

The problem of forced labour within the global supply chain as a means to analyse the regulation of corporate social performance as applicable to companies in the UK

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**Abstract**

This thesis considers the issue of forced labour within the supply chain as a means to understand the regulation of corporate social performance (CSP) as applying to companies within the UK. A corporate governance system based on shareholder primacy has led to a dominant business model of based upon the extensive use of the global supply chain as a source of value. The relentless pressure imposed by a lead firm on its supply chain has created an environment conducive to the use of forced labour. Three regulatory attempts to enhance corporate social performance in the prevention of forced labour within the supply chain are then considered: a voluntary approach as taken by the international community; a disclosure based approach designed to address informational asymmetry; and a duty based approach, imposing on companies a duty to undertake due diligence on their supply chain.

The voluntary and disclosure based approaches are ultimately reliant on market actors to enforce. The ability of the investor and the consumer to act reliably in this regard is questioned through a detailed analysis of the willingness and capability of each to pressure companies to internalise their social costs. The weakness of the current approaches to incentivise CSP is illustrated by a large study of corporate disclosures made in response to the UK’s Modern Slavery Act 2015. Within this context, the potential exists for a duty-based approach, as recently implemented by France legislators, to cascade into the UK. Although this approach is undoubtedly a significant development in looking beyond the market, it is highlighted that the effectiveness of such a model may be compromised by a lack of compliance risk stemming from the difficulty in establishing a breach of duty.

This thesis concludes by proposing a number of recommendations to strengthen each of the three approaches considered.

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**List of Abbreviations**

BA – Bribery Act 2010

BSCI - Business Social Compliance Initiative

CAQDAS - Computer Assisted Qualitative Data Analysis Software

CCC - Clean Clothes Campaign

CDDA – Company Directors Disqualification Act 1986

CEO - Chief Executive Officer

CFA – United States Criminal Finances Act 2017

CMA - Competition and Markets Authority

COP – Communication on Progress (under United Nations Global Compact)

CSO – Civil Society Organisation

CSP – Corporate Social Performance

CSR – Corporate Social Responsibility

CTSCA – California Transparency in Supply Chains Act

DJSI – Dow Jones Sustainability Index

DWP – Department for Work and Pensions

ESG – Environmental, Social, Governance

ETI – Ethical Trading Initiative

EU - European Union

EUCMR - European Union Conflict Minerals Regulation

EUNFDD – European Union Non-Financial Disclosure Directive

EUTR - European Union Timber Regulation

FCA – Financial Conduct Authority

FLA - Fair Labor Association

FRC – Financial Reporting Council

Global Compact - United Nations Global Compact

GPN – Global Production Network

GSC – Global Supply Chain

GSI – Global Slavery Index

GVC – Global Value Chain

ILO – International Labour Organization

ILO MNE Declaration - The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy Declaration

ISO – International Standards Organization

ITUC - International Trade Union Confederation

KLD – Kinder, Lydenberg, Domini and Company, Inc.

KPI – Key Performance Indicator

LTI – Long-Term Incentive

MBR - Management Based Regulation

MSA – UK Modern Slavery Act 2015

MSI – Multi-Stakeholder Initiative

NCP – National Contact Point (under OECD Guidelines for Multinational Enterprises)

NED - Non-Executive Director

NFIS - Non-Financial Information Statement

NGO – Non-Governmental Organisation

NYSE – New York Stock Exchange

OECD - Organisation for Economic Co-operation and Development

OFR – Operating and Financial Review

PBR – Principles Based Regulation

PRI – Principles for Responsible Investment

RBR - Risk Based regulation

SCT – Social Contract Theory

SEC – United States Securities and Exchange Commission

SEDEX – Supplier Ethical Data Exchange

SRI – Socially Responsible Investment

UCPD – Unfair Commercial Practices Directive 2005

UN – United Nations

UNEP FI – United Nations Environment Programme Finance Initiative

UNGPs – United Nations Guiding Principles on Business and Human Rights

UN Norms – United Nations Sub-Commission on the Promotion and Protection of Human Rights Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

UTRs – Consumer Protection from Unfair Trading Regulations 2014

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**Chapter 1: Introduction**

1. **Title**

The problem of forced labour within the global supply chain as a means to analyse the regulation of corporate social performance as applicable to companies in the UK.

**1.1 Defining Forced Labour within the Global Supply Chain**

A modern understanding of forced labour moves beyond the notion of property rights held over an individual, as was the case within chattel slavery most commonly associated with slavery in the traditional sense.[[1]](#footnote-1) Forming the basis of the UK understanding of the issue by way of the European Convention of Human Rights,[[2]](#footnote-2) the ILO defines forced labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[[3]](#footnote-3) This definition comprises three key components: the provision work or service in any activity or industry whether formal or informal; the menace of a wide range of penalties used to compel a person to work; and the notion of involuntariness whereby the individual lacks the freedom to leave the job at any time and/or has not consented to work. It is clear that this consent must be both freely given and fully informed. This will be found lacking where an employer or recruiter has made false assertions leading to a person accepting a job that he or she would not have otherwise accepted.

