, 1561.
[193] Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 The Modern Law Review 24, 26.

themselves and other organisations which accept their authority.[194] Nevertheless, without transparency self-governance is unlikely to be effective.[195]

Having considered this aspect of autonomy, it would also seem important to touch upon the transparency requirements that constitute an infringement of autonomy. These may be considered within two key points.

First, the imposition of mandatory disclosure requirements, for example, may force companies to disclose some specific information.[196] For example, some companies are required to disclose information on gender diversity in accordance with company law in the UK.[197] In this case, one may ask that should autonomous corporations not be free to choose what to reveal about themselves? If not, then transparency may infringe the autonomy of a corporation to decide, forcing them to disclose certain types of information about their operations.

Second, full transparency may contradict the autonomy of individuals, since it may be argued 'one person's transparency is another's surveillance'.[198] In terms of the concept of transparency discussed above, the importance of dialogue between the information discloser and the recipient has been outlined. Indeed, it was highlighted how transparency is a bilateral concept and thus relies upon information disclosure from individuals (as well as recipients). In this respect, transparency may result in 'downwards transparency' as a 'surveillance technique'.[199] Therefore, in some circumstances, greater transparency between the management and employees may also affect the interests of employees negatively. An

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[194] ibid 27.

[195] See David Graham and Ngaire Woods, 'Making Corporate Self-Regulation Effective in Developing Countries' (2006) 34 World Development 868. Different types of *codes of conduct* are further discussed in chapter 4.

[196] For details on mandatory transparency rules by different laws see chapter 5 below.

[197] Companies Act 2006, s 414C (8)(c)(i).

[198] Jonathan Fox, 'The Uncertain Relationship between Transparency and Accountability' (2007) 17 Development in Practice 663, 663.

[199] ibid 665.

example is where greater transparency might reduce 'the right to privacy'. This might be ethically problematical, since 'employees as persons have a right to privacy in the workplace (and also outside the workplace)'.[200] To illustrate this point, greater surveillance forcing employees to polygraph tests could be one example.[201] Such tests can be seen as exploitation of '[t]he employee's inferior bargaining position' and thus her autonomy.[202]

3.3.2.2 Universality

One of the most important features of transparency, when compared to other regulatory strategies, may be its advantages in the regulation of international corporate activities. Although chapter 6 focuses upon this issue, it is also beneficial to briefly consider universality of transparency when compared to other regulatory strategies examined above.

Insofar as regulating the negative impact of corporations upon employees is concerned, traditional regulatory strategies fall short of doing what is necessary, since many corporations, such as transnational companies (TNCs), are composed of several components that may be stationed in more than one country or continent. Most of the manufacturing functions of a TNC are conducted through subsidiary companies or suppliers, which are often in countries where employee rights are not well developed. [203] Therefore, in order to improve employee interests globally, the regulation of corporations should go beyond national borders, otherwise it may not be effective enough to deal with problems that have been exposed through the use of international supply chains.[204] In this regard, transparency can play a

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200 John R Rowan, 'The Moral Foundation of Employee Rights' (2000) 24 Journal of Business Ethics 355, 358.
201 ibid 359.
202 ibid.
203 Brian Roach. 'Corporate Power in a Global Economy' (Global Development and Environment Institute–GDAE, Tufts University 2007) Box 2, 13 <http://www.ase.tufts.edu/gdae/education_materials/modules/Corporate_Power_in_a_Global_Economy.pdf> accessed 22 August 2016.
204 See Larry C Backer, 'From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations' (2008) 39 Georgetown Journal of International Law 591.

crucial role when compared with other regulatory strategies, which can be made by considering two points.

First, as discussed above, transparency may make companies self-disciplined, which lessens the burden of states in terms of rule-making and the enforcement of the same. Unlike public rules, the private body of the TNC may play a role in controlling its own suppliers and their impact upon employee interests.[205] For example, self-imposed codes of conduct created by the corporation themselves may regulate suppliers.[206] In this respect, private actors, such as consumers, activists, non-profit organisations put pressure on TNCs. [207]

Second, transparency is predominately built upon value-neutral foundations.[208] This value-neutral nature of transparency can make it a more acceptable strategy internationally. Almost all regulatory strategies are built on different norms. For instance, the concept of human rights, including employee rights, may be criticised as a concept grounded in Western values. However, within other systems and cultures, such as in Asian culture, individual rights might be subordinated to notion of social harmony.[209] These cultures pay considerably greater attention to aspects such as discipline and order than may be afforded to individual liberties or well-being.[210] To demonstrate the point of 'cultural objection', it is illustrative to point out the regulatory strategies that relate to issue of non-discrimination. For example, a Muslim Pakistani employer may only employ men or women, rather than mixing them. From

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[205] See 4.1.2 below.
[206] As examined in detail in chapter 4, such codes are predominantly based upon the concept of transparency.
[207] See generally Simon Zadek, *The Civil Corporation: The New Economy of Corporate Citizenship* (Earthscan 2007).
[208] Karl Homann, Peter Koslowski and Christoph Luetge, *Globalisation and Business Ethics* (Ashgate Publishing 2007) 114.
[209] Denis G Arnold, 'Philosophical Foundations; Moral Reasoning, Human Rights and Global Labor Practices' in Laura P Hartman, Denis G Arnold and Richard E Wokutch, *Rising above Sweatshops: Innovative Approaches to Global Labor Challenges* (Greenwood Publishing Group 2003) 86.
[210] ibid.

the Western perspective this may seem as discriminative.[211] However, transparency may reduce these kinds of problems, especially where social and cultural detail is observed. Transparency strategies, by the most part, do not contradict with such values.[212] In some circumstances, transparency may even play a role in producing new norms, 'applicable' to regulating global corporate activities.[213]

There are of course some circumstances where even transparency may be ineffective at improving the interests of employees internationally.[214] However, even where there are difficulties in creating an international transparency regime, transparency can still be viewed as a more advantageous strategy than some of the alternatives presented.

3.3.2.3 Accountability and Democratic Decision Making

Existing literature suggests that transparency strategies play a great role in promoting accountability.[215] In effect, transparency may be able to recruit a significant number of stakeholders to act as 'guardians', or 'monitors' of the corporation, and thereby ensure that executives are held to account to some extent.[216] An example of this is where companies are made to disclose their policies relating to employee interests, and where a large proportion of the population then react to such information through rewards or sanctions.[217] Therefore, transparency may enable 'stakeholders [to] hold [corporations] accountable through the

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[211] Eva Kocher, 'Codes of Conduct and Framework Agreements on Social Minimum Standards–Private Regulation?' in Martin Herberg and Gerd Winter Olaf Dilling (ed), *Responsible Business: Self-governance and Law in Transnational Economic Transactions* (Hart Publishing 2008)74.
[212] Homann, Koslowski and Luetge (n 208) 114.
[213] Bjorn Fasterling, 'Development of Norms Through Compliance Disclosure' (2012) 106 Journal of business ethics 73, 76.
[214] For details on limitations of transparency rules national/regional initiatives see 5.3.1 below.
[215] See Villiers (n 40) 21-23.
[216] Such accountability is also called 'stakeholder accountability'. See David L Owen, 'Corporate Social Reporting and Stakeholder Accountability: The Missing Link' (2005) ICCSR Research Paper Series 32-2005 <https://www.nottingham.ac.uk/business/ICCSR/assets/researchpapers/32-2005.pdf> accessed 22 August 2016.
[217] These sanctions and rewards are analysed in 4.1.1.1 below.

markets for their securities, products and services, reputations, insurance and debt, and through accountability in the courts and other regulatory processes'.[218]

The use of transparency strategies may also pave the way for the democratic participation in decision-making processes. Within the corporation, for example, transparency may enable shareholders to participate in corporate decision-making.[219] Shareholders may benefit from information disclosure while exercising their voting powers.[220]

Furthermore, in respect to government regulation of the business, transparency may be conceptualised as a more democratic strategy than other regulatory strategies as transparency enables individuals 'to exercise influence over the organizations' and the issues that may affect their lives,[221] whilst many other regulatory strategies are unable to guarantee this opportunity as they are mostly prepared by bureaucrats.[222] Without transparency individuals are merely seen as 'passive beneficiaries of [regulations and] actions by politicians and experts'.[223]

3.3.2.4 Trust

Even minor transactions in society require at least some degree of trust.[224] Transparency as a regulatory tool may be able to improve trust, both within and outside of the corporation. As such, adopting transparency as a regulatory strategy may prove to be more advantageous for regulated corporations and regulators when compared to other strategies for several reasons.

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[218] Parker (n 103) 216.
[219] Villiers (n 40) 22.
[220] ibid 23.
[221] Archon Fung, 'Infotopia: Unleashing the Democratic Power of Transparency' (2013) 41 Politics & Society 183, 185.
[222] eg Command and Control strategies, see 3.2.6 above.
[223] Fung and others (n 36) 5.
[224] Peter Michael Blau, *Exchange and Power in Social Life* (Transaction Publishers 1964) 94.

First, transparency 'increases stakeholder trust' in the corporation.[225] Trust can be seen as a perceptual contract, based upon the parties' understandings.[226] Elements, such as 'accurate information, explanation for decisions [made] and openness', all affect corporate trust.[227] Therefore, the management of a company may be trusted better by employees which in turn may improve efficiency in the workplace.[228]

Second, transparency may also make corporations more trustworthy in the eye of other stakeholders such as consumers and shareholders. Transparent corporations that enjoy greater public trust may also generate more profit or access to the market.[229] The impact of trust on *the business case* is further discussed in chapter 4.[230]

Third, transparency may play a vital role in improving trust in the government. Greater transparency, which plays a greater role in reducing corruption may mean governments are more trusted by the people.[231]

Conversely, O'Neil suggests that transparency in some circumstances 'may be bad for trust'.[232] According to her, transparency 'can produce a flood of unsorted information and misinformation' which may sometimes result in confusion and thus decrease trust.[233] Crucially, O'Neil depicts the concept of transparency in her work as mere openness.

[225] John Elia, 'Transparency Rights, Technology, and Trust' (2009) 11 Ethics and Information Technology 145, 149.
[226] Sandra L Robinson, 'Trust and Breach of the Psychological Contract' (1996) 41 Administrative Science Quarterly 574, 575.
[227] Ellen M Whitener and others, 'Managers as Initiators of Trust: An Exchange Relationship Framework for Understanding Managerial Trustworthy Behavior' (1998) 23 Academy of Management Review 513, 517.
[228] Elia, 'Transparency rights, technology, and trust' (n 225) 149.
[229] ibid.
[230] See 4.1.1.1.1 below.
[231] Cary Coglianese, Heather Kilmartin and Evan Mendelson, 'Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration' (2009) 77 George Washington Law Review 924, 928.
[232] Onora O'neill, *A Question of Trust: The BBC Reith Lectures 2002* (Cambridge University Press 2002) 68.
[233] ibid 72-73.

However, as section 3.1 briefly discussed at the earlier in this chapter, the conceptualisation of transparency differs from mere openness.[234]

3.3.2.5 Economic Efficiency

Another argument in support of transparency may be market efficiency. Market economics highlights the importance of information for better functionality. [235] To this end, research by the leading scholar Hayek has underlined the importance of information with respect to the allocation of scarce resources.[236]

In keeping with the research of Hayek, evidence has suggested imperfect information can in some cases lead to market failure.[237] Interestingly, disclosure has often been cited as a remedy for instability within markets as this builds ‘confidence and efficiency’.[238] When all parties have access to complete information, the conditions for 'perfect competition’ can be obtained, since information plays a crucial role in enabling individuals to make better economic decisions.[239]

With the above in mind, ‘the Coase theorem’, which relies upon the reallocation of property rights and bargaining for the most efficient outcome, may be useful to highlight the importance of information disclosure. [240] According to Coase theorem, two parties can

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[234] Transparency cannot necessarily be equated to information disclosure if disclosure does not possess some vital elements. See 3.1 above.

[235] See Friedrich A Hayek, 'The Use of Knowledge in Society' (1945) 35 The American Economic Review 519.

[236] ibid 520-521.

[237] Karl–Gustaf Lofgren, Torsten Persson and Jorgen W Weibull, 'Markets with Asymmetric Information: The Contributions of George Akerlof, Michael Spence and Joseph Stiglitz' (2002) 104 The Scandinavian Journal of Economics 195, 195.

[238] Allen L White, 'Why We Need Global Standards for Corporate Disclosure' (2006) 69 Law and Contemporary Problems 167, 177.

[239] Dara O’Rourke, ‘Opportunities and Obstacles for Corporate Social Responsibility Reporting in Developing Countries’ (Report for the Corporate Social Responsibility Practice of the World Bank Group, the World Bank March 2004) 7 http://documents.worldbank.org/curated/en/2004/03/6479712/opportunities-obstacles-corporate-social-responsibility-reporting-developing-countries> accessed 22 July 2016.

[240] Ronald H Coase, ‘’The Problem of Social Cost’ (1960) 3 Journal of Law and Economics 1.

negotiate and bargain for an efficient allocation of the costs and benefits.[241]Information has a key importance in realisation of Coase theorem, [242] as to ensure the most efficient allocation of costs and benefits.[243] From this perspective, one assumption might be that once individuals receive information, they can 'act on the information' to bargain for what is termed the *Pareto optimal*[244] solution,[245] and so information availability can be seen as an crucial factor in order to achieve efficiency.

3.3.3 Potential Strategic Disadvantages of Transparency

3.3.3.1 The Cost of Transparency

For the regulator, most regulatory strategies possess a variety of differing direct and indirect costs. An example of such costs may be the wage of personnel within the regulatory structures of an organisation, or the costs related to information collation during the planning process of the regulation.[246] Regulation may also create specific types of costs with respect to implementation, such as enforcement and monitoring of the rules.[247]

The use of transparency also attracts a number of costs. These costs can be divided into three categories, namely: costs for disclosers, costs for regulatory agents and costs for information recipients/users. Each are discussed in turn.

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[241] ibid 4.

[242] Joseph Farrell, 'Information and the Coase theorem' (1987) 1 The Journal of Economic Perspectives 113.

[243] Paul R Kleindorfer and Eric W Orts, 'Informational Regulation of Environmental Risks' (1998) 18 Risk Analysis 155, 161.

[244] 'Pareto optimality is a state of allocation of resources in which it is impossible to make anyone individual better off without making at least one individual worse off during the process of allocating a certain amount of allocable resources to a set of individuals'. Xiaoxi Wang, *Studies on Moral Capital* (Springer 2015) 22.

[245] David W Case, 'Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective' (2005) 76 University of Colorado Law Review 379, 419.

[246] Wim Marneffe and Lode Vereeck, 'The Meaning of Regulatory Costs' (2011) 32 European Journal of Law and Economics 341, 346-348.

[247] ibid 348.

First, with respect to costs for the discloser, the work of Kuijper has highlighted that these may and are not limited to:

> …the cost of computing, storing, recording, processing, analyzing, and displaying information in myriad forms; the cost of communicating, including the cost of connecting to any other economic actor and exchanging information; the cost of finding and passing on information; and the cost of coordinating, monitoring, and assessing financial, business, and economic activities. [248]

In addition to Kuijpers view, Fung *et al* have highlighted that the costs of disclosure 'increase[s] with the amount, scope, and/or level of detail of information provided to users'.[249]

Second, transparency may create some costs for the regulator. In some circumstances, the regulator itself may collect information on companies and disclose this information to public.[250] Even if the disclosure is made by the companies themselves, the 'policing of the quality of information' disclosed by the companies may create a series of costs for the regulator.[251]

Finally, transparency may also imposes costs upon the users/recipient.[252] Obtaining information, such as scrutinising labels, for example, may be costly for consumers.[253] The time of such users spent processing such information can be a basis for improving costs.[254]

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[248] Kuijper (n 16) 40.

[249] Archon Fung, Mary Graham, David Weil 'The Political Economy of Transparency: What Makes Disclosure Policies Effective?' (2002) Harvard University, John F Kennedy School of Government Working Paper Series OPS-02-03, 17. <http://archonfung.net/docs/articles/2002/FGWTransparency1.pdf> accessed 21 September 2016.

[250] Baldwin, Cave and Lodge (n 90) 119.

[251] ibid 120.

[252] David Weil, 'The Benefits and Cost of Transparency: A Model of Disclosure Based Regulation' (2002) John F. Kennedy School of Government, Transparency Policy Project Working Paper 7/2002, 16 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=316145> accessed 22 July 2016.

[253] Baldwin, Cave and Lodge (n 90) 120.

[254] See Aleecia M McDonald and Lorrie Faith Cranor, 'The Cost of Reading Privacy Policies' (2008) 4 Journal of Law and Policy for the Information Society 543.

Although transparency attracts some costs, as other regulations, a key question in this respect is whether or not transparency is more cost-efficient than other strategies. The use of transparency strategies is fundamentally based upon 'informational regulation', may prove to be more efficient and less expensive than other regulatory regimes overall.[255] In this respect, the following factors may play a role.

First, transparency may have positive effects on the regulatory costs of governments.[256] Transparency strategies overall may play a role in moving 'all regulatory costs onto those being regulated'.[257] Second, transparency strategies generally use some cost-effective techniques such as shaming with respect to sanctions.[258] Through such a system, the corporation can be sanctioned (or rewarded) by employees, consumers, governments and shareholders.[259] Third, new communication technologies clearly play a role in reducing the cost of information collation and distribution to minimum.[260] Technological developments assist stakeholders in putting pressure on TNCs to provide greater transparency. [261] Fourth, transparency may also play a role in reducing other indirect costs. Disclosing hazard warning information, for example, plays a role in the reduction of accidents and any associated losses.[262] Lastly, being transparent also helps companies reduce costs. Therefore, even if they

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[255] Cass R Sunstein, 'Informational Regulation and Informational Standing: Akins and Beyond' (1999) 147 University of Pennsylvania Law Review 613, 625.
[256] Fung and others (n 36) 14.
[257] Self-regulation through codes of conduct may be one example in this regard. See Bryne Purchase, 'The Political Economy of Voluntary Codes' in Kernaghan R Webb (ed), *Voluntary Codes : Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University 2004) 79.
[258] For details on shaming see 3.2.1 above. Shaming is more cost-effective than other sanctions See Dan M Kahan and Eric A Posner, 'Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines' (1999) 42 Journal of Law and Economics 365, 366.
[259] See 4.1.1.1 below.
[260] Kuijper (n 17).
[261] See Joel Gurin and Beth S Noveck, 'Corporations and Transparency: Improving Consumer Markets and Increasing Public Accountability' in Nigel Bowles, James T Hamilton and David Levy (eds), *Transparency in Politics and the Media: Accountability and Open Government* (I B Tauris 2014).
[262] Wesley A Magat and W Kip Viscusi, *Informational Approaches to Regulation*, vol 19 (Massachusetts Institute of Technology Press 1992) 2.

are not required to be transparent, strategic reasons, such as branding or profit increases associated to reputation encourage them to disclose information voluntarily.[263]

Conversely, there may be some factors associated to the efficiency of transparency regulations. Such factors which may impose limits upon impact and decrease the efficiency of transparency are scrutinised in the next section.

3.3.3.2 Recipients' Limits in terms of using Information

The information users/recipients may not always be able to make full use of information they receive.[264] Therefore, transparency, as a regulation strategy, may not always be effective at improving the interests individuals, or in the present case, employees. Several reasons may account for this:

Behavioural and Cognitive Biases

In some circumstances, information users may not be able use the information effectively because of some cognitive and behavioural constraints.[265] For example, individuals are prone to make irrational choices if there is too much information.[266] As the work of Ripken has highlighted, too much information may mean people are left confused or make inferior decisions.[267]

An example of this is where consumers may not make rational choices owing to constraints place upon them by advertisement which affected by their subconscious.[268] Indeed, psychological biases may make investors over confident or optimistic about their choices,

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[263] All these issues making companies disclose more information will be analysed in 4.1.1.1.
[264] Calo (n 32) 1052.
[265] Susanna K Ripken, 'The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation' (2006) 58 Baylor Law Review 139, 160-176.
[266] ibid 161.
[267] ibid 160.
[267] ibid 160-163.
[268] Jacob Jacoby, 'Is It Rational to Assume Consumer Rationality-Some Consumer Psychological Perspecitve on Rational Choice Theory' (2000) 6 Roger Williams University Law Review 81, 104.

without paying attention to information, or only paying attention to information that affirms their beliefs.[269]

Aside from common behavioural and cognitive biases, individuals might also have differing capacities to understand information.[270] Some of the reasons for differing capacities are discussed in the following sub-sections.

Lack of Education

Education is thought to be a major factor affecting the outcome and effectiveness of transparency regimes,[271] such that information may often only prove useful to educated individuals.[272] Educated people are more likely to make rational decisions in response to the information disclosed to them, and can be easily exemplified by routines in their everyday life.[273] However, uneducated people, such as illiterate consumers who are not aware of the harmful effects of products they consume may not benefit from transparency. Even if the consumer is educated, if corporations use formal language in their disclosure, this information can only be understood by a limited number of people, conversant in the terminology.[274]

Education can further affect the response of employees to transparency. For example, employees, who are not aware of their legal rights may not benefit from such information as effectively as those that are. In this respect, education can improve an employee's understanding risk information and in turn improve their means of self-protection against

[269] Ripken (n 265) 176.
[270] Sage (n 21) 1728.
[271] Raymond E Schucker and others, 'The Impact of the Saccharin Warning Label on Sales of Diet Soft Drinks in Supermarkets' (1983) Journal of Public Policy & Marketing 46.
[272] Ben-Shahar and Schneider (n 22) 740-741.
[273] For example, according to a survey educated people are most likely to pay attention to nutritional information on food packages. Alyssa Brown, 'In U.S., Less Than Half Look at Restaurant Nutrition Facts' (*Gallup,* 9 August 2013) <http://www.gallup.com/poll/163904/less-half-look-restaurant-nutrition-facts.aspx> accessed 20 August 2016.
[274] Calo (n 32) 1053.

such factors.[275] Nevertheless, it is widely understood that in today's world, especially in international supply chains, many employees are not aware, or made aware, of their rights.[276]

Social Norms and Cultural Traditions

The impact of transparency may be limited by the habitual norms or dominant thoughts in society. As discussed above, although transparency is a regime that attempts to flow against corruption, if personal connections play a role in a particular society, any increase in transparency is unlikely to decrease corruption.[277] Indeed, transparency may even 'enhance the incentives to establish connections for [the purposes of] corruption', as to circumvent controls. [278]

When it comes to corporations, social norms may of course be a key element and play an effective role in the implantation of transparency. The demand for information disclosure and the effectiveness of disclosure may depend upon culture and social values.[279] To this end supply of information may be affected by habits, traditions and social norms, especially since corporate decision-makers may be prone to non-disclosure.[280]

In summary, owing to social norms, individuals may in some cases continue to pay greater attention what other people say than considering all of the information disclosed to them. [281]An example of this may be information on health, where many consumers continue

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[275] Fung and others (n 36) 12.

[276] Tula Connell, 'Defying Challenges, Myanmar's Workers Win Crucial Labour Rights' (*Equal Times,* 13 September 2016) <http://www.equaltimes.org/defying-challenges-myanmar-s?lang=en#.V-LlxuT2aUl> accessed 21 September 2016.

[277] Mehmet Bac, 'Corruption, Connections and Transparency: Does a Better Screen Imply a Better Scene?' (2001) 107 Public Choice 87, 93.

[278] ibid.

[279] Rozaini M Haniffa and Terry E Cooke, 'Culture, Corporate Governance and Disclosure in Malaysian Corporations' (2002) 38 Abacus 317, 318.

[280] See Stephen M Bainbridge, 'Mandatory Disclosure: A Behavioral Analysis' (2000) 68 University of Cincinnati Law Review 1023.

[281] S Robinson and M Brodie, 'Understanding the Quality Challenge for Health Consumers: The Kaiser/AHCPR Survey' (1997) 23 the Joint Commission Journal on Quality Improvement 239.

to fail in their use of this information effectively.[282] As such, if culture and social values play a greater role in individual behaviour, transparency regulations may face a number of limitations and the end users may not pay substantial attention to the information.[283]

Unequal Bargaining Power

Economic conditions may play a significant role in the reaction of individuals towards transparency. Information disclosure, for example, may not have an influential impact upon the choices of poor people.[284] It should also be noted that transparency may prove less effective if the recipients have economic difficulties[285] since 'poor people must focus intensely on the economic consequences of their expenditures'.[286]

Information relating to workplace conditions, for example, may not offer any positive outcomes where the unemployment rate is high, or there is no choice to work for a different employer.[287] Even if employees are provided with information, they may not use this information effectively if they fear being fired.[288] In some developing countries, where the majority of TNC supply chains operate, employees are often not protected by social welfare programs.[289] As such, many may not feel they are in a position to take advantage of transparency regulations.

Accordingly, even if transparency resulting in informed employees, this may not improve their rights or interests. Put differently, if there is 'a high costs of exiting, [the] threat

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[282] ibid.
[283] ibid.
[284] Schucker and others (n 271).
[285] For example, according to a Gallup survey 'Lower-income Americans are less likely than middle- and higher-income Americans to say they pay attention to nutritional information on food packages and in restaurants'. Brown (n 273).
[286] Cass R Sunstein, 'It Captures Your Mind' *The New York Review of Books* (Volume LX, No 14 September-October 2013) 47.
[287] Fung and others (n 36) 11.
[288] For how employees can use the information disclosed by the companies see 4.2.1.1.1.
[289] Denis G Arnold and Norman E Bowie, 'Sweatshops and Respect for Persons' (2003) 13 Business Ethics Quarterly 221, 230.

of [an] exit might not be credible'.[290] Indeed, depending on the job performed, it may prove impossible for a worker to find a safe place to work. Nevertheless, in such circumstances, other regulations may help improve employee interests, and prevent the corporation from taking advantage of employees.[291]

In light of the above, there may prove to be similar limits in terms of consumer reactions to transparency with respect to employee interests. [292] For instance, some customers may select cheap products, rather than purchasing the products of companies which are environmentally and socially transparent.[293] In other words, their choices may be driven by prices instead of information disclosed by the company.

Imperfect Competition

Lack of perfect competition in the market may also reduce the impact of transparency strategies. Although transparency can help individuals to put pressure on companies to change their behaviour, in imperfect competition, for example, consumers may not 'sanction or reward corporations' [294] due to the lack of sufficient alternatives in the market. [295] Consumers may only be effective if the market is based upon perfect competition.[296]

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[290] Russell W Coff, 'When Competitive Advantage Doesn't Lead to Performance: The Resource-Based View and Stakeholder Bargaining Power' (1999) 10 Organization Science 119, 122.
[291] Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (n 148) 43.
[292] ibid.
[293] ibid.
[294] Such pressure held by consumers is called as 'consumer sovereignty'. According to Hutt, consumer sovereignty 'refers to the controlling power exercised by free individuals, in choosing between ends, over the custodians of the community's resources, when the resources by which those ends can be served are scarce'. William H Hutt, 'The Concept of Consumers' Sovereignty' (1940) The Economic Journal 66, 66. For further discussion on consumer sovereignty see 4.1.1.1.2 below.
[295] N Craig Smith, *Morality and the Market: Consumer Pressure for Corporate Accountability* (Routledge 1989) 35.
[296] Smith (n 235) 35.

Consequently, the aforementioned factors substantially restrict the reaction users may have to the disclosure made to them. All of the factors discussed in this section impede effective transparency regulation and may reduce such output to certain extent.

However, such limitations may be reduced to some extent. For example, governments may educate people to make more ethical choices.[297] The education system could perhaps teach individuals to consider fundamental ethical issues, such as labour rights. Educated shoppers, who have sufficient knowledge on employee rights, may be more inclined to purchase selectively. Employees can also be educated better on their rights. In this respect, in-factory education and training programs for employees may prove useful.[298]For example, education may improve the understanding of hazardous materials and self-protection.[299] Interestingly, education also play a number of other indirect roles. For instance, educated employees who are more likely to realise their legal rights may have greater bargaining power to 'advocate for themselves'.[300] Hence, some of the limitations of transparency regulations can be overcome by improved education.

Moreover, in some circumstances the behavioural limitations of employees may be reduced by different techniques, in order to convey the message less able users. However, signs or symbols may also prove useful. As Calo has argued, '[l]anguage is not the only means to convey information'.[301] Therefore, even if a consumer does not have the time to spend for reading information, or if she is not educated enough to understand the information,

[297] Olivier De Schutter, 'Corporate Social Responsibility European Style' (2008) 14 European Law Journal 203, 221.
[298] Heather White, 'Educating Workers,' in Archon Fung, Dara O'Rourke and Charles F Sabel (eds), *Can We Put an End to Sweatshops?* (Beacon Press 2005) 70.
[299] Fung and others (n 36) 12.
[300] White (n 298) 70-71.
[301] Calo (n 32) 1034.

strategies such as grades or rating systems may allow the information to be made understandable.[302]

Lastly, when the information presented is complex or difficult to understand, intermediaries may ensure the information is useful and help individuals to contemplate and process it. [303]

3.3.3.3 Limits on Confidential Information

Privacy is very much regarded as an important human right. [304] Indeed, it is transparency that in some circumstances may result in negative consequences or impact upon the autonomy of persons by affecting their privacy. Hence in such circumstances transparency may be limited.

For instance, a company may require employees to disclose private information that may in turn damage them. Indeed, an example of this is where American companies 'such as Johnson Controls and Carlisle Plastics [which required] female job applicants to submit pregnancy screening: women are refused employment if the test is positive'.[305] As with this example, the transparency 'exchange' may assist companies to discriminate against current or prospective employees. As such, one limit on transparency can be on private information of employees.

Another confidential source of information may be trade secrets. Some corporations may invest a great deal of money, research and undivided attention in to trade secrets. However, even if this is the practise undertaken, companies can also be transparent to some

[302] Fung and others (n 36) 11.
[303] Dalley (n 25) 1125.
[304] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) art 8, 1950.
[305] Arnold and Bowie (n 289) 227.

measure. For example, if the trade secret is likely to affect the general public, relevant information might be revealed for the sake of vulnerable stakeholders.[306]

Conclusion

This chapter has sought to convince the reader that, if companies are to behave appropriately towards their employees, they should do so and transparently. The chapter first begun by conceptualising the notion of transparency, highlighting that transparency should not be considered in terms of mere information disclosure. For transparency to be effective, information disclosure is required to be accurate, complete, relevant, understandable and timely, and should be shaped through a dialogue between the discloser and the end user.

A typology of regulatory strategies was then discussed, and the ways in which corporations attempt to respect the interests of employees was discussed. This typology outlined strategies across a spectrum, from less interventionist (transparency) to interventionist regulations (state ownership). The chapter then analysed, and defended, the merits of transparency. The arguments advanced were built upon two pillars, first the intrinsic value of transparency and then the strategic value of transparency, as a means to improving the interests and well-being of employees. In doing so, the chapter looked at the merits of transparency and what makes it an effective strategy. Finally, the chapter considered some of the weaknesses of transparency when compared to alternative strategies.

A conclusion question for this chapter may then be: how do we move forward towards delivering a transparency regime? Will it happen 'spontaneously', by companies simply choosing to comply and respect the transparency requirements identified in this chapter, or is some degree of 'compulsion' be necessary, and why? The thesis shall now build upon its

[306] ibid.

discussion thus far and shall, in the next chapter, consider evidence in a bid to address such questions.

Chapter 4

The Avenues to Transparency

Introduction

Light helps us to see hidden faces, and to appreciate the true colour of the things around us. Disclosure arguably plays a similar role in allowing us to assess whether corporations respect employees and stakeholders. Although some corporations voluntarily expose themselves to such light, some still fall behind, and intentionally so. However, the many reasons to justify bringing corporations into the light, which this chapter shall investigate accordingly.

The previous chapter established the case for transparency. It sought to show why someone who accepts the premise of chapter 2 – namely that in revising the corporate objective, companies must treat their employees with genuine respect – should also accept the claim that companies must be, or be made to be, transparent.[1] Of course, there are many who accept the premise – who believe companies should treat employees well – but who also doubt that transparency has much of a role to play in securing such behaviour. Chapter 3 attempted to convince such critics that they are wrong. To achieve this, both the intrinsic and the strategic merits of transparency were emphasised.

With the above in mind, and assuming that the reader may now accept the argument advanced by the thesis thus far, the next question is essentially one of *implementation* or *enforcement*. How do we ensure companies exhibit the transparency this thesis argues is

[1] For intrinsic and strategic merits of transparency see 3.3 above.

necessary for intrinsic, and strategic, reasons? It is one thing to justify these things theoretically, yet, it is quite another to change the behaviour of a company on an everyday level. In one respect, the answer could run as follows. It may be claimed that most companies often have – purely from self-interest basis alone – reasons to be transparent. Companies themselves, or those running them, are also sometimes better off if they choose to be transparent.[2] However, this *voluntary* mode of transparency, driven by self-interest alone, only gets us so far. Too often, the incentive to being transparent – namely the benefits that being transparent may deliver – will be insufficient. When self-interest runs out, *compulsion* must take over.[3] Hence, this chapter argues there must be some degree of compulsion upon companies to be transparent. Naturally, compulsion can take many different forms, as will be demonstrated later.

In keeping with the above, the structure of this chapter shall run as follows. The first part of the chapter, 4.1, shall focus upon this issue of *voluntary* disclosure. Within this section, the question of *how far will companies choose to be transparent if there are no external, legally enforced, rules* shall serve as the main point of reference. Notably, *voluntary* disclosure is used here as a loose term, as it will be analysed under three categories, namely *Pure Voluntarism*, *Self-Imposed Codes of Practice* and *Codes Created by External Organisations*. In this way, section 4.1.1, shall examine *pure voluntarism* in particular. In order to fully appreciate the core motivations for companies to be transparent, three situations shall be examined: the business case, managerial self-interest and managerial moralism. Following on from this, section 4.1.2 shall scrutinise voluntary disclosure in light of company specific Self-Imposed Codes of Practice (SICP) as a means of corporate *pre-commitment* to being transparent. Finally, 4.1.3 shall focus on external codes. In this respect, external codes,

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[2] See 4.1 below.

[3] Such as through mandatory transparency requirements by government regulation. For details see 4.2 below.

which require corporate transparency, applicable to the companies through ad hoc decisions to be transparent/disclose information, shall be discussed. Overall, the first part of the chapter shall conclude, whilst voluntary disclosure goes someway to improving corporate transparency, evidence to be outline will demonstrate this is not effective enough. Hence, mandatory disclosure rules shall be necessary. The second part of the chapter, 4.2, shall place the spotlight upon state-sponsored mandatory transparency requirements. Here, along with the motives of mandatory disclosure requirements, the various avenues that make companies disclose such information, and the potential problems encountered, shall be examined.

4.1 Voluntary Transparency

4.1.1 Pure Voluntarism

As briefly outlined above, three categories may be distinguished within voluntary disclosure. The first of these is called *pure voluntarism*. In such category, it is assumed that there are no external soft law codes of practice, recommending transparency, and there are no self-imposed policies by the company itself, requiring transparency. Rather, a company may simply decide whether or not to disclose some information, according to the balance of the costs and benefits such disclosure may yield, as they appear at the moment of choice. In considering why, and the extent to which, companies may disclose information on pure voluntary basis, there said to be three different motivations the company will make when assessing such disclosures. These are;

a) The Business Case: The company itself may be better off with such disclosures;
b) Managerial Self-interest: Managers/directors may derive some self-benefits from disclosure;
c) Managerial Moralism: Managers/directors may feel a moral obligation to ensure the company makes such disclosures.

The following sections shall attempt to examine the mechanisms through which each of these three motivations may come to operate, and critically discuss each in order to consider their strengths.

4.1.1.1 The Business Case

> Managers must make a strategic response to external pressure that may necessitate going beyond compliance with law, and this may result in increased costs. From the company's perspective incurring them will be worthwhile if the market penalties for failing to adopt higher standards are likely to be even more damaging to profitability.[4]

It has been claimed that there is a business case for disclosure.[5] Specifically, it can be said that the business case may be conceptualised as 'a pitch for investment in a project or initiative that promises to yield a suitably significant return to justify the expenditure'.[6] That is to say, if there is to be a business case for *pure voluntary* disclosure, it must arise when the company gains more than it loses from such disclosure.[7] As such, one can conceive of the company as identifying the costs and the gains of disclosing, or of failing to disclose, and comparing them to see whether, on balance of probabilities, they favour such disclosure.[8] It

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[4] John Parkinson, 'Disclosure and Corporate Social and Environmental Performance: Competitiveness and Enterprise in a Broader Social Frame' (2003) 3 Journal of Corporate Law Studies 3, 25 (References are omitted).

[5] The disclosure of 'Environmental, Social, and Governance' (ESG) performance can have a business case. See Save the Children, 'Private Sector Transparency and Post-2015, Mandatory Corporate Reporting of Non-Financial Performance: A potential Indicator of the Private Sector's Contribution to a Post-2015 Framework' (Policy Brief March 2013) 7 <http://www.savethechildren.org.uk/resources/online-library/private-sector-transparency-and-post-2015> accessed 26 July 2016.

[6] Elizabeth Kurucz, Barry Colbert and David Wheeler, 'The Business Case for Corporate Social Responsibility in Andrew Crane and others, *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press 2008) 84.

[7] Stephen M Bainbridge, 'Mandatory Disclosure: A Behavioral Analysis' (2000) 68 University of Cincinnati Law Review 1023, 1056.

[8] According to a research, '[b]enefits of disclosing corporate social information are expected to be in excess of [its]costs'. Tamara Zunker, 'Determinants of the Voluntary Disclosure of Employee Information in Annual Reports: An Application of Stakeholder Theory,' (PhD Thesis, Bond University March 2011) 4 <http://epublications.bond.edu.au/theses/43/> accessed 25 August 2016.

can thereby be assumed that individuals' reaction to disclosure form the business case for transparency.

However, which group of individuals may opt to react to the company for its disclosure practices towards employees? What is the prospective magnitude of gains and losses to be experienced by the company? How likely is the calculation to favour disclosure of information with respect to employees? This work shall start by addressing the case of employees.

4.1.1.1.1 Employee sanctions and rewards

One of the most obvious groups who may sanction or reward companies for their disclosure practices towards employees are, of course, employees themselves. Hence, companies who consider the role of transparency on parity with affecting employee performance may see a business case in transparency. Four points can be made in this respect.

First point may be related to the psychological benefits of transparency. In this respect, transparency can be said to improve the motivation and morale of the employees, and their overall commitment to the company.[9] Examples of such transparency may found through the use of internal communication tools, such as personnel newsletters, company conventions, intranet platforms, all of which constitute factors affecting the motivation of workers.[10] Overall, motivated employees are likely to be more productive.[11] That is to say, transparency

[9] Nagib S Bayoud, Marie Kavanagh and Geoff Slaughter, 'Corporate Social Responsibility Disclosure and Employee Commitment: Evidence from Libya' (2012) 4 International Journal of Economics and Finance 37, 46.
[10] Francesco Perrini, 'Building a European Portrait of Corporate Social Responsibility Reporting' (2005) 23 European Management Journal 611, 615.
[11] James R Lindner, 'Understanding Employee Motivation' 36 Journal of Extension 1.

motivates employees ‘to use all their abilities for achieving [the] company goals’.[12]

One of the motivational factors that may improve or decrease the employees’ contribution to the corporation is trust.[13] Trust can be defined as ‘the reliance by one person, group, or firm upon a voluntarily accepted duty on the part of another person, group, or firm’.[14] According to an empirical study, ‘trust and transparency are positively related’.[15] In particular, the work of Ellia suggests ‘[t]rust is a common explanatory mechanism for transparency’s contributions to business growth: Transparency increases stakeholder trust; [and by] increasing stakeholder trust, a business distinguishes itself and grows’.[16]

Employees who have sufficient information about the company and its operations are more likely to trust the company.[17] Improved trust in turn reduces transaction costs.[18] For instance, improved trust can help managers to make ‘changes that increase efficiency’.[19] Without trust ‘employees [may] have built in negative response to change’.[20] One example to illustrate this point can be wage negotiations. Where a company discloses information that may inform employees of its financial hardship, this may help them to understand the economic well-being of the company and the reason for any changes.[21] Where the company

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12 Bayoud, Kavanagh and Slaughter (n 9) 41.

13 Sandra L Robinson, ‘Trust and Breach of the Psychological Contract’ (1996) 41 Administrative Science Quarterly 574, 578.

14 Larue T Hosmer, ‘Trust: The Connecting Link between Organizational Theory and Philosophical Ethics’ (1995) 20 The Academy of Management Review 379, 393.

15 Brad L Rawlins, 'Measuring the Relationship between Organizational Transparency and Employee Trust' (2008) 2 Public Relations Journal 1, 21.

16 John Elia, 'Transparency Rights, Technology, and Trust' (2009) 11 Ethics and Information Technology 145, 149.

17 Rawlins (n 15) 15-16.

18 Shann Turnbull, ‘The Science of Corporate Governance’ (2002) 10 Corporate Governance: An International Review 261, 273.

19 Philip Bromiley and Larry L Cummings, 'Transactions Costs in Organizations with Trust' in Roy J Lewicki, Blair H Sheppard, and Max H Bazerman *Research on Negotiation in Organizations* vol 5 (JAI Press 1995) 239.

20 ibid 238.

21 Acas, ‘Collective Consultation on Redundancies’ (Policy Discussion Papers) <http://www.acas.org.uk/media/pdf/l/2/pdp-collective-consultation-on-redundancies-accessible-version-July-2011.pdf> accessed 25 August 2016.

opts to withhold such information for itself, then it may be hard to convince employees that it cannot afford to pay them more.

Another benefit of trust can be its role in reducing the cost of monitoring and controlling.[22] For example, higher level of trust can eliminate the prospective cost of installing control systems such as 'review of [employee] activities by both supervisors and auditors'.[23] In the absence of trust, however, companies are required to improve their control systems which cost money.[24] Moreover, improving monitoring systems can sometimes have negative consequences upon the organisational commitment of employees, in addition to the financial cost.[25] Indeed, it may 'have the potential to communicate a message of mistrust in employees, conveying a sense that the organisation is an adversarial force to the employee', which may in turn affect organisational commitment of employees argued above.[26]

Lastly, trust results in cooperation in the company with employees who can count on each other.[27] It also enables better cooperation among divisions of a company which improves the joint projects within the company and thus its overall performance.[28] In fact, an example of this may be found in a study that suggested, the high cooperation among units of Japanese companies had in turn suggested improved performance.[29]

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[22] Bromiley and Cummings (n 19) 220.
[23] ibid 231.
[24] ibid 229.
[25] Tom R Tyler, 'Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches' (2005) 70 Brooklyn Law Review 1287, 1295.
[26] ibid 1295.
[27] Bromiley and Cummings (n 19) 232.
[28] ibid 238-239.
[29] Norman E. Bowie, *Business Ethics: A Kantian Perspective* (Blackwell 1999) 35.

Although trust may create some negative impact on employees, since it 'implies vulnerability on the part of the worker who is economically dependent on the employer',[30] companies that realise the business case stemming from improved trust may pay more attention to transparency.

Secondly, in addition to psychological benefits, transparency, which requires dialogue and consultation with employees, may improve the communication between the company and employees.[31] Companies that benefit from such communication are likely to spot technical problems and fix them earlier than usual.[32] Employees can also help companies to adapt fast changing business world conditions[33] as employees may have better access to information than the management.[34] However, corporations that cannot create a transparent environment in which employees can communicate with each other may find themselves sanctioned and lagging behind competitors.[35]

Kaizen, a Japanese manufacturing philosophy, can be a good example of how the involvement of all employees in the organisation may benefit the corporation as whole.[36] In this system, also known as *lean production*, transparency plays a key role by creating 'positive feedback for employees [who make] improvements' in the firm.[37]

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[30] Charlotte Villiers, *Corporate Reporting and Company Law*, vol 5 (Cambridge University Press 2006) 289.

[31] Dialogue and consultations are crucial elements in terms of effective transparency, see 3.1.4 above.

[32] Martin Reeves and Mike Deimler, 'Adaptability: The New Competitive Advantage' (Harvard Business Review, July–August 2011) 138 <https://hbr.org/2011/07/adaptability-the-new-competitive-advantage> accessed 26 July 2016.

[33] See generally Reeves and Deimler (n 32).

[34] Katherine I Miller and Peter R Monge, 'Participation, Satisfaction, and Productivity: A Meta-Analytic Review' (1986) Academy of Management Journal 727, 730.

[35] One example can be Nokia in this respect. Reeves and Deimler (n 32) 139-140.

[36] Nigel Bassett-Jones, 'The Paradox of Diversity Management, Creativity and Innovation' (2005) 14 Creativity and Innovation Management 169, 171.

[37] James P Womack and Daniel T Jones, *Lean Thinking: Banish Waste and Create Wealth in Your Corporation* (Simon and Schuster 2010) 26.

Thirdly, transparency can improve the reputation of the company and shape the company's image within the labour market.[38] Corporate social image influences existing employees in terms of 'their job satisfaction and [whether they have any intention] to leave the organisation'.[39] Interestingly, transparency has been said to help qualified staff judge whether the company is satisfying their expectations, and may contribute to the recruitment of top qualified employees.[40]

Indeed, transparency, such as disclosures with respect to labour standards, may allow potential employees assess whether they would work for the company. An important example of this in the public domain is the publication of various guides outlining 'the best companies to work for'.[41] Such lists help potential employees to decide the value or worth of such companies and the positions to which they may apply. Thus, today, companies often report on their supply chain and environmental performance in order to inform and attract ideal employees.[42] A better reputation will help maximise the number of applicants, and the quality of such applicants, which may influence the positive effect of employees upon the overall

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[38] Richard Mosley, 'CEOs Need to Pay Attention to Employer Branding' (Harvard Business Review 11 May 2015) <https://hbr.org/2015/05/ceos-need-to-pay-attention-to-employer-branding> accessed 26 August 2016.

[39] Christine M Riordan, Robert D Gatewood and Jodi Barnes Bill, 'Corporate Image: Employee Reactions and Implications for Managing Corporate Social Performance' (1997) 16 Journal of Business Ethics 401, 410.

[40] Disclosure, for example, may help people see whether pay policies are discriminatory or unfair in the company. Lynn Rhinehart, 'Salary Transparency Will Help Women' *Time* (18 February 2016) <http://time.com/4226633/pay-transparency/> accessed 23 September 2016.

[41] These lists could be formed for specific members of any race, sex or minority groups, such as best companies for women, blacks or Hispanics. Steve Lydenberg, 'How to Read a Social Responsibility Report: A User's Guide' (Institute for Responsible Investment, Boston College Center for Corporate Citizenship 2010) 13 <http://hausercenter.org/iri/wp-content/uploads/2010/05/IRI-How-to-Read-a-Corporate-Social-Responsibility-Report.pdf> accessed 26 July 2016.

[42] The Gap, a clothing and accessories retailer, could be one example in this regard. See Belinda Richards and David Wood, 'The Value of Social Reporting: Lessons Learned from a Series of Case Studies Documenting the Evolution of Social Reporting at Seven Companies' (Institute for Responsible Investment, Boston College Center for Corporate Citizenship 2009) 33 <http://hausercenter.org/iri/wp-content/uploads/2010/05/Value-of-Social-Reporting.pdf> accessed 26 July 2016.

performance of the company.[43] As such, companies are more likely to pay attention to their social reputation. One such example can be the food and drink manufacturer Nestle. The company, which was criticised harshly over its misconduct in the developing world, had publicly noted its worry 'about [the] recruitment of high quality graduates'.[44]

Lastly, employees, as members of the local communities where corporations operate, can play an active role in constructing a good public image by conveying information about the corporation's activities.[45] Indeed, the reverse is also true; as employees may also convey information from local communities to the company.[46] However, this is contingent upon the company being transparent to the employee.[47] The company may therefore see a business case for transparency.

Undoubtedly, there are some circumstances in which disclosure may have deleterious effects for the corporation.[48] For example, disclosure may not be favoured by the employees. However, even if the information disclosed is not favoured by employees as whole, transparency can make the decisions pass as more acceptable by improving the perception of fairness among employees.[49]

Notably, employees may not always be able to sanction or reward companies. As noted in the previous chapter, issues such as behavioural limits or the unequal bargaining

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[43] See Daniel B Turban and Daniel M Cable, 'Firm Reputation and Applicant Pool Characteristics' (2003) 24 Journal of Organizational Behavior 733.
[44] Rob Harrison, Terry Newholm and Deirdre S Shaw, *The Ethical Consumer* (SAGE 2006) 96.
[45] Debra Sequeira and M Warner, *Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets* (International Finance Corporation 2007) 26.
[46] ibid.
[47] ibid.
[48] David Graham and Ngaire Woods, 'Making Corporate Self-Regulation Effective in Developing Countries' (2006) 34 World Development 874.
[49] Harroll J Ingram Jr, *Organizational Transparency, Employee Perceptions, and Employee Morale: A Correlational Study* (ProQuest 2009) 40.

power of employees may render them 'toothless' against their own corporation.[50] In such cases, a company may not see any business case for transparency. Nevertheless, there are other stakeholder groups that may seek to impose punishment or rewards with respect to corporate transparency. The focus shall be on these stakeholders in the following sections.

4.1.1.1.2 Consumer sanctions and rewards

Are consumers likely to reward or punish companies according to how transparent they may be? This remains one of the key questions for transparency, and the concept of 'consumer sovereignty' implies that consumers can and may do just this.[51] 'Consumer sovereignty' refers to the purchasing power consumers possess and how this may in turn affect the behaviour of some businesses.[52] The level of information held by consumers regarding products that they purchase can play a vital role in the effect had by consumer sovereignty.[53]

In terms of consumer sovereignty 'consumers use their economic votes to reward' companies they prefer.[54] Companies may be rewarded by consumers according to the quality, or price of the products they produce.[55] They may also be 'rewarded' or 'punished' according to how ethical their behaviour is perceived to be.[56] Nevertheless, it should be asked whether consumers would be interested in employment practices of corporations, which provide goods and services themselves.

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[50] See 3.3.3.2 above.
[51] M Joseph Sirgy and Chenting Su, 'The Ethics of Consumer Sovereignty in an Age of High Tech' (2000) Journal of Business Ethics 1, 8.
[52] William H Hutt, 'The Concept of Consumers' Sovereignty' (1940) The Economic Journal 66, 66.
[53] Lack of information is seen as one of the reasons reducing consumer sovereignty. N Craig Smith, *Morality and the Market : Consumer Pressure for Corporate Accountability* (Routledge 1989) 35; However, in addition to information access, consumers need to be able to process the information as well. For further examination on this issue see Sirgy and Su (n 51).
[54] Sirgy and Su (n 51) 2.
[55] ibid.
[56] Elizabeth H Creyer, 'The Influence of Firm Behavior on Purchase Intention: Do Consumers Really Care about Business Ethics?' (1997) 14 Journal of Consumer Marketing 421, 432.

Indeed, a study commissioned by the National Consumers League (NCL) and conducted by the Opinion Research Corporation (ORC International) highlighted that consumers are willing to incur some financial sacrifices in favour of humane working conditions for those employees manufacturing the supplies for such corporations.[57] However, for this purpose, consumers may need information upon which they may judge companies regarding the policies and activities they employ, and how this may in turn affect employees.[58]

Informed consumers generally prefer the products of companies that respect corporate social responsibility, rather than companies who fail in this regard.[59] From this perspective, it could be expected that consumers may reward companies according to the information they disclose, in particular that which details improved labour conditions. In this respect, a study conducted at Harvard University highlighted that 'sales of products rose dramatically when they were labelled as being made [using] good labour standards'.[60] Indeed, such research demonstrates that labels that offer information regarding issues affecting employees directly influences consumer choices.[61]

Crucially, in a transparent system, consumers who interact with other people may further improve the effect of disclosure. Under such system, where information affects

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[57] National Consumers League, 'Survey Says Consumers Willing to Sacrifice for Humane Factories' <http://www.natlconsumersleague.org/worker-rights/105-worker-safety/647-survey-says-consumers-willing-to-sacrifice-for-humane-factories> accessed 3 July 2016.

[58] For the role of transparency in the choices of consumers (and other stakeholders), see Michael R Siebecker, 'Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse' (2009) 87 Washington University Law Review 115.

[59] ibid 115.

[60] Michael J Hiscox and Nicholas FB Smyth, 'Is There Consumer Demand for Improved Labor Standards? Evidence from Field Experiments in Social Labeling' (2006) Department of Government, Harvard University 1, 2 <http://scholar.harvard.edu/files/hiscox/files/consumerdemandfairlaborstandardsevidencesocial.pdf> accessed 9 August 2016.

[61] ibid 5.

people's choices, 'all people appear to serve as each other's keepers'.[62] As such, relevant and adequate information even change the purchase patterns of other consumers.[63]

Importantly, disclosure plays a vital role in the reputational management of a corporation.[64] Reputation gives basic information about a company upon which a consumer may rely. The most obvious example of this is the importance of reputation among consumers and brand marketing.[65] For example, identical products produced under different brands may often face being turned down by customers, since the reputation of a particular brand affects their behaviour.[66]

Ethical issues, such as how the company treats its employees, may also affect the reputation of the company, and thus the choices of the consumers.[67] A good example of this may be products that display the Fairtrade logo,[68] which are perceived by consumers as better quality products.[69] A company specifically discloses information about the manufacturing process of its products through such labelling.[70] Interestingly, whilst the use of such a logo

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[62] Larry C Backer, 'From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations' (2008) 39 Georgetown Journal of International Law 591, 625.
[63] Pat Auger and others, 'What Will Consumers Pay for Social Product Features?' (2003) 42 Journal of Business Ethics 281, 299.
[64] For a further analysis on this issue see Charles J Fombrun and Violina P Rindova, 'The Road to Transparency: Reputation Management at Royal Dutch/Shell' in Majken Schultz, Mary J Hatch and Mogens H Larsen, *The Expressive Organization: Linking Identity, Reputation, and the Corporate Brand* (Oxford University Press 2000).
[65] See Albert Caruana, 'Corporate Reputation: Concept and Measurement' (1997) 6 Journal of Product & Brand Management 109.
[66] Anjan Chatterjee and others, 'Revving Up Auto Branding' (2002) The McKinsey Quarterly 134.
[67] Caruana (n 65) 118.
[68] Fairtrade International (FLO), 'About Fairtrade' <http://www.fairtrade.net/about-fairtrade.html> accessed 3 July 2016.
[69] 'It is possible that consumers attracted to Fair Trade labelled goods may be motivated, in full or in part, by a desire for product quality, and may infer that ethically-labelled products are of higher quality than alternatives'. Michael J Hiscox, Michael Broukhim and Claire Litwin 'Consumer Demand for Fair Trade: New Evidence from a Field Experiment using eBay Auctions of Fresh Roasted Coffee' (2011) 27 <http://www.ohio.edu/people/paxton/webpage/altruism/altruism/Hoscox_EbayCoffee.pdf> accessed 26 July 2016.
[70] Fairtrade logo, for instance, can be seen as giving information how the company considers 'decent working conditions and fair terms of trade for farmers and workers' in manufacturing process. See Fairtrade Foundation, 'What Fairtrade Does, <http://www.fairtrade.org.uk/en/what-is-fairtrade/what-fairtrade-does>accessed 26 July 2016. See also 4.1.1.5 below.

provides consumers with information on employees, labelling may have a greater potential in terms of further disclosure. As the work of Ayres would suggest, 'the average hourly labor costs of products' may also be disclosed on the products.[71] In short, labelling is likely to inform customers to consider whether or not to sanction or reward companies according to their labour practices.[72]

Supplementary to ethical labelling, consumers may also employ a number of other mediums in order to reward or punish companies accordingly. The internet, for example, helps consumers to see and assess employee issues easily. A good example of this is the *Corporate Watch*,[73] which investigates the social impact of corporations with respect to different issues affecting employees, such as violations of health and safety regulations.[74] Another portal, called the *Ethical Consumer*, ranks companies according to their ethical performance, including workers' rights.[75] As such, the internet helps consumers to sanction or reward companies according to consumer's own standards. Consumers can in turn advocate boycotts, for example, in reaction to those corporations who abuse employees or fail to respect employees' rights,[76] highlighting how easily the reputation of a company can be sanctioned by the consumer. The threat of such a boycott might be enough to change the company's behaviour. As the Economist observed, 'where brand matters, it may be better to talk than fight'.[77] Accordingly, in some circumstances, disclosure can be the best avenue

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[71] Ian Ayres, 'Monetise Labor Practices' in Archon Fung and others, *Can We Put an End to Sweatshops?* (Beacon Press 2001) 83.
[72] ibid 2.
[73] Corporate Watch, 'About Corporate Watch' <https://corporatewatch.org/pages/about-corporate-watch> accessed 3 July 2016.
[74] Corporate Watch, 'Bayer AG: Corporate Crimes' (14 June 2005) <https://corporatewatch.org/company-profiles/bayer-ag-corporate-crimes> accessed 26 July 2016.
[75] Ethical Consumer, 'Our Ethical Ratings' <http://www.ethicalconsumer.org/shoppingethically/ourethicalratings/humanrights.aspx> accessed 26 July 2016.
[76] David Hencke, 'Consumers Start Online Campaign to Boycott Kettle Chips' *The Guardian* (9 October 2007) <https://www.theguardian.com/business/2007/oct/09/money.retail> accessed 3 July 2016.
[77] Harrison, Newholm and Shaw (n 44) 95.

through which to talk and even fix the damaged public image of a corporation. Therefore, this may aid companies in seeing a business case for disclosure.

In summary, much like informed employees, consumers can play a vital role, externally, where the punishment or reward of a corporation, and their use of transparency, is concerned. In this regard, as argued above, disclosure affect consumer choices. Thus, companies, which monitor the risks to reputation in order to ensure competitive advantage in the market, may be prone to disclose information.

Nevertheless, in some circumstances, consumers may not be able to sanction inferior companies.[78] For example, consumers may be unable to award or punish those companies which do not produce end-use consumer goods, such as companies producing raw materials.[79] Therefore, it could be expected that such companies may not consider the negative reaction of consumers as a result of lacking transparency.[80] However, even companies of this kind may be obliged to consider their reputation and transparency, since they supply to other companies producing consumer goods.[81]

4.1.1.1.3 Shareholder sanctions and rewards

As the suppliers of capital to a company, shareholders who care about whether the company is transparent or not may opt to sanction the company and its suppliers, depending upon whether or not they regard the matter as important.[82] Such sanctions may include selling

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[78] Consumers, for example, may be unable to 'sanction or reward corporations' if there is imperfect competition in the market, see 3.3.3.2 above.

[79] Robert J Liubicic, 'Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights through Private Initiatives' (1998) 30 Law and Policy in International Business 111, 141.

[80] ibid.

[81] Consumers may also be concerned with transparency of the supply chain issues. Steve New, 'The Transparent Supply Chain' (Harvard Business Review October 2010) <https://hbr.org/2010/10/the-transparent-supply-chain> accessed 27 August 2016.

[82] For example, evidence suggests that shareholders reward or sanction companies according to the information related to their environmental behaviour. See Caroline Flammer 'Corporate Social

shares or declining to invest in a company or supplier that fails to behave in a transparent manner towards its stakeholders, or using their voice within such companies to demand transparency.[83] Rewards may include investing more in those companies with good transparency practices.

Shareholders that pay attention to employee related disclosure may be considered in two categories. The first are shareholders who think there is a *business case* for employee-facing transparency. The second are ethical shareholders who consider employee interests in their investments from moral perspective. The following sections focus on these two groups of shareholders individually.

4.1.1.1.3.1 Shareholders paying attention to the business case

Information has a great importance for corporate investors so they may evaluate the worth of their investments. For example, disclosure of information such as 'revenues, net earnings and depreciation of assets during a specified time period' may guide shareholders in relation to existing or future investments.[84] As such, greater transparency ensures the performance of a company is visible to such investors. It may affect stock prices and lower the cost of equity[85] and diminish 'the information asymmetry among managers and investors'.[86]

Responsibility and Shareholder Reaction: The Environmental Awareness of Investors' (2013) 56 Academy of Management Journal 758.

[83] Anastasia O'Rourke, 'A New Politics of Engagement: Shareholder Activism for Corporate Social Responsibility' (2013) 12 Business Strategy and the Environment 227, 228.

[84] International Corporate Governance Network (ICGN), 'ICGN Statement and Guidance on Non-financial Business Reporting' (ICGN 2008) 7 <https://circabc.europa.eu/webdav/CircaBC/FISMA/markt_consultations/Library/accounting/Non-financial-reporting/individuals-others/INT_icgn_3_en.pdf> accessed 26 July 2016.

[85] Sandeep A Patel and George S Dallas, 'Transparency and Disclosure: Overview of Methodology and Study Results - United States' (Standard & Poor's Transparency and Disclosure, Standard and Poor 2002) 4 <http://ssrn.com/abstract=422800> accessed 26 July 2016.

[86] Giacomo Boesso and Kamalesh Kumar, 'Drivers of Corporate Voluntary Disclosure: A Framework and Empirical Evidence from Italy and the United States' (2007) 20 Accounting, Auditing & Accountability Journal 269, 270.

In keeping with the above, the disclosure of non-financial information which demonstrates how the management approaches social issues, such as employee welfare, can play a major role in the company's valuation since 'socially aware and concerned management will also possess the requisite skill to run a superior company in the traditional sense of financial performance'.[87] Some research, for example, underlines the correlation between social performance disclosure and the investment value of a company's common shares.[88] Accordingly, even if some shareholders are primarily motivated by mere profit, they may also pay attention to the impact conveyed by non-financial information since disclosure may be a substantial factor while they are assessing the performance of the corporations in which they invest.[89] The information may be related to the financial risks and returns of the investments of shareholders. For instance, information on corporate activity in the developing world, where corruption is a problem, may help ease financial risks on investors.[90]

As the evidence presented demonstrates, disclosure does not need to be limited to financial information alone, since the non-financial performance of a company can influence the financial performance of a company.[91] Non-financial information such as issues related to intangible assets may therefore make disclosure a significant subject matter to shareholders. For instance, disclosure with regard to employees can be considered as a serious matter in

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[87] Gordon J Alexander and Rogene A Buchholz, 'Corporate Social Responsibility and Stock Market Performance' (1978) 21 The Academy of Management Journal 479, 479.
[88] Barry H Spicer, 'Investors, Corporate Social Performance and Information Disclosure: An Empirical Study' (1978) 53 The Accounting Review 94.
[89] Belinda Hoff and David Wood, 'White Paper: Report on Project Findings, The Use of Non-Financial Information: What Do Investors Want' (Institute for Responsible Investment, Boston College Center for Corporate Citizenship 1 March 2008) <http://www.finrafoundation.org/web/groups/foundation/@foundation/documents/foundation/p118412.pdf> accessed 26 July 2016.
[90] Harry Hummels and Diederik Timmer, 'Investors in Need of Social, Ethical, and Environmental Information' (2004) Journal of Business Ethics 73, 83.
[91] Joshua D Margolis and James P Walsh, *People and Profits? The Search for a Link between a Company's Social and Financial Performance* (Psychology Press 2001).

relation to the long-term health of a company.[92] The previous section outlined how employee-related information influences the choices of consumers, and thus the performance of the company.[93] Indeed, when a company is sanctioned or rewarded by its stakeholders, shareholders may also be affected by these reactions. Accordingly, shareholders may act to shape their investment decisions in response to transparency, such as opting to decline investment in companies that fail to behave in a transparent manner, or invest more in companies with good transparency practices.[94]

Of course, some shareholders may be ethically oriented beyond profit maximisation. As such, these shareholders pay specific attention to the information on the behaviour of the corporation towards employees when making their investment decisions. This shall be examined further in the next section.

4.1.1.1.3.2 Ethical shareholders

Some investors specifically abstain from investing in particular companies citing ethical justifications.[95] Such ethical or socially responsible investors, who primarily consider ethical issues in relation to their investments, often pay attention to information on social and environmental issues, including employee conditions, such as issues related to health and safety and wellbeing of employees.[96] Governance quality rating schemes created by rating

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[92] The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 in the UK can be a useful example in this respect. Under these regulations directors are required to consider employee related issues when it comes to their responsibility towards shareholders. According to s 414C (1) ' the purpose of the strategic report is to inform members of the company and help them assess how the directors have performed their duty under s 172 (duty to promote the success of the company)'. This notion shall be examined in depth in chapter 5.
[93] See 4.1.1.1.2 above.
[94] See Siebecker (n 58).
[95] Alan Lewis, 'A Focus Group Study of the Motivation to Invest: 'Ethical/Green' and 'Ordinary' Investors Compared' (2001) 30 The Journal of Socio-Economics 331, 332.
[96] In this respect, one example may be the responsible investment funds of the Friends Life (by Aviva). Friends Life, 'The Stewardship Philosophy and Investment Policies' (December 2014) 12 <https://advisers.friendslife.co.uk/funds/Stewardship/> accessed 26 July 2016.

agencies Standard & Poor, and Fitch governance quality rating schemes, demonstrate how such investors require more information on such non-financial issues.[97]

Pension funds are notably among one of the most important ethical shareholders. As will be seen in the proceeding chapter, in some countries pension funds are urged to invest in socially responsible schemes.[98] Pension funds that are expected to make socially responsible investment create pressure upon public companies. Companies that want to attract these pension funds therefore disclose more information on social issues.[99] In addition to these funds themselves, ethical investment advisers such as Domini Social Investments in the US or F&C Asset Management in the UK uses a range of non-financial information in their decision-making and advice.[100]

Ethical shareholders tend to avoid investments in corporations that create environmental harms or abuse employees.[101] Therefore, they are prone not to invest in shares of companies possessing a poor reputation. In this regard, disclosure plays a key role in steering the choices of ethical shareholders, as greater disclosure may make socially responsible companies distinctive from others.[102]

Ethical shareholders also need transparency after investing in a company since transparency enables them to 'engage corporate management in dialogue and influence

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[97] Allen L White, 'New Wine, New Bottles: The Rise of Non-Financial Reporting. Business for Social Responsibility Business Brief' (Business for Social Responsibility 20 June 2005) 3 <http://www.businesswire.com/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/services/ir_and_pr/ir_resource_center/editorials/2005/BSR.pdf> accessed 26 July 2016.

[98] Such as in the UK. See 5.1.5.2 below.

[99] Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press 2006) 176.

[100] Lydenberg (n 41) 12.

[101] Friends Life (n 96) 5.

[102] Hummels and Timmer (n 90) 78-79.

corporate operations'.[103] Transparency may play a role in 'satisfying [shareholders'] demand to know the exposure of the company to risks arising from its social and environmental conduct'.[104]

However, lack of transparency, for example, may lead an ethical shareholder to disinvest from the company. In this respect, the Norwegian Government Pension Fund Global (NGPF) may serve as a notable example.[105] The Council on Ethics for the NGPF (the Council) makes recommendations to Norway's central bank and Norges Bank on matters pertaining to more ethical investment, or recommendations for disinvestment from those companies who do not respect such matters.[106] Wal-Mart, for instance, was one of the largest retailer company's excluded from the Fund in 2006, owing to the allegations relating to the violation of labour rights in its business operations 'in the USA and Canada, and at its suppliers in Nicaragua, El Salvador, Honduras, Lesotho, Kenya, Uganda, Namibia, Malawi, Madagascar, Swaziland, Bangladesh, China and Indonesia'.[107] One of the elements playing a role in disinvestment decisions of the Council was Wal-Mart's lack of transparency.[108]

In addition to pension funds, listing requirements and sustainable indices of stock exchanges may be seen another factor in the improving impact of ethical investment upon companies for transparency. In this regard, the FTSE4Good Index series in the UK, launched

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103 Aaron A Dhir, 'Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights' (2009) 47 Osgoode Hall Law Journal 47, 47.
104 Graham and Woods (n 48) 873.
105 Alice De Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar Publishing 2011) 56.
106 Council on Ethics for the Norwegian Government Pension Fund Global, 'The Council on Ethics gives Recommendations to Norges Bank on Observation and Exclusion of Companies from the Norwegian Government Pension Fund Global (Unofficial English Translation, Annual Report 2015) 7 <http://etikkradet.no/files/2016/03/Etikkraadet_AR_2015_web.pdf> accessed 26 July 2016.
107 Ministry of Finance (Norway), 'Two companies - Wal-Mart and Freeport - are being excluded from the Norwegian Government Pension Fund - Global's Investment Universe' (Press Release 44/2006, 6 June 2006) <https://www.regjeringen.no/en/aktuelt/two-companies---wal-mart-and-freeport---/id104396/> accessed 26 July 2016.
108 Council on Ethics for the Norwegian Government Pension Fund Global (n 106) 29.

in 2001 with the support of London Stock Exchange Group, is one such example of sustainably focused indices.[109] Companies selected by the index are required to meet the criteria shaped by environmental, social and human rights performance.[110] More importantly, companies are expected to be actively transparent in relation to their activities. For example, if the listed company uses reporting standards of the Global Reporting Initiative (GRI) this means the company shall receive higher scores within the index.[111] Employee issues, such as supply chain management and labour standards, are significant criteria of the index.[112] Furthermore, the Social Stock Exchange (SSE) which was established in 2013, requires member companies to be transparent in terms of their social impact.[113] For instance, companies need to publish an impact report annually.[114]

In summary, both shareholders who merely focus upon profit maximisation, as well as ethical shareholders who afford greater regard to the company's wider impact, may pay attention to the company's performance in relation to its treatment of employees and, in turn, the information published on such matters. Consequently, companies that consider such investments, disinvestments and the other reactions of shareholders may see a business case for the disclosure of information in relation to employees.

Occasionally, sanctions and rewards by shareholders may not result in sufficient consequences to change the company behaviour. Indeed, Socially Responsible Investment

[109] Rieneke Slager, 'The FTSE4Good Index: Engagement and Impact' (International Centre for Corporate Social Responsibility, Nottingham University Business School July 2012) 3 <http://www.nottingham.ac.uk/business/ICCSR/assets/The-FTSE4GOOD-index_engagement-and-impact.pdf> accessed 26 June 2016.
[110] ibid 3.
[111] ibid 8.
[112] ibid 3.
[113] Social Stock Exchange (SSX), 'Prime Minister launches the Social Stock Exchange' (6 June 2013) <http://socialstockexchange.com/prime-minister-launches-the-social-stock-exchange/> accessed 26 June 2016.
[114] SSX, 'Impact Reports' <http://socialstockexchange.com/membership/impact-reports/> accessed 26 July 2016.

(SRI) accounts for a 'very small percentage of overall investment'.[115] As such, it might not result in a sufficient enough impact upon all corporations. Indeed, SRI is based upon 'shareowner engagement with companies'.[116] Therefore, as the work of Umlas has pointed out, ownership structures, such as family or government owned companies, may be an obstacle to the consideration of social matters insofar as the investment decisions of those shareholders is concerned.[117]

4.1.1.1.4 Government sanctions and rewards

Evidence would suggest that companies may be more motivated to act against the imposition of stricter *'command and control'* style regulation by the state.[118] Therefore, even if there is no obligatory regulation governing information disclosure, companies may disclose information as a corporate tactic, reducing the likelihood of legal intervention by the government through regulation.[119] Indeed, most business actors can be keen to favour voluntary disclosure over any mandatory scheme.[120] Hence, companies may act with the aim of reducing the strength of the future regulations by demonstrating voluntary acts of disclosure take place without such laws in place. [121]

Another assumption may be that the attitude of the government towards reform and development for stricter regulations may lead some companies to disclose information even

[115] Elizabeth Umlas, 'The Global Expansion of SRI: Facing Challenges, Meeting Potential' (2008) 39 Development and Change 1019, 1020.
[116] ibid 1025.
[117] ibid.
[118] Ans Kolk, Rob V Tulder and Carlijn Welters, 'International Codes of Conduct and Corporate Social Responsibility: Can Transnational Corporations Regulate Themselves?' (1999) 8 Transnational Corporations 143, 152.
[119] In this respect, corporate self-imposed codes of ethics may be an important example. See Wesley Cragg, *Ethics Codes, Corporations, and the Challenge of Globalization* (Edward Elgar Publishing 2005) 11.
[120] One example can be the viewpoint of the Confederation of British Industry (CBI) on the statutory OFR regulation in the UK. See Gloria O Botchway, 'The Role of Regulation in Social and Environmental Reporting in the UK' (PhD thesis, University of Leeds 2014) 100.
[121] ibid 21.

before the law comes into effect.[122] As such, it might be in the interests of companies to disclose voluntarily, since if they are 'ahead of statutory regulation they will achieve prudential cost savings'.[123]

In summary, according to the examination above, employees, consumers, shareholders (mere profit oriented or ethical) alongside the government may be seen as significant actors in the process of shaping the business case for disclosure with respect to the issues related to the interests of employees. However, whilst they may present a business case for transparency by playing a role in rewarding or punishing companies according to transparency, there remain some identifiable limitations. Some of these limitations are examined in the next section.

4.1.1.1.5 Limits of the business case

Some factors may downgrade the importance of the business case for transparency. In fact, most of these factors are already examined as limits of transparency in chapter 3.[124] These factors can be as follows:

First, the cost of disclosure may downgrade the importance of the business case for some companies. In this respect, the actual cost of disclosure may be one of the major obstacles to transparency.[125] For example, 'preparing and disseminating [of] information' constitute costs.[126] Hence, if the cost of disclosure is more than the predicted financial

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[122] An example of such attempts may be, during the reform process of company law in the UK, where many companies were already compliant with some of the disclosure requirements outlined. Martyn Jones and others, 'UK: Surveying OFRs and Narrative Reporting in Annual Reports - Part 1' (*Mondaq*, 8 November 2005) <http://www.mondaq.com/x/35904/Corporate,+Asset+Project+Finance/Surveying+OFRs+And+Narrative+Reporting+In+Annual+Reports+Part+1> accessed 9 August 2016.
[123] Graham and Woods (n 48) 878.
[124] See 3.3.3 above.
[125] For details on the cost of transparency see 3.3.3.1 above.
[126] Michael D Guttentag, 'An Argument for Imposing Disclosure Requirements on Public Companies' (2004) Florida State University Law Review 123, 139.

benefit, companies may reconsider disclosing such information.[127] In this case, companies may not be expected to disclose information when the cost may seem greater than the marginal benefit of disclosure.[128]

Information disclosure may also result in a number of indirect costs for companies. Voluntarily disclosed information may reduce the competitive advantage of companies, for example, and in turn impact upon their profitability.[129] Thus, in some circumstances, companies may abstain from disclosing information that has an impact upon their future plans.[130] Indeed, companies may be reluctant to disclose the kind of information competitor companies may use 'to their own competitive advantage'.[131]

Transparency may improve the interests of employees, such as to increase their bargaining power.[132] As such, this may create some costs for the company, where employees are more informed regarding issues such as working conditions and in turn demand higher wages or improved social benefits.[133] As a result, the business case for voluntary disclosure may become less attractive.

Secondly, in some circumstances, only some stakeholder groups may punish or reward corporate transparency. For example, consumers may be less effective to influence some companies through purchasing power, if such companies do not produce consumption goods.[134] Similarly, the same applies where a company may possess a monopoly within the

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[127] Bainbridge (n 7) 1056.
[128] Tara Vishwanath and Daniel Kaufmann, 'Towards Transparency in Finance and Governance' (World Bank 6 September 1999) 6 <http://ssrn.com/abstract=258978> accessed 26 July 2016.
[129] ibid.
[130] Bainbridge (n 7) 1031.
[131] ibid 1032.
[132] See 3.2.1 above.
[133] Patrick Roy, *Voluntary Disclosure of Company Information-Costly Additions or a Step towards Competitive Advantage? An Application to the Case of Publicly Quoted Football Clubs in Europe* (Diplom.de 2001) 25- 26.
[134] Graham and Woods (n 48) 872-873.

market. In this respect, consumers may not be able to reward or punish the company, or affect the business case, even if the company does not disclose sufficient information with respect to employee interests.[135] Hence, the business case for disclosure may not compel the company to disclose adequate information.

Thirdly, if stakeholders are indifferent to disclosure, the benefits of the business case may be limited since the business case for disclosure is mostly shaped by the positive or negative reactions of stakeholders.[136] As discussed above, in some cases, stakeholders may be unable to process the information owing to the complexity of the information shared, cognitive and behavioural constraints, socio-economic reasons, a lack of education and/or social norms and cultural traditions etc.[137] In such circumstances, companies may not see a business case for disclosure.

In short, whilst the business case is an important factor in making companies disclose information, it may be insufficient to justify action in some cases, as noted above. However, in addition to business case, there may be other factors playing a role in pure voluntary disclosure. This will be analysed in the proceeding sections.

4.1.1.2 The Incentive of Directors for Disclosure

Research would suggest that voluntary disclosure with respect to non-financial matters is significantly affected by the personalities of senior company officers.[138] Therefore, another indirect factor in the scheme of pure voluntary disclosure may be the personal motivations of corporate personnel, especially company directors. As such, this section will

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[135] See 3.3.3.2 and 4.1.1.1.2 above.

[136] For example, if stakeholders, such as consumers, are not capable to process information disclosure, transparency strategies may not be effective. See 3.3.3.2 above.

[137] These shortcomings can also be seen as the weaknesses of transparency, for details see 3.3.3 above.

[138] David J. Campbell, 'Legitimacy Theory or Managerial Reality Construction? Corporate Social Disclosure in Marks and Spencer Plc Corporate Reports, 1969-1997' (2000) 24 Accounting Forum 80.

examine whether directors have any personal benefit to be derived from disclosure. For this purpose, managerial motivations for disclosure will be categorised under two headings. Firstly, the analysis shall focus on the directors' personal financial benefits such as bonus payments or career development in response to disclosure. Secondly, some psychological and moral reasons that urge directors to disclose information shall be analysed.

4.1.1.2.1 Managerial self-interest

The personal interests of directors can be linked to the financial performance of the corporation since their economic interests are affected by the share prices of the corporation.[139] Research discussed above has highlighted how voluntary disclosure may influence share prices.[140] From this perspective, one assumption may be that if disclosure is likely to positively affect share prices, successful managers, compensated with stock options, may pay greater attention to disclosure in order to improve their personal wealth. In other words, the directors who focus on personal financial benefits may choose to disclose more information.

Moreover, company managers who consider the interests of other stakeholders may find themselves motivated by some other indirect individual outcome, such as career advancement.[141] Or their benefits from considering the interests of employees may merely be 'be construed as self-interested in the form of psychological egoism'.[142] In these circumstances, it may also be assumed that if directors see self-interests in terms of paying

[139] Alfred Rappaport, 'Executive Incentives vs. Corporate Growth' (Harvard Business Review July 1978) <https://hbr.org/1978/07/executive-incentives-vs-corporate-growth> accessed 29 August 2016.
[140] See also Roy (n 133) v.
[141] Scott J Reynolds, Frank C Schultz and David R Hekman, 'Stakeholder Theory and Managerial Decision-making: Constraints and Implications of Balancing Stakeholder Interests' (2006) 64 Journal of Business Ethics 285, 293.
[142] Christine A Hemingway and Patrick W Maclagan, 'Managers' Personal Values as Drivers of Corporate Social Responsibility' (2004) 50 Journal of Business Ethics 33, 36.

attention to the interests of employees, they may consider the disclosure of more information relating to employee welfare.

However, what if voluntary disclosure affects share prices negatively? If disclosure results in decrease in share prices, directors may not be eager to disclose information. Put in other words, self-interested managerial discretion may result in some unintended consequences for transparency. For example, research claims that managers are inclined to delay disclosure of bad news.[143] Therefore, negative information disclosure related to employees might be delayed if there is no compulsion on the directors.

In summary, pure voluntary disclosure may stand in accordance with the personal interests of directors. However, self-interest alone may not be the only factor in managerial decisions. As the following section shall examine, some other moral factors may also play a role in decision-making process of directors.

4.1.1.2.2 Managerial moralism

Some managers may not consider ethical issues as worthwhile, and instead 'exploit opportunities in order to improve personal or corporate gain'.[144] Nevertheless, this does not mean to imply that managers do not themselves have any moral perspective or view upon the position of stakeholders, such as employees.[145] As the work of Arnold highlights, from moral perspective, managers may feel they have a moral duty to respect employee rights.[146] Therefore, some managers may take intrinsic ethical decisions, or pay greater attention to

[143] SP Kothari, Susan Shu and Peter D Wysocki, 'Do Managers Withhold Bad News?' (2009) 47 Journal of Accounting Research 241.
[144] Archie B Carroll, 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders' (1991) 34 Business Horizons 39, 45.
[145] Denis G Arnold, 'Philosophical Foundations: Moral Reasoning, Human Rights, and Global Labor Practices' in Laura P Hartman, Denis G Arnold and Richard E Wokutch (eds), *Rising above Sweatshops: Innovative Approaches to Global Labor Challenges* (Greenwood Publishing Group 2003) 79.
[146] ibid 88.

principles such as justice and fairness, beyond the requirements of the law. [147] For instance, when a manager decides between two suppliers, he or she may pay attention not only to cost but whether the supplier respects the basic rights of its workers.[148] An extension of this may be that managers may play a 'constructive role' by paying greater attention to issues such as the transparency of management.[149]

In keeping with the above, the personal values of managers may greatly affect the social policies of the company.[150] For example, the moral beliefs, such as religion, may play a role in the attitudes of managers towards social responsibility.[151] As such, the organisational behaviour and strategies relating to employees (and other stakeholders) may also be affected by the moral and ethical personality of the managers.[152] Indeed, disclosure strategies that improve workers interests may be one such strategy used by morally attentive managers.[153]

In conclusion, the personal benefits and moral behaviour of managers and directors may play a role in pure voluntarism. Such an approach can have the potential to make companies transparent to some extent. However, as discussed above, the business case for companies constitutes the most significant factor when considering whether a company shall be motivated to act in this respect. Employees, consumers, shareholders and governments can be some of the prominent stakeholders who opt to reward or punish the corporation, shaping the business case. As such, corporations might decide, as each new situation arises, whether

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[147] ibid 83.
[148] ibid.
[149] In this respect to such moral management, one may give an example of the 'Open Door Policy of IBM Carroll (n 144) 45.
[150] Hemingway and Maclagan (n 142) 41.
[151] Johan Graafland, Muel Kaptein and Corrie Mazereeuw-van der Duijn Schouten, 'Conceptions of God, Normative Convictions, and Socially Responsible Business Conduct: An Explorative Study Among Executives' (2007) 46 Business & Society 331.
[152] Hemingway and Maclagan (n 142) 41.
[153] To illustrate this point, one of the earliest examples might be the senior executives at Mattel, Inc. who had played a role in the creation of the Global Manufacturing Principles and the Independent Monitoring Council for Global Manufacturing Principles of Mattel. See Arnold, 'Philosophical Foundations: Moral Reasoning, Human Rights, and Global Labor Practices' (n 145) 94.

not to choose to disclose information. Typically, evidence suggests they may choose according to the balance of the benefit and the costs of such disclosure, as they appear at the moment of choice.

As the analysis thus far has shown, whilst *pure voluntarism* may have some impact upon the propensity of companies to favour transparency, this is subject to a number of compelling shortcomings and limitations. However, this does not automatically warrant government intervention or regulation. Hence, before examining transparency regulations by governments, some other variants of voluntarism need to be considered. The first of these shall be Self-Imposed Codes of Practice (SICP).

4.1.2 Self-Imposed Codes of Practice (SICP)

> To avoid lying you need only believe in the truth of what you say when you say it, but a promise binds into the future, well past the moment when the promise is made.[154]

So far, this work has assumed companies make no *pre-commitment* to being transparent. However, companies may sometimes voluntarily *pre-commit* themselves to be transparent in the future tense, through the publication of mission statements, for example. The commitments made in such statements are likely to claim that the company takes disclosure and openness seriously, and will therefore make future choices, as they arise, in a way that will satisfy these commitments. Hence, it is claimed that such pre-commitments are mostly shaped by the 'needs' of the company, and are not generated by companies in response to externally imposed norms that require transparency.[155] Accordingly, this section shall consider what difference, if any, the promulgation of such a commitment makes in relation to the level of openness and transparency employed by such a company.

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[154] Charles Fried, *Contract as Promise : A Theory of Contractual Obligation* (Harvard University Press 1981) 16.

[155] S Prakash Sethi, *Setting Global Standards: Guidelines for Creating Codes of Conduct in Multinational Corporations* (John Wiley & Sons 2003) 88.

Interestingly, there are several labels used by companies who make such pre-commitments, such as, 'corporate codes of ethics', 'codes of practice', 'codes of behaviour' or 'codes of conduct', however, whilst there are subtle differences amongst such self-imposed codes,[156] for the purposes of this section, they shall all be referred to as Self-imposed Codes of Practice (SICP).

Generally, an SICP can embrace a given set of norms, such as the prohibition of forced labour, the minimum wage, hours of work, health and safety conditions, and commitments against discrimination based upon race, gender, religion, age, disability, and sexual orientation, for example, especially as these relate to employee interests.[157]

SICPs differ slightly from the approach of *pure voluntarism* embedded in the pure calculation of cost and benefits in relation to the disclosure of information.[158] However, once a company issues an SICP, this refers to a public commitment to a certain type of behaviour.[159] The corporation is also 'expected' to determine its policies in accordance with its SICP once it has been established.[160] If the SICP is not implemented, one result may be 'a widening gap between the corporate promises and the corporate conduct'.[161] Therefore, even if it is the case that a company attempts to avert implementing an SICP, this in turn may result in improved external pressure being placed upon the corporation to do so.[162]

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[156] According to L'Etang, for example, corporate codes of ethics, give basic information on the ethical behaviour of a corporation encapsulating more normative characteristics. However, other codes, such as 'corporate codes of conduct or practice', might use more specific and legalistic language than 'codes of ethics'. Jacquie L'etang, 'A Kantian Approach to Codes of Ethics' (1992) 11 Journal of Business Ethics 737, 737.

[157] For example, see Apple Inc, 'Apple Supplier Code of Conduct' (Version 4.0 2013) <https://www.apple.com/ca/supplier-responsibility/pdf/Apple_Supplier_Code_of_Conduct.pdf> accessed 26 July 2016.

[158] See 4.1.1 above.

[159] Sean D Murphy, 'Taking Multinational Corporate Codes of Conduct to the Next Level' (2005) 43 Columbia Journal of Transnational Law 389, 401.

[160] ibid.

[161] Sethi (n 155) 90.

[162] ibid.

Although SICPs differ from *pure voluntarism*, corporations still widely consider *the business case*, such as ‘increased customer loyalty and enhanced corporate reputation’, as part of issuing such a commitment.[163] Companies internalise the responsibility, and attempt to maintain the image of their SICPs, usually due to market or peer pressure.[164] The costs of improved labour interests, such as paying higher wages, which may have been externalised by the corporation before, may then be internalised through an SICP.[165] As such, issuing an SICP may create some costs. However, such an approach may also save costs alongside a provision of added benefits.[166] Companies can gain a competitive advantage by issuing a SICP, for example. By doing so, they send out a message of how they differ from other companies. A corporation can ‘differentiate its ethical position’ from that of other competitors by ‘tailoring’ it’s SICP, for example.[167]

Essentially, corporations may prefer SICPs to the imposition of strict mandatory regulation as developing an SICP, which is shaped by the ‘needs and capabilities’ of the corporations themselves, can be more flexible for corporations than other externally imposed regulation.[168]

Overall, some key factors play a common role in the effectiveness of an SICP. The first of these may be the language of an SICP.[169] If the language of an SICP is clear and precise, this may improve its effectiveness, since vagueness may result in uncertainty, which

[163] ibid 89.
[164] Kernaghan R Webb and Andrew Morrison, 'The Law and Voluntary Codes: Examining the ‘Tangled Web’ in Kernaghan R Webb (eds), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University 2004) 114.
[165] Murphy (n 159) 402.
[166] ibid.
[167] Ruth Rosenbaum, 'In Whose Interest? A Global Code of Conduct for Corporations. Global Codes of Conduct' in Oliver F Williams (ed), *Global Codes of Conduct: An Idea Whose Time has Come* (University of Notre Dame Press 2000) 298.
[168] Murphy (n 159) 425.
[169] Ann E Tenbrunsel, 'A Behavioral Perspective on Codes of Conduct: The Ambiguity-Specificity Paradox' in Williams (n 167).

may give way to self-interested and unethical behaviour.[170] For instance, even if an SICP mentions the betterment of employee wages, it makes little sense without a clear definition of what such betterment refers to.[171]Referencing national law, for example, may show how the commitment and language of the SICP is precise.[172]

A second significant factor may be the comprehensibility of an SICP. The corporation may be selective in terms of specifying particular rights, for example, employee rights in relation to collective bargaining, which may be excluded from the SICP.[173] As such, some subtle factors may not be visible in an SICP.[174] In terms of improving the comprehensiveness of an SICP, employee consultation may play a vital role. An SICP can be an effective tool if its creation reflects the general will of the corporation, such as discussions with its employees, rather than mere decisions taken and imposed by senior management.[175]

Third, the transparency of an SICP itself plays a crucial role in its effectiveness. For example, if the development process of the SICP is transparent and accessible enough for affected stakeholders to be involved, this can improve its credibility.[176] Without transparency, it may be claimed that an SICP is unlikely to be successful enough to improve employees'

[170] ibid.
[171] Ivanka Mamic, *Implementing Codes of Conduct: How Businesses Manage Social Performance in Gobal Supply Chains* (International Labour Organization 2004) 40.
[172] ibid.
[173] Bob Hepple, 'A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct' (1998) 20 Comparative Labor Law and Policy Journal 347, 358.
[174] For instance, even though an SICP may cover some basic labour rights, it may not include provisions that specifically touch upon women workers' and access to genderised toilets, Ruth Pearson and Gill Seyfang, 'I'll Tell You What I Want...': Women Workers and Codes of Conduct' in Rhys O Jenkins, Ruth Pearson and Gill Seyfang (eds), *Corporate Responsibility and Labour Rights Codes of Conduct in The Global Economy* (Earthscan 2002) 48.
[175] L'Etang (n 156) 743.
[176] Webb and Morrison (n 164) 108.

interests.[177] For a successful SICP, all stakeholders, especially employees, need to be informed of the statements made by it and how they in turn are affected.

Finally, where an SICP may be able to offer some information on the present and future behaviour of a company, it is necessary such commitments are monitored and verified for effectiveness.[178] In other words, SICPs should be implemented. However, why should companies implement voluntary SICPs? Next section looks for an answer to this question.

Why should companies implement an SICP?

First reason that motivates corporations to implement SICPs may be the business case. When corporations issue an SICP, they consider the negative market effects of the non-compliance with their SICPs. For example, it is argued that 'having a code and not enforcing it is worse than not enacting a code in the first instance'.[179] As such, the underlying and over reason fuelling the initiative of companies to implement such a code may be driven by the business case. In this respect, similar arguments made in relation to pure voluntarism can also be reapplied to SICP.

Secondly, an SICP may merely echo legal obligations that corporations are already adhere to under the national/local labour laws.[180] For example, Apple Supplier Code of Conduct requires the suppliers to comply 'with all applicable laws and regulations'.[181] In this respect, the corporate non-compliance with its SICP might in effect mean a non-compliance with the law.

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[177] André Sobczak, 'Codes of Conduct in Subcontracting Networks: A Labour Law Perspective' (2003) 2 Journal of Business Ethics 225, 228.
[178] Sethi (n 155) 205.
[179] Mark B Baker, 'Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?' (1993) 24 The University of Miami Inter-American Law Review 399, 421.
[180] Helen Keller, 'Codes of Conduct and their Implementation: The Question of Legitimacy' in Rudiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 245.
[181] Apple Inc (n 157) 1.

Thirdly, occasionally, the promises laid down by companies within their codes may result in prospective legal commitments arising from contract law and, in some cases, the law of misleading advertising. [182] In some circumstances, an SICP may be contractually binding.[183] However, the SICP would need to be written in a promissory language such as to be mindful of being treated as a contract.[184] In doing so, one might consider whether a SICP '(1) made a promise clear enough for an offer; (2) was disseminated in a manner that employees knew of its contents and reasonably relied on it; and (3) whether employees accepted the offer either by commencing or continuing to work'.[185] As a consequence, if the SICP does not have these specific features, it is unlikely to result in having any legal effects.

Across several jurisdictions, it is a requirement that the information conveyed by an advertisement is be true.[186] Article 6(2)(b) of the EC directive 2005/29/EC,[187] for example, emphatically states the compliance and truthfulness of commitments that are made by companies in their codes must reflect the truth.[188]

In keeping with the above, unless the information outlined by the codes is true, its content may run the risk of being considered a violation of the law, such that it may be considered false/misleading advertising. For example, Kasky v Nike,[189] a US case, provides a

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[182] Carola Glinski, 'Corporate Codes of Conduct: Moral or Legal Obligation' in Doreen J McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 122.
[183] Katherine E Kenny, 'Code or Contract: Whether Wal-Mart's Code of Conduct Creates a Contractual Obligation Between Wal-Mart and the Employees of its Foreign Suppliers' (2007) 27 Northwestern Journal of International Law & Business 453, 462.
[184] ibid.
[185] Kenny underlines these elements while answering whether Wal-Mart's code of conduct be interpreted as a contract or as Guidelines? ibid 463.
[186] See the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277.
[187] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22 (Hereinafter 'Unfair Commercial Practices Directive').
[188] Glinski (n 182) 126-127.
[189] *Nike, Inc v Kasky 539 US 654* (2003)

good illustration of how false advertising and a violation of unfair competition law has a potential to result in companies being made to implement their SICP.[190] Although now settled, Nike agreed to pay for $1.5 million to the Fair Labour Association (FLA),[191] following a lawsuit that demonstrated how the potentially false statements over the labour practices and working conditions of its suppliers may result in legal consequences for a company. Indeed, in this case, it is also important to see how non-compliance with an SICP may result in negative consequences for companies, especially as far as the business case is concerned. Of course, the result of such cases may better encourage companies to comply with their SICPs, paying more attention to the monitoring of the SICP than disclosure based upon pure voluntarism.[192]

Monitoring and Enforcement

Companies may further 'promise to disclose information documenting what they are doing to implement their codes and their performance relative to the standards and aspirations set forth'.[193] Monitoring mechanisms included in the SICP are therefore expected to improve the compliance likelihood of corporations.[194]

Some large brands issue assurances to monitor their compliance in keeping with the promises made in their *SICPs*.[195] In this respect, an SICP can urge the suppliers to a corporation, who are party to a contract with the retailer, to act in such a way that is

[190] Murphy (n 159) 431.
[191] Duncan Campbell, 'Nike's Big Ticking-Off' *The Guardian* (17 November 2003) <https://www.theguardian.com/society/2003/nov/17/17> accessed 27 July 2016.
[192] In terms of pure voluntarism, there is no pressure by a policy/codes affecting the company's decision. See 4.1.1 above.
[193] Organization for Economic Co-operation and Development (OECD), 'Codes of Corporate Conduct: Expanded Review of their Contents' (OECD Working Papers on International Investment 2001/06, OECD Publishing 2001) 12 <http://dx.doi.org/10.1787/206157234626> accessed 26 July 2016 (the OECD research analyses both the SICP and other codes created by external initiatives. However, the number of the codes examined in the report are predominantly SICP).
[194] Kolk, Tulder and Welters (n 118) 154.
[195] Dara O'Rourke, 'Multi-stakeholder Regulation: Privatizing or Socializing Global Labor Standards?' (2006) 34 World Development 899, 901.

consistent with the code, given the contract has legal implications for the parties.[196] The corporation might also penalise the supplier by terminating its contract where this seen not to be upheld. This potentially places pressure on the supplier, whose business may take place in a different country.

An example of the above trend may be where some corporations have built internal departments to evaluate the compliance of suppliers with their codes.[197] Levi-Strauss, for example, conduct monitoring and enforcement of its code of conduct by using questionnaires on employment practices, audits and surprise visits to suppliers.[198] Some companies, rate their subcontractors according to their labour performance and terminate if their performance are poor.[199] For instance, Levi-Strauss promises to terminate contracts with suppliers prone to violate their own code of conduct. Indeed, the company terminated contracts with suppliers after the company's code of conduct auditors had inspected factories in Saipan.[200]

Limitations of SICPs

In spite of the above benefits, an SICP may also have some limitations. Where an SICP goes beyond *pure voluntarism*, it may also suffer from particular shortcomings, similar to those outlined for *pure voluntarism* in relation to the business case.[201] One limitation may be related to the cost of an SICP. Creation and implementation of an SICP, for instance, may decrease the profit of company in the short-run.[202] Thus, in some circumstances companies

[196] Webb and Morrison (n 164) 122.
[197] O'Rourke, 'Multi-stakeholder Regulation: Privatizing or Socializing Global Labor Standards?' (n 195) 901.
[198] Lance Compa and Tashia Hinchliffe-Darricarrere, 'Enforcing International Labor Rights through Corporate Codes of Conduct' (1995) 33 Columbia Journal of Transnational Law 663, 677.
[199] O'Rourke, 'Multi-stakeholder Regulation: Privatizing or Socializing Global Labor Standards?' (n 195) 901-902.
[200] Compa and Hinchliffe-Darricarrere (n 198) 678.
[201] See 4.1.1.1.5 above.
[202] Baker (n 179) 417.

may be reluctant to implement an SICP.[203] Furthermore, an SICP may contain vague language and/or it may be selective in terms of employee issues.[204] As McBarnet and Kurkchiyan point out, some companies may not participate in contractual control of suppliers, or 'the entire supply chain' may not be covered and, as argued above, companies may be selective in choosing the sorts of issues that shall be covered.[205]

Another limitation may be the lack of transparency. In some circumstances, companies may even fail to inform employees as to the operation of an SICP.[206] Indeed, many companies have been found not to mention information disclosure with respect to their SICPs.[207]

As discussed above, monitoring plays a vital role in making SICPs an effective transparency strategy, and ensuring commitments within SICPs are credible. Yet, there are also some weaknesses that may be noted with respect to such monitoring. First, self-imposed monitoring may possess shortcomings owing to costs. Effective self-monitoring may create financial costs, which thereby result in companies wishing not to release negative information in to the public domain, which are strengthened by the business case.[208] Second, problems may arise in relation to the employees who are meant to undertake self-monitoring activities. Such employees may not be sufficiently qualified or trained to monitor labour issues in

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[203] Sethi (n 155) 90.
[204] Rhys Jenkins, 'Corporate Codes of Conduct: Self-Regulation in a Global Economy' (Technology, Business and Society Programme Paper Number 2, United Nations Research Institute for Social Development (UNRISD) April 2001) 26-30 <https://www.researchgate.net/profile/Rhys_Jenkins2/publication/37150822_Codes_of_Conduct_Self_Regulation_in_a_Global_Economy/links/5448d2f30cf2f14fb8144837.pdf> accessed 14 August 2016.
[205] Doreen J McBarnet and Marina Kurkchiyan, 'Corporate Social Responsibility through Contractual Control? Global Supply Chains and 'Other-Regulation' in Campbell, McBarnet and Voiculescu (n 182) 82-86.
[206] For example, Disney might be one company critiqued in this regard. See China Labor Watch, 'Code of Conduct is No More than False Advertising, Disney Suppliers Continue Exploiting Chinese Workers' (November 2010) 7 <http://www.chinalaborwatch.org/upfile/2010_11_10/I00404E.pdf> accessed 26 July 2016.
[207] According to an OECD report, '[m]any company codes (61%) do not mention a commitment to disclose relevant information'. OECD (n 193) 15.
[208] Liubicic (n 79) 136.

accordance with the SICP.[209] Lastly, if auditors conducting self-monitoring assessments are not independent, this may lead employees not to fully trust auditors with respect to reporting SICP violations.[210] Therefore, an independent third party may be better placed to perform the role of monitoring SICP compliance.

It is noteworthy that whilst a company may opt to use an external monitoring initiative for the purposes of its SICP compliance, in some circumstances, even external monitoring agents may only selectively report its findings to the corporation, as this could prove ineffective where the monitoring initiative is financially dependent upon the corporation.[211]

For effectiveness, SICPs covering employee rights are to be monitored by third parties, who are independent of the company and later report its findings to both the company and other stakeholders.[212] In this respect, it is recommended that independence requires the party should have no other business with the corporation.[213] For example, the Commission for the Verification of Corporate Codes of Conduct (COVERCO), an independent monitoring party, promises to make public any investigation it may conduct.[214] COVERCO promises to publish periodic reports on its findings during the monitoring process[215] and sets specific

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[209] ibid 137.
[210] ibid.
[211] ibid.
[212] Rosenbaum (n 167) 215.
[213] Sethi (n 155) 231.
[214] Coverco, 'How Coverco Works' <http://www.coverco.org.gt/e_comotc.html> accessed 27 July 2016.
[215] Homero Fuentes and Dennis Smith, 'Independent Monitoring in Guatemala: What Can Civil Society Contribute?' in Robin Broad (ed), *Global Backlash: Citizen Initiatives for a Just World Economy* (Rowman & Littlefield Publishers 2002) 208.

terms relating to transparency in the monitoring contracts with companies, such as Lis Clairborne and Gap.[216]

In summary, the analysis in this section has demonstrated that Self-Imposed Codes of Practice (SICP) place some degree of compulsory pressure upon companies who choose to be more transparent. Nevertheless, for reasons made clear earlier in the analysis, SICP also suffers from some limitations, and may not go far enough as to ensure companies are as transparent as this thesis suggest is necessary. The self-imposed voluntary aspect of the codes may be seen as the key reason in this regard.[217] Moreover, with respect to monitoring, SICPs are unlikely to prove effective owing to the reasons discussed above. Thus, even if some corporations have internal and external enforcement mechanisms in keeping with their SICP, there may still need to be some compulsory means, to ensure corporations are adequately transparent. The proceeding sections shall therefore examine the alternatives to SICPs.

4.1.3 Codes Created by External Organisations

The discussion above mainly focused upon *pure voluntarism* alongside self-oriented SICPs. However, rather than the corporations themselves, there may be external bodies who are better placed to impose more compelling programmes upon companies to be more transparent. Some of this external pressure which may arise from externally generated codes of practice, with non-legal enforcement mechanisms shall be examined below.

In this respect, first *the codes created by group of companies* (CCGC) such as industry associations which contribute to the construction of external transparency norms shall be analysed. Second, the focus shall be on the *codes*, *frameworks* and *guidelines* created

[216] Michael Posner and Justine Nolan, 'Can Codes of Conduct Play a Role Promoting Workers Rights? ' in Robert J Flanagan and William B Gould (eds), *International Labor Standards: Globalization, Trade, and Public Policy* (Stanford University Press 2003) 216.
[217] Kenny (n 183) 455.

by non-governmental organisations. Lastly, external voluntary norms produced by national governments, through inter-governmental or hybrid organisations shall be discussed.

4.1.3.1 Codes Created by Group of Companies (CCGC)

As pointed out in the previous section, disclosure through *pure voluntarism* and/or an SICP may create some costs for the corporation. In order to reduce such prospective costs, a group of corporations in a given industry or region may agree to the creation of a common code of conduct.

Through the use of codes created by group of companies (CCGC), signatory corporations further aim to take 'advantage of being competitively neutral, as all the enterprises that are otherwise competitors are subject to the same standards of conduct'.[218] It can therefore be claimed that the CCGCs may create 'a level playing field' and prove more cost-effective than individual company codes may be, since it is based upon the cooperation of several corporations.[219] Thus the costs that stem from competition may thereby be reduced by the CCGCs.

The CCGCs subtly differ from SICPs, which are created by individual companies, and are applied to their 'own operations or are applied specifically to their suppliers'.[220] Even if companies voluntarily sponsor CCGCs, the norm creation process for disclosure encapsulates external elements.[221]

With respect to the CCGC, the Sullivan principles, created by Reverend Leon H. Sullivan, a member of General Motors' board of directors in 1977, were followed by several

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[218] Helen Keller, 'Codes of Conduct and their Implementation: The Question of Legitimacy' (University of Zurich 2008) 17 <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.696.2344&rep=rep1&type=pdf> accessed 27 September 2016.
[219] Sethi (n 116) 85.
[220] Keller (n 218) 17.
[221] Sethi (n 155) 95.

signatory companies, which may be of the examples.[222] The Sullivan Principles were aimed at improving employee rights through the use of transparency. One objective in this respect was reaching non-segregation of the races in work facilities and equal treatment of all employees,[223] where the signatory companies were required to publish periodic reports on their progress in this regard.[224] Although Sullivan principles had voluntary characteristics, they played an effective role in changing the behaviour of the companies, which were doing business in South Africa, governed by the apartheid regime.[225]

However, CCGCs may be critiqued from different perspectives. The first critique that may be related to the lack of independence of CCGCs since such codes may have from the interests of the corporations constructing them.[226] Although CCGCs are created externally, they are primarily shaped by the 'discretion of industry'.[227] Therefore, similar to SICP, the implementation of the CCGC may be weak owing to corporate interests. Second, CCGCs are more likely to suffer from the *free rider* problem,[228] as some companies are likely to take advantage of the group code without being changing their behaviour.[229] As such, CCGCs may be seen as inferior to SICPs. Thirdly, under codes created by a group of companies, a corporation may even be less competitive in terms of ethical issues.[230] For instance, once a

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[222] Su-Ping Lu, 'Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law' (1999) 38 Columbia Journal of Transnational Law 603, 612.
[223] Dennis M Patten, 'The Market Reaction to Social Responsibility Disclosures: The Case of the Sullivan Principles Signings' (1990) 15 Accounting, Organizations and Society 575, 577.
[224] Sethi (n 155) 103.
[225] Oliver F Williams, 'A Lesson from the Sullivan Principles: The Rewards for Being Proactive' in Williams (n 167) 79-80.
[226] Posner and Nolan (n 216) 210.
[227] ibid.
[228] A free rider refers to a member of a group who contributes 'little or nothing toward the cost of the good [created by the group], while enjoying its benefits as fully as any other member'. Oliver Kim and Mark Walker, 'The Free Rider Problem: Experimental Evidence' (1984) 43 Public Choice 3, 3.
[229] Sethi (n 155) 87.
[230] ibid 86-87.

company becomes a signatory to one of the CCGCs, it may not make any further efforts other than to comply with its minimum requirements.[231]

4.1.3.2 Codes and Frameworks Created by Multi-Stakeholder Institutions

So far, within the above regimes, namely pure voluntarism, SICPs and CCGCs, corporations themselves have been the central determinants. Even within the creation of external norms, such as in CCGCs, companies are the main actors. However, another impact directing companies to improve transparency may be (non-corporate) multi-stakeholder initiatives. These initiatives can also be players in pushing companies to create norms for improved corporate behaviour, which improves transparency.

In this respect, companies may merely consent to adopting principles within the codes of conduct formed by such multi-stakeholder initiatives, and in some circumstances agree to be monitored by these initiatives.[232] This consent makes both multi-stakeholder organisations and the public levy pressure upon companies to be more transparent with respect to employee interests.

Nevertheless, multi-stakeholder initiatives differ from each other in a number of respects. First, some of these initiatives specifically provide reporting principles for companies. The best example can said to be the Global Reporting Initiative (GRI), with its standards for reporting with regard to non-financial issues.[233] Its broad perspective, which encompasses various elements related to economic, social and environmental issues, forms a

[231] ibid.
[232] See 6.2.3.2 below.
[233] Global Reporting Initiative (GRI), 'About GRI' <https://www.globalreporting.org/information/about-gri/Pages/default.aspx> accessed 27 July 2016.

stakeholder driven reporting framework.[234] The GRI aims to create a system of non-financial reporting which is similar to financial reporting procedures.[235]

Second, some initiatives assist corporate transparency through certification and/or accreditation. If a company agrees to comply with the codes created by one of these initiatives, it agrees with the assessments and monitoring of its suppliers to be subject to the same.[236] Although such initiatives may expect companies to conduct internal monitoring, they may also conduct unannounced factory visits to the supply chains of affiliated companies.[237] Social Accountability International (SAI), Fair Labor Association (FLA), and the Ethical Trading Initiatives (ETI) are some examples of these initiatives.[238] Such global initiatives shall be examined further in chapter 6.

Third, labelling may prove to be another strategy that multi-stakeholder initiatives can adopt to ensure corporations disclose information. Once a company adopts the 'codes' created by a labelling initiative, it thereby agrees to comply with them.[239] Here, the company may use the logo of the initiative as a disclosure and validation mechanism. Indeed, over a hundred years ago, some garment companies opted to comply with the labour conditions inspected by the National Consumers League (NCL).[240] Today, consumers purchase Fairtrade

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[234] Halina Szejnwald Brown, Martin de Jong and David L Levy, 'Building Institutions Based on Information Disclosure: Lessons from GRI's Sustainability Reporting' (2009) 17 Journal of Cleaner Production 571, 571.

[235] Dara O'Rourke, 'Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring' (2003) 31 Policy Studies Journal 1, 18.

[236] One example can be the Fair Labor Association (FLA). See FLA 'Transparency' <http://www.fairlabor.org/transparency> accessed 27 July 2016. See also 6.2.3.2.2 below.

[237] ibid.

[238] See 6.2.3.2 below.

[239] Janet Dine and Kirsteen Shields, 'Corporate Social Responsibility: Do Corporations have a Responsibility to Trade Fairly? Can the Fairtrade Movement Deliver the Duty?' in Nina Boeger, Rachel Murray and Charlotte Villiers (eds), *Perspectives on Corporate Social Responsibility* (Edward Elgar Publishing 2008) 161.

[240] Kernaghan R Webb, 'Understanding the Voluntary Codes Phenomenon' in Kernaghan R. Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University 2004) 5.

products on par with a similar ideal, which gives a specific information in relation to employee conditions and ethical regimes.[241]

In fact, multi-stakeholder codes can be seen as more credible than *pure voluntarism*, *SICP* and CCGC. From the perspective of stakeholders, who can punish or reward companies, independence of the multi-stakeholder codes from company discretion may make the multi-stakeholder initiatives and their codes more credible than other strategies.[242] Indeed, multi-stakeholder codes may potentially play a better role in monitoring, so long as they are independent from the companies and the government agencies.[243]

One can assert that external codes are more likely to be effective when non-governmental organisations (NGOs) are involved in the development process.[244] Whilst SICP and CCGC are mostly shaped by the employers or the senior managers, multi-stakeholder approaches encapsulate much broader participant involvement.

The critique

In spite of their value and success at encouraging companies to be transparent, multi-stakeholder initiatives may also fall short in a number of respects. Firstly, whilst multi-stakeholder codes are externally formed, sometimes they may not act fully independent from the participating companies themselves.[245] For example, in terms of monitoring, participating

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[241] Fairtrade Foundation, 'What Fairtrade Does' <http://www.fairtrade.org.uk/en/what-is-fairtrade/what-fairtrade-does> accessed 8 August 2016.

[242] '[If] there is no liability for false or misleading', independent verification may make corporate disclosure more reliable. See David Hess and Thomas W Dunfee, 'The Kasky-Nike Threat to Corporate Social Reporting: Implementing a Standard of Optimal Truthful Disclosure as a Solution' (2007) 17 Business Ethics Quarterly 5, 18.

[243] Posner and Nolan (n 216) 214.

[244] ibid 210.

[245] For example, some non-governmental initiatives may partly be funded by companies. Steven Greenhouse, 'Critics Question Record of Fair Labor Association, Apple's Monitor' *The New York Times* (13 February 2012) <http://www.nytimes.com/2012/02/14/technology/critics-question-record-of-fair-labor-association-apples-monitor.html> accessed 8 August 2016.

companies may still play a role in the selection of which vendor companies to be audited.[246] Secondly, the implementation of codes may not be transparent, which may be a significant problem since multi-stakeholder codes 'lack substantive measures to penalise companies'.[247] Indeed, an initiative may only disclose information on the code compliance to the member company, rather than to public.[248] Thus the sanctions and/or rewards by stakeholders according to transparency may be weakened. Thirdly, multi-stakeholder initiatives may not be as effective as governments in creation of compulsion on companies since their codes are not legally binding, in other words corporations are not exposed to any criminal or civil penalties if they do not comply with them.[249]

In spite of the above, multi-stakeholder initiatives and their codes can still help the public to sanction companies in case of non-compliance with such codes. In addition to multi-stakeholder initiatives, governments may also play a role in creation of voluntary codes for corporations. Next section shall focus on such codes.

4.1.3.3 Disclosure Norms and Codes by Governmental, Inter-Governmental and Hybrid Organisations

Alongside those companies which act collectively and multi-stakeholder initiatives, governments may also contribute to the creation of codes that ensure companies are more transparent, which may be made to occur through a number of different initiatives.

First, governments might merely initiate a multi-stakeholder initiative which creates codes. For example, some of the multi-stakeholder initiatives that highlighted above, such as Ethical Trading Initiative (ETI) in the UK and Fair Labor Association (FLA) in the US, are

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[246] Sethi (n 155) 143.
[247] ibid 144.
[248] The Ethical Trading Initiative (ETI) is one example in this respect. For further information on the ETI see section 6.2.3.2.3 below.
[249] Mamic (n 171) 65.

initiated by the governments.[250] Chapter 6 shall further analyse the role of such initiatives with respect to transparency.

Second, some individual governments may be in favour of using codes to direct companies in terms of transparency.[251] In this respect, some corporate governance codes encapsulate recommendations on transparency in relation to stakeholders, such as employees.[252] Aside from outlining their own codes, some governments may also adopt voluntary standards and guidelines, as determined by private organisations.[253] As will be seen in chapter 5, an individual government may also publish voluntary best practice guidelines for companies.[254]

Third, governments may also create codes through regional/supranational organisations with a number of other governments. One example in this respect can be that 'a Code of Conduct for Community Companies with Subsidiaries, Branches or Representation in South Africa', in the European Community.[255] The code specifically addressed transparency in relation to employee interests. Accordingly, companies were required 'to publish detailed and fully documented annual reports on the progress made when applying this code and to submit a copy of this to their national governments'.[256]

Fourth, governments have also been contributors to the creation of codes of conduct through intergovernmental organisations (IGO)s. IGOs started developing codes of conduct for corporations in the 1970s, in order to control corporate activities in third world

[250] For details see also 6.2.3.2.2 and 6.2.3.2.3 below.
[251] Dániel Gergely Szabó and Karsten Engsig Sørensen, 'Integrating Corporate Social Responsibility in Corporate Governance Codes in the EU' (2013) 24 European Business Law Review 781, 13-16.
[252] ibid 16.
[253] Webb and Morrison (n 164) 134.
[254] See 5.2 below.
[255] Menno T Kamminga, 'Holding Multinational Corporations Accountable for Human Rights Abuses: A challenge for the EC' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 564.
[256] Alexandra Gatto, *Multinational Enterprises and Human Rights: Obligations Under EU Law and International Law* (Edward Elgar Publishing 2011) 176.

countries.[257] The Organisation for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises (the Guidelines) which were adopted in 1976 may be one example in this respect.[258] The Guidelines are based upon recommendations directed at non-financial issues such as human rights, disclosure of information, labour relations and environmental matters, for example, by governments through to multinational enterprises.[259] The Guidelines specifically underline that companies should disclose information on material matters relating to employees.[260]

Indeed, some of these inter-governmental codes have a broader geographical scope than the OECD. For example, the International Labour Organisation (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,[261] and the United Nations Guiding Principles on Business and Human Rights[262] can be seen as global codes with a broader ambition.

Fifth, governments may also be collaborating with companies via hybrid organisations in the creation of codes. An illustrative example in this regard is the United

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[257] See Thomas H Reynolds, 'Clouds of codes: The New International Economic Order Through Codes of Conduct: A Survey' (1982) 75 Law Library Journal 315.

[258] Organization for Economic and Co-operation for Development (OECD) Observer, 'The OECD Guidelines for Multinational Enterprises' (June 2001) <http://www.oecd.org/investment/mne/1903291.pdf> accessed 9 August 2016.

[259] OECD and the United Nation Principles for Responsible Investment (PRI), 'The United Nation Principles for Responsible Investment and the OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions' (Working Document for the 2007 Annual OECD Roundtable on Corporate Responsibility 2007) 2 <http://www.oecd.org/investment/mne/38783873.pdf> accessed 9 August 2016.

[260] The most recent edition of the Guidelines see OECD, *OECD Guidelines for Multinational Enterprises,* (2011 edn, OECD Publishing 2011) ch 3 <http://dx.doi.org/10.1787/9789264115415-en> accessed 13 July 2016.

[261] ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (4th edn, ILO Publications 2006)* <http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm> accessed 9 August 2016.

[262] United Nations Human Rights Council (UNHRC), 'Guiding Principles on Business and Human Rights: Implementing the United Nations ''Protect, Respect and Remedy'' Framework' (21 March 2011) UN Doc A/HRC/17/31.

Nations Global Compact (UNGC) programme and its '*ten principles*'.[263] Corporations which make a commitment to the UNGC are expected to act in accordance with its ten principles related to human rights, labour standards and the environment. [264] In terms of transparency, the UNGC urges companies to commit to providing annual public disclosure to stakeholders on the progress made when attempting to implement these principles, which is called the Communication on Progress (COP).[265]

In short, as demonstrated, governments may play a role in a variety of different initiatives that aim to affect the creation of external norms for transparency. These international strategies shall be analysed in greater depth in chapter 6. However, for the present purposes, it is important to point out that external governmental codes also possess some notable limitations. First critique may be that governments' propensity to create such non-binding codes favour voluntary soft norms, rather than creating legal transparency rules.[266] Some of the codes created with government involvement do not even have any monitoring and enforcement mechanisms.[267] Second, the geographical scope of some codes may be limited to the number of companies who are located in the member countries to the initiative. For example, the OECD guidelines, and the codes created by national governments or the EU may be some examples in this respect. Thus, such codes may only affect those

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263 United Nations Global Compact, '*The Ten Principles*' <https://www.unglobalcompact.org/what-is-gc/mission/principles> accessed 17 July 2016.

264 UNGC, 'Corporate Sustainability in the World Economy' (January 2014) <https://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf> accessed 16 July 2016.

265 UNGC, 'UN Global Compact Policy on Communicating Progress' (Updated 1 March 2013) 1 <https://www.unglobalcompact.org/docs/communication_on_progress/COP_Policy.pdf> accessed 18 July 2016.

266 See Amnesty International (AI), 'United Nations: A Call for Action to Better Protect the Rights of Those Affected by Business-Related Human Rights Abuses' (14 June 2011) <https://www.amnesty.org/download/Documents/32000/ior400092011en.pdf> accessed 16 July 2016.

267 One example can be the 'ten principles' of the United Nations Global Conduct (UNGC). See Letter from Upendra Baxi and others to Kofi Annan, UN Secretary-General (20 July 2000) <http://www.corpwatch.org/article.php?id=961> accessed 17 July 2016.

companies which fall within geographical scope of the initiative.[268] Third, some problems which may arise from the attitude of individual national governments, may make the enforcement of some codes ineffective since governments play a critical role in terms of implementation of some of these codes. In this respect, one example is the OECD National Contact Points (NCP)s. Although NCPs are mostly conducted by governmental agencies, some governments may be criticised for being less transparent regarding these processes.[269] All these issues with respect to international initiatives shall further be examined in Chapter 6.

Despite the fact that the codes of an external initiative may have some weaknesses, it creates some degree of compulsion, which in turn is levied upon corporations who subscribe to such an initiative. Once companies agree to comply with such codes they accept the duty to disclose both 'good news and bad news'.[270] More specifically, member companies to such initiatives will agree on potential costs that may stem from transparency. Hence, this differs in a number of obvious ways from *pure voluntarism,* since companies do not merely calculate the business case in terms of disclosure when they adopt these external norms. Furthermore, as has examined, some external codes are mostly written and monitored by various actors, such as government, non-governmental and civil society organisations, rather than companies themselves.[271] Hence, norms created and implemented by external initiatives can be seen more credible and independent than self-imposed and implemented codes, namely SICP.[272]

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[268] See OECD guidelines in 6.2.1.1 below.
[269] One may find some other shortcomings of governmental codes. Chapter 6 will further examine such shortcomings in detail.
[270] Jay Janney, Greg Dess and Victor Forlani, 'Glass Houses? Market Reactions to Firms Joining the UN Global Compact' (2009) 90 Journal of Business Ethics 407, 408.
[271] Mamic (n 171) 43.
[272] ibid.

4.1.4 A Recap: Advantages and Disadvantages of Voluntarism

Many of the strengths and weaknesses in the following discussion have already been allured to under each variant of voluntarism discussed so far. Firstly, the section on voluntary disclosure began with '*pure voluntarism'*, and noted some of its likely strengths, alongside its shortcomings. Then, secondly, what difference is made by a *SICP* was discussed in some detail. Finally, the external codes, such as *CCGC*, *multi-stakeholder* and *governmental codes*, were analysed in light of their comparative strengths and weaknesses.

The overall analysis thus far has therefore highlighted that all variant forms of voluntarism possess some inherent weaknesses insofar as the delivery of disclosure as suggested by this work would require. However, before moving to look at the difference mandatory disclosure can make, it is vital to finalise the discussion on voluntarism by reviewing the strengths and weaknesses of voluntarism as a whole.

4.1.4.1 The Strengths of Voluntarism

Voluntary approaches, namely pure voluntarism, SICPs and external codes, may have the following advantages in improving corporate transparency:

First, companies can benefit from all types of voluntary disclosure which have been examined above. In this respect, section 4.1 clearly listed some of the benefits companies may yield from adopting *pure voluntarism*. Although SICP and other types of external codes can be seen as more compelling than *pure voluntarism,* they remain to benefit from the perspective of the business case. Voluntary strategies which mostly focus upon self-regulation also possess lower compliance and administrative costs for companies. [273]

[273] Glen Hepburn, 'Alternatives to Traditional Regulation' (OECD Report) para 0.13 <http://www.oecd.org/regreform/regulatory-policy/42245468.pdf> accessed 9 July 2016.

Second, in addition to private companies, other stakeholders, such as governments, can also benefit from the voluntary disclosure examined above. Voluntarism lowers the administrative burden of mandatory regulation placed upon governments.[274] As discussed and highlighted in chapter 3, whilst transparency is relatively more cost efficient than other strategies, the creation of disclosure rules and their enforcement can often also create costs for the regulator.[275] However, voluntarism shifts some of the burden of these costs on to the regulatee.[276]

Third, all voluntary strategies can be seen as more flexible than mandatory rules.[277] Voluntarism, which results in self-regulation, ensures the regulation of companies is more flexible. The flexibility of self-regulation may help deal with specific problems and adapt to changing circumstances more quickly.[278] For example, companies and governments can adapt to changes in information, trends, technology and markets, at a pace much quicker than is possible through mandatory regimes.[279]

Fourth, all types of voluntary disclosure may play a role in improving the interests of 'indirect employees' at the international level.[280] Although workers in supply chains constitute the quintessential victim of the negative corporate behaviour, and are the group most in need of improvements,[281] developing country governments have limited capacity to

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[274] Robert B Gibson, *Voluntary Initiatives and the New Politics of Corporate Greening* (University of Toronto Press 1999) 4.
[275] See 3.3.3.1 above.
[276] Darren Sinclair, 'Self-Regulation versus Command and Control - Beyond False Dichotomies' (1997) 19 Law & Policy 19.4 (1997) 529,549.
[277] Hepburn (n 273) para 0.13.
[278] ibid.
[279] ibid.
[280] Indirect employees can be conceptualised as 'the employees of an entity hired to produce products or deliver services to another party' see Backer (n 62) 594.
[281] For instance, although there are more than 1 million workers in suppliers of Nike, only less than 44,000 of these workers are direct employees. Nike Inc, 'FY 13 Corporate Responsibility Report' <http://www.nike.com/nikebiz/nikebiz.jhtml?page=29&item=fy04> accessed 5 March 2015.

regulate corporate activities.[282] However, a corporation may improve the conditions of its subsidiaries and/or suppliers, ensuring they are more transparent, through ad hoc SICPs, or by adopting external voluntary codes. It is asserted that private codes have a positive impact on improving 'the conditions of workers and communities in the global supply chain of major industries'.[283] For example, monitoring under voluntary codes is mostly grounded in the broader idea of brand self-regulation, which is in contrast to traditional state monitoring which focuses on 'factory-centred' regulation.[284] Although national mandatory transparency regulations are likely to be limited to the jurisdiction of a particular country, *pure voluntarism*, *SICP* and other *external codes* have a potential to urge companies to think globally.[285] This global aspect of the three different types of voluntary disclosure might help improve transparency of worker conditions across supply chains. Chapter 5 and 6 will examine these in greater detail.

Finally, even though *SICP* and other *external codes* have voluntary characteristics, they play a role in institutionalising the pressure upon companies.[286] As Backer states:

> Under the private law of contract for example, the principal parties can bind themselves voluntarily to behaviour standards they might deem proper. …the parties might agree to certain behaviours in order to receive a certification of compliance with "good" behaviour issued by a reputable third party in the business of making such certifications. Those obligations are usually enforced privately as well-through mandatory agreements to disclose information and permit the monitoring of behaviour. Such moral obligations, and the

[282] Graham and Woods (n 48) 879.
[283] Elliot J Schrage, 'Promoting International Worker Rights through Private Voluntary Initiatives: Public Relations or Public Policy?' (A report to the US Department of State on Behalf of the University of Iowa Center for Human Rights 2004) xii <http://www.cfr.org/content/publications/attachments/Schrage-DOS.pdf> accessed 9 August 2015.
[284] O'Rourke, 'Multi-stakeholder Regulation: Privatizing or Socializing Global Labor Standards?' (n 195) 900.
[285] The limits of national/domestic transparency rules are analysed in depth in 5.3.
[286] Backer (n 62) 595.

methodologies of enforcement, are coming to be institutionalized in private regulatory efforts, principally in corporate ethics and behaviour codes.[287]

As Backer points out voluntary codes may institutionalise social pressure on companies. However, although voluntary strategies may have some potential to improve the corporate behavior towards stakeholders such as employees, they also suffer from several unavoidable weaknesses. The next section shall examine some of these in greater detail.

4.1.4.2 The Unavoidable Weaknesses of Voluntarism

It is important to note that all voluntary disclosure strategies that discussed above, namely pure voluntarism, SICPs, CCGCs and other external codes may also possess some of the following shortcomings:

First, as examined in the discussion of the limits inherent in the business case for disclosure, where disclosure it is said to be more costly than its financial benefits, the company may thus stop disclosing.[288]Therefore, *voluntarism* may not entirely be seen as an effective measure to ensuring corporations act transparently since the business case for voluntary disclosure has some limits.[289] For the sake of the business case, corporations may only disclose 'good news'.[290] In other words, they may be selective on issues included in disclosure.[291] The business case for transparency, as has already been highlighted above, is shaped by the rewards and sanctions by stakeholders. However, in some circumstances,

[287] Ibid.
[288] Bainbridge (n 7) 1056.
[289] Deborah Doane, 'Market Failure: The Case for Mandatory Social and Environmental Reporting' (New Economics Foundation March 2002) 1 <http://www.eldis.org/vfile/upload/1/document/0708/DOC10248.pdf> accessed 9 August 2016.
[290] O'Rourke, 'Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring' (n 235) 27.
[291] Hess and Dunfee (n 242) 25.

stakeholders' reaction to transparency may limit the business case. For instance, stakeholders may be indifferent to transparency, as their choices are influenced by cognitive bias.[292]

Moreover, even if stakeholders process the information disclosed by a company, some stakeholders, such as consumers, may be unable to sanction if a company has a monopoly power within the market.[293] As such, this may prevent consumers from imposing sanctions that have any impact on companies. Similarly, if a company does not produce consumption goods, consumers may also be unable to impose sanctions on such a company, since such companies may not be affected by consumers' sanctions. For example, the companies that sell raw materials, may not consider their 'brand or corporate image'.[294] Therefore, they may not be motivated by the business case for transparency.

Second, the lack of dialogue between the company and employees may be another problematic issue. Indeed, transparency require there to be a dialogue between the company and its employees.[295] However, as the work of Zumbansen has asserted, often codes created by corporations, such as SICPs, mostly ignore this dialogue, along with employee representation and union involvement.[296] Indeed, the communication with the employees is an important factor in terms of implementation of both SICPs and external codes since employees can help the company detect code violations. However, even if there is a robust monitoring process in place, employees might opt to avoid letting inspectors know of self-imposed and external code violations.[297] For instance, if the inspectors communicate with the

[292] See 3.3.3.2 above.
[293] In this respect, mandatory transparency rules may also be ineffective. See the limits of transparency in in 3.3.3.2 above.
[294] Liubicic (n 79) 141.
[295] See 3.1.4.
[296] Peer Zumbansen, 'The Parallel Worlds of Corporate Governance and Labor Law' (2006) 13 Indiana Journal of Global Legal Studies 261, 295.
[297] Liubicic (n 79) 148.

workers in front of managers, workers might be pressured not to disclose subtle problems in the workplace.[298]

Third, lack of transparency in terms of the implementation process may be another problematic aspects of the voluntary strategies discussed thus far. Indeed, a SICP or external code may not require 'further transparency' regarding compliance.[299] Although transparency has a crucial role in terms of the successful implementation of voluntary codes, an external initiative monitoring the corporation's compliance with the codes may only share such information with the member company, rather than public disclosure.[300]

Fourth, even if corporations disclose information in a range of different voluntary ways, the problem of credibility of the information disclosed may pose an issue as voluntary types of disclosure may not possess enforcement measures.[301] Therefore, some voluntary strategies, such as CCGCs suffer from a great possibility of *free riding*.[302] *Free riding* may occur when a company takes advantage of particular voluntary regime without paying for the cost of the benefits or imposing real change.[303] As such, external codes without effective enforcement mechanisms are more likely to suffer from *free riding*.

Fifthly, without a standard form of compelling disclosure rules stakeholders may be unable to compare voluntary disclosure made by corporations since every company shapes its

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[298] Alison Maitland, 'Social Audits 'are Failing to Detect Factory Abuses' *Financial Times* (2 November 2005) <http://www.ft.com/cms/s/0/0dc3fd9c-4b45-11da-aadc-0000779e2340.html#axzz3EQPGCqyG> accessed 9 August 2005.

[299] Murphy (n 159) 401.

[300] Sethi (n 155) 144-145. In this respect, one example can be the Ethical Trading Initiative (ETI) see 6.2.3.2.3 below.

[301] Sethi (n 155) 87.

[302] ibid.

[303] Kathryn Gordon, 'Rules for the Global Economy: Synergies between Voluntary and Binding Approaches' (1999) OECD Working Papers on International Investment 1999/03, 9 <https://www.oecd.org/daf/inv/investment-policy/WP-1999_3.pdf> accessed 9 August 2016.

disclosure in accordance with its own strategy.[304] Although, some external initiatives, such as the Global Reporting Initiative, aim to reduce the problem of comparison, the variety of external codes also exacerbate this problem of comparison. [305]

Lastly, in some circumstances, SICP and external codes may also have indirect negative consequences upon the interests of the employee. For example, a parent company might terminate its contract with its supplier, in response to information on poor performance or the violation of the *SICP* or an external code. The consequence of this may result in employees working with that supplier losing their job and work under worse conditions.[306]

In summary, voluntary disclosure by companies may occur, and is worthwhile, however, on the whole it is unlikely to prove sufficient. Therefore, the remainder of this chapter examines the mandatory requirements that place compulsory measures upon on companies for transparency.

4.2 Disclosure Requirements by Government Regulation

4.2.1 Background

Mandatory disclosure as a means of information sharing can be traced back to a period earlier than the concept of limited liability.[307] Even in the 1800s, companies were required to disclose information such as the names and addresses of the investors to inform creditors when investors transfer their shares.[308] However, the archaeology of mandatory non-financial disclosure is not an old phenomenon. Although there have been non-financial elements to statutory disclosure measures within some legal systems since early 1900s, non-

[304] Hess and Dunfee (n 242) 25.
[305] ibid. For further information on GRI see 6.2.3.1 below.
[306] Liubicic (n 79) 148-149.
[307] Villiers Corporate Reporting and Company Law (n 30) 16.
[308] ibid 16-17.

financial issues have not formed part of the corporate disclosure regime until the late 1980s.[309]

However, in the following years, public reaction against environmental and social problems, which have been caused by irresponsible corporations, has urged governments to better regulate corporate activities through mandatory reporting.[310] More recently corporate scandals, such as Enron, Worldcom or Tyco, exemplifying how lack of transparency can lead to corporate failure, have played a crucial role in the promotion of disclosure and transparency as a remedy.[311] Immediately after these scandals, several new regulations that now force companies to disclose information were put into place by a number of governments.[312] Even where these regulations have been mostly limited to financial issues, non-financial transparency has attained importance alongside such matters. Indeed, the problem had been ethical, in a broad sense, since not only the investors and creditors, but also other stakeholder groups, such as employees, customers and the local communities, were negatively affected by these scandals.[313]

However, transparency with respect to employees is still mostly grounded in voluntary characteristics even in developed countries.[314] Nevertheless, mandatory disclosure

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[309] For example, the US Securities Act of 1934 has been requiring companies to disclose material information. Dara O'Rourke, 'Opportunities and Obstacles for Corporate Social Responsibility Reporting in Developing Countries' (Report for the Corporate Social Responsibility Practice of the World Bank Group, The World Bank March 2004) 11 <http://documents.worldbank.org/curated/en/2004/03/6479712/opportunities-obstacles-corporate-social-responsibility-reporting-developing-countries> accessed 22 July 2016.

[310] ibid.

[311] Peter Verhezen and Paul V Morse, 'Fear, Regret and Transparency: Corporate Governance Embracing Disclosure and Integrity' (World Bank-NACC, Public Affairs Publishing 2010) 32 <https://www.nacc.go.th/images/journal/peter.pdf> accessed 9 August 2016.

[312] Rawlins (n 15) 2.

[313] Ann K Buchholtz and Archie B Carroll, *Business & Society: Ethics & Stakeholder Management* (South-Western Cengage Learning 2010) 181.

[314] One example can be the UK. Villiers, *Corporate Reporting and Company Law* (n 30) 264.

rules may play a crucial role in some circumstances to ensure corporate transparency to and about employees. Next section shall focus on such factors.

4.2.2 The motives of Mandatory Disclosure

The discussion of mandatory disclosure can be best assessed from two perspectives: the public benefits and corporate benefits.

From the perspective of the benefits to public, the first argument may relate to the weaknesses of the business case for disclosure. As examined in 4.1.1.1.5 above, the business case for disclosure suffers from notable limitations. Indeed, if there is no business case for disclosure, governments may need to improve mandatory disclosure mechanisms for the public benefit.[315] Where corporations are unlikely to disclose information owing to the lack of an evident business case, mandatory disclosure requirements will thereby provide a means of obtaining such information.

Proceeding a corporation's disclosure of information, the question of accuracy, completeness and monitoring remain key. Therefore, another argument in favour of mandatory disclosure for the public benefit may relate to the quality of the disclosure. Mandatory rules created by governments may provide a common framework for the quality of disclosure, especially where the enforcement of the disclosure requirements are conducted by specialised government agencies.[316] Mandatory requirements may also constitute an advantageous avenue in terms of consistency and uniformity.[317] This may reduce the differences in areas such as timing and content of disclosures offered by corporations.

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[315] Doane (n 289) 5-6.
[316] O'Rourke, 'Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring' (n 235) 31.
[317] Gordon (n 303) 8.

Significantly, mandatory disclosure rules may also prove beneficial for the corporation.[318] Accordingly, the following arguments can be made in favour of the business case for mandatory reporting.

First, mandatory disclosure can provide a comparative advantage for corporations that are already transparent, since if all companies are required to be transparent, stakeholders in the market would reward or penalise the companies according to their performance.[319] Such arguments are grounded in the assumption that if every corporation discloses credible information, bad corporations can be distinguished according to their negative performance.[320] As such, some corporations shall be likely to benefit from mandatory disclosure rules.

Second argument in favour of the *business case* may be that mandatory disclosure, which determines a common framework for companies on what to disclose, may reduce the cost of disclosure for some corporations. As the work of Doane points out, mandatory reporting, which clarifies and simplifies disclosure, may reduce costs for corporations that already spend significant amounts of money on the preparation of disclosures.[321] Accordingly, if disclosure was made mandatory, the process of reporting may be less costly for the company since the monitoring of disclosure is conducted by regulatory bodies.[322]

Third, mandatory disclosure may also help resolve problems in relation to *business case*. For example, in some circumstances, even if there is a business case for disclosure, the corporation may not be eager to take the lead if no company discloses information. The company might be afraid to 'face the risk that bad news will be seised upon whilst more

[318] Doane (n 289) 6.
[319] ibid 5.
[320] Hess and Dunfee (n 242) 17.
[321] Doane (n 289) 6.
[322] ibid 5.

secretive competitors are let off the hook'.[323] For example, the lead company disclosing information on employee conditions in its factories may suffer due to the lack of information about the factory conditions of competitor corporations.[324] However, mandatory disclosure requiring all competitors to disclose may overcome this problem. Therefore, governments may level the playing field for disclosure through mandatory transparency requirements.[325]

Fourth, compared to the differing types of voluntary disclosure with non-binding features, mandatory transparency rules with strong enforcement mechanisms may help decrease the problem of *free riders*.[326] Indeed, mandatory disclosure differs from voluntary tools, owing to its coercive nature which relies upon sanctions.[327] These sanctions might further affect the market performance of the company, such as by causing a drop in stock prices in addition to the penalties imposed.[328]

As a consequence, compulsion by mandatory transparency rules may be indispensable in some circumstances. As such, some NGOs such as Amnesty International in the UK, organise campaigns to push governments for new laws in order to ensure greater transparency.[329]

Indeed, different acts and regulations require corporations to disclose non-financial information with regard to employee interests.[330] Statutory transparency rules are typically grounded in domains such as company law, employment law and related fields. Accordingly,

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[323] Graham and Woods (n 48) 874.
[324] Fung and others (n 71) 19.
[325] Doane (n 289) 5.
[326] For information on free rider problem see 4.1.3.1 above.
[327] Webb and Morrison (n 164) 106.
[328] Cynthia A Williams, 'The Securities and Exchange Commission and Corporate Social Transparency' (1999) 112 Harvard Law Review 1197, I279.
[329] Zerk (n 99) 33.
[330] See generally chapter 5.

the next section shall go on to discuss different fields of mandatory disclosure by starting with company law.

4.2.3 Company Law and Reporting

Reporting is one of the primary means of achieving greater transparency through disclosure.[331] In many countries, corporations are already required to publish information with respect to employees within their reports.[332] In the UK, for instance, the listed companies are required to disclose such information in accordance with s 414C of the Companies Act 2006.

Under company laws listed companies are obliged to publish annual reports.[333] Therefore, it may be assumed that requiring companies to disclose employee-related information within their annual reports may play a significant role for greater transparency, since the auditing requirement of annual reports may facilitate the comparability of the information disclosed in such reports.[334] One such approach has been that the legislation of individual countries may require companies to publish an Integrated Report (IR), for example.[335] The IR principally refers to the disclosure of information that is designed to inform shareholders on detail outlining how the company ensures value over a given period

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[331] Adrian Henriques, *Corporate Truth: The Limits to Transparency* (Earthscan 2007) 69.

[332] One example, can be France, where all listed companies are required to include non-financial information in annual report see Steve Lydenberg and Katie Grace 'Innovations in Social and Environmental Disclosure Outside the United States' (Domini Social Investments and Social Investment Forum November 2008) 14-17 <http://www.domini.com/sites/default/files/_files/Innovations_in_Disclosure.pdf> accessed 28 June 2016.

[333] See Companies Act 2006, s 471.

[334] Pamela Kent and Tamara Zunker, 'Attaining Legitimacy by Employee Information in Annual Reports' (2013) 26 Accounting, Auditing & Accountability Journal 1072, 1081.

[335] For example, companies listed on the Johannesburg Securities Exchange (JSE) are required to publish an Integrated Report in South Africa. See Mark Hoffman, 'Integrated Reporting in Practice: The South African Story' (KPMG in South Africa June 2012) <https://www.kpmg.com/Global/en/topics/corporate-reporting/better-reporting/Documents/the-south-african-story.pdf> accessed 10 August 2016.

of time.[336] Although the IR aims at informing shareholders, it may also benefit other stakeholders.[337] Employees may be one group of stakeholders in this respect. For example, the dissemination of information on employee training, which improves the human capital of the corporation, may be one example that is considered alongside the preparation of an integrated report.[338]

Irrespective of the benefits, most governments do not require companies to publish an integrated report. Indeed, even where some governments compel companies to consider employee related matters within the scope of their annual reports, in most cases this rarely requires companies to offer specific details as to what kind of information needs to be disclosed, and how companies might disclose this.[339] In other words, even if company directors are obliged to disclose non-financial information that may affect employees' interests, they mostly voluntarily choose how to disclose such information.[340]

As part of the aforementioned approach, reporting requirements may be based upon *narrative reporting*. With *narrative reporting,* the inclusion of employee related issues is often given from the perspective of the directors.[341] Therefore, even where mandatory disclosure rules oblige company directors to disclose employee related information, where directors do not see the information as material, they may simply ignore this. For instance, in

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[336] The International Integrated Reporting Council (IIRC), 'The International IR Framework' (December 2013) para 1.7 <http://integratedreporting.org/wp-content/uploads/2013/12/13-12-08-THE-INTERNATIONAL-IR-FRAMEWORK-2-1.pdf> accessed 10 August 2016.
[337] ibid para 1.8.
[338] ibid para 2.11.
[339] For example, in the UK, directors' discretion plays a major role in terms of the inclusion of non-financial issues in the Strategic report. See 5.1.2.3.3 and 5.1.2.3.4 below.
[340] ibid.
[341] *Narrative reporting* is conceptualized as a type of reporting which 'complements accounting reporting with discussions on the management's take of future prospects and risks and the planned management response besides additional commentaries on corporate social responsibility (CSR) and brand equity considerations, which may impact upon corporate valuation'. Peter Yeoh, 'Narrative Reporting: The UK Experience' (2010) 52 International Journal of Law and Management 211, 212. For further discussion on *narrative reporting,* see also Charlotte Villiers, 'Narrative reporting and Enlightened Shareholder Value under the Companies Act 2006' in Joan Loughrey (ed), *Directors' Duties and Shareholder Litigation in the Wake of the Financial Crisis* (Edward Elgar Publishing Limited 2013).

the UK the conceptualization of material information and the creation process of disclosure is dependent upon managerial discretion.[342] Directors are required to present 'information about the company's employees' only if it is 'necessary for an understanding of the development, performance or position of the company's business'.[343] Disclosure with respect to employees is at directors' discretion and their disclosure is grounded in *comply or explain approach*.[344] This approach imposes no sanction upon companies in case of non-disclosure as long as companies explain the reasons for their non-disclosure.[345]

Comply or explain approach

Regulatory bodies now use the *comply or explain approach*, which constitutes the most distinct example of the deviation from traditional substantive disclosure systems,[346] insofar as transparency requirements are concerned. By contrast to the peremptory aspect of traditional mandatory requirements, this approach employs much greater flexibility with language by setting minimum standards without a statement upon what 'indicators are to be reported, or in what format'.[347] Therefore, with this approach, companies have flexibility over whether or not to disclose material information.[348] Through such a system, the regulatory body does not specifically urge companies how to report, rather the companies themselves

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[342] David Owen and Tracey Swift, 'Introduction Social Accounting, Reporting and Auditing: Beyond the Rhetoric?' (2001) 10 Business Ethics: A European Review 4, 8.
[343] Companies Act 2006 s 414C (7)(b)(ii).
[344] According to s 414C (7)(b) of the Companies Act 2006, 'If the report does not contain information' on stakeholders like employees 'it must [merely] state which of those kinds of information it does not contain'.
[345] GRI, 'Report or Explain: A Smart EU Policy Approach to Non-Financial Information Disclosure GRI Report' (GRI Non-paper May 2013) <https://www.globalreporting.org/resourcelibrary/GRI-non-paper-Report-or-Explain.pdf> accessed 10 August 2016.
[346] John C Ruhnka and Heidi Boerstler, 'Governmental Incentives for Corporate Self Regulation' (1998) 17 Journal of Business Ethics 309
[347] Steve Lydenberg, Jean Rogers and David Wood, 'From Transparency to Performance: Industry-Based Sustainability Reporting on Key Issues' (The Initiative for Responsible Investment (IRI), Hauser Center for Nonprofit Organizations at Harvard University June 2010) 6 <http://iri.hks.harvard.edu/files/iri/files/from_transparency_to_performance_industry-based_sustainability_reporting_on_key_issues.pdf> accessed 10 August 2016.
[348] GRI, 'Report or Explain: A Smart EU Policy Approach to Non-Financial Information Disclosure GRI Report' (n 345) 6.

choose how to disclose information, or explain why they have decided not to.[349] Even if the government require mandatory disclosure, this requirement is predominantly embedded in a voluntary commitment. Therefore, where governments still play a role in making hard law that requires transparency, actors such 'as civil society organizations and movements, the media and public opinion to expose, name and shame or otherwise bring pressure to bear on a company to improve its performance'.[350]

Of course, nowadays, some governments and regional organisations employ the *comply or explain* model to regulate and monitor corporate activity. For instance, the approach is used by the European Union in its Directive (2014/95/EU) regarding the disclosure of non-financial and diversity information by large companies and groups.[351] Accordingly, if a company does not comply with certain requirements in the directive, it must explain why it does not. For instance, if a company director does not include employee related information in the annual report, s/he must provide reasons for this.[352]

In short, even where the *report or explain* approach is made mandatory by a government, to ensure companies disclose information, it expects corporate stakeholders will act as a conduit to the provision of sanction or rewards accordingly. One might therefore assert that disclosure requirements under statutory law also entails some voluntary elements.

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349 KPMG and others, 'Carrots and Sticks: Sustainability Reporting Policies Worldwide – Today's Best Practice, Tomorrow's Trends' (KPMG Global Sustainability Services 2013) 14 <https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf> accessed 14 August 2016.

350 Peter Utting, 'Rethinking Business Regulation: From Self-Regulation to Social Control' (Technology, Business and Society Programme Paper Number 15, United Nations Research Institute for Social Development (UNRISD) September 2005) 10 <http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/F02AC3DB0ED406E0C12570A10029BEC8/$file/utting.pdf> accessed 10 August 2016.

351 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330.

352 ibid art 20.

Voluntary elements in mandatory disclosure and their shortcomings

Some companies discuss non-financial issues in their financial reports, covered within a few sentences, by contrast, some publish very detailed and much longer reports.[353] In keeping with such an approach, some integrate non-financial information into the narrative on business performance and value through an Integrated Report (IR).[354] Other companies may publish separate non-financial reports appear under a number of different names, such as sustainability, corporate social responsibility (CSR), or environmental reports, dependent upon the subject covered.[355] Such reports may include a broad range of information on issues such as intangible assets, sustainability, environmental, social and governance (ESG), Key Performance Indicators (KPI) or intellectual capital.[356]

Of course, as has highlighted in section 4.1.4.2, the lack of standard form of disclosure might constitute an important barrier to evaluating the information shared by companies.[357] It can therefore be difficult to compare what corporations disclose, since the information shared may be presented on different scales and harbour different scopes. Differences in the length, content, timing and the language of disclosure may also make the comparison of reports problematic.

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[353] Lydenberg (n 41) 5.

[354] Allen L White, 'New Wine, New Bottles: The Rise of Non-Financial Reporting' (Business Brief, Business for Social Responsibility 20 June 2005) 1 <http://www.businesswire.com/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/services/ir_and_pr/ir_resource_center/editorials/2005/BSR.pdf> accessed 10 August 2016.

[355] According to a report published by KPMG in 2013, 'the most commonly used terms globally are 'corporate responsibility' (14 per cent) or 'corporate social responsibility' (25 per cent) and 'sustainability' report (43 per cent)'. KPMG International, 'the KPMG Survey of Corporate responsibility reporting 2013' (December 2013) 6 <https://assets.kpmg.com/content/dam/kpmg/pdf/2015/08/kpmg-survey-of-corporate-responsibility-reporting-2013.pdf> accessed 10 August 2016.

[356] Robert G Eccles and Michael P Krzus, *One report: Integrated Reporting for a Sustainable Strategy* (John Wiley & Sons 2010) 81.

[357] Hess and Dunfee (n 242) 25; Meinolf Dierkes and Ariane B Antal, 'Whither Corporate Social Reporting: Is It Time to Legislate?' (1986) 28 California Management Review 106, 110.

However, in response to such a problematic issue, governments may require companies to use ‘a single standardized format’.[358] Furthermore, governments may also provide companies with Key Performance Indicators (KPI)s.[359] Furthermore, they may require companies to address internationally recognised guidelines for their reports and the verification of such reports. An example of this may be the non-financial information disclosed by listed companies in France, which require third-party verification.[360]

Conversely, mandatory disclosure strategies are not limited to reporting requirements under company law. This will be analysed further in 4.3.4.

4.2.4 Other Mandatory Requirements for Transparency

A number of observations in relation to the mandatory requirements for transparency can be as follows:

First, state-owned companies can be particularly obliged to disclose information on issues relating to employees. The public sector is one of the largest employers within many countries.[361] Indeed, research shows that there is an increase in the number of countries that require state owned companies to ensure they are more transparent.[362] In some countries for example, in Sweden, state owned companies have been required to publish a non-financial

[358] Hess and Dunfee (n 242) 25.
[359] Lydenberg, Rogers and Wood (n 347) 10.
[360] Commission, ‘Impact Assessment Accompanying the Document Proposal for a Directive of The European Parliament and of the Council Amending Council Directives 78/660/EEC and 83/349/EEC as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Companies and Groups‘ (Staff Working Document) SWD(2013) 127 final 50.
[361] Naoko Kubo, “Public Agency Sustainability Reporting—A GRI Resource Document in Support of the Public Agency Sector Supplement Project’ (Global Reporting Initiative (GRI) January 2004) 2 <https://www.globalreporting.org/resourcelibrary/Public-Agency-Sustainability-Reporting.pdf> accessed 21 July 2016.
[362] KPMG and others (n 349) 17.

report in accordance with the GRI G3 guidelines.[363] This may typically result in a positive spillover effect among other private corporations.[364]

Second, mandatory disclosure can be enforced under the umbrella of employment law. For instance, employees may have statutory rights to be informed about an impending dismissal in advance.[365] Similarly, they may possess a moral or legal right to information disclosure in terms of occupational health and safety issues.[366] Indeed, mandatory disclosure measures on health and safety issues play a vital role in every labour law regime.[367]

Third, mandatory disclosure requirements in terms of Socially Responsible Investment (SRI) can be seen as another avenue for transparency with respect to employee interests. Statutory obligations for the institutional shareholders to declare their attitudes towards the social policies of potential investee companies may have an indirect influence on the behaviour of public corporations.[368] This in turn may encourage corporations to disclose non-financial information with respect to employee interests. For example, in the UK, pension funds are required to disclose 'the extent (if at all) to which social, environmental, or ethical considerations are taken into account' in their investments.[369]

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363 ibid 75.

364 Cornis VD Lugt and Daniel Malan (ed), 'Making the Investment Grade: The Future of Corporate Reporting, New Trends in Capturing and Communicating Strategic Value' (United Nations Environment Programme, Deloitte and Centre for Corporate Governance in Africa 2012) 102 <www.deloitte.com/assets/Dcom-SouthAfrica/Local%20Assets/Documents/Making_Investment_Grade.pdf> accessed 31 August 2016.

365 Employment Rights Act 1996 s 86(1).

366 Ruth R Faden and Tom L Beauchamp, 'The Right to Risk Information and the Right to Refuse Workplace Hazards' in Tom L Beauchamp and Norman E Bowie (eds), *Ethical Theory and Business* (7th edn, Pearson Prentice Hall 2004) 204.

367 For the disclosure requirements under employment law in the UK see 5.1.3 below.

368 For details see 5.1.5.2 below.

369 The Occupational Pension Schemes (Investment) Regulations 2005, SI 2005/3378, reg 2 (3)(b)(vi). See also 5.1.5.2 below.

Fourth, another mandatory strategy that may lead companies to become more transparent may be through freedom of information laws.[370] However, freedom of information laws are typically restrictive in terms of coverage.[371] The information may merely cover the state owned companies.[372] In accordance with such laws, information on private companies that have relationships with governments departments or schemes may also be shared.[373] Indeed, freedom of information laws could potentially be extended to the realm of other private companies.[374]In this respect, there may be a comprehensive right of access to private information which covers private companies that may improve corporate transparency with respect to employees' interests.[375]

Fifth, whistleblowing could be better employed as another strategy towards improving transparency. With such a strategy, employees themselves take on the main role by making an ethical decision about whether to disclose information. Companies which have policies on whistleblowing can clarify the circumstances in which this may apply.[376] Whistleblowing can be directly linked to employee interests, such as protecting health of employees.[377] However, once an employee blows a whistle, the cost of such act may affect her physically, financially and psychologically.[378] For instance, she may be fired or victimised because of

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[370] Utting (n 350) 10.

[371] John M Ackerman and Irma E Sandoval-Ballesteros, 'The Global Explosion of Freedom of Information Laws' (2006) Administrative Law Review 85, 99.

[372] Ann Florini, *The Right to Know: Transparency for an Open World* (Columbia University Press 2007) 229.

[373] Henriques (n 331) 85.

[374] George Monbiot, 'Freedom of Information: My Monstrous Idea will Keep Corporate Tyrants at Bay' *The Guardian*, (7 May 2012) <http://www.theguardian.com/commentisfree/2012/may/07/freedom-information-my-monstrous-proposal> accessed 10 August 2016.

[375] In this regard one example can be Section 32 of the constitution of South Africa Florini (n 372) 232.

[376] Tim Barnett, Daniel S Cochran and G Stephen Taylor, 'The Internal Disclosure Policies of Private-Sector Employers: An Initial Look at their Relationship to Employee Whistleblowing' (1993) 12 Journal of Business Ethics 127, 129.

[377] David Lewis, 'The Contents of Whistleblowing/Confidential Reporting Procedures in the UK: Some Lessons from Empirical Research' 28 Employee Relations 76, 77.

[378] Michael Cover and Gordon Humphreys, 'Whistleblowing in English Law' in Gerald Vinten (ed), *Whistleblowing : subversion or corporate citisenship?* (Paul Chapman 1994) 89.

whistleblowing.[379] As such governments have a major role to play in protecting those who disclose by offering legislative safeguards.[380]

Sixth, as introduced above, mandatory labelling may be another strategy.[381] For example, a government can pass a law requiring the use of mandatory social labelling.[382] In the case of governments to which corporations provide services and goods, they may require companies to comply with labelling schemes justified on public procurement terms.[383]

Lastly, in addition to the disclosure requirements listed above, governments might also contribute to the growth in corporate transparency by passing additional laws. For instance, governments can promote greater truth in advertising by passing strict false advertising or consumer protection laws.[384] Therefore, even if the corporation discloses information through the means of voluntary disclosure, governments may also play a role in helping stakeholders to sanction companies at the courts.[385]

4.2.5 Potential Shortcomings of Mandatory Disclosure

Mandatory disclosure requirements can be seen as the combination of market-based and command and control (C&C) strategies.[386] As such, potential shortcomings of mandatory disclosure strategies are mostly similar to some of the critiques levied at C&C strategies in chapter 3. In this respect, such strategies may have the shortcomings as follows:

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379 David Lewis and Tina Uys, 'Protecting Whistleblowers at Work: A Comparison of the Impact of British and South African Legislation' (2007) 49 Managerial Law 76, 89.
380 See 5.1.3.3 below.
381 For the role of labelling in terms of improving transparency see 4.1.1.1.2 and 4.1.3.2 above.
382 Belgium can be one example in this regard. Alessia Di Pascale, 'The EU Voluntary Approach to Corporate Social Responsibility in Comparison with Regulatory Initiatives across the World' (CSR Paper 16.2007, Fondazione Eni Enrico Mattei December 2007) 9 <http://www.feemdeveloper.net/attach/CSR2007-016.pdf> accessed 10 August 2016.
383 Wales, which was declared the world's first fair trade nation, can be one example in this regard. See Fair Trade Wales, 'Fair Trade Nation' <http://fairtradewales.com/fair-trade-nation> accessed 10 August 2016.
384 ibid 431.
385 See Unfair Commercial Practices Directive, art 6(2)(b)
386 Karen Yeung, 'Government by Publicity Management: Sunlight or Spin' (2005) 2 Public Law 360, 367.

First, mandatory strategies used to regulate corporations may be less attractive to governments than the voluntary strategies discussed above.[387] One reason for this may be the cost of mandatory transparency regulation, since as other regulations, mandatory transparency regulation creates costs for the government.[388]

Second, if mandatory disclosure is based upon a set of standards, without considering the differences among various sectors, and applied to companies without paying attention to their differences, such an approach may prove ineffective.[389] In this respect, voluntary disclosure shaped mostly by individual companies and sectors may be seen as more preferable. For instance, within some industries, employee interests may be more significant. Companies with a myriad of suppliers in developing countries may require different metrics than national banks doing business in only a developed western country.[390] Thus the requirements for mandatory disclosure need to be modified according the features of industry concerned.

Third, in some circumstances, mandatory regulation centralised 'in government-led binding systems' might be captured 'by interests groups'.[391] The government, responsible for the creation and enforcement of mandatory transparency requirements, may be lobbied by corporations. Naturally, some governments might be weak or too corrupt to implement these regulations.[392] As such, the implementation of mandatory transparency rules may be limited.

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[387] Murphy (n 159) 393.
[388] See 3.3.3.1 above
[389] Mandatory rules, such as Command and Control regulations, are seen as being inflexible. See 3.2.6 above.
[390] GRI, 'Sustainability Topics for Sectors: What do Stakeholders Want to Know?' (2013) <https://www.globalreporting.org/resourcelibrary/sustainability-topics.pdf> accessed 23 September 2016.
[391] Gordon (n 303) 9.
[392] These shortcomings will be argued profoundly in 5.3 below.

Fourth, although it was emphasised how mandatory disclosure requirements may play a role in preventing the problem of *free riding*, it may suffer deficiencies in this respect also. Therefore, governments should conduct proper monitoring and enforcement in order to ensure mandatory disclosure rules are effective. [393]

Fifth, whilst governments require companies to disclose information with respect to employees, some of these mandatory requirements, such as the *comply or explain approach*, offer companies/directors discretionary power in the determination of the content of the information.[394] In this respect, company directors mostly disclose information in accordance to their fiduciary duties. Thus a jurisdiction in which the fiduciary duties of directors are grounded in shareholder value may make the directors more inclined to disclose information only if it is of material worth to the shareholders.[395]

Lastly, mandatory disclosure requirements designed by governments may be limited in terms of the international activities of corporations and their supply chain. This problem mostly stems from territorial limit of national law. Although governments may pass disclosure laws requiring companies to disclose their extraterritorial practices, monitoring and enforcement of these may not prove effective.[396] Chapter 5 shall examine this issue in more detail when discussing the limits of national transparency regimes.

Conclusion

This chapter has addressed a core question faced by any authority attempting to ensure the level of transparency that has been advocated in chapter 3. What must be done to ensure companies operate transparently? The chapter questioned whether companies could be

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[393] Tara Vishwanath and Daniel Kaufmann, 'Toward Transparency: New Approaches and their Application to Financial Markets' (2001) 16 The World Bank Research Observer 41, 51.
[394] See 4.2.3 above.
[395] In this respect, the UK can be one example. See the critique of the UK Company Law in 5.1.2.3 below.
[396] See 5.3.2.1 below.

relied upon to choose, out of self-interest, how it is they should be transparent. The first answer considered whether nothing ought to be done. The chapter referred to this as *pure voluntarism*. In this respect, it was seen that without any external regulation, that corporations may disclose information since such a disclosure would have a *business case*. Some corporate stakeholders, who consider transparency relating to their choices, were seen as actors affecting the profitability of corporations. In the discussion, several points were made: first, employees themselves were demonstrated as corporate constituents who can affect the performance of the corporation through the use of transparency. Second, consumers who prefer transparent companies in their choices examined as another stakeholder group that make companies pay more attention to the information disclosed with respect to employees. Third, it was argued that shareholders, either ethically or by way of profit-oriented choices, may pay greater attention to transparency. This attention was considered by the corporations as the business case to disclosing information and doing so in a digestible format. Fourth, the governmental approach to transparency was seen as another factor to ensure corporations are more regarding of disclosure. Lastly, it was showed that in some circumstances, individual directors may be inclined to disclose information owing to personal benefits or ethical reasons. In short, all of the aforementioned factors were seen as playing a role in *pure voluntarism*, as discussed within this chapter.

It is further argued whilst *pure voluntarism* may help us to see how, to some extent, a company treats its employees, such as issues regarding basic labour conditions, it also suffers from several shortcomings. Although companies may voluntarily choose to take some steps towards guaranteeing transparency, whilst such transparency is welcome, voluntarism often will not go far enough. Hence, the chapter examined evidence that suggests some degree of compulsion is necessary to ensure companies achieve the levels of disclosure and

transparency the earlier chapters have argued in order to ensure employee interests are respected.

Self-imposed codes of practices (SICP) ensures some degree of compulsion is levied upon companies to act in a prescribed manner. In essence, through an SICP companies promise to ensure their future behaviour is transparent, rather than addressing any pure calculation of a business case for disclosure. However, SICPs may seem inferior to ensure compulsion is placed upon corporations when compared to other external codes. External codes with independent third party monitoring and verification mechanisms appear more robust than SICP, since these mechanism improves the accuracy of information disclosed by companies. However, all modes of voluntary of compulsion for transparency are mostly based upon the business case, and thus the reaction of corporate stakeholders to disclosure. However, corporate stakeholders who process the information have some limits to rewarding or sanctioning companies. Sometimes governments can therefore play an indispensable role in helping stakeholders maintain a voice.

Overall, mandatory disclosure requirements can be seen as more direct, concrete, and effective in placing a measure of compulsion upon companies to guarantee more transparent behaviour. Nevertheless, in some circumstances they may also possess some drawbacks. For instance, mandatory rules may be limited when addressing issues such as the cost of transparency and monitoring the activities of companies and their international supply chains. In short, whilst there is a great need for compulsion to be placed upon companies to ensure greater transparency, such compulsion can only be achieved through a combined approach, encapsulating a combination of both mandatory and voluntary elements.

Having made the case for mandatory measures and compulsion, the remainder of this thesis shall now address *two sub-questions* that arise in this work. These are: (i) whether compulsion can be achieved adequately within a single state, namely the UK (or perhaps a regional group of states, such as the EU) and (ii) does compulsion require the development of what might, for now, be loosely termed 'international transparency norms' – namely norms that are agreed at the international level, and subject to international mechanisms of enforcement?

In doing so, chapter 5 shall address these questions by trying to ascertain what can realistically be achieved at the national (and regional) level. To do that, the chapter shall use the UK as a case study, demonstrating how much has been and can be achieved, but that there are inherent limitations within the national initiatives, thereby paving the way to explore, in chapter 6, the benefits of international cooperation.

Chapter 5

A National Strategy for Transparency: The UK Disclosure Regime and Employees

Introduction

The analysis within the previous chapter concluded that the achievement of effective corporate transparency requires some degree of compulsion to be levied upon the corporation.[1] For this purpose, the present chapter, along with the proceeding one, shall examine the most appropriate geographical based means by which this may be achieved. In this respect, the present chapter shall focus upon whether effective transparency norms are achievable through national and/or regional initiatives. The proceeding chapter shall then move to address international initiatives and their use to achieve transparency. For the purposes of the present chapter, the transparency initiatives employed in the UK shall constitute the material used for our national/domestic *case study*. Its current membership to the EU will provide the regional trans-national dimension of the chapter.

Through its analysis of the UK as a case study, this chapter aims to demonstrate that whilst national/regional initiatives can accomplish meaningful improvements, and may compel corporations to act transparently, many initiatives fall short of achieving the level of transparency that this thesis advocates is required to protect the interests of employees.[2]

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[1] 'Some' degree of compulsion includes both mandatory legal rules and 'soft law' recommendations found in codes of practice generated 'externally' –beyond the company to which it applies.

[2] For the merits of transparency, see generally chapter 3.

The present chapter then shall be organised as follows: section 5.1 shall examine the current state of the UK corporate transparency regime. For this purpose, the legal requirements of company law, employment law and other indirect statutory measures, such as whistleblowing, for example, shall be examined in relation to employee's interests. Then, in 5.2, the use of soft law requirements, such as codes of practice and voluntary guidelines shall be considered for their worth as alternative strategies in achieving corporate transparency. In addition to voluntary regimes, hybrid frameworks (such as explanatory guidelines based on statutory laws) shall also be considered. Notably, neither 5.1 nor 5.2 aim to offer a comprehensive summary of all disclosure norms. Indeed, these sections shall not cover all of those measures available in the UK that aim to offer provision of corporate transparency for the benefit of employees. There are already a number of scholars who provide a good coverage of existing UK disclosure obligations.[3] Rather, this chapter shall use a number of significant transparency schemes as examples in order to demonstrate the argument that foreshadows the limitations of national/regional initiatives, as referred to above. Having done this, section 5.3 shall then review the general shortcomings apparent within national/regional disclosure regimes. The chapter shall finally conclude by observing a greater need for an international system of transparency, in order to address the gaps and shortcomings apparent within domestic initiatives.

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[3] eg Rob Gray, Reza Kouhy and Simon Lavers, 'Corporate Social and Environmental Reporting: a Review of the Literature and a Longitudinal Study of UK Disclosure' (1995) 8 Accounting, Auditing & Accountability Journal 47; Andrew L Friedman and Samantha Miles, 'Socially Responsible Investment and Corporate Social and Environmental Reporting in the UK: An Exploratory Study' (2001) 33 The British Accounting Review 523; John Parkinson, 'Disclosure and Corporate Social and Environmental Performance: Competitiveness and Enterprise in a Broader Social Frame' (2003) 3 Journal of Corporate Law Studies 3; John Stittle, 'UK Corporate Reporting of Human Capital: A Regulatory Failure to Evolve' (2004) 109 Business and Society Review 311; Simon Goulding and Lilian Miles, 'Regulating the Approach of Companies towards Employees: The New Statutory Duties and Reporting Obligations of Directors within the United Kingdom' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsiblity* (Edward Elgar Publishing 2005); Charlotte Villiers, *Corporate Reporting and Company Law*, vol 5 (Cambridge University Press 2006) etc.

5.1. Mandatory Transparency Rules in the UK

5.1.1 Background

Developments in relation to mandatory transparency programmes in the UK can be analysed from two perspectives. On the one hand, transparency reforms represent, or are a consequence of, the domestic social needs and developments of the UK. On the other hand, transparency reforms may be made a direct consequence of developments within the EU, in particular judicial or legislative reforms that impose a requirement for change.

In the first instance, the corporate scandals that occurred during the early 1990s created a need for better corporate governance, which led to number of developments in the UK.[4] These developments are corporate governance reports created by such as Cadbury, Greenbury, Hampel, and Turnbull Committees.[5] Although these committees did not pay specific attention to transparency as a tool for improving the interests of employees, they triggered a debate on 'expanded non-financial disclosure' of materials which may be linked to employees.[6] Accordingly, the role of stakeholders in good corporate governance was highlighted.[7] One of these committees, Hampel Commitee, noted in relation to transparency, 'proposed that public companies should be required by the London Stock Exchange's listing rules to disclose in their annual report how they applied principles of good governance (including CSR principles)'.[8]

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[4] Steve Giles, *The Business Ethics Twin-Track: Combining Controls and Culture to Minimise Reputational Risk* (John Wiley & Sons 2015) 147.
[5] Christine A Mallin , *Corporate Governance* (Oxford University Press 2010) 26-29.
[6] Cynthia A Williams and John M Conley, 'An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct' (2005) 38 Cornell International Law Journal 493, 511.
[7] Nina Boeger, Rachel Murray and Charlotte Villiers, *Perspectives on Corporate Social Responsibility* (Edward Elgar Publishing 2008) 212.
[8] Aurora Voiculescu, 'The other European Framework for Corporate Social Responsibilty: From the Green Paperto New Uses of Human Rights Instruments' in Doreen J McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2009) 252.

In the second instance, transparency requirements may be seen as a result of reforms or developments made within the EU. Notably, most of the mandatory disclosure requirements in place in the UK have originated from the EU. Company law may be seen as the first such area EU requirements have impacted upon the UK transparency regime. EU directives[9] have constituted a ‘direct’ impact on the UK corporate law.[10] For example, it may be said that ‘the Companies Act [2006] is, in part, an expression of the EU modernisation project’.[11] Indeed, the reporting requirements within the CA 2006, examined below, can be seen as well as it is the implementation of the EU directives.

Outside of the realm of company law, within a number of spheres, the EU is still one of the key influential actors. Disclosure requirements under the EU laws such as these effect health and safety or collective redundancies for example have significantly influenced the UK’s approach to transparency. In this respect, the implementation of the Directive 2002/14/EC,[12] which draws upon the general framework insofar as informing and consulting with employees is concerned may be seen as an important example in this respect. In accordance with the article 4(2) of directive 2002/14/EC, employees must be informed of financial and strategic developments within a corporation, along with potential structural changes that may occur within the organisation.

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[9] The EU directives are crucial tools in constructing the framework of the company law in the EU. These directives encapsulate common goals drawn by the EU, and allow member states how to interpret these goals. Therefore, they play a major role in the corporate disclosure regime at the EU level. European Union, ‘Regulations, Directives and other Acts’ <http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm> accessed 19 July 2016.

[10] Bryan Horrigan, ‘Directors' Duties and Liabilities -- Where Are We Now and Where Are We Going in the UK, Broader Commonwealth, and Internationally?’ (2012) 3 International Journal of Business & Social Science 21, 25.

[11] Gordon L Clark and Eric RW Knight, 'Implications of the UK Companies Act 2006 for Institutional Investors and the Market for Corporate Social Responsibility' (2009) 11 University of Pennsylvania Journal of Business Law 259, 262.

[12] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L 80 (Information and Consultation of Employees Directive).

In summary, it is apparent from this discussion there are many incumbent mandatory transparency requirements that have been created response to developments in the EU and the UK, domestically. The following sections shall examine some of these requirements in greater detail.

5.1.2 Disclosure Obligations under UK Company Law

In the wake of several crises in relation to corporate governance, during the 1990s UK government accelerated its modernization of the company law.[13] These efforts resulted in the enactment of the Companies Act (CA) 2006. In relation to transparency specifically, s 417 of the CA 2006 required corporate directors to ensure that a *Business Review* (BR) was included in their annual reports. This requirement was further reformed by the Companies Act 2006 (Strategic Report and Directors' Report) and Regulations 2013 (SRDRR).[14] SRDRR replaced s 417 of the CA 2006, and made a number of other, mostly subtle, and modest, changes to the social reporting requirements placed upon companies in the UK.

Within the following sections, discussion and analysis shall consider the latest transparency requirements in the field of company law and the critique of these requirements in relation to employee interests.

5.1.2.1 Strategic Report and Directors' Report Regulations 2013 (SRDRR)

In keeping with the former *business review* requirements of s 417 of CA 2006, the SRDRR stipulates that directors of listed companies, with the exception of some smaller companies, are required to prepare a 'strategic report' as part of their annual report.[15] In doing

[13] Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: The Strategic Framework* (Consultation Paper, URN 99/1144, Department of Trade and Industry 1999).
[14] Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 (SRDRR 2013) SI 2013/1970.
[15] S 414A Companies Act 2006 inserted by Regulation 3 of the SRDRR 2013 inserted s 414A, 'duty to prepare strategic report' to the Companies Act 2006.

so, company directors are required to use the report to present 'a fair review of the company's business [and] a description of the principal risks and uncertainties'.[16] According to s 414C (7)(b)(ii) and (iii) of CA 2006, the strategic report must include 'information about the company's employees' and 'social, community and human rights issues', 'including information about any policies the company has in relation to those matters and the effectiveness of those policies'. However, these disclosure requirements are grounded in a voluntary commitment by the company to share such information, as required by the former BR component of the CA. Notably, none of these provisions impose a mandatory requirement to report, and where these matters are not included in the Strategic Report, then this must merely be stated.[17]

Ultimately, the main purpose of the Strategic Report requirements is to ensure that directors disclose to shareholders material information on issues that may affect the development and performance of the company.[18] Thus, insofar as information in relation to the employees of the company is concerned, this should only be disclosed 'to the extent necessary for an understanding of the development, performance or position of the company's business'.[19]

The introduction of SRDRR brought about some new disclosure requirements, which signified a new approach to corporate transparency, in difference to the mere repeat of requirements listed under the former BR approach. First, in accordance with s 414C (7)(b)(iii) CA 2006, listed companies were now required to disclose their approach to human rights issues. Accordingly, even if the company covered the subject of employee or human rights

[16] Companies Act 2006, s 414C (2)(a)(b).
[17] Companies Act 2006, s 414C (7)(b).
[18] Financial Reporting Council, 'Guidance on the Strategic Report' (2014) ss 5.6-5.11 <https://www.frc.org.uk/Our-Work/Publications/Accounting-and-Reporting-Policy/Guidance-on-the-Strategic-Report.pdf> accessed 19 July 2016.
[19] Companies Act 2006, s 414C (4).

issues in a separate CSR report, it must now also include this information in its annual report.[20] The provision on the disclosure of human rights information may be interpreted as requiring companies to afford greater attention to supply chain matters.[21] Second, according to s 414C(8)(c)(i), the strategic report must include 'the number of persons of each sex who were directors of the company' and (iii) 'the number of persons of each sex who were employees of the company'.[22] Hence, the SRDRR specifically introduced requirements that touch upon the gender diversity of the board and the employees.

In addition to above requirements, the Financial Reporting Council (FRC) published its 'Guidance on the Strategic Report'[23] in order to help company directors with the requirement of *narrative reporting*.[24] This guidance is grounded in voluntary roots.[25] The guidance on the Strategic Report provides a general framework how directors are expected to disclose information with respect to employees, whilst it further elaborates upon the meaning of s 414C (7)(b) of the CA 2006, which requires directors to include the information that may relate to the 'development, performance, position or future prospects of the entity's business'.[26] According to the Guidance, the information included in the Strategic Report may depend upon the sector in which the company conducts its business.[27] In this respect, if a company pays attention to worker conditions through its suppliers, in order to reduce the risks that may be detrimental to its reputation, this information may be included in the strategic

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[20] Deloitte, 'The Strategic Report — A Practical Guide to the New Regulations' (9 October 2013) 20. <http://www.iasplus.com/en-gb/publications/uk/other/the-strategic-report-2014-a-practical-guide> accessed 10 August 2016.
[21] Financial Reporting Council (n 18) s 7.31.
[22] Companies Act 2006, s 414C (8)(c)(i) and (iii)
[23] Financial Reporting Council (n 18).
[24] For the concept of *narrative reporting* see 4.2.3 above.
[25] Financial Reporting Council (n 18) s 2.1.
[26] ibid ss 7.29-7.37.
[27] ibid s 7.30.

report.[28]

Notwithstanding, all of the information disclosed in accordance with the strategic report should be material only to shareholders.[29] As such, the next section shall now examine the importance of shareholders with respect to disclosure.

5.1.2.2 The Role of Section 172 of the CA 2006 in terms of Disclosure

When considering disclosure in relation to employee interests, this consideration ought to be evaluated within the frame of directors' duties, as defined by s 172 of the CA 2006. According to s 414C(1) of CA 2006, 'the purpose of the strategic report is to inform members of the company and help assess how the directors have performed their duty under s 172 (duty to promote the success of the company)'. Accordingly, directors are obliged to provide shareholders with information in relation to their performance, in accordance with their *duties,* to enable shareholders better understand the issues relating to the business of the company.

However, the exact prescription of these duties warrants further examination. S 172 (1)(b) of the CA 2006 conceptualises the duties of the directors as follows:

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

With the above in mind, it is evident s 172 itself does not detail any requirement with respect to information disclosure. Nevertheless, as highlighted in the discussion above, SRDRR underlines directors' duties in relation to disclosure. Thus, one may thereby ask whether

[28] ibid s 7.31.
[29] See 5.1.2.2 below.

directors owe any duty to consider the interests of stakeholders of the company, other than those of the shareholders.

One might argue that s 172 has a particular importance in relation to stakeholder interests, since 'it posits a relationship between the pursuit of shareholder wealth maximization and the obligation to consider the impact of decisions on various stakeholders'.[30] However, it is apparent that s 172 (1)(b) requires directors to 'have regard to the interests of the company's employees' only with respect to the company's success. As such, s 172 regards employees, alongside other stakeholders, as means of playing a role in the long-term success of the company, for the benefit of its shareholders, and thus require company directors to consider the interests of employees instrumentally.[31] Put differently, directors are expected to maximise the 'Enlightened Shareholder Value (ESV)', as conceptualised in chapter 2.[32] Therefore, one can see that s 172 requires directors to consider employee interests, only if they are important when considering the success of the company. Therefore, the information that should be disclosed in accordance with SRDRR is likely to remain limited to the interests of employees other than shareholders.

As the above analysis outlines, s 172 does not include any disclosure requirements. However, it is through disclosure requirements outlined in the SRDRR that members of a company are empowered with the necessary information to understand whether directors comply with the requirements prescribed in s 172. Yet, critically speaking, is disclosure necessary for this purpose? For example, would company law (CA 2006) be reformed to require directors to act in a proper way without disclosure requirements?

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[30] Robert Goddard, 'Directors' Duties' (2008) 12 Edinburgh Law Review 468, 472.
[31] Although s 172 uses the word of 'members,' the company members are defined as shareholders whose names are entered in the company's register of members. See CA 2006, s 112.
[32] See 2.2.2 above.

Even where company law some way requires directors to act in *a proper way* towards ensuring the success of a company, without disclosure, it would appear directors would be free from accountability or having to respond accounting for their actions, whether or not these were in *a proper way*. Therefore, it would appear that there is a need for additional provisions specifically addressing disclosure in relation to directors' duties.[33]

Indeed, even with disclosure, the attitude of a manager who acts in *a proper way* is unlikely to be challenged since in addition to disclosure, any provision addressing the core duties of the directors ought to be clear enough. [34] In this respect, for example, s 172 may be criticised since in accordance with section 172 of the CA 2006, it is difficult to challenge the directors' decisions as long as they are taken in 'good faith'.[35]

Crucially, even where disclosure requirements under company law consider employee interests, insofar as these requirements only detail a section which frames the duties of directors in relation only to the interests of both shareholders and the success of the company. In this respect, the SRDRR, for example, merely aims to ensure shareholders are more informed, and to assess the performance of directors under CA 2006 s 172.[36] The regulations pay attention to the importance of considering stakeholders, however doing so only instrumentally. With this in mind, the critique of company law shall be furthered in 5.1.2.3 below.

[33] Such as s 414C of the Companies Act 2006.

[34] Olaojo Aiyegbayo and Charlotte Villiers 'The Enhanced Business Review: Has it Made Corporate Governance More Effective?' (2011) 7 Journal of Business Law 699, 707.

[35] ibid. See also Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2012) 93-106.

[36] Financial Reporting Council (n 18) para 4.

5.1.2.3 A Critique of Company Law in the UK

5.1.2.3.1 Shareholder Value and the Limited Scope of Disclosure Requirements

From the outset, the interests of stakeholders are often subordinate to the interests of the shareholders insofar as disclosure requirements under company law are concerned.[37] As has highlighted above, transparency requirements under SRDRR are largely based upon the idea of maximizing the wealth of company members, namely shareholders. Therefore, one of the shortcomings apparent within the UK transparency regime can be said to be its instrumentalist/consequentialist focus upon the interests of employees, in order so they may contribute to the improvement of shareholder wealth. This instrumentalist perspective of the UK transparency regime may be criticised for 'viewing employees and human capital only in terms of the company's needs and subject only to an efficiency calculus.[38]

Although the reform process in company law and the CA 2006 in particular adopted the concept of the *enlightened shareholder value*[39] – emphasizing a focus upon long-term company success – the interests of employees are often not taken in to account in their own right within laws of the UK. The shareholder value maximisation model of corporate governance adopted in the UK is principally grounded in the notion of ensuring company directors are held responsible for disclosure to its shareholders.[40] For example, whilst it is required that employee issues are considered in the strategic report, such information has to be material to shareholders.[41] As discussed in 5.1.2.1 and 5.1.2.2 above, the scope of directors' reports encapsulates only how directors consider employee interests in relation to shareholder value.

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[37] Villiers (n 3) xii.
[38] ibid 290.
[39] *Enlightened shareholder value* (ESV) considers other stakeholder interests instrumentally in terms of maximizing long-run shareholder value. See 2.2.2 above.
[40] Kevin Campbell and Douglas Vick, 'Disclosure Law and the Market for Corporate Social Responsibility' in McBarnet, Voiculescu and Campbell (n 8) 246.
[41] Companies Act 2006, s 414C(1).

In keeping with the above analysis, Clark and Knight argue that '[t]he Disclosure requirements of the Companies Act are entirely consistent with Anglo-American investor expectations with regard to the premium on the free-flow of market-sensitive data'.[42] Nonetheless, favouring only shareholder interests limits the scope of disclosure in improving the behaviour of the corporation towards employees (as well as other stakeholders).[43]

5.1.2.3.2 Lack of Clarity

Another aspect of the transparency requirements under company law that may be subject to critique is the relative lack of clarity, namely of what kind of information must be disclosed by company directors.[44] Even the Guidance on the Strategic Report for the latest regulations, SRDRR, fails to improve the clarity detailing specifically what directors must disclose when it comes to issues such as human rights and employees.[45]

One might therefore suggest that reporting requirements in company law are in need of reform, with a view to improving the clarity regarding 'the issues to be covered (i.e. how to go about assessing relevance); the amount and type of information required (i.e. how to go about assessing materiality); and the indicators by which performance is to be measured ('KPIs')'.[46]

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42 Clark and Knight (n 11) 262.
43 Shift, 'John Ruggie and Shift Comments to Financial Reporting Council's Exposure Draft: Guidance on the Strategic Report' (2013) 3 <http://shiftproject.org/sites/default/files/John%20Ruggie%20and%20Shift%20Comments%20to%20FRC%20Exposure%20Draft%202013%2011%2015.pdf> accessed 10 July 2016.
44 Aiyegbayo and Villiers (n 34) 707. Although Aiyegbayo and Villiers critique the repealed Business Review requirements, SRDRR may also be critiqued from a similar perspective.
45 ibid 5.
46 Corporate Responsibility Coalition (CORE), 'Towards an effective UK regime for environmental and social reporting by companies' (CORE 2011) 9 <http://corporate-responsibility.org/wp-content/uploads/2014/07/Simply-Put_CORE.pdf> accessed 10 July 2016.

5.1.2.3.3 Weak Auditing and the Lack of Possibility to Challenge the Directors' Discretion

As discussed earlier in 5.1.2.1, the issues that require inclusion in corporate annual reports is often interpreted by directors of the company, since the non-financial disclosure under UK company law permits *narrative reporting*.[47] Therefore, although information with respect to employee issues requires the attention of directors, this is only matter when it is deemed material in the eyes of the directors. Accordingly, this perspective affords directors too much discretion with respect to disclosure. Where the information relating to employees is not disclosed by the company directors, then current provisions only require that directors highlight which issues are not included in the report.[48] Even where directors choose to disclose information, the comprehensibility and credibility of the information may still remain limited, as directors cannot be challenged as if they are acting in breach of their duties.[49] Indeed, in the present case, employees do not have the right to present a complaint to any authority, nor are they able to challenge a director's report, if the information is vague or it does not pay adequate attention to employee interests.[50]

5.1.2.3.4 Lack of Dialogue

As the aforementioned discussion highlights, directors are the sole actors in deciding what information ought to be disclosed with respect to employee issues when dealing with UK company law. However, full transparency, as conceptualised earlier in the work, requires dialogue between the users/recipients of information.[51] In other words, companies need to consult with employees and other stakeholders regarding the information disclosed. To this end, the employees' role is essential in respect of the reporting process. For example,

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[47] For the definition of narrative reporting see Yeoh (n 24) 212.
[48] Companies Act 2006, s 414C (7).
[49] Aiyegbayo and Villiers (n 34) 707.
[50] Goulding and Miles (n 3) 99. Whereas Goulding and Miles touches upon this issue in terms of the former OFR proposal, current strategic report requirement can also be critiqued from the same perspective.
[51] See 3.1.4 above

employees provide feedback and inform companies of ‘what issues are important’ to them.[52] Therefore, for the quality of the information disclosed by the company, employees should be consulted.[53] However, disclosure requirements under company law, do not pay specific attention to the role of employees, or any other stakeholders in this regard.

In summary, the transparency regime within UK company law would appear to contain several shortcomings with respect improving the interests of employees. As such, the shortcomings highlighted require improvement in order so greater transparency may be achieved.

5.1.3 Disclosure Obligations under Employment Law

Labour rights have a great significance within the EU. As one Commission report highlights, ‘respect for labour standards is an integral element of the European social model’.[54] Labour law in the EU is regulated by ‘treaty provisions, fundamental rights and general principles of EU law, secondary law, collective agreements at EU level, case law from the Court of Justice, and soft law measures’.[55] For example, the Treaty Establishing the European Community (TEC) encapsulates social objectives such as ‘…the promotion of employment, improved living and working conditions...’ [56] Accordingly, transparency constitutes one of the primary strategies within EU labour law. This aspect of the EU directly affects disclosure rules under UK employment law. As such, the following sections shall briefly focus on some of the transparency requirements apparent within the UK, which predominantly stem from EU laws.

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[52] Janet Williamson, 'A Trade Union Congress Perspective on the Company Law Review and Corporate Governance Reform since 1997' (2003) 41 British Journal of Industrial Relations 511, 524.
[53] ibid.
[54] Commission, ‘Promoting core labour standards and improving social governance in the context of globalisation’ (Communication) COM (2001) 416 final 10.
[55] Mia Rönnmar, 'Labour and Equality Law ' in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2014) 591.
[56] Consolidated Version of the Treaty Establishing the European Community [2002] OJ C325/1, art 136.

5.1.3.1 Information and Consultation of Employees Regulations 2004

Much like in company law, EU Directives constitute one of the most crucial tools to ensuring change within the frame of EU labour law.[57] To this end, one of the most important directives to have been implemented with respect to informing employees is Directive 2002/14/EC, also known as Information and Consultation of Employees Directive.[58] This was transposed in to UK law through the Information and Consultation of Employees Regulations 2004 (ICE Regulations).[59]

In chapter 3, *consultation* with employees was highlighted as a vital element in ensuring transparency is effective.[60] The ICE Regulations regulations focus upon this issue.[61] The regulations apply to undertakings in companies where there are at least 50 employees.[62] The regulations give employees (or their representatives) the right to request the negotiation of an agreement on information and consultation.[63] However, this request is only valid if the agreement represents a minimum threshold of 10 per cent of all employees.[64] Employers must start the negotiations with employee representatives within three months of the request being made by employees.[65]Although employees can themselves make a request for information and engage in consultation, employers themselves may also decide to start a negotiation process by issuing a written notification to its employees.[66]

Whereupon the employer fails to initiate negotiations upon the employees' request for information, or an agreement cannot be reached during negotiations, then the employer must

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[57] Rönnmar (n 55) 594.
[58] Information and Consultation of Employees Directive.
[59] Information and Consultation of Employees Regulations 2004 (ICE Regulations 2004) SI 2004/3426.
[60] See 3.1.4 above.
[61] ICE Regulations 2004.
[62] ibid reg 3(1)(a).
[63] ibid reg 7.
[64] ibid.
[65] ibid reg 14(3).
[66] ibid reg 11.

provide the information and engage in consultation with representatives.[67] Employers must inform the employees, or their representatives, with respect to certain issues such as;

> (a) the recent and probable development of the undertaking's activities and economic situation;
>
> (b) the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking; and
>
> (c) decisions likely to lead to substantial changes in work organization or in contractual relations. [68]

When it comes to enforcement, the Central Arbitration Committee (CAC) plays a key role in this respect. For instance, where the negotiation process fails, then employees have a right to complain to the CAC, which may order the employer to take such steps as necessary to implement action.[69] In some circumstances, where the employee has a reason to do so, he or she may apply to the Appeal Tribunal for a penalty notice.[70]

In spite of their overall ethos, the regulations arguably contain a number of shortcomings. First, they do not affect undertakings with companies where there are less than 50 employees. Thus more than 90 percent of undertakings in the UK are exempted.[71] Secondly, the regulations 'bypass' the unions' role in terms of the representative mechanisms usually employed when disseminating information and engaging in consultation.[72] From the perspective that claims collective action is more powerful than the individual causes[73], the

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[67] ibid reg 18.
[68] ibid reg 20(1)(a)(b)(c).
[69] ibid reg 22(4).
[70] ibid reg 22(6).
[71] Department of Trade and Industry (DTI), *Regulations to Establish a General Framework for Informing and Consulting Employees in the UK*, (Final Regulatory Impact Assessment, Employment Relations Directorate, DTI October 2004) para 2 <http://collections.europarchive.org/tna/20060213205515/http://dti.gov.uk/er/emar/inform_consult_ria.pdf> accessed 10 August 2016.
[72] Paul Davies and Claire Kilpatrick, 'UK Worker Representation after Single Channel' (2004) 33 Industrial Law Journal 121, 140-141.
[73] Trades Union Congress (TUC), 'Democracy in the Workplace: Strengthening Information and Consultation' (Economic Report Series July 2014) 1

regulations can therefore be critiqued. Under the regulations, the role of the unions is thereby limited.[74] Third, another shortcoming may relate to the narrow definition of the word of 'employee' under the ICE Regulations. According to the regulations, an employee is conceptualised as 'an individual who has entered into or works under a contract of employment'.[75] From this perspective, a part-time worker does not qualify as an employee.[76]

In summary, although the ICE regulations contain a few shortcomings, they afford a number of statutory rights to employees in relation to the disclosure of information and consultations concerning issues that may directly affect their working lives.

5.1.3.2 Disclosure Requirements on Health and Safety

Under UK law, employers have a duty to ensure the health and safety of their employees at work.[77] Health and safety law in the UK is also predominately based upon the implementation of the EU law, where the Health and Safety Framework Directive (89/391/EEC)[78] has largely been implemented through the Management of Health and Safety at Work Regulations 1999.[79]

Information disclosure constitutes a significant aspect of health and safety regulations both within the UK and across the EU. Firstly, employers must ensure employees are

<https://www.tuc.org.uk/sites/default/files/Democracy_In_The_Workplace_2014_.pdf> accessed 10 August 2016.

[74] Mark Hall, John Purcell and Duncan Adam, 'Reforming the ICE Regulations –What Chance Now?' (2015) Warwick Papers in Industrial Relations No 102, 1 <https://www2.warwick.ac.uk/fac/soc/wbs/research/irru/wpir/wpir102.pdf> accessed 10 August 2016.

[75] Information and Consultation of Employees Regulations 2004, SI 2004/3426, reg 2.

[76] Keith D Ewing and Glynis M Truter, 'The Information and Consultation of Employees Regulations: Voluntarism's Bitter Legacy' (2005) 68 The Modern Law Review 626, 629

[77] Health and Safety at Work etc. Act 1974 c 37 s 2(1).

[78] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L 183/1

[79] Management of Health and Safety at Work Regulations 1999, SI 1999/3242.

informed by displaying a health and safety law poster, and providing a leaflet which gives information on the UK's health and safety laws.[80]

Secondly, according to regulation 10(1) of the Management of Health and Safety at Work Regulations (MHSWR) 1999, employers have a duty to provide comprehensible health and safety information to employees, such as possible health and safety risks, and 'preventive and protective measures'. In accordance with such provisions, health and safety information should be understandable for everyone. As examined in chapter 3, for effective transparency, the simplicity of information disclosure plays a great role.[81] Accordingly, for example, the provision of interpretation or translation of information on health and safety materials information signs should be available in other languages.[82]

Thirdly, the UK laws aim to improve the management of the health and safety issues at workplaces through consultation with the employees. For example, according to the UK regulations, employers must also consult with employees or employee representatives specifically in relation to health and safety matters.[83]

Fourthly, employers are required to inform employees about specific hazardous substances that may pose a risk to workers' health or safety. According to the Control of Substances Hazardous to Health Regulations (COSHH) 2002, 'every employer who undertakes work which is liable to expose an employee to a substance hazardous to health shall provide that employee with suitable and sufficient information, instruction and

[80] Health and Safety Information for Employees Regulations 1989, SI 1989/682, reg 4(1).
[81] See 3.1.3 above.
[82] Trades Union Congress, 'Safety and Migrant workers: A Practical Guide for Safety Representatives,' (2007) 8 <https://www.tuc.org.uk/sites/default/files/safetymw.pdf> accessed 10 August 2016.
[83] There are two different regulations in this regard: Safety Representatives and Safety Committees Regulations 1977, SI 1977/500 and Health and Safety (Consultation with Employees) Regulations 1996 1996/1513.

training'.[84] According to regulation 12 (2)(a) of the COSHH, employees need to be informed of:

> (i) the names of those substances and the risk which they present to health,
>
> (ii) any relevant occupational exposure standard, maximum exposure limit or similar occupational exposure limit,
>
> (iii) access to any relevant safety data sheet, and
>
> (iv) other legislative provisions which concern the hazardous properties of those substances;

However, in addition to risk related information, details regarding the health and safety performance of companies may also prove helpful. The next section will examine the regulation of this information.

5.1.3.2.1 Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR) 2013

Although disclosure with respect to health and safety issues, and consultation with employees, have a key role to play in the protection of employees' health and safety, it is also crucial to monitor the performance record of a company's health and safety. This kind of information may aide the Health and Safety Executive in maintaining relevant and important statistics that identify health and safety risks, and plays a role where there is a need for further investigations in to serious accidents.[85]

The law in the UK requires employers to record the occurrence of any incidents any incidents that are linked to employees' health and safety.[86] In accordance with the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR) 2013, employers

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[84] Control of Substances Hazardous to Health Regulations 2002 (COSHH), SI 2002/2677, reg 12(1).

[85] HSE, 'Reporting Injuries, Diseases and Dangerous Occurrences in Health and Social Care, Guidance for Employers' (Health Services Information Sheet No 1 (Revision 3) 1 <http://www.hse.gov.uk/pubns/hsis1.pdf> accessed 10 July 2016.

[86] Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR 2013), SI 2013/1471, reg 12.

must report incidents such as deaths and injuries caused by workplace accidents, occupational diseases,[87] exposure to carcinogens mutagens and biological agents,[88] specified injuries to workers,[89] dangerous occurrences,[90] and gas incidents.[91] Moreover, if an accident renders a worker incapable of doing work for more than seven days, it must be reported even if it is not a 'specified injury'.[92] However, the disclosure of the information regarding the death or injury of a worker needs to be work-related. For example, where an employee commits suicide, this information does not need to be disclosed.[93] Indeed, as discussed in Chapter 1,[94] in some circumstances, an employee suicide might be work-related, which would require further explanation by the employer.[95]

5.1.3.3 Whistleblowing Rights

As discussed above, consulting with employees and maintaining dialogue plays a key role in ensuring there is transparency.[96] In addition to their role in consultations, employees may also contribute to the transparency of a company by whistleblowing.

Whilst whistleblowing may improve transparency in the immediate sense, it may also result in unwelcome consequences for the employee.[97] Where the employee is likely to be dismissed or treated unfairly because of the whistleblowing, she or he may be reluctant to disclose information. However, whistleblowers are protected by the law. The Employment Rights Act 1996 (ERA 1996), which was amended by the Public Interest Disclosure Act 1998

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[87] ibid reg 8.
[88] ibid reg 9.
[89] ibid reg 4(1)(a) to (h).
[90] ibid reg 7.
[91] ibid reg 11.
[92] ibid reg 4 (2).
[93] Health and Safety Executive (HSE), 'Types of Reportable Incidents' <http://www.hse.gov.uk/riddor/reportable-incidents.htm> accessed 10 August 2016.
[94] See ch 1, Introduction above.
[95] Jenny Chan, 'A Suicide Survivor: The Life of a Chinese Worker' (2013) 28 New Technology, Work and Employment 84.
[96] See 3.1.4 above.
[97] Michael Cover and Gordon Humphreys, 'Whistleblowing in English Law' in Gerald Vinten (ed), *Whistleblowing: Subversion or Corporate Citizenship?* (Paul Chapman 1994) 89.

(PIDA 1998), encapsulates provisions with respect to whistleblowing. Unlike a majority of other legal strategies in the UK, whistleblowing forms part of domestic law, and was not the result of the implementation of EU laws.

In accordance with the laws in this area, if an employee is dismissed owing to his/her whistleblowing, she/he may claim unfair dismissal.[98] Indeed, within the legislation, there is specific criteria detailing whistleblowing protections. In accordance with s 43B(1) of the ERA 1996, an employee may blow the whistle if there is 'a criminal offence, breach of a legal obligation, danger to health and safety, a miscarriage of justice, damage to the environment'. All these circumstances constitute the conditions for what is termed 'protected disclosure'.[99]

The employee can convey information on the wrongdoing to her employer, or a prescribed person.[100] Indeed, in 2013, the Enterprise and Regulatory Reform Act (ERRA) updated PIDA 1998 and a provision on the legal protection of whistle-blower employees for bullying or harassment from co-workers was included in the act.[101] Crucially, the disclosure of wrongdoing must be in the public interest.[102]

Whistleblower protection laws in the UK can be seen as more comprehensive than the laws in other countries.[103] However, one may also assert that whistleblowing laws are still insufficient enough to protect employees.[104] In order to improve the protection of the whistle-blowers in the UK, research by Lewis has detailed a number of recommendations. Accordingly, he argues that employees should be protected even if they are found to be

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[98] Employment Rights Act 1996 (ERA 1996) s 103A.
[99] ibid s 43C.
[100] ibid s 43C, sub-s (1).
[101] Enterprise and Regulatory Reform Act 2013 (ERRA 2013) s 19.
[102] ibid s 17.
[103] Mark Worth, *Whistleblowing in Europe: Legal protections for Whistleblowers in the EU* (Transparency International 2013) 83.
[104] David Lewis, 'Ten Years of Public Interest Disclosure Legislation in the UK: Are Whistleblowers Adequately Protected?' (2008) 82 Journal of Business Ethics 497.

whistleblowing in respect of actions that do not breach legal obligations.[105] For example, employees should be protected against any victimisation and discrimination based upon whistleblowing, and should have a right to reinstatement or reengagement in case of dismissals owing to whistleblowing itself.[106]

Interestingly, according to the Public Concern at Work's (PCaW) survey, most workers did not even know whether there is a law to protect whistle-blowers.[107] Even if they knew of their rights, whistleblowing is subject to cultural and political factors which play a significant role in the reduction of whistleblowing as an effective tool. [108]

However, irrespective of the limitations highlighted, the concept of whistleblowing has a prospective role to play in detecting wrongdoings that might affect employee interests. Therefore, it constitutes one avenue among others that encourages corporations to be transparent.

5.1.3.4 Information Disclosure with regard to Dismissal and Collective Redundancies

Employees must be provided a minimum period of notice before dismissal.[109] According to the ERA 1996 s 86(2), employees, who have been working for at least one month, must be informed in advance of the dismissal.

In difference to most dismissal notices, some employees may also be entitled to receive a written statement about the reasons for their dismissal.[110] Accordingly, employees

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[105] David Lewis and Tina Uys, 'Protecting Whistleblowers at Work: A Comparison of the Impact of British and South African Legislation' (2007) 49 Managerial Law 76, 88.
[106] ibid 89.
[107] Public Concern at Work, 'Whisteblowing Beyond the Law Biennial Review' (October 2011) 17 <http://www.pcaw.org.uk/files/PCAW_Review_beyondthelaw.pdf> accessed 10 July 2016
[108] Anja Osterhaus and Craig Fagan, *Alternative to Silence: Whistleblower Protection in 10 European Countries* (Transparency International 2009) 7.
[109] ERA 1996, s 86(1).
[110] ERA 1996, s 92.

who have completed at least 2 years of employment[111] can request a written statement detailing reasons of dismissal.[112] Some employees, such as those on statutory maternity leave, for example, must be given a written statement about the dismissal, even if they do not request it, and irrespective of how long they may have worked at the company.[113]

Where there are to be redundancies, also have a number of further obligations. The Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) requires employers consult with employee representatives on the nature of the collective redundancy itself. A collective redundancy refers to the dismissal of '20 or more employees at one establishment within a period of 90 days or less'.[114] In accordance with s 188(4) of TULRCA, employers, who proposed to dismiss employees, are required to disclose information on matters such as;

(a) the reasons for his proposals,
(b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant,
(c) the total number of employees of any such description employed by the employer at the establishment in question,
(d) the proposed method of selecting the employees who may be dismissed,
(e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect.
(f) the proposed method of calculating the amount of any redundancy payments to be made, other than statutory redundancy pay

If the employer fails to disclose the information required by the trade union representative, then the trade union 'may present a complaint to the Central Arbitration

[111] Or 1 year if the employee started to work before 6 April 2012. ibid.
[112] ERA 1996, s 92 (3).
[113] ERA 1996, s 92(4).
[114] Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992), s 188(1).

Committee'.[115]

Doubtless one can also find some further disclosure requirements within the domain of employment law.[116] However, as has already been highlighted in introduction, this chapter shall not cover all of those measures available in the UK that aim to offer provision of transparency for the benefit of employees.

In summary, disclosure requirements constitute an important aspect of employment law. It is apparent these requirements improve the transparency of companies towards both employees and the public. Where the requirements outlined mostly consist of minimum workplace standards, they also in part play a role in improving employee interests. In light of the RIDDOR statistics, for example, the Health and Safety Executive (HSE) points out that the UK benefits from very low rates of accidents or fatal injuries to workers, which makes it a relatively safe place for workers when compare to other industrialized countries.[117] Although one may argue that workers still suffer from mistreatment in the workplace, such as forced labour, comparatively speaking, the UK may be seen as one of the safer places to work.[118]

However, the age of economic globalization enables companies that seek to reduce labour costs to mobilise their operations to poorer countries, where protective labour laws are less comprehensive.[119] As such, economic globalization reduces the capability of those requirements dictated by domestic labour laws. Accordingly, the UK government sought to

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[115] ibid s 183(1)(a).
[116] For instance, according to s 8 of the Employment Rights Act 1996, employees must be provided with a written statement, outlining the total amount of wages or salary and deductions made in their pay in that tax year. Another example may be found in s 181 and 182 of the TULRCA 1992, which requires employers provide information to the trade union representatives in relation to collective bargaining.
[117] HSE, 'Statistics on fatal injuries in the workplace in Great Britain 2015: Full-year Details and Technical Notes' (2016) 8 <http://www.hse.gov.uk/statistics/pdf/fatalinjuries.pdf> accessed 10 July 2016
[118] See Human Rights Watch, *Hidden Away: Abuses against Migrant Domestic Workers in the UK*, (Human Rights Watch March 2014) <https://www.hrw.org/sites/default/files/reports/uk0314_ForUpload.pdf> accessed 10 August 2016.
[119] For details see 5.3 below.

employ other means to ensure transparency requirements are adhered, such as supply chain transparency provisions, included in the Modern Slavery Act, for example.

5.1.4 Modern Slavery Act 2015

Modern Slavery Act 2015 (MSA) is one such strategy employed by the UK government to eradicate forced and slave labour in the supply chains of UK companies. Although it is not specifically designed as piece of company law legislation, the MSA incorporates elements that relates to company management. In this respect, the MSA uses transparency to ensure corporations to take steps to eliminate modern slavery. S 54 of the MSA in particular aims to ensure forced labour and trafficking for labour exploitation are made visible.

5.1.4.1 Disclosure Requirements under the MSA 2015

The *transparency clause* used within the UK's MSA is inspired by the California's Transparency in Supply Chains (CTSCA) Act in the US.[120] However, in spite of this, there remain subtle differences between two acts. Most notably, the CTSCA applies only to those businesses producing goods for sale, whilst the transparency clause contained in the MSA also applies to those companies that supply both goods and services.[121] Indeed, the MSA covers both British companies and foreign companies conducting business in the UK.

[120] See Home Office, *Modern Slavery and Supply Chains Consultation: Consultation on the Transparency in Supply Chains Clause in the Modern Slavery Bill,* 10 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/403575/2015-02-12_TISC_Consultation_FINAL.pdf> accessed 11 August 2016. For a detailed examination of CTSCA see Kamala D Harris, 'The California Transparency in Supply Chains Act; A Resource Guide' (2015) <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf> accessed 10 July 2016.

[121] Home Office, 'Modern Slavery Bill Factsheet: Transparency in Supply Chains etc (Part 6 clause 51)' (November 2014) 2 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/373539/Transparency_in_supply_chains.pdf> accesed 10 July 2016.

Interestingly, s 54 of the MSA requires corporations with a specified turnover,[122] who are either incorporated or conduct their business in the UK, to disclose information about their operations. In this respect, the MSA disclosure requirements apply only to those companies supplying goods or services in the UK.[123] According to s 54(1) of the MSA, these companies 'must prepare a slavery and human trafficking statement for each financial year'.[124] Principally, companies are required to disclose what they have done, as well as what they have not, in order to ensure that there is no slave labour in their supply chains.[125]

In keeping with the MSA, companies have to include in their statement how they have 'verified its supply chains to evaluate and address risks, audited suppliers, certified goods and services purchased from suppliers, maintained internal accountability standards, and trained staff' in their strategic reporting with respect to modern slavery.[126] In accordance with s 54(5) of the MSA, the information on slavery and human trafficking statement may include;

(a) the organisation's structure, its business and its supply chains;

(b) its policies in relation to slavery and human trafficking;

(c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;

(d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;

(e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;

(f) the training about slavery and human trafficking available to its staff.

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122 'Companies with a turnover or group turnover of £36 million'. Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015, SI 2015/1833, reg 2.
123 Modern Slavery Act 2015, s 54(1).
124 ibid.
125 ibid s 54(4)(a)(b)
126 Joint Committee on the Draft Modern Slavery Bill, *Draft Modern Slavery Bill Report,* (HL 2013-2014, HL 166, HC 1019) para 184 <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtslavery/166/166.pdf> accessed 10 July 2016.

As has been seen, s 54(5) of the MSA, in addition to transparency of the anti-slavery policies, companies are also expected to be transparent on what steps they have taken in practice to eliminate transparency. In this respect, for example,

Such statement 'must be approved by the board of directors (or equivalent management body) and signed by a director (or equivalent)'.[127] Furthermore, the MSA also highlights the publicity of the statement. In this respect, if the company has a website, it must publish the slavery and human trafficking statement.[128] If it does not have a website, then the company must provide a copy of the statement to the parties who make a written request of information in 30 days.[129]

When it comes to the sanctions being imposed upon companies that do not comply with the requirements under the MSA, even though there are some legal risks, the sanctions are weak. For instance, although the Secretary of State has power 'bringing civil proceedings in the High Court for an injunction or, in Scotland, for specific performance of a statutory duty under section 45 of the Court of Session Act 1988',[130] the real risk for companies is largely reputational.[131] Indeed, companies may risk their reputation unless they ensure their supply chain has no obvious links to slave labour. As discussed in Chapter 4,[132] some stakeholders may pay significant attention to the issues such as slave labour and ethical practises.[133] Thus, the sanctions imposed upon companies may largely be imposed by corporate stakeholders.

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[127] ibid s 54(6)(a).
[128] ibid s 54(7).
[129] ibid s 54(8).
[130] ibid s 54(11).
[131] Reputation plays a crucial role in the business case. See 4.1.1.1.1 and 4.1.1.1.2 above.
[132] ibid.
[133] According to a research conducted by Walk Free Foundation, UK consumers would stop purchasing a product if they discovered there was modern slavery in its supply chains. See Kieran Guilbert, 'UK Shoppers Would Switch Brands, Pay More to Avoid Use of Slaves - Poll - TRFN' (*Reuters 11 March 2015*)

5.1.4.2 Critique of the MSA

Before looking at the critiques of the MSA, it is crucial to note that the MSA only pays attention to issue of slave labour, and does not encapsulate other issues that may affect the interests of employees. Therefore, it confines its impact upon improving corporate transparency towards employees that analysed in this thesis. In addition to this limitation, the MSA also contains a number of features worthy of critique.

First, the MSA does not require companies to report on the supply chains of subsidiary companies registered abroad, if their goods and services are not coming to the UK.[134] Therefore, some companies may continue with an attempt to conceal their transactions within supply chains within some developing countries, unless such goods were to end up being supplied in the UK.

Second, another critique may be levied upon the enforcement of the supply chain transparency provision contained within Act. The MSA does not contain any 'monetary or criminal penalties' with respect to the noncompliance with such provision.[135] Disclosure requirements are therefore based upon voluntary foundations. According to the MSA, companies may even disclose that they have not done anything to make its supply chain free from modern slavery.[136] The Act therefore only enables market actors, insofar as urging companies to eradicate modern slavery in concerned, to impose pressure as required. However, companies may not be so reluctant to say they have done nothing where the

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<http://uk.reuters.com/article/uk-slavery-poll-unitedkingdom-idUKKBN0M700O20150311> accessed 9 August 2016.

134 Parosha Chandran, 'A Loophole in the Slavery Bill Could Allow Companies to Hide Supply Chain Abuses' *The Guardian* (24 March 2015) <https://www.theguardian.com/global-development/2015/mar/24/loophole-modern-slavery-bill-transparency-supply-chain-abuses> accessed 9 August 2016.

135 Lindsay Fortado, 'Lacklustre Compliance on Anti-Slavery Law' *Financial Times* (7 March 2016) <http://www.ft.com/cms/s/0/d8147d76-e22d-11e5-9217-6ae3733a2cd1.html#axzz4GxAIyAXb> accessed 10 August 2016.

136 See Modern Slavery Act 54(4)(b).

negative reaction of consumers or shareholders is likely to prove insufficient.[137] Indeed, as the discussion in Chapter 4[138] highlighted, although employees, consumers and shareholders may be influential upon the behaviour of companies', this influence might still be limited.[139] For example, the 'levels of concern among consumers about labour standards' or their limited impact to change in supply chain conditions, might be the crucial shortcoming of the MSA.[140]

Third, the difficulty encountered when comparing statements disclosed by the companies in accordance with the MSA may be another critiques, since MSA does not have a provision requiring companies upload their statements to a central repository.[141] This situation may therefore reduce the ability of the corporate stakeholders to carry out a critical review.

Fourth, the MSA does not specifically state what corporations are required to disclose. Indeed, the MSA is grounded in flexible requirements, which may fit differently according to different corporate actors. Even if the government intends to support companies by creating a statutory guidance for what kind of information they may include in their disclosure, the statutory guidance is largely based upon voluntary elements, which leave it to companies to disclose necessary information it feels obliged to share with consumers and shareholders.[142] Thus although such a provision is flexible, rather than *one size fits all*, corporations may require further guidance to ensure greater transparency.

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[137] See 4.2.1.1.5, for further information on the limits of the business case for transparency.
[138] See 4.1.1 above.
[139] See 4.2.1.1.5 above.
[140] Nicola Phillips, 'Lessons from California: Why Compliance Is Not Enough' *The Guardian* (19 September 2013) <https://www.theguardian.com/global-development-professionals-network/2013/sep/19/why-compliance-isnt-enough> accessed 9 August 2016.
[141] Claire Falconer, 'Carrots and Sticks: Increasing Corporate Accountability for 'Modern Slavery' (*Open Democracy,* 26 May 2016) <https://www.opendemocracy.net/beyondslavery/pt/claire-falconer/carrots-and-sticks-increasing-corporate-accountability-for-modern-slav> accessed 10 August 2016.
[142] Home Office (n 120) 17.

Fifth, the MSA may also be criticised in terms of the grievance mechanisms and remediation of abuses. The MSA '…does not specifically refer to information about companies' remediation processes where negative impacts have taken place and the company has caused or contributed to them'.[143]

In summary, as the above discussion highlights, transparency requirements under the MSA contain a number of shortcomings. Nevertheless, the MSA may be hailed as a significant development towards ensuring companies include cross border activities within their disclosures. Although extraterritorial regulation of corporate activities in host countries may encapsulate several obstacles, it would seem the MSA plays a pioneering role towards ensuring parent companies consider supply chain issues through the lens of transparency.

5.1.5 Other Disclosure Requirements by the UK government

Although the primary concern within this section is to consider the disclosure obligations as these are imposed upon companies and employers, there are also other indirect statutory measures that may be used to ensure corporations operate transparently. Although these strategies mainly affect a small number of companies, the following paragraphs will briefly demonstrate them.

First, corporations may be required to disclose information by the government in terms of public procurement since the government is one of the major consumers of goods and services provided by national corporations. Indeed, global privatisation movement over the past few decades has made a number of different corporations important providers of

[143] Shift, 'Mapping the Provisions of the Modern Slavery Act against the Expectations of the UN Guiding Principles on Business and Human Rights,' (July 2015) 3 <http://shiftproject.org/sites/default/files/Shift_Mapping%20Modern%20Slavery%20Act%20Against%20UNGPs%20Note_July2015.pdf> accessed 10 July 2016.

public services.[144] In this respect, UK companies carrying out public services are now expected to consider a number of good employment practices. For this end, different government agencies in the UK have published a variety of relevant policy documents.[145] Indeed, in accordance with the EU legislation in this area, the UK government pays attention to the performance of the contractor companies under the 'obligations in the fields of environmental, social and labour law established by [European] Union law, national law, collective agreements or by the international environmental, social and labour law provisions'.[146] According to the EU Directive (2014/24/EU), also known as the Public Contracts Directive, purchasers can now take into account factors such as social issues when deciding upon whether to award a contract to a company.[147] The Public Contracts Regulations, which transposes the Directive in to UK law, came in to effect in February 2015.[148] Notably, although the regulations do not force companies to disclose a great degree of information, they encapsulate a provision highlighting the importance of social and environmental labels in terms of public procurement.[149] Such labels, as discussed in Chapter 4, which are symbolic schemes such as Fairtrade, provide a significant amount of information on the performance of the contractor companies in relation to employee standards.[150] In fact, the use of labels in terms of public procurement has already been practiced by several public institutions in the

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[144] John B Goodman and Gary W Loveman, 'Does Privatization Serve the Public Interest?' (Harvard Business Review, November-December 1991) <https://hbr.org/1991/11/does-privatization-serve-the-public-interest> accessed 10 August 2016.
[145] See Department for Environment, Food and Rural Affairs (DEFRA), 'Ethical Procurement Policy Statement,' (DEFRA March 2011) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69420/sustainable-procurement-policy-statement.pdf> accessed 10 July 2016.
[146] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65, art 18(2) (Hereinafter 'Public Procurement Directive').
[147] ibid, art 18.
[148] Public Contracts Regulations 2015, SI 2015/102.
[149] ibid, reg 43(1).
[150] See 4.1.1.1.2 above.

UK. Universities, for example, have been committed to ‘supporting, promoting and using Fairtrade goods’.[151]

Second, even though it mainly affects a small number of companies, the Freedom of Information (FOI) Act 2000 can be another way towards ensuring companies act more transparently. Disclosure requirements under the FOI are limited only to public companies, and companies carrying out public services.[152] In this respect, the freedom of information laws require expansion in order to other companies are captured in the attempt to make corporate transparency more widespread.[153] However, although both the FOI act constitutes an alternative strategy aim at ensuring companies conduct public service more transparently, it does not oblige companies to ensure greater transparency with respect to employee interests.

Third, another mandatory scheme of transparency may be said to be requirements within Socially Responsible Investment (SRI). Indeed, as highlighted in Chapter 4, disclosure requirements with respect to SRI, which require investors to disclose information in relation to whether they consider social issues, such as employee conditions, when investing in companies, may indirectly urge companies to disclose information.[154] In this respect, disclosure requirements for pension funds can be an important example. Indeed, the UK is the first country that requires occupational pension fund trustees to disclose their investment policies on environmental, social and governance (ESG) issues.[155] According to the

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[151] Durham University, ‘Durham University Fairtrade Policy’ (2016). <https://www.dur.ac.uk/greenspace/policies/fairtradepolicy/> accessed 10 July 2016.
[152] Freedom of Information Act 2000, s 6.
[153] Jennifer A Zerk, 'Corporate Abuse in 2007: A Discussion Paper on What Changes in the Law Need to Happen' (The Corporate Responsibility (CORE) Coalition November 2007) 30 <http://www.jenniferzerkconsulting.com/publications/corporateabuse2007.pdf> accessed 10 July 2016.
[154] Ethical shareholders may put pressure on companies to disclose information. See 4.1.1.1.3.2 and 4.2.4 above.
[155] UK Sustainable Investment and Finance (UKSIF), ‘Focused on the Future 2000–2010 Celebrating Ten Years of Responsible Investment Disclosure by UK Occupational Pension Funds,’ (UKSIF June 2010) 2 <http://uksif.org/wp-

Occupational Pension Schemes (Investment) Regulations 2005, trustees must disclose to what 'extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realisation of investments'.[156] However, as other strategies examined in this section, disclosure requirements with respect to SRI affect a small number of companies.[157]

In conclusion, both domestic reforms and developments within the EU have helped shape the nature of the mandatory transparency regime employed in the UK. However, UK company law predominantly considers the interests of employees in terms of corporate/shareholders' ends. Conversely, other laws such as employment law aims more directly towards improving the basic interests of employees. Nevertheless, the UK transparency regime would appear to fall short when judged in relation to the global activities of corporations. This issue shall be examined in greater detail in 5.3. Before doing so, the next section shall examine the soft law/voluntary disclosure requirements and best practice guidelines employed by the government and non-governmental groups in the UK.

5.2 Soft Law Developments: Government Initiated Frameworks and Guidelines

As Chapter 4 examined in greater detail, whilst transparency measures are implemented through the use of legislation, there may also be a basis to employ soft laws. Indeed, the government may play various roles in improving transparency through soft law. This section shall exemplify some of those roles that the government plays.

Firstly, 'codes of conduct' are one such of soft law measures used by the UK government. One of the earliest uses of a 'codes of conduct' may be traced back to the codes

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content/uploads/2012/10/UKSIF_Focused_on_the_Future_Report_June_20101.pdf> accessed 10 July 2016.

[156] The Occupational Pension Schemes (Investment) Regulations 2005, SI 2005/3378, reg 2 (3)(b)(vi).

[157] Elizabeth Umlas, 'The Global Expansion of SRI: Facing Challenges, Meeting Potential' (2008) 39 Development and Change 1019, 1020.

against the Apartheid regime in South Africa in 1970s. The Code of Conduct for Companies with Interests in South Africa: Government Guidance to British Companies on the Code of Conduct (the Code)' detailed a number of labour rights, specifically in relation to the problems then arising from segregation and race based discrimination in South Africa.[158] According to Section 7 of the code, UK companies (parent companies) were expected to disclose information on their progress towards applying the code.[159]

Secondly, some governmental organisations play a significant role in simplifying complicated (transparency) laws for corporations by creating non-binding guidelines. For instance, the 'Reporting Statement: Operating and Financial Review' document published by the Accounting Standards Board (ASB) provides one example of non-binding frameworks created through a governmental initiative. Although the mandatory Operating and Financial Review (OFR)[160] was repealed in 2005,[161] the Reporting Statement 1(RS1) on OFR by the ASB continued as a framework for 'a voluntary statement of best practice'.[162] This framework was replaced by the guidance on the Strategic Report in June 2014.[163] As has observed above,[164] the guidance on the Strategic Report helps directors in preparing disclosure in accordance with the CA 2006.[165]

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[158] S Prakash Sethi and Oliver F Williams, *Economic Imperatives and Ethical Values in Global Business : The South African Experience and International Codes Today* (University of Notre Dame Press 2001) 201-202.
[159] ibid.
[160] Operating and Financial Review (OFR) amendments to the Companies Act 1985, could be seen as the government's compliance effort with the EU legislation. Although the mandatory OFR requirement was repealed by the government, the Accounting Standards Board (ASB) reporting standards (RS1) had continued to be a best practice guideline, in order to determine 'key elements of the disclosure framework that directors should address in an OFR'. See Accounting Standards Board (ASB), *Reporting Standard: Operating and Financial Review* (ASB January 2006) <https://frc.org.uk/Our-Work/Publications/ASB/Reporting-Statement-Operating-and-Financial-Review-File.pdf> accessed 11 July 2016.
[161] Terry Macalister, 'New Rules for Audits Watered down by Lobbyists' *The Guardian* (26 November 2004) <https://www.theguardian.com/business/2004/nov/26/2> accessed 10 August 2016.
[162] Accounting Standards Board (n 160).
[163] Financial Reporting Council (n 18).
[164] See 5.1.2.1 above.
[165] Financial Reporting Council (n 18).

Thirdly, the UK government also contributes to the creation of non-governmental/hybrid organisations that put pressure on companies for transparency. The Ethical Trading Initiative (ETI) is an important example in this respect. The organisation, which employs a hybrid structure, and was brought in to existence through sponsorship by the UK government, works alongside trade unions and other non-governmental organisations (NGOs), and plays and important role in influencing their conduct.[166] The ETI Base Code, which constitutes one of the main guidelines published by the ETI, outlines a number of recommendations relating to treatment and wellbeing of employees.[167] The ETI pays particular attention to transparency, and the use of these recommendations in the Principles of Implementation of the Base Code.[168] The ETI and its transparency requirements shall be examined in greater detail in chapter 6.[169]

Lastly, the UK government supports a multi-stakeholder benchmarking strategy, widely known as the Corporate Human Rights Benchmark (CHRB). For this purpose, the Department for Business, Innovation & Skills allocated '£80,000 start-up funding' for the benchmark.[170] The CHRB, made up of investors and some other civil society organisations,

[166] Voiculescu (n 8) 373.
[167] Ethical Trading Initiative (ETI), 'The ETI Base Code' <http://s3-eu-west-1.amazonaws.com/www.ethicaltrade.org.files/shared_resources/eti_base_code_english.pdf?ppXz9ivoyynr1uTTo5e.Z5n.ZHaQvQfN> accessed 11 August 2016.
[168] ETI, 'ETI Principles of Implementation' (19 February 2009) <http://www.ethicaltrade.org/resources/key-eti-resources/principles-implementation> accessed 11 August 2016.
[169] For details see 6.2.3.2.3 below.
[170] Department for Business, Innovation & Skills, 'Jo Swinson Pledges Support for a New Ranking of Companies' Human Rights Performance' (Press Release, 18 December 2014) <https://www.gov.uk/government/news/jo-swinson-pledges-support-for-a-new-ranking-of-companies-human-rights-performance> accessed 11 July 2016.

aims to rank corporations according to their human rights performance.[171] Corporate transparency constitutes one of the indicators of the pilot methodology used by the CHRB[172]

In summary, the UK government and government authorities would appear to contribute to the improvement of corporate transparency through use of various soft law measures. Voluntary recommendations play a supplementary, but crucial role towards supporting the mandatory transparency regime employed in the UK. The government itself plays its part through the deployment of soft law, which ensures companies actively disclose information. In this respect, in addition to promulgating codes of conduct, the government improves the general understanding of transparency rules through public agencies. Similarly, the government establishment of initiatives such as the ETI, often contributes to the monitoring of corporations.

Nevertheless, whilst transparency requirements in soft law initiatives listed above are based upon predominately voluntary features, which suffer from a number of shortcomings discussed in chapter 4,[173] transparency schemes in the UK can be critiqued from a broader perspective. The next section shall focus on this critique.

5.3 Why are the National/Regional Transparency Initiatives Inevitably Insufficient?

Thus far this work has examined an array of measures that aim to promote greater corporate transparency. One aspect of this examination has sought to demonstrate that some initiatives are purely domestic, whilst others owe their existence to measures first agreed to and introduced by the EU. It has also been seen that such measures can be divided up

[171] Corporate Human Rights Benchmark, 'Corporate Human Rights Benchmark Pilot Methodology 2016' (March 2016) <https://business-humanrights.org/sites/default/files/CHRB_report_06_singles.pdf> accessed 11 July 2016.
[172] ibid 122.
[173] See 4.1.4.2 above.

according to whether they would typically be classified as part of the corporate or employment law worlds, or perhaps neither of these groups. Finally, the work has sought to highlight that measures can also be divided up according to whether they are mandatory legal requirements, as was the subject of section 5.1, or 'soft law' requirements as addressed by 5.2.

The examination thus far has therefore sought not only to highlight the positive contribution of various national measures when attempting to encourage greater corporate transparency, but also their potential weaknesses and criticisms whilst doing the same. Some of the weaknesses and criticisms offered above could appear modest, and may easily be overcome. One example of this may be the criticism made of the 'Strategic Report' requirements, imposed by UK company laws.[174] Such reporting requirements are sometimes unclear, or still too closely based on shareholder interests. Nevertheless, only a minor alteration to the wording of the Companies Act 2006, for example, would be required to address such 'local' weakness.[175]

However, the focus in this section will be to examine whether there is in fact a deeper truth behind the weaknesses of various national and regional transparency measures. This will be illustrated by reference to national measures (and a regional body as effective as the EU) which cannot fully achieve the level of transparency depicted in the previous chapters.

In this respect, the analysis shall be developed through sections 5.3.1 to 5.3.3, outlined below. In this respect, the main argument shall be that national or regional initiatives do not correspond with the '*transnational*' scope of corporate activities in today's, globalised, economy. Indeed, it may be said, on the one hand, the geographically limited focus of

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[174] See 5.1.2.3 above.

[175] For instance, directors' duties to *the members*(shareholders) of the company defined as shareholders under CA 2006 s 112 may be amended as *shareholders and employees*. See 5.1.2.2 above.

national and regional regulatory efforts, and on the other, the global scope of corporate activities, mean that the former is unable to sufficiently cope with the latter.

More precisely, most of the disclosure requirements analysed above predominantly pay attention to corporate activities taking place within the UK.[176] As David and Tadaki put it, corporate law and other domestic laws, such as labour law, are mostly 'designed to operate intra-territorially'.[177] However, today, companies operate across national borders more easily and frequently. Although a corporation may be registered in one country, its shareholders, subsidiaries and supply/sub-contracting chains may reside in a range of different countries. The control of Transnational Corporations (TNCs), 'operating in more than one country or a cluster of economic entities operating in two or more countries',[178] is challenging to domestic law since '…the TNCs as a whole is not fully accountable to any single country. The same is true for responsibilities they fail to assume for activities of their subsidiaries and affiliates'.[179]

However, even if modern, large, corporations *straddle* many different countries, why are individual states unable to regulate such companies sufficiently through the *patchwork* of domestic regulations? To substantiate this concern, a thorough analysis is required. This analysis is based on the different relationships which individual states are likely to have with corporations that straddle different jurisdictions. To understand these relationships, it is crucial to comprehend the distinction between so-called *host states* and *home states,* which is

[176] In fact, some of the national transparency requirements, such as the provision on supply chain transparency under s 54 of the Modern Slavery Act 2015 have extraterritorial features. However, as observed in 5.1.4.2, the MSA has some limitations.

[177] David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 Virginia Journal of International Law 931, 938.

[178] United Nations Commission on Human Rights (UNCHR) (Sub-Commission), 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2, para 20.

[179] UNCHR (Sub-Commission), 'The Impact of the Activities and Working Methods of Transnational Corporations on the Full Enjoyment of all Human Rights, in Particular Economic, Social and Cultural Rights and the Right to Development, Bearing in Mind Existing International Guidelines, Rules and Standards Relating to the Subject-Matter' (2 July 1996) UN Doc E/CN.4/Sub.2/1996/12, para 72.

fundamental to the analysis offered here. [180] Section 5.3.1, therefore shall begin by explaining this conceptual distinction, before then moving in 5.3.2 and 5.3.3 to further explore its implications.

5.3.1 Home States vs Host States

The concept of '*home'* and '*host state'* can be defined by giving an example of a single corporation such as British Petroleum (BP) plc, with operations in many countries around the world. A cursory examination of the website of BP reveals that the corporation currently operates in over 70 countries, with almost 80,000 employees globally.[181]BP would, nevertheless, be understood as having its 'home' in the UK, in the sense that it is incorporated in the UK,[182] and its shares have their primary listing on the London Stock Exchange.[183] In short, for BP, then, the UK would be regarded as its 'home state'.

Conversely, the other 70-plus countries in which BP also carries out activities, typically through wholly- or partly-owned subsidiaries, would be regarded as '*host states*'. Thus, the United States (US), where BP carries out a significant variety of activities, would for the present purposes be considered one (among many other) 'host state' in its relationship with BP as a whole.[184]

The foregoing distinction defines *home* and *host states* in respect of their relationship with a single corporation. However, the situation would appear oversimplified, and is likely to be more complex than at first it may appear. Whilst the distinction made assumes that for

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[180] In this section, *home state* specifically refers to the state of the parent or controlling company of TNCs and *host state* is the state which hosts the foreign activities of these corporations and supply chains etc.
[181] BP Global, 'BP at a Glance' <http://www.bp.com/en/global/corporate/about-bp/bp-at-a-glance.html> accessed 11 August 2016.
[182] BP Global, 'Key Business Addresses' <http://www.bp.com/en/global/corporate/about-bp/bp-at-a-glance/key-business-addresses.html> accessed 11 August 2016.
[183] London Stock Exchange, 'Prices and Markets; BP PLC' <http://www.londonstockexchange.com/exchange/prices-and-markets/stocks/summary/company-summary/GB0007980591GBGBXSET0.html> accessed 24 August 2016.
[184] See BP, United States <http://www.bp.com/en_us/bp-us.html> accessed 8 September 2016.

any single corporation, there will always be a single home state and, very likely, one or more host states, it may well be argued that some corporations are already so international that their operations evade being home to any one single *home state*. Such corporations may carry out operations in multiple host states, none of which are important enough to warrant one being defined as their home state. As such, one argument that has already been advanced is that there may be 'stateless' corporations.[185] Whilst such a suggestion is controversial, such controversy will not be examined any further, since this will not add to our analysis. Indeed, if the argument that some corporations are now 'stateless' is true, then it certainly further exacerbates some of the problems in the national regulation of transnational corporations that are addressed below. However, as the following paragraphs will demonstrate, these problems do not themselves *depend* on whether some corporations are truly *stateless*.

Alongside the foregoing distinction, it has only been shown that, in respect of a single company, for example BP, the world can indeed be divided up between a home state, many host states, and other countries that may be neither. Categorising a state as home or host state in relation to a single company may make sense, insofar as any of the complaints levied at the effectiveness of national regulation may then focus upon whether a particular country is a *home state* or *host* accordingly. Yet, some of the arguments developed in sections 5.3.2 and 5.3.3 below are different since such arguments will assume that some states are generally home states, whilst others are generally host states.

Indeed, at first sight, such generalisation may seem inappropriate. As soon as we move beyond a single company, and consider the position in relation to the many thousands

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[185] Robert Reich, 'Who Is Us?' (*Harvard Business Review,* January–February 1990); Amy Borrus, Wendy Zellner and William J Holstein, 'The Stateless Corporations: Forget Multinationals--Today's Giants are Really Leaping Boundaries' *Business Week* (14 May 1990) 98-106; John Gapper, 'The Stateless Company Plays a Risky Game, *Financial Times* (6 January 2016) <http://www.ft.com/cms/s/0/e9b4a640-b2e5-11e5-b147-e5e5bba42e51.html#axzz4CKiMcGYD> accessed 11 August 2016.

of corporations that exist, we begin to see that any one state is likely simultaneously to be a home to some, and a host to many more. It cannot be possible to divide the world into one group of states that are always, and only, *home states*, and another group of states that are always, and only, *host states*. Every state is simultaneously a *home state* and a *host state* to different companies. Therefore, whilst the UK may be listed as home state for BP, and the US one of the host states, the US is a home state for Texaco Inc, and the UK is one of the host states of Texaco.[186]

However, in terms of analysing the likely success, and limits, of any individual state's national initiatives, it is useful to *generalise* in respect to the position of states globally and, in doing so, divide them according to whether they are *home* and *host states*. Indeed, the fact that multinational companies tend to locate their homes in the more economically advanced countries of the world,[187] means less economically advanced countries, by contrast, tend to act usually (although by no means exclusively) as host states.[188] From this perspective, it may be appropriate, when considering the problems of national regulation, to include in our analysis some of the problems which are faced by more economically well developed countries, which we shall label *home states*, and the problems encountered less developed countries, which we shall label as host states.

Given the overlapping pattern of *home state* and *host state* jurisdiction over the operation of global multinationals, we can begin to see that both *home states* and *host states* may act to regulate such companies. *Home states*, in which the parent company, or the

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[186] For its UK operations, see Texaco UK (Valero Energy Ltd), 'About Us' <https://texaco.co.uk/about-us> accessed 11 August 2016.

[187] Home states are mostly depicted as developed and industrialised states. See Robert McCorquodale and Penelope Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 The Modern Law Review 598, 600. In addition, home states usually have 'a well-developed legal system and well-developed financial and securities markets' Alice De Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar Publishing 2011)14.

[188] McCorquodale and Simons (n 187) 599.

headquarters, is often located, may attempt to control the corporation, even if they conduct businesses in another country. For instance, a *home state* can require a parent company to control its subsidiaries, wherever in the world they may operate.[189] The UK government, for example, may unilaterally act to improve employee interests in foreign countries. Thus, the UK's jurisdiction over parent companies may affect the interests of the employees working in the suppliers of UK companies. An example of the extraterritorial reach of UK law may be the repealed Corporate Responsibility Bill 2003 (CORE Bill). According to the CORE Bill, parent companies would have been required to consider employee as these may exist with suppliers.[190] The bill had also intended to impose mandatory reporting requirements.[191] However, the Bill was later scrapped, an outcome which the remaining sections of this chapter will suggest was entirely predictable.

Finally, in light of the above arguments, the next section shall focus on the limits of unilateral action by an individual country. However, the section shall not consider whether if all home states, or all host states, or just all states, were able to agree to transparency requirements, that this would pass as feasible and effective. Such agreements constitute international co-operative action, which shall be the subject of the next chapter.

5.3.2 Regulation via Home states

To what extent can home states can secure effective regulation? Since *home states* are typically the jurisdiction in which multinational corporations call 'home', often the country may be free to impose effective transparency requirements upon the multinational; requirements which will apply throughout a multinational group of companies, and within whatever host states the multinational may also happen to operate. As such, home states can

[189] McCorquodale (n 187) 616.
[190] Corporate Responsibility HC Bill (2003-2004) [29], cl 3, s 6 (Hereinafter 'CORE Bill').
[191] ibid s 3.

control the 'head' of the multinational, and by doing so, indirectly ensure control of all parts of its operations, wherever this may be located.

However, this control can only be limited since the number of companies registered in one home country is limited. For example, the UK alone controls only a small proportion of companies in the world.[192] As such, the key point here is in order to create a robust transparency regime, in addition to the UK, a sufficient proportion of other *home state* governments – whom together controlling a sizeable proportion of the world's significant multinationals – also need to require their corporations to be transparent with respect to their international activities. However, there may be some problems in this respect. The Next section shall consider some of such problems.

5.3.2.1 Problems in relation to Enforcement and Sanctions

If home states are to control the global activities of domicile multinationals, then they must ensure domestic laws include extraterritorial transparency rules. However, the enforcement of these rules may not be possible or may be incomplete without host state assistance due to the following reasons.

First, 'a parent company and its subsidiaries are distinct legal entities'.[193] Accordingly, companies are mainly subject to the national laws of the country in which they operate. Therefore, '…a parent company generally is not legally liable for wrongs committed by a subsidiary…'[194] Furthermore, in some circumstances, corporate activities are also involved

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[192] Only 27 companies are British in the 500 biggest companies of the world. Adam Gale, '27 British Companies are in the World's Top 500' *(Management Today*, 22 Jul 2015) <http://www.managementtoday.co.uk/news/1357359/30-british-companies-worlds-top-500/> accessed 11 August 2016.

[193] John G Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 American Journal of International Law 819, 824.

[194] Ibid.

with suppliers. Such suppliers 'are legally not connected to [companies registered in the home country] by structural ties'. [195]

In this respect, the regulation of corporations by the *home state* may be arduous since states are generally prohibited from regulating companies in other territories.[196] The view is based upon the premise 'no state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State',[197] which thereby reduces the capability of a home state to improve corporate activities in the developing world.

Secondly, there may be severe difficulties with respect to sanctions in the case of violations of *homes state* laws that are the result of extraterritorial regulation. As with other unilateral national regulations, transparency regulations may be insufficient in terms of remedies in the case of violations committed in foreign countries. For example, individuals abused through the operations of a TNC in the developing countries may not have access to remedy due to the cost of litigation.[198] Similarly, the concept of *forum non conveniens*[199] may present a problem for victims seeking a judicial remedy in the *home state* against corporations in case of corporate human rights abuses.[200]

[195] Janet Dine, *Companies, International Trade and Human Rights*, vol 4 (Cambridge University Press 2005) 51.
[196] For territorial principle in international law see Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press 2006) 105-106.
[197] United Nations General Assembly (UNGA) Res 2131 (XX) (21 December 1965) UN Doc A/RES/20/2131.
[198] Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (The International Corporate Accountability Roundtable (ICAR), CORE, and the European Coalition for Corporate Justice (ECCJ) December 2013) 18 <http://icar.ngo/wp-content/uploads/2013/12/The-Third-Pillar-FINAL1.pdf> accessed 11 August 2016.
[199] 'The doctrine of forum non conveniens allows courts to prevent a case from moving forward in the jurisdiction in which it is filed on the basis that another jurisdiction is the more appropriate venue for the case... [the theory refers to that] the case is dismissed under the theory that it can be filed in the host State'. Skinner, McCorquodale and De Schutter (n 198) 15.
[200] ibid.

The discussion has thus far assumed the that *home states* would themselves are willing to enact controls upon multinationals that operate extra-territorially, affecting all parts of the multinational, wherever it might happen to operate. However, the next sub-section, will attempt to qualify this assumption.

5.3.2.2 Reluctance of Home States to Legislate Against Their Own Multinationals

No one country is home to or is able to control all multinational corporations. Effective home state regulation requires a number of home states to regulate multinationals. However, a key concern is whether they are likely to do so. The following section will argue that home states are mostly reluctant to pass new laws for regulation of TNC activities abroad, and it will outline the possible reasoning behind this reluctance.

5.3.2.2.1 Economic Benefits

As the discussion in Chapter 3 outlined, the imposition of transparency has the effect of creating costs for the regulator. [201] However, in addition to the direct cost of transparency, there may also be a number of economic factors that make home states reluctant to impose extra-territorial transparency requirements upon corporations. For example, extra-territorial regulation 'might put their companies at a competitive disadvantage vis-a`-vis other companies'.[202]

Furthermore, home states may also reap some economic benefits, such as tax income, from corporations who reside in the country.[203] As such, the home government may not be

[201] For details see 3.3.3.1 above.
[202] Deva touches upon the unwillingness of both developed and developing states in terms of controlling corporations with regard to human rights. See Surya Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' (2012) 9 European Company Law 101, 103.
[203] There can also be some indirect taxes such as '...income taxes paid by MNE employees, business taxes paid by suppliers of MNEs, and capital gains taxes paid by investors in MNEs'. Tania Voon, 'Multinational Enterprises and State Sovereignty under International Law' (1999) 21 Adelaide Law Review 219, 235. Furthermore, corporate subsidiaries abroad may also have to make payments to TNC headquarters for use of capital, technology and intellectual property rights under licenses ibid.

eager to place an extra burden upon corporations registered in its own territory, by improving regulatory requirements, since such corporations may prove beneficial for its economy.[204] Therefore, as the research of Ruggie has pointed out, 'governments often support the preferences of corporations domiciled in [its country]'.[205]

In this respect, one approach has been that *home states* may opt to threaten *host state* legislature in order to attain law reforms, so these may ease the legal burdens placed upon its TNCs. An example of this may be the pressure exerted by the UK government upon the Californian legislature, in order to reform laws, thereby preventing the double taxation of the British TNCs; demonstrating how states may pay attention to the economic well-being of TNCs.[206] However, where home state governments are likely to assist their national corporations against the impact of regulatory barriers in foreign countries, they may then not be so eager with respect to the protection of human rights abuses within such companies.[207] Allegations of such behaviour have been associated with the UK government's support of corporations such as Rio Tinto and Shell.[208] Rio Tinto, for example, were accused of discriminating against black employees (including other alleged human rights abuses).[209]

Finally, in countries, such as in the UK, the government favours deregulation for economic benefits.[210] The de-regulation movement, in accordance with neo-liberal economic

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[204] Deva (n 202) 103.
[205] Ruggie (n 193) 822.
[206] Voon (n 200) 238.
[207] McCorquodale and Simons (n 187) 598-599.

[208] Owen Bowcott, 'Documents Reveal Extent of Shell and Rio Tinto Lobbying in Human Rights Case' *The Guardian* (6 April 2014) <https://www.theguardian.com/business/2014/apr/06/shell-rio-tinto-human-rights-nigeria-kiobel> accessed 10 August 2016.
[209] Peter Frankental, 'Yes Minister... It is a Human Rights Issue: The Documents that Show our Government Caved in to Corporate Lobbying' (*Amnesty International UK/Blogs,* 7 April 2014) <https://www.amnesty.org.uk/blogs/yes-minister-it-human-rights-issue/uk-government-shell-rio-tinto-human-rights-niger-delta> accessed 11 August 2016.
[210] See Brian Roach, 'Corporate Power in a Global Economy' (Global Development and Environment Institute (GDAE), Tufts University 2007) 9

ideology, has attempted to ensure governments avoid strict regulations. In accordance with a deregulatory policy, states may therefore avoid creating strict mandatory disclosure requirements for companies.[211]

In summary, in light of the above factors, home states may be reluctant to impose robust extraterritorial pressure on corporations. However, lobbying may be another factor making *home states* reluctant to impose pressure on corporations. The next section shall focus on such factor.

5.3.2.2.2 Lobbying

Multinationals are likely to be active, and effective, at persuading their respective home states not to impose heavy regulatory burdens upon them,[212] and so may also prove influential over national governments with respect to law making. [213] An example of this may be where they lobby governments to accept lower labour standards.[214] Indeed, in some circumstances, corporations may even threaten governments, as to ensure no tighten regulations are enacted.[215]

Corporate lobbying can play a major role in inhibiting stricter regulations by home state governments.[216] Furthermore, lobbying may not only affect the content of the law, but also its

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<http://ase.tufts.edu/Gdae/education_materials/modules/Corporate_Power_in_a_Global_Economy.pdf> accessed 9 September 2016

[211] For instance, Rowbottom and Schroeder examine the impact of deregulation and neoliberal economic system in the repeal of the Operating Financial Review (OFR). Nick Rowbottom and Marek Schroeder, 'The Rise and Fall of the UK Operating and Financial Review' (2014) 27 Accounting, Auditing & Accountability Journal 655.

[212] Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar Publishing 2010) 135.

[213] ibid.

[214] Eric Kolodner, *Transnational Corporations: Impediments or Catalysts of Social development?* (United Nations Research Institute for Social Development (UNRISD) 1994) 22.

[215] Noreena Hertz, 'Why We Must Stay Silent No Longer' *The Guardian* (8 April 2001) <http://www.theguardian.com/politics/2001/apr/08/globalisation.world> accessed 10 August 2016.

[216] Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (n 196) 303.

enforcement.[217] As such, one assumption would be that even if a home state enacts transparency regulations, subsequent lobbying may reduce the enforceability of these regulations.

In this respect, lobbying pressure placed upon the UK government not to improve disclosure requirements may be one such example.[218] The abandonment of the Operating Financial Review (OFR),[219] which would have improved the transparency requirements in the UK, highlights how lobbying plays a role in terms of influencing transparency regulations.[220] During the drafting process of the legislation, the businesses in the UK mainly focused upon issues such as 'maintaining shareholder-centric focus', 'not significantly extending corporate accountability,' 'nor widening director liability'.[221] One of the key actors taking part in lobbying the government had been the Confederation of British Industry (CBI).[222] The CBI was specifically not in favour of statutory disclosure requirements, but favoured voluntary measures instead.[223] The main argument made by the CBI had been the burdensome impact of the regulations upon the competitiveness of the UK firms.[224]

Eventually, 'intense lobbying' lead to the government to repeal the OFR, which would have imposed strong auditing requirements for disclosure.[225] Therefore, as the case of repealed OFR shows, lobbying which affects national governments may be a barrier insofar as improving unilateral transparency regulation is concerned.

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[217] Doreen J McBarnet, 'Corporate Social Responsibility beyond Law, through Law, for Law' in McBarnet, Voiculescu and Campbell (n 8) 45.
[218] See Gloria O Botchway, 'The Role of Regulation in Social and Environmental Reporting in the UK' (PhD thesis, University of Leeds 2014).
[219] For further information on the OFR, see Accounting Standards Board (n 160).
[220] McBarnet (n 217) 45.
[221] Rowbottom and Schroeder (n 211) 675.
[222] Botchway (n 218) 100.
[223] Ibid.
[224] Botchway (n 218) 101-102.
[225] Macalister (n 161).

In summary, lobbying may prevent home states attempting to enact and enforce effective transparency requirements it intends to levy against the worldwide operation of multinationals that call such states as home. Our attention shall therefore to *host states*, to address the question: are host states more likely to be effective at requiring companies who operate within their countries to be transparent?

5.3.3 Regulation via Host states

Importantly, even where home states were able and willing to enact effective regulation, host state action would still be required, in order ensure that monitoring and enforcement of home state rules can be achieved. However, here, one might ask whether, in the absence of effective home state regulation, host states can ensure effective regulate the operations of multinationals corporations who function within their borders?

It is worth noting that there is an inherent difficulty for underdeveloped/developing *host states* to control multi-national corporations through government regulation.[226] Even if the host state has sufficient laws with respect to employee rights, for example, it might not be able to enforce them, owing to a lack of resources.[227] Therefore, even if a host state is committed to improving disclosure requirements, the enforcement of these requirements is unlikely to be effective. Host state governments may not have 'the technical and financial resources' to support such a cause.[228]

Moreover, host states may not be eager either improving strict transparency regulations through national law or enforcing the extraterritorial transparency requirements

[226] Joseph E Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities' (2007) 23 American University International Law Review 451, 476.
[227] Kevin Kolben, 'Transnational Labor Regulation and the Limits of Governance' (2011) 12 Theoretical Inquiries in Law 403, 427.
[228] Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (n 196) 85.

created by *home state* governments. *Host states* might be reluctant due to the following reasons.

5.3.3.1 Economic Interests

Corporations bring a number of economic benefits for host countries. Companies create jobs and pay taxes, which provide important, direct, economic benefits. Moreover, TNC investments in the host country may result in the transfer of technology and some other indirect ‘spillovers’.[229] These ‘spillovers’ may improve the productivity and competition of host country markets.[230] TNCs play a significant role in Foreign Direct Investment (FDI), which means economic benefits for the host country.[231]

In such host countries, ‘domestic laws [are adjusted] to allure foreign direct investment or the host government simply looks the other way at violations of its domestic law’.[232] Indeed, the comparative advantage of low labour costs benefit the developing host country to attract TNCs.[233] However; cheap labour often means poor working conditions, or ‘sweatshops’ conditions.[234] In such sweatshops, the interests of employees are frequently not considered.[235]

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229 Magnus Blomström, ‘Host Country Benefits of Foreign Investment’ (1991) National Bureau of Economic Research (NBER) Working Papers Series 3615, 1 <https://www.researchgate.net/profile/Magnus_Blomstrom/publication/5191590_Host_Country_Benefits_of_Foreign_Investment/links/02e7e51b1945454c4e000000.pdf> accessed 11 July 2016.
230 ibid.
231 Eduardo Borensztein, Jose De Gregorio and Jong-Wha Lee, 'How Does Foreign Direct Investment Affect Economic Growth?' (1998) 45 Journal of International Economics 115.
232 Elisa Westfield, 'Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century' (2002) 42 Virginia Journal of International Law 1075, 1077.
233 David J Doorey, 'In Defence of Transnational Domestic Labor Regulation' (2010) 42 Vanderbilt Journal of Transnational Law 953, 966.
234 Roach (n 210) 13.
235 Madeleine Bunting, ‘Sweatshops Are Still Supplying High Street Brands’ *The Guardian* (28 April 2011) <https://www.theguardian.com/global-development/poverty-matters/2011/apr/28/sweatshops-supplying-high-street-brands> accessed 10 August 2016.

Conversely, one may see such sweatshops as beneficial for *host states*.[236] According to this view, more sweatshops make those nations better off.[237] These arguments are based upon the logic that sweatshops can constitute an important opportunity to change the economic well-being of poorer nations.[238] As such, developing *host states* may justify sweatshops and low workers' rights as essential factors for their country's economic growth.[239]

A consequence of the above has meant, on the one hand, a host state may not be so eager to improve transparency regulations since the host state, paying undivided attention to aggregate economic interests, is likely to avoid direct government regulation because of the competition with other countries in terms of attracting foreign companies.[240] On the other hand, *host states* may also be reluctant to play a role in the enforcement of transparency regulation formed by a foreign state.[241] Indeed, in both scenarios, the mobility of corporation and the ability to move from one host country to another may place pressure on developing host states not to enforce strict regulatory requirements.[242]

Hence, duo to the preceding reasons host states may be reluctant to control the activities of corporations. Therefore, either the extraterritorial transparency regulation formulated by the home state, or host originated regulation, is unlikely to result in the overall effective corporate transparency.

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[236] Allen R Myerson, 'In Principle, a Case For More 'Sweatshops' *The New York Times* (22 June 1997) <http://www.nytimes.com/1997/06/22/weekinreview/in-principle-a-case-for-more-sweatshops.html> accessed 10 August 2016.
[237] ibid.
[238] Nicholas D Kristof, 'In Praise of the Maligned Sweatshop' *The New York Times* (6 June 2006) <http://www.nytimes.com/2006/06/06/opinion/06kristof.html> accessed 10 August 2016.
[239] Luc Fransen and Brian Burgoon, 'Privatizing or Socializing Corporate Responsibility Business Participation in Voluntary Programs' (2014) 53 Business & Society 583, 590.
[240] Westfield (n 228) 1085.
[241] Deva (n 202) 103.
[242] Stiglitz (n 226) 476-477.

5.3.3.2 Corruption and Lobbying

Governments that have an interest in the activities of TNCs may be inclined to disregard their 'the negative impact of the activities of transnational corporations on human rights', or to 'pass legislation in their favour'.[243] There may be three reasons playing a role in host state governments' behaviour permit such practices to take place.

First, the *host state* government may be authoritarian or a dictatorship. Such governments may employ 'corporate resources in its own abuses of human rights'.[244] For example, a dictatorial authority of a developing state might be supported by a TNC to fight individuals such as union members.[245] In this respect, it would be unrealistic to expect an effective role to be played by the governments of such countries, by ensuring companies are transparent.

Second, the *host state* government may be corrupt. One recent example in this regard can be the collapse of the Rana Plaza in Bangladesh. Corruption was one of the key contributory factors in the collapse.[246] Many UK clothing companies were involved with the supplier, where more than 1100 people died.[247] After the collapse of the building, the UK government put in place some strategies to improve supply chain conditions.[248] Transparency

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[243] UN Economic and Social Council (ECOSOC) 'Working Document on the Impact of the Activities of Transnational Corporations on the Realization of Economic, Social and Cultural Rights' (10 June 1998) UN Doc E/CN.4/Sub.2/1998/6, para 16.
[244] See Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 The Yale Law Journal 443, 462.
[245] Brian Winter, 'Documents Suggest Foreign Automakers Aided Brazil's Dictators' (*Reuters*, 5 August 2014) <http://www.reuters.com/investigates/special-report/brazil-dictatorship-companies/> accessed 10 August 2016.
[246] William Gomes, 'Reason and Responsibility: The Rana Plaza Collapse' (*Open Democracy,* 9 May 2013) <https://www.opendemocracy.net/opensecurity/william-gomes/reason-and-responsibility-rana-plaza-collapse> accessed 11 August 2016.
[247] BBC News, 'Bangladesh Tragedy: UK and Companies 'Must Do More' (28 April 2013) <http://www.bbc.co.uk/news/uk-22327930> accessed 10 August 2016.
[248] Department for International Development, 'The UK has Ramped up Efforts to Improve Safety and Working Conditions in Bangladesh's Garment Sector since the Rana Plaza Disaster in April 2013' (A News Article Published under the 2010 to 2015 Conservative and Liberal Democrat Coalition Government 24

has been one such strategy.[249] However, even if the UK, as a home state, can play a role in improving the transparency of suppliers to UK corporations, the Bangladesh government has a role to place in the enforcement and inspection of such suppliers. However, the Bangladesh government would seem reluctant to play such a role. For example, political influence of factory owners make the government reluctant to improve regulations.[250] Indeed, some Bangladeshi politicians also have personal interests in the business of suppliers that provide to TNCs.[251] According to a study conducted by Transparency International, 10% of current parliament members were 'directly involved with the garments industry'.[252] Hence, it may seem plausible to suggest factories may not be inspected properly by the government.[253]

As such, in an environment where the host state does not fulfil their basic duty to act,[254] transparency may not prove effective in terms of improving employee interests. Therefore, although attempts may be made by the UK government to improve transparency obligations, as evidenced by the Modern Slavery Act, transparency might not help improve the interests of workers in Bangladesh, unless its government carries out its own role.

Thirdly, even where the *host state* government is not authoritarian or corrupt, TNCs may look for 'legal' avenues to improve their corporate benefits in host countries.[255] For

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April 2014) <https://www.gov.uk/government/news/rana-plaza-one-year-on-uk-aid-to-improve-bangladeshs-garment-sector> accessed 11 August 2016.

[249] Bangladesh All Party Parliamentary Group, 'After Rana Plaza A Report into the Readymade Garment Industry in Bangladesh' (Parliamentary Liaison Office 2013) 12 <http://www.annemain.com/files/attachments/APPG_Bangladesh_Garment_Industry_Report.pdf> accessed 11 July 2016.

[250] Transparency International, 'The Readymade Garment Sector: Governance Problems and Way Forward' (October 2013) 17 <https://blog.transparency.org/wp-content/uploads/2014/04/2013_TIB_GarmentSector_EN.pdf> accessed 11 July 2016.

[251] ibid.

[252] ibid.

[253] Bangladesh All Party Parliamentary Group (n 249) 52.

[254] For example, the duty to inspect the construction of factory buildings (according to the national building codes and laws).

[255] Oleg Karpovich, *Global Governance Past, Present and Future* (Authorhouse 2013) 249.

instance, as in *home states*, lobbying may place pressure upon *host states* governments.[256] A TNC may lobby the *host state* government(s) with a view to lowering regulations.[257] In this respect, corporations may even threaten governments on issues related to worker rights.[258]

Hence, in such situations, both the enforcement of transparency rules created by *home states* and the transparency regulation through the law of the *host state* are unlikely to be effective

5.3.3.3 Concerns about Sovereignty

In some circumstances, the host state may view extraterritorial regulation as undermining its sovereignty.[259] Some developing nations 'have suffered [the effect of] imperialism in the past,' and may therefore perceive the imposition of external standards as suspicious.[260] In this respect, unilateral home state intervention may be viewed as 'imperialistic'.[261] Indeed, should, any state attempt to apply its laws in another territory, this may be viewed as an infringement upon the sovereignty of that state.[262] Therefore, *host states* may be reluctant to accept the implementation of foreign transparency regulations.

Put differently, because of the obstacles to ensure the activities of TNCs and their suppliers are transparent through national/domestic regulatory frameworks, it is necessary to look at transparency schemes at international/global level. In this respect, the unilateral UK

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[256] Stephen Tully, *Corporations and International Lawmaking* (Martinus Nijhoff Publishers 2007) 101-102.
[257] ibid.
[258] For example, according to CEO Philip Knight (Nike) 'if wages were allowed to get too high' the economy of Indonesia (a host country) would be wrecked. Randy Shaw, *Reclaiming America: Nike, Clean Air, and the New National Activism* (University of California Press 1999) 39.
[259] Edwin Mujih, *Regulating Multinationals in Developing Countries: A Conceptual and Legal Framework for Corporate Social Responsibility* (Ashgate Publishing Group 2012) 128.
[260] Charles Sabel, Archon Fung and Dara O'Rourke, 'Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace' (2000) John F Kennedy School of Government Harvard University Faculty Research Working Papers Series 00-010, 34 <http://ssrn.com/abstract=262178> accessed 12 July 2016.
[261] For a broader discussion on this issue see Sara L Seck, 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?' (2008) 46 Osgoode Hall Law Journal 565.
[262] Harry Arthurs, 'Extraterritoriality by Other Means: How Labor Law Sneaks Across Borders, Conquers Minds, and Controls Workplaces Abroad' (2010) 21 Stanford Law and Policy Review 527, 530.

transparency regime alongside other domestic transparency regimes appear to fall short in their attempt to ensure TNCs operate transparently.

Conclusion

This chapter began by addressing some of the existing UK schemes that attempt to ensure greater corporate transparency. The chapter divided its analysis into focus upon mandatory norms, alongside norms that operate only as ‘soft law’, such as recommendations of good practice. In doing so, it considered norms that the UK government, or other UK institutions, had ‘unilaterally’ opted to promulgate, and which the UK was required to back owing to its membership of the EU.

Through this discussion, the aim had *not* been to provide a comprehensive, textbook like, description of all the norms that require transparency. Rather, the aim was to use the examples cited demonstrate what already exists, and to illustrate limited effectiveness of such norms. The first focus was on company law. Instrumentalist approach of the UK company law, viewing employees as means, the lack of clarity and dialogue with employees and impossibility to challenge the directors’ discretion with respect to disclosure about employees were listed as the main shortcomings of the transparency requirements under company law.

Although the disclosure requirements under company law were criticised for being insufficient to improve the interests of employees, disclosure requirements under other laws, especially under employment law, was depicted as more robust to accomplish meaningful improvements to compel corporations to act transparently. However, whilst such national/regional initiatives can accomplish meaningful improvements to compel corporations to act transparently, they also suffer from some limitations and fall short of achieving the sufficient level of transparency at the international level. As the analysis in section 5.3 demonstrated that territorial limits of national laws play the major role in this situation.

Such limits discussed in section 5.3 respectively aimed at understanding why the UK experience, with its apparent weaknesses, is typical of any individual state's attempts to impose effective transparency requirements upon the companies which are based in its jurisdiction, which may be *home* or *host* based. The discussion then outlined a number of reasons why neither *home states*, nor *host states*, are likely to be successfully to in the effective regulation of extra-territorial requirements.

Given these inevitable limitations in the likely achievements of individual states, the focus must instead turn to international initiatives. As noted earlier, the fundamental failure at the level of individual states arises because national efforts do not match onto the global scope of the operations of TNCs. To reach and effectively control this, transparency schemes on international level shall be the subject of chapter 6.

Chapter 6

International Legal and Non-Legal Strategies to Make Corporations Transparent

Introduction

Our focus within the present chapter shall now turn from national/regional initiatives and their use in securing transparency to a discussion of those strategies used on an international level. The primary aim of this chapter shall be to develop and substantiate the argument that an international approach is required, in order so that some of the shortcomings identified as inherent within the national approach are avoided, as outlined within our examination of the UK's achievements in the previous chapter.

In chapter 5, the UK's transparency regime, as our case study, illustrated the barriers and difficulties of unilateral transparency regulations when used by national governments, and how these fall short of achieving optimal transparency on an international level.[1] However, this chapter shall attempt to demonstrate, inter-governmental, non-governmental and hybrid organisations grounded in negotiations and cooperation between governments, companies and other stakeholders as key actors within the process of compelling corporations to act transparently. The chapter shall therefore consider how international public and private organisations may contribute to ensuring transparency as a strategy improving the interests of employees globally.

[1] See 5.3 above.

Within the examination of international law, section 6.1 shall consider the developments in compulsory transparency that arise under such laws, specifically addressing the United Nations Norms on Transnational Corporations and Other Business Enterprises (the Norms). However, this work shall argue that, notwithstanding the strength of formal, internationally binding transparency rules, the Norms are an isolated and rare example.[2] The chapter shall then proceed to look beyond international law to examine what are usually regarded as 'soft law' strategies. Section 6.2 shall examine transparency strategies initiated by inter-governmental and non-governmental organisations. In this regard, the first focus in 6.2.1 is to consider transparency strategies initiated by inter-governmental organisations. Regulatory frameworks such as the OECD Guidelines for Multinational Companies, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy by the International Labour Organisation (ILO), developments within the United Nations (UN), "Protect, Respect and Remedy" framework, UN Guiding Principles on Business and Human Rights (UNGP) and the UN's Guiding Principles Reporting Framework shall be analysed. In section 6.2.2, the transparency related strategies of two hybrid organisations, the United Nations Global Compact (UNGC) and the International Standardisation Organisation (ISO) shall then be considered. In section 6.2.3, the focus shall be on the contribution that non-governmental reporting, assurance, certification and accreditation organisations make to corporate transparency. In this respect, some of the key schemes in this area, such as Global Reporting Initiative (GRI), Social Accountability International (SAI), Fair Labor Association (FLA), Ethical Trading Initiative (ETI) shall be considered.

Having identified the various international initiatives that aim to compel the enactment of greater corporate transparency, the final section of the chapter, section 6.3, shall

[2] See 6.1 below.

then turn to offer a critique of the strategies examined. This section shall aim to demonstrate that whilst transparency requirements at an international level are not yet fully developed, they constitute a positive move towards ensuring corporations operate transparently, especially with respect to their international activities. This section shall therefore emphasise that whilst international strategies still have some shortcomings, they are likely to cope with some of the limits in improving corporate transparency at global level.

6.1 International Law

Corporations are typically subject to the domestic laws of a particular jurisdiction. In this respect, one feature of the corporate entity is that domestic law identifies the corporation as a legal personality.[3] However, within the arena of international regulation, the situation is often different. Many scholars are inclined to point out that Transnational Corporations (TNCs) do not possess international legal personality.[4] Indeed, TNCs are often not accepted as subjects under international law.[5] Thus, rather than regulating TNCs, international law tends to focus upon the relations between states.[6]

With the above in mind, it is worth noting that international law does not directly regulate TNCs per se, unless there would appear some extreme issue at stake, such as war crimes, crimes against humanity or forced labour.[7] Indeed, states often resist the imposition of international law with respect to the social regulation of corporations.[8] The issue at hand is

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[3] Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 Georgetown Law Journal 439, 439.

[4] Peter Muchlinski, 'Corporations in International Law' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010).

[5] David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44(4) Virginia Journal of International Law 931, 944.

[6] Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press 2006) 104.

[7] Carlos M Vázquez, 'Direct vs. Indirect Obligations of Corporations under International Law' (2004) 43 Columbia Journal of Transnational Law 927, 927.

[8] Larry C Backer, 'From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations' (2008) 39 Georgetown Journal of International Law 591, 594.

often that governments aim to protect their national economic interests, as discussed in the previous chapter, which may also be seen as a factor for such resistance.[9] For example, states' unwillingness or lack of capability to impose stricter regulation, may prevent building international consensus to control corporate behaviour under international law, such as a treaty.[10]

Conversely, human rights law is an example of public law that may be examined in terms of the international regulation of corporate activities. Within the frame of international human rights law, states, often party to international treaties or covenants, such as International Covenants on Economic, Social and Cultural Rights 1966[11] and the International Covenant on Civil and Political Rights 1966,[12] must honour international human rights obligations. Accordingly, for example, states, party to such an agreement may be held responsible for any breach in fundamental labour rights.[13]

Typically, corporations do not possess international legal liability for human rights violations.[14] However, individual states may be held responsible for the regulation of corporations, and to ensure corporate entities respect human rights within domestic jurisprudence.[15] Yet, the difficulties stem from 'territoriality', and 'nationality' as this relates to the regulation of suppliers in domestic law, similar to the issues that we discussed in terms of domestic corporate regulation in the previous chapter, find themselves present in

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[9] See section 5.3 above.
[10] ibid.
[11] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
[12] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[13] Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 Modern Law Review 598, 619.
[14] ibid 599.
[15] Zerk (n 6) 84.

international human rights law also.[16] One reason for this may be, 'to a significant degree, international human rights law relies on domestic law'.[17]

Hence, although there would appear a number of developments that create obligations that bind corporations under international laws, such developments have mostly failed to bring about the creation of an international treaty.[18] Indeed, the United Nations Norms on the Responsibilities of Transnational Corporations and Other Enterprises with Regard to Human Rights (the Norms) may be considered as an important example of the failure to witness an international legal document binding companies directly under international law.[19]

6.1 United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

The United Nations (UN) is the most significant global organisation in international arena that operates to create a dialogue and cooperation among nations with respect to international problems 'such as peace and security, climate change, sustainable development, human rights' etc'.[20] UN's efforts in relation to the impact of Transnational Corporations on social issues can be traced back to the early 1970s.[21] Such efforts accelerated by the work undertaken by the Sub-Commission on the Promotion of Human Rights of the UN

[16] Extraterritorial regulations may suffer from some problems with respect to their enforcement. See 5.3.2.1 above.
[17] Kinley and Tadaki (n 5) 937.
[18] United Nations Commission on Human Rights (UNCHR), 'Responsibilities of Transnational Corporations and Related Business Enterprises with regard to Human Rights' (20 April 2004) UN Doc E/CN.4/Dec/2004/116.
[19] UNCHR (Sub-Commission), 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (hereinafter 'UN Human Rights Norms for Corporations').
[20] United Nations, 'Overview' <http://www.un.org/en/sections/about-un/overview/index.htm> accessed 12 September 2016.
[21] For example, the Commission on Transnational Corporations and the United Nations Centre on Transnational Corporations (UNCTC) were created in 1974. See Louis Emmerij and Richard Jolly, 'The UN and Transnational Corporations' (UN Intellectual History Project, Briefing Note 17, July 2009) <http://www.unhistory.org/briefing/17TNCs.pdf> accessed 15 June 2016.

Commission on Human Rights (the Commission) and resulted in the adoption of the Norms on Transnational Corporations and Other Business Enterprises (the Norms) in 2003.[22]

One of the distinct features of 'the Norms' had been the direct application of human rights obligations upon companies themselves, rather than operating through the state.[23] As such, the norms were considered a radical step towards ensuring TNCs were to be held responsible for human rights abuses. With this, the Norms were seen as one of the first significant developments that moved towards the creation of legislative obligations for corporations in terms of international law.[24]

The Norms themselves highlighted the responsibilities of businesses with respect to human rights, covering issues related to employees' welfare.[25] An example of this may be the responsibilities of TNCs with respect to forced labour, child labour, health and safety, and remuneration (ensuring the standard of living for workers and their families), freedom of association and collective bargaining, all of which were covered under the paragraphs in the section on 'rights of workers'.[26]

With respect to transparency, the Norms also encapsulated disclosure obligations. Indeed, transparency consisted of a crucial part of implementing the norms. For example, General Provisions of Implementation, Part H, highlighted the role of reporting and external monitoring by independent parties.[27] In this respect, paragraph 15 stated that TNCs 'shall

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[22] UN Human Rights Norms for Corporations.

[23] For a detailed examination of this issue see Larry C Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' (2005) 37 Columbia Human Rights Law Review 287, 371-80.

[24] Sascha-Dominik Bachmann and Pini Pavel Miretski, 'The UN 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' - A Requiem' (2012) 17 Deakin Law Review 5.

[25] UN Human Rights Norms for Corporations, para 5-9.

[26] ibid.

[27] UN Human Rights Norms for Corporations, para 15.

periodically report on and take other measures fully to implement the Norms and to provide at least for the prompt implementation of the protections set forth in the Norms'.[28] According to such Norms, TNC disclosure was to be monitored and verified by the UN and other national and international bodies.[29] The Norms underlined the importance of transparency in the monitoring and the participation of stakeholders,[30] and were inclusive of a number of specific provisions with respect to information disclosure on matters such as health and safety issues.[31]

It is particularly worth mentioning that the Norms had also sought to address the issue of reparation in terms of enforcement. According to Paragraph 18, for example, TNCs were subject to provide 'reparations, restitution, compensation and rehabilitation for any damage done or property taken' in case of the breach of the Norms.[32] Accordingly, the Norms aimed to make litigations possible against the parent company for harms caused by one of its subsidiaries.[33] Therefore, the Norms aimed at solving the problem of remediation/sanctions with respect to extraterritorial regulations of corporations discussed in Chapter 5.[34]

In spite of its intended benefit, the Norms were widely criticised by states and businesses. From the states' perspective, on the one hand, the Norms were perceived as to interfere with their privileged role in protection of human rights, since the Norms would act to directly bind TNCs as liable for their human rights abuses.[35] From the business perspective,

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[28] ibid.
[29] ibid para 16.
[30] ibid.
[31] Commentary on the Norms, para 7(b).
[32] UN Human Rights Norms for Corporations, para 18.
[33] Larry C Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' (2005) 37 Columbia Human Rights Law Review 287, 336.
[34] See 5.3.2.1 above.
[35] This aspect of the Norms was opposed by some developed states. See Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' (n 33) 376.

in addition to the presence of similar reactions,[36] the main opposition had been in relation to the requirement to reparation in case of the breaches of the Norms, which would render corporations liable in terms of abuses.[37] Overall, the mandatory nature of the Norms as being directly binding upon TNCs had been critiqued harshly.[38] Although the Norms were approved by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, the UN Commission on Human Rights (the Commission) itself did not approve it. [39] The Norms were said to have had 'no legal standing'.[40]

Although the Norms, a possible strategy to regulate corporate transparency within the frame of international law, were not approved by the commission, over the past few decades, international human rights norms have successfully implemented through various soft law mechanisms. Such strategies predominantly require transparency on the part of the corporations, and play a role in the creation of international transparency regime. The remainder of the chapter shall now scrutinise these developments.

[36] In this regard, one critique was the *privatisation of human rights* through the Norms. See International Organisation of Employers (IOE) and International Chamber of Commerce (ICC), 'Joint Views of the IOE and ICC on the Draft 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (March 2004) 18 <https://business-humanrights.org/en/joint-views-of-the-ioe-icc-on-the-un-human-rights-norms-for-business#c25602> accessed 13 July 2016.
[37] Carolin F Hillemanns, 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' (2003) 4 German Law Journal 1065, 1078.
[38] UNCHR, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (22 February 2006) UN Doc. E/CN.4/2006/97, para 60.
[39] UNCHR, 'Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights' (n 18).
[40] ibid.

6.2 International Soft Law[41] Strategies

International soft law (ISL) strategies, such as non-binding guidelines, codes of conduct and best practice frameworks may be regarded as a complementary strategy to the implementation of unilateral national and international legislation. These strategies differ from the formal sources of 'international hard law' grounded in Article 38(1) of the Statute of the International Court of Justice (ICJ), and are predominantly reflective of the voluntary requirements already introduced and discussed in Chapter 4.[42]

Overall, transparency constitutes one of the most significant features of ISL strategies. Although most ISL strategies encapsulate specific provisions for disclosure, TNCs that promise to comply with these regimes are required, as a matter of course, to ensure that they act transparently, since the enforcement of ISL strategies are fundamentally based upon the notion of disclosure, reporting and the monitoring of the compliance with these regimes.[43] Essentially, dialogue between the corporations and its stakeholders, such as employees, helps to internalize the principles of ISL strategies by the corporation.[44] With this in mind, the remainder of this chapter shall focus upon the elements of transparency within ISL strategies, by drawing specific attention to the interests of employees.

The proceeding sections shall first consider inter-governmental organisations. This investigation will start from considering a relatively less global organisation, namely the

[41] 'Soft law instruments range from treaties, but which include obligations… to non-binding or voluntary and codes of conduct formulated and accepted by international regional organisations… to statements individuals in a non-governmental capacity, but which down international principles'. Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989)38 International and Comparative Law Quarterly 850, 851 (references omitted).

[42] According to Article 38(1) of the Statute of the International Court of Justice these sources are listed as; 'International conventions,' international custom,' 'the general principles of law,' 'judicial decisions and the teachings of the most highly qualified publicists of the various nations'.

[43] S Prakash Sethi, *Setting Global Standards: Guidelines for Creating Codes of Conduct in Multinational Corporations* (John Wiley & Sons 2003) 217-239.

[44] John G Ruggie, 'Trade, Sustainability and Global Governance' (2002) 27 Columbia Journal of Environmental Law 297, 304.

Organisation for Economic Co-operation and Development (OECD), through to more global initiatives, namely International Labour Organisation (ILO) and the United Nations (UN). The discussion shall aim to highlight how these organisations predominantly construct the foundation upon which other private initiatives, which are investigated here, also build their foundation for transparency.

6.2.1 Inter-governmental and Government-Initiated Organisations

6.2.1.1 The Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises

The Organisation for Economic Co-operation and Development (OECD) is a government-backed organisation that aims to 'improve the economic and social well-being of people around the world'.[45] Here the OECD published its first Guidelines for Multinational Enterprises (the Guidelines) in 1976, and has periodically reviewed these on five occasions to the present day.[46] The guidelines 'are addressed by governments to multinational enterprises operating in or from [the] adhering countries', [47] whereby they outline as voluntary recommendations on responsible corporate behaviour.

The matters related to employees, are defined in the employment and industrial relations chapter of the guidelines.[48] Here the guidance touches upon the issues such as the right of collective bargaining, establishing or joining trade unions, the abolition of forced and child labour and prevention of discrimination based upon race, colour, sex, religion, political

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[45] Organisation for Economic Co-operation and Development (OECD), 'About the OECD' <http://www.oecd.org/about/> accessed 14 July 2016.

[46] The latest update of the OECD Guidelines was in 2011. OECD, 'Guidelines for MNEs: About the OECD Guidelines for Multinational Enterprises' <http://mneguidelines.oecd.org/about/> accessed 14 July 2016.

[47] 34 member and 8 non-member governments (Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania) that adhere to the OECD Guidelines for MNEs. OECD, 'OECD Guidelines for Multinational Enterprises: Frequently Asked Questions' <http://www.oecd.org/corporate/mne/theoecdguidelinesformultinationalenterprisesfrequentlyaskedquestions.htm> accessed 13 July 2016.

[48] OECD, *OECD Guidelines for Multinational Enterprises,* (2011 edn, OECD Publishing 2011) ch V <http://dx.doi.org/10.1787/9789264115415-en> accessed 13 July 2016.

opinion, national extraction or social origin, or other status.[49] The guidelines also outline the importance of improving occupational health and safety measurements,[50] and employee training in terms of improving employee skills, wages and conditions of work.[51]

In the same chapter of the Guidelines, corporations are also expected to disclose information to employees or their representatives on issues such as 'the performance of the entity'[52] and 'dismissals'.[53] For example, according to the Guidelines, information on operational changes that may affect employees, such as information on collective layoffs, should be disclosed to employee representatives.[54]

Furthermore, in order to encourage corporations to disclose on other subjects, chapter 3 specifically focuses on the issue of disclosure.[55] In this respect, corporations in countries adhering to the OECD are expected to disclose information on their 'policies relating to matters covered by the Guidelines'.[56] Corporations should thereby disclose all material information 'regarding their activities, structure, financial situation, performance, ownership and governance' according to requirements.[57]

The governments adhering to the Guidelines play a major role in the implementation and monitoring of the Guidelines. For example, the adhering governments are expected to establish a National Contact Point (NCP), in order to monitor and implement the Guidelines.

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[49] ibid ch IV, para 1.
[50] ibid ch V, para 4(c).
[51] ibid ch V, para 5.
[52] ibid ch V, para 2(c).
[53] ibid ch V, para 6.
[54] ibid ch VI. For instance, the closure of Marks and Spencer in France, without any prior consultations with the workers, might be an important example for a breach of this provision of the guidelines. See Trade Union Advisory Committee (TUAC) to the OECD, 'TUAC Internal Analysis of the Treatment of Cases Raised with National Contact Points February 2001-2005' (TUAC, February 2005) <http://old.tuac.org/statemen/communiq/listofcasesFeb05WithAnnexes.pdf> accessed 14 July 2016.
[55] ibid ch III.
[56] ibid ch III, para 3(a).
[57] ibid ch III, para 1.

The NCPs are responsible for dealing with the complaints regarding the alleged breaches of the guidelines. However, NCPs play a 're-active' role, rather than a 'pro-active' one, since they often only address disputes related to the guidelines.[58] In this respect, the NCPs undertake a mediation process between the complainant and the company, and issue a final statement in relation to the process.[59] Finally, NCPs 'disclose the results of the procedures publicly available, taking into account the need to protect [confidential information]'.[60]

However, the Guidelines and its implementation may be critiqued as having a number of identifiable shortcomings.

The first shortcoming may be in relation to monitoring of companies who breach the guidelines. NCPs, for example, are the responsible point of contact for receiving and dealing with complaints, and are sometimes criticised for being insufficient in terms of collecting information regarding alleged or actual breaches.[61] Indeed, they are often alleged of over relying upon the information provided to them by 'under-resourced NGOs', which undoubtedly means that the information and monitoring provided is questionable with respect to credibility.[62]

Second critique may be levied at the geographical coverage of the Guidelines. The coverage of the guidelines is only limited to OECD members and a number of other adhering

[58] García-Muñoz Alhambra, Beryl ter Haar and Attila Kun, 'Independent Monitoring of Private Transnational Regulation of Labour Standards: A Proposal for a 'Transnational Labour Inspectorate' System' (2014) Labour Law Research Network Working Paper, 7 <http://www.labourlawresearch.net/sites/default/files/papers/TLI-final.pdf> accessed 13 July 2016.
[59] OECD Watch, 'The OECD Guidelines for Multinational Enterprises' <http://oecdwatch.org/oecd-guidelines> accessed 13 July 2016.
[60] OECD Guidelines, procedural guidance, s I, C 3.
[61] Patricia Feeney (ed), *Five Years On: A Review of the OECD Guidelines and National Contact Points*, (OECD Watch, Centre for Research on Multinational Corporations (SOMO) 2005) 17 <https://www.somo.nl/wp-content/uploads/2005/09/OECD-Watch-Five-Years-On.pdf> accessed 13 July 2016.
[62] ibid.

states.[63] In addition, OECD members are mostly industrialised countries[64] which are relatively more transparent than the rest of the world, particularly developing and poor countries.[65] Even though improving transparency in such developing countries is crucial, it is not possible to apply the Guidelines to TNCs based or conducting a business in non-adhering developing nations.[66] Therefore, in terms of creating a universal transparency regime, the likelihood impact of the Guidelines may be limited.

Third, the lack of transparency in the process conducted by the NCPs may also be critiqued. For instance, whilst NCPs ought to be transparent while dealing with alleged violations of the Guidelines, they are found to be insufficient and reluctant to disclose the breaches.[67] Although, in some circumstances, information related to the mediation process is intended to be confidential, the discretionary approach of NCPs in respect of disclosing information reduces its effectiveness, and so, in turn, the degree of corporate transparency offered in accordance with the guidelines.[68]

In summary, although the Guidelines may not be regarded as an international treaty, which bind corporations legally, 'they are a globally applicable standard'.[69] Accordingly, the Guidelines may be helpful to deal with some of the problems identical to a unilateral national

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[63] Martje Theuws and Mariette van Huijstee, *Corporate Responsibility Instruments: A Comparison of the OECD Guidelines, ISO 26000 & the UN Global Compact* (Centre for Research on Multinational Corporations (SOMO) 2013) 38.
[64] OECD Watch, 'OECD' <http://www.oecdwatch.org/oecd-guidelines/oecd> accessed 24 September 2016.
[65] Marie Chêne, 'What Makes New Zealand, Denmark, Finland, Sweden and Others 'Cleaner' than Most Countries?' (*Transparency International,* 7 December 2011) <http://blog.transparency.org/2011/12/07/what-makes-new-zealand-denmark-finland-sweden-and-others-%E2%80%9Ccleaner%E2%80%9D-than-most-countries/> 24 September 2016.
[66] Feeney (n 61) 11.
[67] ibid 23.
[68] Christian Schliemann, 'Procedural Rules for the Implementation of the OECD Guidelines for Multinational Enterprises-A Public International Law Perspective' (2012) 13 German Law Journal 51, 69-70.
[69] ibid 84.

transparency regime as guidelines include transparency recommendations upon which each member state government has agreed.

6.2.1.2 International Labour Organisation (ILO) and the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)

The International Labour Organisation (ILO) was established in 1919 and became a specialised UN agency in 1946.[70] The tripartite organisation, consisting of member governments, employers and employees, aims to improve labour conditions around the world.[71]

However, this section shall aim to highlight the impact of the ILO in terms of soft law developments and transparency, rather than a comprehensive analysis of the organisation. In this respect, one focus can be on the shift from hard law to soft law strategies, which is apparent within the ILO's approach. With its Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration), it has become apparent that the ILO now pays greater preference to 'soft law' strategies, in place of those conventions that require government ratification.[72]

With the above in mind, a noteworthy observation may be that the lack of consensus on international labour standards may be seen as one of the reasons that led the governing body of the International Labour Office to create the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration) in 1977.[73] The

[70] For the chronology of the ILO history, see Gerry Rodgers and others, *The International Labour Organization and the Quest for Social Justice, 1919-2009* (International Labour Organization 2009) 243-249.
[71] Constitution of the International Labour Organisation (ILO) 1919, preamble.
[72] For a broader discussion on this change see Anke Hassel, 'The Evolution of a Global Labour Governance Regime' (2008) 21 Governance: An International Journal of Policy, Administration and Institutions 231.
[73] ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (4th edn, ILO Publications 2006) 1 (hereinafter 'MNE Declaration').

last amendment to the MNE Declaration was made in 2006.[74] Although the MNE Declaration relies on the premises of the ILO Conventions and Recommendations, it exhibits a shift from the state based regulation, which requires ratification by the member states, to private governance regime.[75] Thus the declaration is based upon voluntary recommendations for governments, employers' and workers' organisations. This aspect of the MNE Declaration can be seen as more inclusive than the OECD Guidelines that are applicable only to multinational enterprises.[76]

The ILO declarations constitute significant principles for global employee interests. Member states are expected to 'respect, promote and implement' these principles, even without the ratification of the ILO conventions.[77] This might be seen as a factor in improving the interests of employees internationally. With respect to the MNE Declaration, the ILO members are expected to promote and realize the following:

> (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.[78]

The ILO does not specifically require transparency from corporations on their compliance with the MNE Declaration. However, in terms of the implanting the MNE Declaration, transparency and monitoring may play a significant role since the implementation of the MNE declaration is based upon periodic surveys and interpretation procedures, conducted by the ILO Sub-Committee on Multinational Enterprises (the Sub-

[74] ibid.
[75] Hassel (n 72) 236.
[76] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 212.
[77] Isabelle Duplessis, 'Soft Law and International Labour Law' (2006) ILO Labour Education 143-144, 43<http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@actrav/documents/publication/wcms_111442.pdf> accessed 13 July 2016.
[78] MNE Declaration, addendum II.

Committee). In this respect, the ILO survey mechanism monitors 'the effect given to the Declaration by MNEs, governments, and employers' and workers' organisations'.[79] During this procedure, the tripartite constituents ensure that information regarding the implementation of the MNE Declaration is made available to the Sub-Committee.[80] Finally, the ILO Governing body compiles, analyses, and synthesizes the information gathered during its survey, however, with respect to the final report, the names of participant corporations are not displayed.[81]

Aside from the MNE declaration, ILO plays a constructive role in improving corporate transparency. In this respect, first, the ILO discloses the information that it collects through monitoring labour standards in the developing world.[82] Second, many of the codes of conduct and guidelines created by other governmental and non-governmental initiatives address ILO standards. ILO standards constitute an important indicator of corporate disclosure. NGOs, IGOs, certification and labelling initiatives examined in this chapter are also among the examples of schemes that address the ILO requirements. For example, the United Nation Global Compact (UNGC),[83] the Fair Labour Association (FLA),[84] International Organisation for Standardisation (ISO 26000),[85] Ethical Trading Initiative (ETI)[86] touch upon the ILO standards, declarations or conventions in their frameworks. The ILO, therefore, indirectly affects the disclosure made by companies that comply with other initiatives. Some

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[79] ibid v.
[80] Clapham (n 76) 216.
[81] ibid.
[82] William A Douglas, John-Paul Ferguson and Erin Klett, 'An Effective Confluence of Forces in Support of Workers' Rights: ILO Standards, US Trade Laws, Unions, and NGOs' (2004) 26 Human Rights Quarterly 273.
[83] ILO, *The Labour Principles of the United Nations Global Compact; A Guide for Business* (ILO Publications 2008) 9.
[84] Fair Labor Association (FLA), 'Code of Conduct' <http://www.fairlabor.org/our-work/code-of-conduct> accessed 14 July 2016.
[85]International Organization for Standardization (ISO), 'ISO 26000: Guidance on Social Responsibility' (1st edn, November 2010) (hereinafter 'ISO 26000') <http://www.iso.org/iso/catalogue_detail?csnumber=42546> accessed 29 September 2016.
[86] Ethical Trading Initiative (ETI), 'ETI Base Code' <http://www.ethicaltrade.org/eti-base-code> accessed 13 July 2016.

initiatives, such as the GRI, directly require companies to consider the ILO declarations and conventions with respect to reporting on employee issues.[87] National governments also require companies to disclose information in accordance with the ILO standards.[88] Finally, self-imposed codes of practice and reports created by companies themselves also address ILO standards. According to a research, the MNE declaration led to a significant increase in the number of companies that disclosed in relation to 'workplace human rights'.[89]

Notwithstanding this, there may be some issues worthy of critique with respect to the MNE Declaration and the ILO's contribution to transparency. First are the survey procedure of the MNE Declaration. Although the ILO has reformed the survey procedure,[90] information on the implementation of the MNE declaration still remains insufficient. Indeed, the most significant shortcoming here may be regarded as the censorship of corporations' names from the final report on survey results.[91] Secondly, the ILO declaration may be criticised as being limited to the scope of national law of member states themselves. The MNE declaration specifically highlights the importance of the compliance with the national laws by stating that '[m]ultinational enterprises should take fully into account established general policy objectives of the countries in which they operate'.[92] However, this fails to take account of an international requirement. As highlighted earlier, the national law rules may be insufficient to

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[87] Global Reporting Initiative (GRI), 'Labor Practices and Decent Work' <https://g4.globalreporting.org/specific-standard-disclosures/social/labor-practices-and-decent-work/Pages/default.aspx> accessed 14 July 2016.

[88] For example, in France, the Decree requires companies to indicate 'the extent to which their subsidiaries follow ILO core conventions'. David J Doorey, 'In Defence of Transnational Domestic Labor Regulation' (2010) 42 Vanderbilt Journal of Transnational Law 953, 963.

[89] Muhammad Azizul Islam and Ken McPhail, 'Regulating for Corporate Human Rights Abuses: The Emergence of Corporate Reporting on the ILO's Human Rights Standards within the Global Garment Manufacturing and Retail Industry' (2011) 22 Critical Perspectives on Accounting 790, 798.

[90] ILO Governing Body, 'Implementation Strategy for the Follow-up Mechanism of and Promotional Activities on the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' ILO Doc GB 320/POL/10 <http://www.ilo.org/gb/GBSessions/GB320/pol/WCMS_236168/lang--en/index.htm> accessed 14 July 2016.

[91] Clapham (n 76) 216.

[92] MNE Declaration, para 10.

regulate corporations operate in developing countries.[93] Therefore, the impact of the MNE declaration may be limited in some countries. Thirdly, the lack of any complaint mechanism, similar to that of the NCPs (of the OECD guidelines) may also be seen as a weakness.[94] Finally, the MNE declaration still requires promotion. Both employers and employees need to be better informed about the MNE Declaration as it would seem many remain unaware of it.[95]

In summary, whilst the ILO is a significant organisation with respect to international labour rights, its MNE Declaration suffers from several shortcomings, and it therefore requires improvement, especially with respect to transparency and enforcement. However, it is noteworthy that the UN itself has invested hugely in controlling the impact corporations have upon employees. The following section shall analyse some of these efforts with respect to transparency.

6.2.1.3 United Nations

Section 6.1.1 has already observed some of the failures of the UN in respect of ensuring that there is an international treaty binding upon corporations. However, upon the failure of the Norms, the UN then turned its attention towards the creation of a soft law framework.[96] This section shall draw attention to the UN efforts resulted in the *Protect, Respect and Remedy Framework*, then the UN Guiding Principles on Business and Human Rights and the UN Guiding Principles Reporting Framework in which transparency plays a fundamental role.

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[93] See 5.3 above.

[94] Jernej Letnar Cernic, 'Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (2009) 6 Miskolc Journal of International Law 24, 31.

[95] ibid 32.

[96] John G Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 American Journal of International Law 819, 821.

6.2.1.3.1 'Protect, Respect and Remedy' Framework and the UN Guiding Principles on Business and Human Rights

In response to a request from the United Nations Commission on Human Rights (UNCHR),[97] in 2005 Professor John Ruggie was appointed as the Special Representative to the UN Secretary General with a focus upon the issue of business and human rights.[98] The UN Human Rights Council later accepted the 'Protect, Respect and Remedy' framework (the framework), drafted by Ruggie, in 2008.[99] In 2011, Guiding Principles on Business and Human Rights (UNGP)s, were endorsed for implementing the framework.[100]

As per the framework, the UNGPs were grounded within three pillars. The first pillar is built upon the duties of the states to protect human rights. In fact, these duties refer to obligations which states are required to comply with under international human rights law.[101] In this respect, states are expected to implement the UNGPs and encouraged to develop a National Action Plan (NAP) on business and human rights.[102] The second pillar focuses on the business responsibility to respect human rights. Accordingly, business enterprises 'should avoid infringing on the human rights of others and should address adverse human rights

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[97] United Nations Commission on Human Rights (UNCHR) was replaced by the United Nations Human Rights Council (UNHRC) in 2006. United Nations Human Rights Office of the High Commissioner, 'Welcome to the Human Rights Council; About the Human Rights Council' <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> accessed 14 July 2016.

[98] Harvard University, 'John Ruggie' <http://www.hks.harvard.edu/m-rcbg/johnruggie/> accessed 14 July 2016.

[99] UNHRC, Protect, 'Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (7 April 2008) UN Doc A/HRC/8/5.

[100] UN Office of the High Commissioner, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (2012) HR/PUB/12/02, 1 <http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf> accessed 16 July 2016.

[101] UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations ''Protect, Respect and Remedy'' Framework' (21 March 2011) UN Doc A/HRC/17/31, ch I (hereinafter 'UN Guiding Principles').

[102] UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights' (Version 1.0, December 2014) <http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf> accessed 16 July 2016.

impacts with which they are involved'.[103] The responsibilities of corporations under the second pillar may be interpreted as more detailed compared to the state obligations under the first pillar, since this pillar ensures that corporations responsibly comply with international norms as well as national jurisdictions.[104] For example, with respect to employees, corporations are expected to pay attention to the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.[105] Finally, the third pillar aims to hold states responsible by taking 'appropriate steps to investigate, punish and redress business-related human rights abuses'.[106] Access to remedies is grounded in state and non-state based remedies.

Unlike the Norms examined above,[107] the UNGPs do not bring about new international law rules. Indeed, this is expressed clearly in the introduction to the UNGPs by Ruggie. The UNGPs normative contribution may therefore be conceptualised as:

> elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.[108]

When it comes to transparency, UNGPs encapsulate many elements under each pillar. Firstly, principle 3(d) highlights the role of the states in terms of encouraging business enterprises to communicate how they address the human rights impacts.[109] Moreover, the commentary of the principle states that the business enterprises can be required through

[103] UN Guiding Principles, principle 11.
[104] Larry Catá Backer, 'Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All' (2015) 38 Fordham International Law Journal 457, 492-493.
[105] UN Guiding Principles, principle 12.
[106] UN Guiding Principles, principle 25.
[107] See 6.1.1 above.
[108] UN Guiding Principles, Introduction to the Guiding Principles, para 14.
[109] ibid principle 3.

‘policies or laws’ for communication where the operation of business constitutes ‘a significant risk to human rights’.[110]

Secondly, the second pillar of the UNGPs concentrates on business enterprises. According to principle 16, business enterprises, which embrace a ‘statement of policy’ to show their respect to human rights in accordance with the UNGPs, should make this commitment ‘publicly available and communicated internally and externally to all personnel’.[111] In this respect, such statement of policy, which is similar to the corporate voluntary statements discussed in Chapter 4, may be seen as the main means of disclosure for TNCs in accordance with the UNGPs.[112]

Thirdly, the UNGPs emphasizes the due diligence process.[113] Due diligence process, such as informing stakeholders on human rights abuses, is predominantly based upon transparency. More precisely, acting with due diligence requires companies know their human rights impact and report their performance in terms of human rights.[114] In other words, due diligence requires knowing and showing the corporation’s human rights impact.[115] Furthermore, due diligence can make a third party use the information against the corporation. As Sanders points out, in light of Ruggie’s perspective on this issue, the information disclosure may even result in litigation against the corporation.[116]

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[110] ibid commentary on principle 3.
[111] ibid principle 16.
[112] For details on self-Imposed and external statements/codes, see 4.1.2 and 4.1.3 above.
[113] ibid principle 17.
[114] UNHRC, Protect, ‘Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and human rights: further steps toward the operationalization of the “protect, respect and remedy” framework’ (9 April 2010) UN Doc A/HRC/14/27.
[115] Astrid Sanders, 'The Impact of the ‘Ruggie Framework’and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation' (2014) LSE Law, Society and Economy Working Papers 18/2014, 11 <https://www.lse.ac.uk/collections/law/wps/WPS2014-18_Sanders.pdf> 16 July 2016.
[116] ibid.

Fourthly, principle 21 of the UNGPs puts further emphasis on the importance of communication of the business impact on human rights.[117]Accordingly, such communication can be through different means such as 'in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports'.[118] In this respect, if the corporation is likely to create human rights risk, information on those risks and what the corporation does in order to reduce them is to be disclosed through formal and regular reports.[119] Nevertheless, disclosure should not pose any 'risks to affected stakeholders, personnel or the legitimate requirements of commercial confidentiality'.[120]

Although the lack of standard form of disclosure constitute a barrier to the evaluation of the information shared by companies,[121] principle 21 does not require corporations any specific type of report in disclosing information. Nonetheless, as highlighted in chapter 4, some types of reports facilitate the comparability of the information disclosure.[122]However, according to the Interpretive Guide to the UNGPs (the Guide) published by the UN, if companies use an integrated report as a strategy, this shows how well they integrate the issue of respecting rights in their businesses.[123] In addition, in order to strengthen the content and credibility of the information disclosure, corporations are expected to address independent external parties to verify their reports.[124]

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[117] Guiding Principles, principle 21.
[118] ibid commentary on principle 21.
[119] UN Office of the High Commissioner, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (n 100) question 55, 58.
[120] Guiding Principles, principle 21(c).
[121] See 4.2.3 above.
[122] For example, an integrated report may be seen as effective in this respect. Pamela Kent and Tamara Zunker, 'Attaining Legitimacy by Employee Information in Annual Reports' (2013) 26 Accounting, Auditing & Accountability Journal 1072, 1081. See also 4.2.3 above.
[123] UN Office of the High Commissioner, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (n 100) question 57, 60.
[124] Guiding Principles, commentary on principle 21.

Fifth, transparency is also underlined under the third pillar, namely access to a remedy. For example, Principle 31(e) sees transparency as one of the effectiveness criteria for non-judicial grievance mechanisms.[125] According to the principle, transparency of both states and non-state based grievance mechanisms play an important role. In light of this principle, grievance mechanisms are expected to be transparent through strategies such as disclosure of statistics and case studies.[126]

As highlighted in Chapter 4, the achievement of effective corporate transparency requires some degree of external compulsion to be levied upon the corporation.[127] In respect to the UNGPs, the first pillar, which focuses on the state duty in terms of protection of human rights, and the third pillar, which defines the role of the state in order to take 'appropriate steps' for an effective remedy in case of human rights abuses, may create some compulsion on corporations. In terms of the implementation of the UNGPs and the remediation of corporate abuses, the United Nations Working Group (UNWG)[128] expects governments to establish National Action Plans (NAP)s.[129] NAPs aim to 'develop mechanisms for monitoring, assessing and transparency of national goals and efforts' in terms of implementation of the UNGPs.[130] Therefore, the role of the governments within the UNGPs is crucial for their

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[125] ibid principle 31(e).

[126] ibid commentary on principle 31(e).

[127] Such compulsion, for example, may be imposed by national governments. See generally chapter 4.

[128] UN Human Rights Council decided 'to establish a Working Group on the issue of human rights and transnational corporations and other business enterprises, consisting of five independent experts, of balanced geographical representation, for a period of three years'. UNHRC Res 17/4 (2011) A/HRC/RES/17/4, para 6.

[129] United Nations General Assembly (UNGA), Note by the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises (5 August 2014) UN Doc A/69/263, introduction, para 2 <http://www.ohchr.org/Documents/Issues/SRMigrants/ConsultationRecruitment/NationalActionPlansOnBusinessAndHR.pdf> accessed 16 July 20016.

[130] Backer, 'Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All' (n 104) 471.

implementation. From this perspective, through the UNGPs, governments may create some level of compulsion on corporations for disclosure.[131]

With respect to the implementation of the UNGPs, some governments have already started to improve reporting requirements, in accordance with the GPs. In the UK, for example, the Strategic Report and Directors' Report Regulations 2013 and the Modern Slavery Act 2015 can be seen as the reaction of the UK government to the implementation of UNGPs.[132]

In spite of several benefits, one cannot deny that the UNGPs also possess some weaknesses. Such weaknesses have attracted some criticism from NGOs, such as the Human Rights Watch and Amnesty International.[133] The primary focus of such criticism has been proportionately, based upon the insufficient extraterritorial legal obligations under the UNGPs.[134]

There is no doubt that the UNGPs are grounded in non-binding recommendations for corporations. The UNGPs lean towards lenient language. For instance, the word *responsibility* is preferred to the more strongly worded *obligations*. According to the UNGPs, companies

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[131] For example, they may even play a role in 'hardening corporate responsibility through law, especially regarding due diligence and disclosure'. ibid 490.

[132] John G Ruggie and John F Sherman, 'Adding Human Rights Punch to the New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice' (2015) Journal of International Dispute Settlement 1, 3.

[133] Human Rights Watch (HRW), 'UN Human Rights Council: Weak Stance on Business Standards, Global Rules Needed, Not Just Guidance' (16 June 2011) <http://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards> accessed 16 July 2016; Amnesty International (AI), 'United Nations: A Call for Action to Better Protect the Rights of Those Affected by Business-Related Human Rights Abuses' (14 June 2011) <https://www.amnesty.org/download/Documents/32000/ior400092011en.pdf> accessed 16 July 2016. In fact, along with the HRW and AI, several other NGOs pointed out the weaknesses of the UNGPs even when it was a draft document. See Joint Civil Society Statement, 'Advancing the Global Business and Human Rights Agenda: Follow-up to the Work of the Special Representative of the Secretary-General' (SRSG) on Human Rights and Transnational Corporations and other Business Enterprises (May 2011) <http://www.cesr.org/downloads/Joint-civil-society-statement-on-business-and-human-rights-May-2011_1.pdf> accessed 16 July 2016.

[134] Amnesty International (n 133) 2.

are seen as entities, which should be 'responsible to respect' human rights.[135] Some NGOs also criticised the 'soft law' feature of the UNGPs, as these would appear weaker than the Norms, which were binding upon corporations directly.[136]

Similarly, another critique that may be offered is related to the implementation of the UNGPs. Although GPs consider different stakeholders, individual nation states are still the most significant authority in the 'human rights system' of the UNGPs.[137] Therefore, similar shortcomings identified in the last chapter, such as the insufficient capacity of some developing host states, may also be viewed as problematic with respect to the implementation of guiding principles.[138]

Although the UNGPs are criticised for not being internationally binding, they present a framework based upon international norms and social expectations that go beyond the law.[139] Therefore, in accordance with UNGPs, companies are not only expected to comply with the laws where they operate, but also to respect international norms, such as human rights, no matter where they operate.[140] Indeed, here one may even argue that the work conducted by the UN may play a role in creation of '…a more binding legal requirement on corporations to respect human rights norms…'in future.[141] Hence, UNGP may 'mark the end of the beginning: by establishing a common global platform for action, on which cumulative

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135 Guiding Principles, principle 11.
136 HRW (n 133).
137 Backer, 'Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All' (n 104) 469.
138 For the limits of national control of corporations see 5.3 above.
139 Backer, 'Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All' (n 104) 493.
140 ibid.
141 Robert C Blitt, 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance' (2012) 48 Texas International Law Journal 33, 57.

progress can be built, step-by-step, without foreclosing any other promising longer-term developments'.[142]

Whereas the GPs comprise broad transparency requirements, the UN also recently published the UN Guiding Principles Reporting Framework.[143] As the following section has examined, the reporting framework constitutes a more specific tool on transparency in relation to the interests of employees.

UN Guiding Principles Reporting Framework

The UNGP Reporting Framework (the reporting framework) was developed through a process called the Human Rights Reporting and Assurance Frameworks Initiative (RAFI).[144] The reporting framework details information requirements with respect to the UN Guiding Principles by asking companies a series of questions. In order to subscribe to the reporting framework companies were expected to meet a minimum threshold of information, in response to the requirements and questions outlined.[145]

As argued in the previous sections, companies were expected to disseminate a substantial amount of information in relation to human rights, which was in accordance with the UNGPs. Whilst the reporting framework is based upon a general point of view with respect to this kind of disclosure, the implementation guidance to the reporting framework (the implementation guidance) aids this process by elaborating the principles outlined.

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[142] UN Guiding Principles, Introduction to the Guiding Principles, para 13.

[143] Shift and Mazar, 'UN Guiding Principles Reporting Framework with Implementation Guidance' (2015) <http://www.ungpreporting.org/reporting-framework/> accessed 16 July 2016 (hereinafter 'UNGP Reporting Framework').

[144] ibid 2.

[145] ibid 7.

The reporting framework itself consists of three parts, namely A, B and C. Within part A, the 'governance of respect for human rights' is observed.[146] In this respect, the importance of what commitment is made by the company, such as whether the company has a code of conduct or any other written statement to respect human rights is highlighted.[147] Companies are expected to be transparent on these policy commitments, which resembles to Self-Imposed Codes of Practice (SICP) analysed in chapter 4.[148] Accordingly, in part A1.1, issues such as how the statement of the company is developed, and which stakeholders play a role in the creation of the commitment are discussed as important elements.[149] Part A.1.2 expects companies to disclose what human rights matters they address within their commitments.[150] Then in A1.3, it is asked how the company disseminates its human rights commitments to different actors, such as suppliers, who are then expected to implement such commitments within their business practises.[151]

Part A2 asks how 'the company demonstrate[s] the importance it attaches to the implementation of its human rights commitment[.]'[152] In this respect, part A2 pays attention to how a company informs relevant stakeholders, such as employees and other individuals who work for the company.[153] More specifically, A.2.3, clarifies the importance of informing employees with respect to the implementation of human rights issues. Although A.2.3 would seem to be similar to the idea of ensuring employees are made aware of the policy

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146 UNGP Reporting Framework, part A, 27-48.
147 ibid part A1, 28.
148 See 4.1.2 above.
149 ibid part A1.1, 30-31.
150 ibid part A1.2, 31-32.
151 ibid part A1.3, 33.
152 ibid part A2, 35.
153 ibid part A2.3, 40-41.

commitment of the company mentioned A1, it rather aims to ensure employees, including senior management, are acting in accordance with human rights laws.[154]

Part B**,** on the other hand, draws attention to the main focus of what corporate reporting should be. In this respect, it underlines ‘salient human rights issues’ as crucial feature to reporting.[155] Indeed, the reporting framework uses the term of ‘salient’, instead of ‘material’ when it comes to the conceptualising information which corporations are expected disclose. The concept of ‘materiality’ refers to the choice of audience or goal.[156] For instance, information that may lead to profit maximisation can be seen as material information for shareholders.[157] Therefore, by using the concept of ‘salience’ human rights, the reporting framework refers to ‘those human rights that are at risk of the most severe negative impact through its activities or business relationships’.[158] Furthermore, part B1 specifically addresses that a company should comprehensively consider both ‘*direct* and *indirect employees*’,[159] such as ‘the company’s own employees and contract workers’ who may be affected by the company in terms of identifying salient human rights issues.[160] Therefore, the reporting framework does not ignore one of the difficult issues in improving the behaviour of the corporation towards employees in foreign countries, namely ‘*indirect employees*’.[161]

Part C places further emphasis upon the importance of clarifying the company policies on salient human rights issues and their management. However, unlike part A, which highlights general human rights issues, part C draws attention to specific policies on more

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[154] ibid part A2.3,41.
[155] ibid part B, 47-55.
[156]Shift and Mazars, ‘Salient Human Rights Issues’ <http://www.ungpreporting.org/key-concepts/salient-human-rights-issues/> accessed 17 July 2016.
[157] ibid.
[158] UNGP Reporting Framework, part B1, 48.
[159] For the explanation of ‘*direct* and *indirect employees*’ see 4.1.4.1 above.
[160] UNGP Reporting Framework, part B1, 49.
[161] As has examined in chapter 5, regulating corporate activities in developing host countries through a unilateral/national transparency has some limitations. See 5.3 above.

salient human rights matters that company can have in place, and lists some significant sub-principles that companies are required to consider. In this respect, part C1.1 highlights the communication of the implementation process of salient human rights policies by asking how the company communicates human rights issues to people who implement such policies.[162]Therefore, this part pays attention to the internal communication and internalisation of the company's policy as it specifically highlights that 'a policy related to the right to non-discrimination [may have] different implications' in accordance to those responsible for implementing it.[163] Indeed, in this respect it is also underlined that the implication of such policies may differentiate according to the person 'who recruits employees, someone who allocates contracts to local suppliers in an ethnically diverse region, and someone who handles disciplinary matters'.[164]

In part C2, the issue of stakeholder engagement in terms of reporting is discussed.[165] For example, in order to ensure the reader is informed of issues relating to engagement, the reporting framework asks how the company consider the views of different stakeholders in terms of its decisions.[166] Third, part C3 places emphasis on how the company may provide an assessment of its impacts upon salient human rights issues, and considers changes that happen relate to these issues during the reporting period.[167] Fourth, part C4 asks how the company integrates its findings about salient human rights issues in its decision-making processes.[168] Fifth, part C5 asks how the company knows whether its efforts are successful in reducing salient human rights risks.[169] And lastly, part C6 asks how the company enables a remedy for

[162] ibid part C1.1, 58.
[163] ibid.
[164] ibid.
[165] ibid part C2, 59.
[166] ibid.
[167] ibid part C3, 66.
[168] ibid part C4, 72.
[169] ibid part C5, 81.

victims harmed by their actions and decisions.[170] All of these overarching questions, and some other supporting questions under these headings are asked companies in order to help disclose necessary information in accordance with the UNGPs.[171]

In spite of the fact that, a company may indeed answer all the questions, and comply with all the requirements outlined, there would still appear a need for an assurance mechanism to verify the information disclosed by companies, in accordance with the reporting framework. For this purpose, the UN is expected to publish an assurance framework, as another RAFI Project, in 2016.[172]

In summary, the reporting framework may be seen as a strategy helping companies to address matters in relation to the human rights of employees through transparency. In this respect, it urges companies to ensure employees (and other stakeholders) are informed and consulted on issues that may affect their interests. Therefore, it touches upon the issue of dialogue between the company and the stakeholders, one of the significant elements in transparency.[173] The reporting framework further aims to enable companies to see their progress and receive feedback from employees and other stakeholders. The reporting framework therefore offers a potential solution to one of the shortcomings within the national transparency regime examined in Chapter 5.[174]

Moreover, the reporting framework does not limit transparency obligations to a particular national jurisdiction. As discussed above, part B of the framework, recommends companies to act transparently on issues affecting both '*direct and indirect employees* (such

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[170] ibid part C6, 86.
[171] ibid 6.
[172] ibid 2.
[173] Dialogue between the discloser and the information recipient plays a key role in an effective disclosure. See 3.1.4 above.
[174] See 5.1.2.3.4 above.

as contract workers in company's supply chains)'.[175] As argued within the previous chapter, one of the evident weaknesses of the national transparency regime had been its limit to improve the interests of employees beyond the national jurisdiction.[176] However, the reporting framework is more international, if not global, in its outlook and use.

Furthermore, corporate transparency in international arena is also influenced by hybrid and private multi-stakeholder initiatives. Many of these initiatives align their work with the organisations examined above. The remainder of the chapter shall therefore consider these initiatives.

6.2.2 Hybrid Organisations

6.2.2.1 United Nations Global Compact

The United Nations Global Compact (UNGC) was launched in 2000.[177] The organisation is built upon ten principles related to human rights, labour standards, the environment and anti-corruption.[178] The UNGC is a forum which focuses on the exchange of experiences.[179]

For this purpose, the UNGC recommends signatory companies to respect its Ten Principles.[180] Principles comprise four main issues; Human rights, Labour, Environment and Anti-corruption. The principles between 3 and 6, which address employee related issues, are grounded in the constitution of the International Labour Organisation (ILO). In light of these

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[175] UNGP Reporting Framework, part B1, 49.
[176] See 5.3 above.
[177] United Nations Global Compact (UNGC), 'Corporate Sustainability in the World Economy' <https://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf> accessed 16 July 2016.
[178] ibid.
[179] UNGC, 'After the Signature: A Guide to Engagement in the United Nations Global Compact' (2012) 7 <https://www.unglobalcompact.org/docs/news_events/8.1/after_the_signature.pdf > accessed 16 July 2016.
[180] UNGC, 'The Ten Principles' principle 3 <https://www.unglobalcompact.org/what-is-gc/mission/principles> accessed 17 July 2016.

principles, corporations should ‘uphold the freedom of association and the effective recognition of the right to collective bargaining,’[181] strive to eliminate all forms of ‘forced and compulsory labour’,[182] work to abolish ‘child labour’[183] and avoid ‘discrimination in respect of employment and occupation’.[184]

Although the UNGC’s Ten Principles do not encapsulate any specific requirement for disclosure, in accordance with the Communication on Progress (COP) policy, signatory companies are expected to disclose their performance with regard to implementation of the principles.[185] The COP may therefore appear as a reporting scheme. This disclosure is also published on the website of the UNGC. Thus, one may assert that the UNGC uses self-disclosure and shaming as a pressure mechanism to urge companies to act in accordance with the Ten Principles.[186]

With the above in mind, the UNGC provides companies with self-assessment questions. The questions, which stem from UNGC principles, leave signatory companies to assess their own performance with regard to the principles outlined in the COPs.[187] Whereupon the signatory company fails to submit its COP, then can change its status. In this respect, the company is then given ‘a one-time, 12-month ‘Learner’ grace period during which to then submit a new COP that meets all requirements’.[188] If the company fails again, then ‘it will be expelled from the Global Compact’.[189] To illustrate the regulation carried out,

[181] ibid principle 3.
[182] ibid principle 4.
[183] ibid principle 5.
[184] ibid principle 6.
[185] UNGC, ‘UN Global Compact Policy on Communicating Progress’ (Updated 1 March 2013) 1 <https://www.unglobalcompact.org/docs/communication_on_progress/COP_Policy.pdf> accessed 18 July 2016. (hereinafter ‘COP Policy’)
[186] Tracey Janes, 'Teaching Private Governance: A Critical Analysis of the UN Global Compact' (PhD thesis, University of British Columbia 2006) 41.
[187] COP Policy, 1.
[188] COP Policy, 2.
[189] ibid 3.

657 companies were delisted by the UNGC due to the failure of communicating progress in 2014.[190]

Indeed, companies that have signed up to the UNGC are expected to publish an annual report including 'a statement by the chief executive expressing continued support for the Global Compact', the activities that company has fulfilled in respect to the issues on human rights, labour, environment, anti-corruption and 'a measurement of outcomes'.[191] At this point, it is crucial to highlight that the UNGC uses the *comply or explain approach*.[192] Therefore, when companies do not disclose the relevant policies with respect to implementation of the UNGC principles, they are required to explain why.[193]

Notwithstanding these features, the UNGC may be critiqued from a number of perspectives:

The first critique may be made of the lack of enforcement mechanism, as it only addresses disclosure for the improvement of behaviour within signatory corporations. Moreover, the recommendations of the UNGC are not legally enforceable. According to some non-governmental organisations, the GC may only be a tool for corporations 'to *bluewash*[194] their public image'.[195] The lack of any concrete enforcement mechanism may be one factor that makes the UNGC seem a mere marketing strategy.

The second critique may be made of the self-reporting disclosure strategy of the

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[190] UNGC, 'UN Global Compact Expels 657 Companies in 2014' (14 January 2015) <https://www.unglobalcompact.org/news/1621-01-14-2015> accessed 18 July 2016).
[191] COP Policy, 1.
[192] For details on the comply or explain approach see 4.2.3 above.
[193] COP Policy, COP Minimum Requirements, 1 b, 1.
[194] 'The term bluewash(ing) has been used to criticize the corporate partnerships formed under the United Nations Global Compact initiative…' New York Times, Bluewashing (Schott's Vocab: A Miscellany of Modern Words and Phrases 4 February 2010) <http://schott.blogs.nytimes.com/2010/02/04/bluewashing/> accessed 15 September 2016.
[195] Letter from Upendra Baxi and others to Kofi Annan, UN Secretary-General (20 July 2000) <http://www.corpwatch.org/article.php?id=961> accessed 17 July 2016 (emphasis added).

UNGC. According to the COP policy, companies are expected to complete this for the purposes of self-assessment.[196] However, COPs do not specifically state the criteria that show the success of companies. Moreover, even if corporations disclose sufficient information, the UNGC does not have a verification or monitoring mechanism in order so it may verify the information. [197]

The third critique may concern the technique used by the UNGC, which focuses upon learning and a dialogue process for improving the behaviour of corporations. This technique sees a 'lack of proper governance' or 'lack of knowledge about good business practices' as a factor playing a role in corporate misbehaviour.[198] However, as the work of Oshionebo points out, such factors may not be the main reasons, as some corporations behave well in developed countries, they do not show the same performance in developing countries.[199] From this perspective, whilst a corporation may be transparent with respect to its activities in some parts of the world, it may be vague about activities carried out in others. This paradox may mean that it is necessary to use techniques that are more robust than a mere learning process.

The fourth critique of the UNGC may relate to the number and the country of its participants. Although the number of participants play a role in terms of the effectiveness and legitimacy of the initiative, some have highlighted how small number of large North American corporations have joined the UNGC.[200] Indeed, when considered from the perspective of low participation from the developing world, this constitutes yet another problematic aspect to the UNGC approach in terms of legitimacy.[201]

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[196] COP Policy, 1.
[197] Evaristus Oshionebo, 'The UN Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities' (2007) 19 Florida Journal of International Law 1, 22-23.
[198] ibid 20.
[199] ibid.
[200] ibid 25-26.
[201] ibid

A fifth concern may be in relation to the content of the Ten Principles of the UNGC. In this respect, the broad language of the principles of the UNGC may be considered as a weakness.[202] One can argue that it may 'make it harder to pin down whether a breach has occurred'.[203] Yet, one can claim that the principles with regard to employee issues may be identified as 'less ambiguous' than the other principles of the Compact.[204]

Finally, although stakeholder engagement plays a crucial role in terms of improving the effectiveness of transparency, neither the UNGC principles nor the COP Policy touches upon the issue of stakeholder engagement such as consultation with workers.[205]

In summary, although the initiative would appear to suffer from some shortcomings, the UNGC symbolises one of the hybrid organisations that aims to make TNCs adhere with universal principles through transparency.[206] To this end, UNGC is the most referenced initiative among 200 large enterprises from ten European countries.[207] In terms of transparency, although the COP may appear a weak instrument in making corporations transparent, it helps civil society to scrutinise member corporations.[208] Lastly, it is important to point out that the UNGC ensures TNCs become involve partnerships with states. Therefore,

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[202] Caroline Rees, 'Grievance Mechanisms for Business and Human Rights: Strengths, Weaknesses and Gaps' (2008) Corporate Social Responsibility Initiative Working Paper 40, 11 <https://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_40_Strengths_Weaknesses_Gaps.pdf> accessed 15 July 2016.
[203] ibid.
[204] Nina Seppala, 'Business and the International Human Rights Regime: A Comparison of UN Initiatives' (2009) 87 Journal of Business Ethics 401, 404.
[205] For the role of consultation (dialogue) in effective transparency, see 3.1.4 above.
[206] UNGC, 'Corporate Sustainability in the World Economy' (n 177) 2.
[207] Caroline Schimanski, 'An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles' (European Commission Directorate-General for Enterprise and Industry March 2013) 6 <https://business-humanrights.org/en/pdf-an-analysis-of-policy-references-made-by-large-eu-companies-to-internationally-recognised-csr-guidelines-and-principles> accessed 15 July 2016.
[208] Oshionebo (n 197) 30.

although corporations are not conceptualised as the subjects of the international law from traditional perspective, the UNGC constitute a likely change in this direction.[209]

6.2.2.2 International Organisation for Standardization and ISO 26000 (International Standard for Social Responsibility)

In 2010, the International Organisation for Standardization (ISO), known worldwide as an important institute in relation to certification schemes, released a corporate social responsibility tool called ISO 26000.

ISO 26000 highlights 7 core subjects, and labour practices constitute one of the core subjects.[210] In keeping with this, employee interests are highlighted under the subject of human rights. In terms of fundamental principles and rights at work, ISO 26000 addresses ILO standards as a primary reference.[211] Accordingly, actions and expectations related to human rights of employees, such as 'freedom of association and effective recognition of the right to collective bargaining', 'the elimination of all forms of forced or compulsory labour', 'the effective abolition of child labour', and 'the elimination of discrimination regarding employment and occupation' are all discussed.[212]

In respect of transparency, ISO 26000 may not be seen as an entirely comprehensive tool, although it does touch upon the issue of transparency in a particular sub-clause.[213] Accordingly, 'an organisation should be transparent in its decisions and activities that impact on society and the environment'.[214] Indeed, sub-clause 7.5 provides further information on how corporation can disclose and communicate on matters such as social responsibility.[215] In

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[209] ibid.
[210] ISO 26000, cl 6.4.
[211] ISO 26000, fns 49-117.
[212] ISO 26000, cl 6.3.10.3.
[213] ibid cl 4.3.
[214] ibid cl 4.3.
[215] ibid cl 7.5.

this respect, ISO 26000 clarifies the role of communication,[216] characteristics of information,[217] and strategies that can be used for communication[218] and the importance of stakeholder dialogue.[219] This clarification provides a general idea for companies as to what elements they must to consider for transparency. Here, ISO 26000 underlines the importance of the review of company progress and monitoring in terms of social responsibility.[220] Finally, ISO 26000 refers to other voluntary initiatives, and includes a table showing the similarities between ISO 26000 and other initiatives such as United Nations Global Compact (UNGC), Ethical Trading Initiative (ETI), Global Reporting Imitative (GRI) etc.[221]

Whilst ISO 26000 offers helpful guidance to companies, it may also be critiqued with respect to some shortcomings. First, ISO 26000 does not play a certification role. Instead it acts as mere guidance for corporate social responsibility.[222] This non-certifiable character of ISO 26000 makes it less attractive to corporations because certification plays a role in the business case for companies.[223] ISO 26000 cannot even be used as a tool for market reputation by companies. Secondly, ISO 26000 lacks monitoring mechanisms. Although some other initiatives examined in this chapter have the same deficiency, ISO 26000 would appear inferior to other models, since it does not contain a self-reporting mechanism. Third, ISO 26000 does not have a complaint mechanism. As a result, it is even possible to file a complaint regarding a corporation, which does not comply with the guidance. Fourth,

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[216] ibid cl 7.5.1.
[217] According to ISO 26000 cl 7.5.2, the information disclosure needs to be complete, understandable, responsive to stakeholder interests, accurate, balanced, timely, and accessible.
[218] eg 'public events, forums, reports, newsletters, magazines, posters, advertising, letters, voicemail, live performance, video, websites, podcasts (website audio broadcast), blogs (website discussion forums), product inserts and labels'. ISO 26000 cl 7.5.3.
[219] ISO 26000, cl 7.5.4.
[220] ISO 26000, cl 7.7.
[221] ISO 26000, annex A, table A.1 and table A.2.
[222] ISO, 'It's Crystal Clear. No Certification to ISO 26000 Guidance Standard on Social Responsibility' (30 November 2010) <http://www.iso.org/iso/home/news_index/news_archive/news.htm?refid=Ref1378> accessed 15 July 2016.
[223] Adrian Henriques, *Standards for Change?: ISO 26000 and Sustainable Development* (International Institute for Environment and Development 2012) 4.

companies have to pay in order to download a copy of ISO 26000.[224] This may be seen as another disadvantage of ISO 26000 compared to other guidance instruments.[225]

In conclusion, ISO 26000 cannot be viewed as a sufficient framework for ensuring corporations act transparently due to the lack of monitoring and implementation mechanisms. The scheme merely directs companies with broad guidance on how to treat employees – and other stakeholders. Although ISO 26000 provides more detailed guidance to companies on Corporate Social Responsibility, it does not even possess a disclosure mechanism based upon corporate self-assessment, as the UNGC does.[226]

Indeed, in addition to hybrid initiatives, some private international initiatives may play a role in ensuring corporations act transparently. The next section shall therefore analyse these initiatives.

6.2.3 Non-Governmental Initiatives

In this section, two different types initiatives shall be analysed as playing a role in terms of transparency. Firstly, the Global Reporting Initiative (GRI) shall be considered as a pure reporting initiative. Secondly, we shall then turn our attention to certification and accreditation initiatives. In this respect, Social Accountability International (SAI) as a certification initiative, Fair Labor Association (FLA) and Ethical Trading Initiative (ETI) as assurance organisations shall be investigated.

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[224] Andrew Johnston, 'ISO 26000: Guiding Companies to Sustainability through Social Responsibility?' (2012) 9(2) European Company Law 111, 115.
[225] ibid.
[226] For details on the self-reporting disclosure strategy of the UNGC see 6.2.2.1 above.

6.2.3.1 Reporting Initiatives: Global Reporting Initiative (GRI)

Global Reporting Initiative (GRI) was initiated by the Coalition for Environmentally Responsible Economies (CERES) and the United Nations Environment Program (UNEP).[227] Creating a system of non-financial reporting, complimentary to financial reporting, had been one of the main aims of the GRI.[228] Today, the initiative is the most significant international framework for corporate reporting. The GRI framework is used by more than 11,000 companies in terms of reporting.[229]

The latest GRI reporting framework is the G4.[230] Table 6.1 displays what kind of information should be included in disclosures in relation to employee issues in accordance with the GRI G4 reporting guideline. In addition to such reporting requirements, the GRI also provides Sector Supplements.[231] These supplements highlight more specific issues in relation to different sectors, which are not encapsulated in the general framework.

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[227] Global Reporting Initiative (GRI), 'GRI's History' <https://www.globalreporting.org/information/about-gri/what-is-GRI/Pages/default.aspx> accessed 15 July 2016.

[228] Dara O'Rourke, 'Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring' (2003) 31 Policy Studies Journal 1, 18.

[229] Ben Tuxworth, 'Global Reporting Initiative: A New Framework?' *The Guardian* (22 February 2013) <https://www.theguardian.com/sustainable-business/global-reporting-initiative-updates> accessed 10 August 2016.

[230] GRI, 'The GRI G4 Sustainability Reporting Guidelines' (GRI 2013) s 4.2 <https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf> accessed 15 July 2016 (hereinafter 'GRI G4').

[231] These sectors are 'Airport Operators, Food Processing, Construction and Real Estate, Media, Electric Utilities, Mining and Metal, Event Organizers, NGO, Financial Services, Oil and Gas'. GRI, 'G4 Sector Disclosures' <https://www.globalreporting.org/reporting/sector-guidance/sectorguidanceG4/Pages/default.aspx> accessed 15 July 2016.

Table 6.1
GRI G4 Sustainability Reporting Guidelines[232]

- **Employment labour/management relations**
- **Occupational health and safety such as rates of accidents, occupational diseases, and deaths**
- **Training and education such as total hours of employee training and development programs**
- **Diversity and equal opportunity**
- **Equal remuneration for women and men**
- **Supplier assessment for labour practices**
- **Labour practices grievance mechanisms**
- **Freedom of association and collective bargaining**
- **Forced or compulsory labour**
- **Child labour**
- **Working hours and overtime worked**
- **Age and sex of workers**

The GRI is utilised to highlight some of the principles in terms of the quality of the information disclosed by corporations.[233] In doing so, it attempts to underline the importance of the comparability, accuracy, timeliness, clarity, reliability of information.[234] Moreover, another principle, balanced reporting, places the spotlights upon the necessity of unbiased disclosing, both positively and negatively, the company's performance.[235] However, although the GRI recommends companies to disclose unbiased information through balanced reporting, it does not specifically detail what the negative aspect is. [236]

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[232] Table 6.1 is derived from the GRI's G4 Sustainability Reporting Guidelines, see GRI G4.
[233] GRI G4, s 4.2.
[234] ibid.
[235] ibid.
[236] Rüdiger Hahn and Regina Lülfs, 'Legitimizing Negative Aspects in GRI-Oriented Sustainability Reporting: A Qualitative Analysis of Corporate Disclosure Strategies' (2014) 123 Journal of Business Ethics 401, 403-404.

The disclosure framework of the GRI (G4) provides references to internationally accepted standards.[237] For example, the GRI helps corporations to disclose information in accordance to the requirements under standards such as the OECD Guidelines for Multinational Enterprises and the United Nations Global Compact Principles.[238] Yet, the initiative differs from other principle-based frameworks since it provides specific guidance on the process of the 'measurement, communication and assurance' of sustainable reporting.[239] The GRI predominantly focuses upon guiding corporations in respect to disclosing what it is they are doing. Therefore, it differs from other guidelines, such as ISO 26000, which merely suggest guidance on how companies can integrate social issues.[240] In contrast to other soft law frameworks examined in this chapter, the GRI constitutes more detailed and specific transparency framework. The GRI, for instance, specifically emphasises the issue of 'materiality' in the content of report.[241]

The G4 framework does not focus upon specific companies that operate in a particular region. In addition to companies in developed European countries, companies in developing countries also adopt the GRI standards.[242] This point is significant since the narrow geographical coverage was one of the limitations of national transparency schemes argued in Chapter 5.[243] For example, Asian countries have the second highest rate, when it comes to the international adoption of the GRI frameworks. China, which as country is criticised frequently with respect to indecent employee conditions, leads among Asian countries.[244] Doubtless, the number of companies using non-financial reporting schemes by the GRI does

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[237] See GRI G4, ss 6.6-6.8.
[238] GRI G4, s 6.8.
[239] Frederic Marimon and others, 'The Worldwide Diffusion of the Global Reporting Initiative: What is the Point?' (2012) 33 Journal of Cleaner Production 132, 135.
[240] ibid 133.
[241] GRI G4, s 4.1.
[242] Marimon and others (n 239) 140-141..
[243] See 5.3 above.
[244] ibid 141.

not mean that the GRI frameworks change the behaviour of the companies.[245] It would also seem that the number of GRI adopting companies is proportional when compared to the 'the total number of businesses operating' globally in order so it may deemed affectual.[246] However, increasing the number of companies adopting the GRI might still be an emerging step in improving transparency of supply chains globally.

GRI may be criticised from various perspectives. Firstly, the GRI does not require any external or independent monitoring or verification. This may be the most significant shortcoming of the initiative. Secondly, the GRI is not a management tool. One might see this as a weakness of the initiative.[247] Thirdly, overall, critique may be levied at the latest G4 framework. The reporting principle known as 'sustainability context'[248] is not included in G4 framework. One can argue that without considering that principle (sustainability context) the latest GRI framework fails to make companies sufficiently transparent.[249] Finally, one can also see the large number of indicators within the GRI guidelines as disadvantageous, which

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245 Even if there is an increase in the number of companies using the GRI framework, this may not mean the GRI framework changes the behaviour of the company. Barkemeyer and others highlight these limitations and ineffectiveness of the GRI in changing the behaviour of the companies. See Ralf Barkemeyer, Lutz Preuss and Lindsay Lee, 'On the Effectiveness of Private Transnational Governance Regimes—Evaluating Corporate Sustainability Reporting According to the Global Reporting Initiative' (2015) 50 Journal of World Business 312

246 Rodrigo Lozano and Don Huisingh, 'Inter-linking Issues and Dimensions in Sustainability Reporting' (2011) 19 Journal of Cleaner Production 99, 100.

247 Ran Goel, 'Guide to Instruments of Corporate Responsibility: An Overview of 16 Key Tools for Labour Fund Trustees' (2005) Schulich School of Business, Pensions at Work University-Union Research Alliance Project, 33-34 <http://www.coc-runder-tisch.de/news/news_mai2006/guide_to_instruments_of_corporate_responsibility.pdf> accessed 15 July 2016.

248 This term 'refers to the combination of circumstances that determines what the norms, standards or thresholds for sustainability performance should be when attempting to judge whether or not an organization's activities are sustainable'. Center for Sustainable Organizations, 'Sustainability Context–What Is It?' (2014) <http://www.sustainableorganizations.org/Susty%20Context%20-%20What%20Is%20It.pdf> accessed 18 July 2016.

249 Mark McElroy, 'Has the GRI Consigned Itself to Irrelevance?' (GreenBiz 22 May 2013) <https://www.greenbiz.com/blog/2013/05/22/has-gri-consigned-itself-irrelevance> accessed 18 July 2016.

would seem to make ‘comparison and benchmarking’ more complicated, and information collection more costly. [250]

In short, although the GRI has some shortcomings, it remains to constitute a global reporting framework for both companies and governments. Yet, as examined above, the GRI is not a management tool and disclosure in accordance with the GRI framework still suffers from the lack of assurance. The next section will focus upon initiatives that can be used as a management tool and provide assurances with respect to information regarding employee interests.

6.2.3.2 Assurance: Certification and Accreditation Initiatives

Within the following paragraphs, three different multi-stakeholder organisations, namely Social Accountability International (SAI), Fair Labor Association (FLA) and Ethical Trading Initiative (ETI) will be investigated by drawing attention to their role in monitoring and assurance of corporate transparency.

6.2.3.2.1 Social Accountability International and SA8000

Social Accountability International (SAI) is a non-governmental multi-stakeholder organisation aiming at improving international working conditions. The initiative helps companies in terms of training and provide them technical assistance programs for protection of the integrity of workers.[251]

For this end, the SIA provide companies with a voluntary and auditable social certification standard called SA8000. Such standard is grounded in ‘the UN Declaration of Human Rights, conventions of the ILO, international human rights norms and national labour

[250] Lozano and Huisingh (n 246) 101.
[251] Social Accountability International (SAI), ‘About SIA’ (2015) <http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=472> accessed 18 July 2016.

laws'.[252] The focus of the SA8000 comprises of issues such as child, forced or compulsory labour, health and safety, freedom of association and right to collective bargaining, discrimination, disciplinary practices, working hours and remuneration etc. In some developing countries, free trade unions are banned or restricted by the government under the law.[253] In this respect, SA8000 states that 'the [company] shall allow workers to freely elect their own representatives'.[254]

As stated above, SA8000 is a certification tool for the facilities (such as factories) of the corporation rather than the whole corporation. Hence, a facility seeking certification may apply to the certification body (CB) accredited by the Social Accountability Accreditation Services (SAAS). The CB then audits the compliance of the factory with the SA8000 requirements.[255] Facilities may take correction actions under the control of the audits for a SA8000 certificate. Certification is valid only for three years, and the facility may be suspended from using its certification if it violates the SA8000 requirements.[256]

A Social Performance Team (SPT), made up of the balanced number of representatives from workers and the management, is responsible for the implementation of the SA8000.[257] Such representation may be seen as an important to enable workers to influence the implementation process of the standard since the SPT conducts the monitoring

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252 SAI, 'Social Accountability 8000: International Standard' (June 2014) 2 <http://sa-intl.org/_data/n_0001/resources/live/SA8000%20Standard%202014.pdf> accessed 18 July 2016 (hereinafter 'SA8000').

253 One example can be Saudi Arabia. See International Trade Union Confederation (ITUC), 'Saudi Arabia Bans Trade Unions and Violates all International Labour Standards' (25 January 2012) <http://www.ituc-csi.org/saudi-arabia-bans-trade-unions-and?lang=en> accessed 18 July 2016.

254 SA8000, criteria 4.2.

255 Social Accountability Accreditation Services, 'SA8000 Accredited Certification Bodies' <http://www.saasaccreditation.org/accredcertbodies.htm> accessed 18 July 2016.

256 SAI, 'Audit Requirements for Accredited Certification Bodies for the SA8000 Program' (Issue 2, 7 October 2015) s 7.2.2, 14 <http://www.saasaccreditation.org/sites/default/files/u4/SAAS_Procedure.200.2015.pdf> accessed 18 July 2016.

257 SA8000, criteria 9.2.1.

of the workplace conditions in accordance with the SA8000.[258] The SA8000 Certificate may even be suspended in terms of noncompliance.[259] The representation of the workers through the implementation process aims to facilitate communication amongst workers, the management representatives and senior management on regarding issues related to the SA8000.[260]

As stated above, the SPT conducts monitoring compliance with the SA8000 standards. In this respect, it has the authority to collect information from a variety of different stakeholders. Upon this, it then prepares reports for senior management.[261] However, organisations themselves are also expected to communicate the information it may gather respect to the SA8000. For example, senior management is expected to write a policy statement conveying the compliance with the SA8000.[262] The statement should include the organisation's commitment to both 'national' and 'other applicable laws'.[263] In addition, the organisation itself should also develop policies relating to the implementation of the SA8000.[264] Both the general policy statement and the other policies for the implementation of the SA8000 should be communicated to all personnel in appropriate languages.[265] The organisation is expected to review such policies and statements.[266] In relation to public

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[258] SA8000, criteria 9.4.
[259] SAI, 'Audit Requirements for Accredited Certification Bodies for the SA8000 Program' (Social Accountability Accreditation Services, Issue 2, 7 October 2015) 85-86 <http://www.saasaccreditation.org/sites/default/files/u4/SAAS_Procedure.200.2015.pdf> accessed 18 July 2016.
[260] SA8000, definitions 20, 7.
[261] SA8000, criteria 9.4.
[262] ibid criteria 9.1.1.
[263] ibid 9.1.2.
[264] ibid criteria 9.1.4.
[265] ibid criteria 9.1.1.
[266] ibid criteria 9.1.7.

transparency, organisations are thereby expected to make the policy statement publicly available upon request.[267]

Notwithstanding these features, SA8000 has some weaknesses. First, although SA8000 is a global framework for companies from any sector, the number of companies that adopt the SA8000 remains limited.[268] Second, SAI is not transparent with respect to the corporate facilities which 'have lost their certification or were rejected in their applications'.[269] Third, monitoring of the corporate facilities in accordance with the SA8000, can also be criticised for being insufficient to improve employees' interests. For example, research conducted by the Clean Clothes Campaign shows that how a SA8000-certified company in north India, continues to operate indecent working conditions.[270] Accordingly, the research specifically highlights that there remain problems in terms of the auditing of the SA8000. Indeed, the auditors inform managers of auditing in advance.[271] As such, information on such corporate facilities may not touch upon the problems of employees.

6.2.3.2.2 Fair Labor Association

Supply chain conditions of the clothing and footwear industries in the developing world has played a major role in fuelling the creation of another initiative called the Fair Labor Association (FLA). The association was created under the leadership of the US president Bill Clinton in 1999.[272] The organisation, which is now made up of universities,

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[267] ibid criteria 9.1.8.
[268] Goel (n 247) 75.
[269] O'Rourke (n 228) 14.
[270] Duncan Pruett, 'Looking for a quick fix: How weak social auditing is keeping workers in sweatshops' (Nina Ascoly ed, Clean Clothes Campaign 2005) 12 <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2077&context=globaldocs> accessed 15 July 2015.
[271] ibid 20.
[272] Fair Labor Association (FLA), 'History' < http://www.fairlabor.org/history> accessed 15 July 2016.

civil society organisations and companies, focuses upon addressing and drawing attention employee issues.[273]

The FLA Workplace Code of Conduct (FLA Code) constitutes the main criteria through which affiliated companies are expected to comply.[274] The FLA Code is mostly built upon the ILO and other international good labour practices,[275] and covers issues such as employment relationship, non-discrimination, harassment or abuse, forced labour, child labour, freedom of association and collective bargaining, health and safety, hours of work and compensation.

Similar to the SAI, the FLA monitors affiliated companies in light of its own 'Workplace Code of Conduct and Principles for Monitoring'.[276] Yet, the FLA's auditing strategy differs from the SAI. As highlighted above, accredited audits are chosen by companies themselves in order to audit their facilities for compliance with the SA8000 standard of the SAI.[277] However, in terms of the monitoring of the FLA code, the FLA selects a local third-party monitoring organisation for the conduct of unannounced factory visits.

Independent monitoring auditors constitute an important aspect with respect to transparency. Such auditors visit five percent of the facilities of the affiliated companies a year.[278] The FLA itself uses the information gathered by the monitoring organisation for the

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[273] FLA, 'About Us' <http://www.fairlabor.org/about-us> accessed 15 July 2016.
[274] FLA, 'Code of Conduct' <http://www.fairlabor.org/our-work/code-of-conduct> accessed 15 July 2016.
[275] ibid.
[276] FLA, 'Monitoring Guidance & Compliance Benchmarks' (Version 1.2, 2007) <http://www.fairlabor.org/sites/default/files/monitoring_guidance_and_compliance_benchmarks_0.pdf> accessed 15 July 2016.
[277] See 6.2.3.2.1 above.
[278] FLA, 'Tracking Charts' <http://www.fairlabor.org/transparency/tracking-charts> accessed 15 July 2016.

remediation process, whilst the results of remediation and monitoring are published on the FLA's website.[279]

Independent External Assessment Reports include issues such as assessment of a factory's performance with regard to issues such as employment function, management function, action plans and code violations. Findings within these reports can be categorised as 'immediate action required', which means that clear non-compliance with the FLA Workplace Code of Conduct and local law, along with 'sustainable improvement required', such as lack of termination policies or grievance system, or 'notable feature' which indicates a remarkable feature.[280]

The Monitoring Guidance and Compliance Benchmarks of the FLA are reflective of the monitoring and the auditing policy of the organisation.[281] Accordingly, companies are expected to adopt a code 'meeting or exceeding the FLA standards', and to communicate such code to its suppliers and workers.[282] In terms of internal information collection, companies are expected to create confidential reporting channels for employees and conduct internal monitoring, in keeping with its requirements.[283]

However, the FLA has been subjected to some criticism. For example, FLA is criticised for using an inferior term in terms of minimum wage.[284] Although both SA 8000 and the FLA code touch upon the issue of minimum wage, they use different conceptions.

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[279] ibid.
[280] For instance, see FLA, 'Independent External Assessment Report' (No AA0000000508, Adidas Group, Nike, Inc 15 September 2014) <http://www.fairlabor.org/transparency/tracking-charts> accessed 14 June 2015.
[281] FLA, 'Monitoring Guidance & Compliance Benchmarks' (n 276).
[282] ibid appendix, 56.
[283] ibid
[284] O'Rourke (n 228) 14.

The SA 8000 requires corporations to pay the 'living wage', whilst the FLA uses a relatively weaker term, namely the 'prevailing wage', with respect to wage issues.[285]

FLA is also criticised for having weak monitoring.[286] The case on Apple's supplier Foxconn may be considered a notable example in this respect.[287] Although Foxconn had been notorious with respect to indecent working conditions, optimistic statements on the supplier by the president of the FLA raised questions as to the effectiveness of the association in terms of monitoring corporate misconduct.[288]

6.2.3.2.3 Ethical Trading Initiative

Another notable scheme is the Ethical Trading Initiative (ETI), which has been driven towards encouraging corporations to improve international employee rights since 1999. As discussed in chapter 5, the ETI was introduced by the British government.[289] The initiative now encapsulates different stakeholders such as companies, trade unions and NGOs. Although most of the companies within the ETI are based in the UK, the initiative also has members from different parts of Europe and the world, including Australia, Germany, Spain, Sweden and the USA.[290]

The ETI Base Code clarifies the perspective of the initiative respect to employee based issues. The ILO conventions constitute the foundation of the ETI Base Code.[291] The Base Code affords particular attention to issues such as freedom of association, the right to

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[285] ibid.
[286] Steven Greenhouse, 'Critics Question Record of Fair Labor Association, Apple's Monitor' *The New York Times* (13 February 2012) <http://www.nytimes.com/2012/02/14/technology/critics-question-record-of-fair-labor-association-apples-monitor.html> accessed 8 August 2016.
[287] Steven Greenhouse, 'Early Praise in Foxconn Inspection Brings Doubt' *The New York Times* (16 February 2012) <http://www.nytimes.com/2012/02/17/business/early-praise-in-foxconn-inspection-brings-doubt.html> accessed 10 August 2016.
[288] ibid.
[289] See 5.2.1 above.
[290] Ethical Trading Initiative (ETI), 'Our Members' <http://www.ethicaltrade.org/about-eti/our-members> accessed 15 July 2016.
[291] ETI Base Code, 'Ethical Trading Initiative' (amended 01 April 2014) <http://www.ethicaltrade.org/eti-base-code> accessed 15 July 2016.

collective bargaining, safe and hygienic working conditions, living wage, regular employment, excessive working hours, regular employment, child labour, discrimination, and harsh or inhumane treatment.[292]

With respect to the implementation of the ETI Base Code, the termination of the membership may play a major role in placing pressure upon corporations since the ETI may terminate the membership of any company that fail to honour its membership obligations.[293] Moreover, the initiative focuses on transparency. Accordingly, companies are expected to communicate their commitment to ethical trading to the public and to the employees in the company, including employees of suppliers who work in their supply chains.[294] Member companies must therefore report related worker conditions in their supply chains to the ETI Board annually.[295] As table 6.2 displays, the concept of transparency is also highlighted as a section in the ETI Principles of Implementation. In addition to the disclosure made by the member companies, the ETI itself also discloses information on the activities of the companies. For instance, it reveals information on the projects it conducts in supplier countries with regard to evaluating the code implementation and monitoring in developing countries.

[292] ibid.
[293] ETI, 'Procedures for Enforcing Membership Obligations' para 32 <http://www.ethicaltrade.org/resources/eti-disciplinary-procedure> accessed 16 July 2016.
[294] ETI, 'Principles of Implementation' (19 February 2009) principle 1.2 <http://www.ethicaltrade.org/resources/key-eti-resources/principles-implementation> accessed 15 June 2016.
[295] ETI, 'What members sign up to: ETI corporate membership obligations' <http://www.ethicaltrade.org/node/1192> accessed 15 July 2016.

Table 6.2
ETI Implementation Principles (Principle 6, Transparency)[296]

• The company reports fairly and accurately on its ethical trade activities. • The company complies with ETI reporting requirement. • The company reports publicly, and in more detail as its experience grows, on its commitments to ETI, its ethical trade activities and impacts. • The company encourages its suppliers to be transparent about their ethical trade performance. • The company responds rapidly, fully and openly to any complaints about code violations in its supply chain.

On the other hand, the ETI is also noted for lobbying governments to improve transparency of the TNCs. The Modern Slavery Act 2015, examined in chapter 5,[297] may be a good example for the lobbying role of the ETI as the initiative the British Retail Consortium sent a letter to the UK prime minister by paying specific attention to supply chain transparency.[298]

A number of notable criticisms can be said to apply to the ETI however. First, the ETI is not a certification or labelling scheme. Indeed, as examined above, labelling schemes (or certification schemes) creates a business case for companies and it helps stakeholders to distinguish the products of the superior companies with respect to employee conditions.[299] Therefore this aspect of the ETI might be a weakness in terms of attracting companies that focus on marketing benefits. Second, the initiative does not disclose information 'on the

[296] ETI, 'Principles of Implementation' (n 294) principles 6.1-6.5.
[297] See 5.1.4 above.
[298] Letter from the Ethical Trading Initiative and British Retail Consortium to the PM David Cameron (29 August 2014) <http://www.ethicaltrade.org/sites/default/files/resources/ETI%20BRC%20letter%20to%20PM.pdf> accessed 16 July 2016.
[299] See 4.1.1.1.2 above.

ethical performance of individual companies' to the public.[300] Such aspects of the ETI may result in the problem of *free riding* since the companies with poor performance in accordance with the ETI Base Code may not change their behaviour.[301] Fourth, although the number of temporary workers is great in some developing countries, the ETI does not cover temporary contract workers as part of its scheme.[302] Lastly, there would appear to be constraints on access to a grievance mechanism, as 'only members can complain against other members' with respect to the ETI.[303]

In summary, despite the shortcomings listed above, the ETI can still be seen as a significant initiative in terms of improving employee interests through transparency. However, as with other private initiatives, its impact in ensuring corporations act transparently would be limited.

6.3. Discussion

The examination of international initiatives above has been based upon three different categories, namely inter-governmental, hybrid and private initiatives, with voluntariness constituting the common characteristic of all three. All of these initiatives, even the public ones discussed, have tended to turn towards voluntary strategies, whereby transparency constitutes an indispensable feature. Whilst some of these (such as the ILO MNE Declaration) do not directly address transparency rules, they affect transparency, since companies and other organisations, such as certification schemes, make reference to such initiatives.

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[300] International Labor Affairs at the U.S. Department of Labor (National Research Council's Committee on Monitoring International Labor Standards), *'Monitoring International Labor Standards Techniques and Sources of Information'* (National Academies Press 2004) 87.
[301] Susanna Schaller, 'The Democratic Legitimacy of Private Governance: An Analysis of the Ethical Trading Initiative' (INEF Report 91/2007 Institute for Development and Peace, University of Duisburg 2007) 36 <http://inef.uni-due.de/page/documents/Report91.pdf> accessed 24 September 2016.
[302] Karen Ellis and Jodie Keane, 'A Review of Ethical Standards and Labels: Is there a Gap in the Market for a New 'Good for Development' Label?' (2008) Overseas Development Institute Working Paper 297, 21 <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/3333.pdf> accessed 15 July 2016.
[303] Rees (n 202) 12.

Doubtless, an international treaty may solve some of the global obstacles to making corporate activities transparent. Such treaty, for example, can bind 'all states in equal measure'[304] in order to improve corporate behaviour towards employees. A 'mandatory regime of global reporting'[305] might constitute a more robust option in terms of making companies transparent globally. However, as the failure of the Norms has demonstrated, the international arena still seems far away from creating this kind of treaty.[306]

It has been argued that there has been a change in international regulatory environment towards the use of soft law.[307] Soft law strategies, through transparency requirements, constitute a new way of international regulation of the corporate activities. However, a number of criticism of the scope and effectiveness of these strategies can be noted.

The first criticism may be that ISL strategies are predominantly based upon voluntary characteristics. Chapter 4 had sought to shed light on the weaknesses of voluntary strategies.[308] Some of these weaknesses can also be highlighted in respect to international initiatives observed in this chapter. Accordingly, the notable weaknesses can be related to the monitoring and enforcement mechanisms of the ISL strategies. As argued above, some frameworks do not even have monitoring, verification or enforcement mechanisms.[309] Thus, insofar as the verification of the information disclosed by companies is concerned, there is

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[304] Backer, 'Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All' (n 104) 467.

[305] Backer clarifies this global mandatory regime of transparency. For in depth discussion see Backer, 'From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations' (n 8) 593.

[306] See 6.1.1 above.

[307] Christine M Chinkin 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 International and Comparative Law Quarterly 850.

[308] See 4.1.4.2 above.

[309] For example, ISO 26000 and GRI G4.

still a great need for formal auditing standards to be applied, similar to those standards applied in financial reporting. [310]

Second, a lack of transparency within enforcement mechanisms may be a problematic aspect of the ISL strategies. Not only are disclosure requirements recommended by the ISL strategies, but the transparency of the enforcement mechanisms is one of the criteria in the implementation process of ISL strategies.[311] Even where an initiative has an enforcement mechanism, if the initiative is not transparent whilst assessing the company's compliance with its guidelines, this may affect its accountability.[312] The lack of transparency in terms of the activities under the OECD NCPs may be one example to this weakness. Accordingly, the remediation process conducted by an OECD NCP is not disclosed by the organisation because of the confidentiality issue.[313]

Thirdly, ISL strategies mostly focus upon human rights. Most of these are based upon reference points to human rights, and urge TNCs to act in accordance with human rights norms.[314] Therefore, one may assert that ISL 'embrace[s] Kantian principles protecting human rights'.[315] However, the interests of employees remain broader than human rights issues. Therefore, the focus of the ISL strategies remains limited, and should be extended to include the broader interests of employees.

Fourth, although through ISL strategies states seem to surrendering their regulatory role to non-state actors, they still remain as significant actors in the regulation of corporations

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[310] David Graham and Ngaire Woods, 'Making Corporate Self-Regulation Effective in Developing Countries' (2006) 34 World Development 868, 875.
[311] See generally the OECD Guidelines, procedural guidance.
[312] Feeney (n 61) 23
[313] See 6.2.1.1 above.
[314] In this respect, for example, OECD Guidelines, ISO 26000 and the Global Compact address the Universal Declaration of Human Rights.
[315] Patricia H Werhane, 'Norman Bowie's Kingdom of Worldly Satisfiers' in Denis G Arnold and Jared D Harris (eds), *Kantian Business Ethics: Critical Perspectives* (Edward Elgar Publishing 2012) 54.

at an international level.[316] Therefore, the national interests of states may still play a role in international transparency regime. For example, developed home states may dominate other developing states in international regulation of corporations. [317] In this respect, they may only contribute to strategies if they are beneficial for their own national TNCs. Such situation may result in similar problems as discussed in the previous chapter in relation to limits of national schemes.[318]

Furthermore, states are still significant actors insofar as promoting and enforcing ISL strategies in their territory is concerned. They play a central role in the 'orchestration' of such soft law regime.[319] For example, some establish initiatives to encourage companies to respect the Global Compact, the ILO Tripartite Declaration on Multinational Enterprises, and the OECD Guidelines on Multinational Enterprises and disclose information in light of the principles of these initiatives. [320] In addition to their responsibilities within the inter-governmental initiatives, such as establishing NCPs in line with the OECD Guidelines, or NAPs in line with the UNGPs, governments further shape transparency regulations in accordance with the norms generated by the ISL strategies.[321]

Nevertheless, as highlighted above, whilst states play a role in the implementation of the ISL strategies, they are not the only actors involved in this. Non-state actors also

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[316] Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42 Vanderbilt Journal of Transnational Law 501.
[317] Oshionebo (n 197) 31-32.
[318] See Section 5.3.2.2.1.
[319] Abbott and Snidal (n 316).
[320] For instance, in France, in accordance with the disclosure requirements under the Nouvelles Regulations Economiques, largest 'companies must indicate the extent to which their subsidiaries follow ILO core conventions' Doorey (n 88) 963.
[321] For example, some governments pass laws that may improve corporate transparency. Modern Slavery Act 2015 in the UK can be one example in this respect. Ruggie and Sherman (n 132) 3.

contribute to the ISL strategies. Therefore, soft law strategies are relatively independent from the policy-making authority of most states.[322]

ISL strategies with international and multilateral foundations, may have further advantages compared to *national/domestic transparency* rules, while addressing the transnational activities of companies, and it is therefore worth considering some of these advantages.

First**,** ISL strategies may play a role in improving the cooperation among states in terms of controlling transnational corporations, which does not seem to be effectively reached through both national and international laws discussed thus far. ISL strategies therefore help states to reach a consensus on controversial issues.[323] Thus, ISL strategies may be used as a strategy to reduce the lack of consensus among countries in terms of international legislation and control of TNCs.[324] Unlike conventions and treaties, most ISL strategies do not require a process of national ratification. Nation states may co-operate, without waiting for any ratification process.[325] Therefore, a global system of transparency may be created through these channels.

Second, ISL strategies, based upon the conduct of non-state actors (or collaboration with non-state actors), may prove attractive to governments in terms of cost.[326] As chapter 5 detailed, national governments are not eager to control transnational activities of corporations because of the cost of regulation.[327] In this respect, ISL strategies, mostly based upon

[322] Jimmy Donaghey and others, 'From Employment Relations to Consumption Relations: Balancing Labor Governance in Global Supply Chains' (2013) Human Resource Management, Forthcoming 229, 233.
[323] Ruggie, 'Trade, Sustainability and Global Governance' (n 44) 304.
[324] For instance, the UNGPs were unanimously endorsed by the United Nations Human Rights Council. Backer, 'Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All' (n 104) 525.
[325] eg ILO's MNE Declaration.
[326] O'Rourke (n 228) 4.
[327] See 5.3 above.

voluntary disclosure mechanisms, may constitute an option with less costs. Thus, ISL strategies, for example, might help poor countries with economic difficulties to ensure corporate regulation, as the voluntary characteristics will transfer the regulatory costs on to non-state actors. Individuals or civil society groups, for example, may play a major role in placing pressure upon corporations. [328] Often the media will then monitor the activity of both companies and NGOs, in terms of enforcement guidelines, examined above.[329] Typically, international initiatives will refer to one another. Some international initiatives monitor one other, and how such corporations comply with a given set of guidelines. For example, OECD Watch monitors the effectiveness of the OECD Guidelines and publishes reports.[330]

Third, all the governmental and non-governmental actors discussed in this chapter may place pressure upon the behaviour of the corporation, which cannot be achieved through national (domestic) law. As highlighted in the previous chapter, although some states pass extraterritorial transparency obligations, the enforcement and monitoring of these schemes are problematic. However, intergovernmental organisations (IO)s '[w]orking with private partners', multi-stakeholder and civil society groups reduces the 'reliance on states' in terms of international regulation of corporations.[331]

Fourth, an advantage of the ISL strategies may be its reductive impact on regulatory competition. As the previous chapter outlined, regulatory competition was one of the reasons for developing nations not passing or enforcing strict laws, which may improve employee conditions. However, the ISL strategies may act to level the playing field in the international

[328] Donaghey and others (n 322) 233.
[329] Larry C Backer, 'Multinational Corporations as Objects and Sources of Transnational Regulation' (2008) 14 ILSA Journal of International & Comparative Law 499, 520.
[330] OECD Watch, 'About OECD Watch' <http://www.oecdwatch.org/about-us> accessed 17 July 2016.
[331] Abbott and Snidal (n 316) 341.

arena.[332] If there is an international transparency regime covering all countries and companies, this regime may level playing field between both developed and developing countries.[333]

Fifth, international transparency regimes offer multilateral solutions to improve corporate behaviour in developing host countries. A multilateral international initiative may 'allay sovereignty concerns' of a national government.[334] Therefore, a host nation, which fears the possibility of imperialistic measures of developed home nations, may favour an international solution, rather than unilateral home state originated norms.

In short, soft law transparency requirements play a role in emerging international norms and future mandatory disclosure rules. In this respect, such laws may be 'regarded as part of customary law' over time.[335] Put differently, ISL strategies may be 'seen as evidence of emergent new standards of customary international law.[336]

Conclusion

This chapter has sought to analyse how a regime of international transparency can play a role in improving the behaviour of companies globally. The analysis has therefore considered the contribution made by various initiatives to corporate transparency, and sought to demonstrate how these initiatives can have relatively less territorial limitations than

[332] John F Sherman, 'The UN Guiding Principles: Practical Implications for Business Lawyers' (In-House Defense Quarterly January 2013) 52 <http://www.shiftproject.org/media/resources/docs/UNGPsimplicationsforlawyers.pdf> accessed 24 September 2016.

[333] Anita M Halvorsen and Karin Buhmann, 'Extraterritorial Regulations of Companies and the UN Guiding Principles on Human Rights and Business' in Manoj Kumar Sinha, *Business and Human Rights* (Sage 2013) 178.

[334] Reuven S Avi-Yonah, 'National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization' (2003) 42 Columbia Journal of Transnational Law (2003)5, 32

[335] The principles of the Rio Declaration on Environment and Development 1992, which are 'widely regarded as part of customary law' now, can be one example in this regard. Zerk (n 6) 71.

[336] Peter Muchlinski, 'Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by Intergovernmental Organisations' (2003) 3 Non-State Actors and International Law 123, 128.

national/domestic transparency rules, since most apply transparency requirements to global activities of corporations and corporate suppliers with a worldwide scope.

As argued in this work, the ideal notion of corporate transparency requires a degree of compulsion.[337] Therefore, at the very beginning of the chapter, disclosure requirements operated through international law and inter-governmental organisations were investigated. Within the frame of this investigation, although the UN's attempt at binding corporations under international law has failed,[338] the organisation has continued its work to improve corporate transparency.

As the most significant global organisation in respect of international law, the UN constitutes the best option, according to this work, when compared to other relatively less global initiatives in creation of an international system of transparency.[339] There remains no doubt that the recent developments within the UN system, namely UNGPs and UNGP reporting Framework, constitute the main features of this system.

Other hybrid and private initiatives constitute a necessary supplement to international efforts in making corporations more transparent. Indeed, most of these refer to the UNGPs or other inter-governmental initiatives, and play a role in monitoring corporations. Therefore, these initiatives can also be seen as supplementary non-state actors the regime promoted by the UN.

[337] See generally chapter 4.
[338] See 6.1.1 above.
[339] Other initiatives covers only limited number of companies and countries. See for example the limited geographical coverage of the OECD Guidelines in 6.2.1.1 above.

Chapter 7

Conclusion

The primary purpose of this chapter is to review the opening rationale for the thesis, synthesise the issues raised in the discussion, and point out the limitations in a work of this kind. This chapter shall, firstly, aim to outline of how the individual chapters have addressed the research questions posed and, secondly, detail the limitations of the thesis in the work undertaken. The final section shall then outline some suggestions and recommendations for future research.

7.1 Theoretical Findings with regard to the Research Questions

This thesis has focused on the role of transparency and, in particular, on how corporations may use this for the benefit of their employees. The thesis argues that corporations must be transparent, and such transparency can only be fully achieved through regulatory initiatives on an international level. In this respect, the thesis, sought to answer the following questions:

- What should be the corporate objective, and how do employees' interests feature in that objective?

- Assuming corporations have obligations to pursue the protection of employee interests, then, what are the potential regulatory tools that may be employed to ensure companies behave in this way?

- What are the theoretical advantages and disadvantages of transparency obligations, imposed on companies to promote the intrinsic interest of the employee, and how does this compare to the alternative strategies?
- To what extent must companies be compelled by regulation to be transparent?
- How far can any one individual country, acting alone, ensure its companies demonstrate sufficient transparency?
- How does, or could, transparency strategies in international law or international soft law regime can improve the interests of employees.

In light of the aforementioned research questions, the following observations can be made:

The first question examined what the objective of the corporation should be, and how do employees' interests feature in that objective. In this respect, the objective of the corporation was re-examined from the standpoint of non-instrumental perspective. The chapter clearly argued that employees should be treated as ends in themselves, rather than as a means to shareholders' ends. This argument was built upon Kantian deontological ethics. Mainstream corporate governance approaches were examined from this perspective also. One of the themes to emerge from this examination was how shareholder value theory, among other theories within corporate governance, are insufficient at offering respect to the intrinsic interests of employees, particularly from a deontological ethics perspective. Some of the scholars within stakeholder theory, whom argue in favour of employee interest in terms of corporate governance, have also failed to see the intrinsic value of respecting employee interests.

Second, having argued that corporations have an obligation to pursue the interests of employees, the potential regulatory tools that may be used to ensure companies behave in such a manner were then analysed. The thesis argued here that ensuring that companies treated employees appropriately also meant ensuring that companies acted transparently towards their employees. Accordingly, the work argued corporations must be, or should be made to be transparent in order to treat employees with respect. Despite the relevant literature, which mostly focuses on instrumental value of transparency, Chapter 3 then detailed a theoretical explanation of transparency from both an instrumental and non-instrumental perspective. From the perspective of intrinsic value, transparency was depicted as merely good in itself. It was demonstrated as part of treating employees with genuine respect, since employees as persons deserve to be treated honestly and openly. From the strategic perspective, on the other hand, transparency was seen as a comparatively better strategy than many others in changing the behaviour of the corporations towards employees. In addition, it was also indicated that transparency could be seen as more beneficial than other regulatory strategies for governments and corporations themselves. Besides the advantages of transparency, the chapter also suggested that, in some circumstances, transparency may also have inherent limitations to improving employee interests. It was conceded that transparency is not strategically perfect and does suffer from some apparent weaknesses. Nevertheless, comparative evidence had suggested it also possess a number of strengths.

Third, the thesis sought to demonstrate how corporations ought to ensure they exhibit a sufficient level of transparency. In this respect, first, it was claimed that corporations will often choose, out of self-interest, to be transparent without any compulsion. To this end, evidence highlighting the market sometimes rewards transparent corporations, and how this plays a major role in information disclosure with respect to employee interests, was

discussed. However, then it was highlighted how, too often, this voluntary incentive driven by the benefits of transparency is insufficient. The analysis in chapter 4 demonstrated that, in some circumstances, voluntary disclosure falls short of ensuring a corporation is transparent. When there is no self-interest, 'compulsion' may then take over. The thesis stated that there must be some degree of compulsion levied upon companies to be transparent.

Fourth, the thesis then examined whether such compulsion may be adequately achieved from within a single country, or whether this would require the development of 'international transparency' norms; agreed on an international level and subject to international mechanisms of enforcement. For this purpose, the UK was used as the main case study. Here it was argued, whilst transparency requirements have increased across different fields of laws over recent years, such developments still appear to fall short of improving the behaviour of the corporation, especially when it comes to the employees within UK companies (and their suppliers), who may be based in foreign countries. Indeed, the territorial limits national laws in this regard were seen as the main obstacle. It has been argued that prominent shortcomings are noticeable particularly with respect to the enforcement mechanisms of national/domestic regimes dealing with problems in relation to employees of Transnational Corporations (TNCs), which are global in character. Chapter 5 therefore concluded that although domestic/national transparency laws play a crucial importance in control of corporations, there remains a need for an international system of transparency in order to ensure an adequate level of transparency with respect to employee issues.

Fifth, the observations outlined in chapter 6 demonstrated that international initiatives constitute a necessary supplement to unilateral domestic efforts of one specific country, compelling companies to be transparent, especially when it comes to corporate activities beyond national borders. The emerging regime of international/global transparency was

referred to as International Soft Law Strategies (ISLS) within the present thesis. ISLS were demonstrated as including a variety of elements with respect to transparency relating to employees interests. Whilst the use of ISLS may still be in its infancy, and have some identifiable need for improvement, the thesis has outlined how such strategies play a vital role in filling the gap in so far as compelling corporations to be transparent is concerned.

In summary, the thesis has demonstrated that corporations must ensure they are transparent in order to afford genuine respect to employees, and this may only be achieved through regulatory initiatives on an international level.

7.2 The Scope of the Study

This thesis has offered a normative analysis of the impact of transparency has upon improving the behavior of the corporation, given the limitations imposed upon a work of this kind, there has of course been a specific focus upon scope of the analysis, and the research questions it may address. Some issues therefore remain unaddressed. The following considers some of these limitations.

First, given the word limit, the thesis has been limited to the analysis of the corporate behaviour towards one group of stakeholders, namely employees, which it argues are persons who deserve genuine respect by the corporation. However, other stakeholders should also be offered dignity and deserve genuine respect from the corporations they interact with. Consumers, for example, may also be analysed from deontological perspective, since they to deserve to be treated as ends in themselves.

Secondly, most of the arguments regarding the strategic advantages of transparency in this thesis rely upon normative justifications. Although theoretical conceptualisation is significant in order to demonstrate the merits of transparency, and to evaluate the extent to

which transparency works to improving the interests of employees, there is also a need for empirical information. The thesis may therefore be seen as limited in terms of the empirical information used to analyse transparency, both in the UK and at international level.

Thirdly, although Chapter 5 generally reviewed a national transparency regime using the UK as a case study, other national/regional regimes may also provide a very different view than presented by considering the UK (and the EU). There is no doubt another country may have more robust transparency requirements than the UK and so the lack of comparator may be limitation of the thesis when relying upon its case study.

Fourthly, the study mainly focuses upon the role of transparency within larger corporations. In effect, these corporations, with their business connections to other companies, may have the most significant impact upon the interests of employees. However, focusing on only larger corporations may also constitute a limitation within this work.

7.3 Recommendations for Further Research

Recognising the limitations listed above, such also provides for the possibility of posing further research questions. For example, linked to the questions posed by this thesis, one may also ask whether corporations possess broader responsibilities with respect to protecting the interests of the consumer. Future research may examine the corporate objective by drawing attention to the interests of consumers.

As detailed above, further research may also focus on statistical data, which would complement the present study. Empirical research on analysing the impact of transparency requirements, using both hard and soft law regimes is still very limited. Thus, an empirical work analysing the correlation between increasing transparency obligations and the attitudes of firms towards employee issues could also provide further insight.

Similarly, future research may consider the transparency regime of a developing host country. The limits of national/regional transparency regimes observed in this thesis are based upon the transparency requirements in the UK, a developed home country. However, another research project may consider a developing host country as its focus.

Lastly, further research may focus on the examination of non-listed and small companies. As has been highlighted in Chapter 5, non-financial transparency requirements with respect to employees mostly apply to larger, listed corporations.[1] However, small companies may also have a crucial role in employee interests. Hence, further research may focus on this subject.

[1] See 5.1.2.1 above.

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