Legal instruments in this area have moved to incorporate an objective standard in which the issue of voluntariness may be considered. This standard can be based around either the knowledge of the perpetrator or the knowledge of the victim. An example of the former is the Australian Criminal Code which defines forced labour as: “the condition of a person (the *victim*) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free: to cease providing the labour or services; or to leave the place or area where the victim provides the labour or services.”[[4]](#footnote-4) The latter basis for the standard is found in the UK’s approach with the UK’s Modern Slavery Act 2015 (MSA) whereby a person commits an offence where “the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour.”[[5]](#footnote-5) In such cases, the fact that a person has consented to provide their labour “does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour.”[[6]](#footnote-6)

Article 2(2) of the ILOs Forced Labour Convention No. 29 provides for a number of exceptions that relate to conditions imposed by the state which may otherwise be deemed as constituting forced labour. [[7]](#footnote-7) This list of exceptions includes compulsory military service, emergency work, and penal sanctions under certain conditions, with an obvious example being a community service order requiring a convicted person to freely provide their labour for a specified number of hours. However, this study focuses on the process of production within the global supply chains of companies, thus state-sponsored forced labour and those exceptions to it will necessarily be excluded from consideration. Similarly, a focus on the supply chain means that a number of other manifestations of forced labour will also be omitted. As such, commercial sexual exploitation, forced begging, domestic servitude, and the use of child soldiers are not considered.

Reflecting the criminal law underpinning forced labour use, conventional understandings of forced labour focus on the relationship between the victim and the person or persons directly exploiting them. In the context of forced labour within the global supply chain, this exploitative relationship may exist between the victim and the supplier, a sub-supplier, a labour agency or a recruitment broker.[[8]](#footnote-8) A variety of techniques may be used to drive down the cost of labour via the restriction of free will with vulnerabilities created by the employer or labour agent[[9]](#footnote-9) through actual or threatened physical or sexual abuse, restrictions on movement and housing or the withholding of personal documents, such as passports and travel documents. [[10]](#footnote-10) Other strategies include the threat of denunciation to the authorities for migrant workers without correct documentation, withholding wages, or controlling bank accounts and ATM cards. [[11]](#footnote-11) One of the most common forms of coercion is the use of ‘debt bondage’ with an employer or labour broker providing advances at unfavourable rates. This may be to cover high recruitment fees charged to the worker or pay for travel and accommodation arrangements in advance of the employment commencing. Indeed, the physical relocation of the worker may serve to reduce the ‘costs of coercion’ in terms of establishing control, dependence and the prevention of escape.[[12]](#footnote-12) Other unscrupulous recruitment practices involve deception as regards wages or conditions, or workers being asked to sign a contract in a language which they do not understand or having to sign a new contract (with lower wages and benefits) upon arrival at the workplace.[[13]](#footnote-13) Where deceptive practices have been utilised the voiding of an employment contract due to misrepresentation, fraud, coercion, or undue influence is technically possible, access to the law in many developing countries may make such action impossible in practice. Even where legal recourse is accessible, unawareness of such action or fear on behalf of the worker may negate any legal remedy offered.

Given its prevalence within regulatory discourse in this area, it is also pertinent to consider the meaning of ‘modern slavery’. Whilst in some cases the term is used interchangeably with forced labour, the notion of modern slavery is used more typically as a broader term to incorporate the issue of human trafficking along with specific forms of forced labour such as child labour, bonded labour and domestic servitude. As forced labour is the most common element of modern slavery, the term ‘forced labour’ will be preferred within this thesis aside from where the regulation specifically refers to modern slavery more generally. It follows that detailed consideration will not be extended to the issue of human trafficking and the specific regulation in this area such as the United Nations Palermo protocols to the 2000 Convention against Organised Crime.

**1.2 Defining Corporate Social Performance (CSP)**

This thesis aims to consider the regulation of forced labour within the global supply chain occurring beyond the national jurisdiction as a means to investigate the regulation of corporate social performance (CSP) more broadly.

This thesis opts to use a narrow definition of the term CSP to describe what may be expected of corporate behaviour in order to permit its formulation as a regulatory objective. Although the notion of sustainability has achieved greater prominence in recent years,[[14]](#footnote-14) the idea of sustainable development suggests a broadened scope beyond purely the regulation of corporate activity. Moreover, the concept of sustainability appears ill fitting in relation to the discussion of forced labour, a practice that has spanned thousands of years in one manifestation or another. This thesis also rejects the use of the notion of Corporate Social Responsibility (CSR) given the contentious nature of its use. Although the most commonly used term to describe corporate behaviour in this area is in terms of CSR, the ubiquitous nature of this term has arguably impacted on its ability to carry any distinctive meaning. As Sheehy observes, in spite of its use across a vast range of literature, little consensus have been achieved among commercial, academic, and political interests.[[15]](#footnote-15) Indeed, Crane, Matten and Spence identify a number of core characteristics of the concept, yet acknowledge that “few, if any, existing descriptions will include all of them.”[[16]](#footnote-16) The fact that the CSR agenda in practice has been very much shaped by the corporate interests is perhaps the greatest barrier to its use as a term of reference to corporate behaviour. As Crane, Matten and Spence observe, “the precise manifestation and direction of the responsibility lie at the discretion of the corporation.”[[17]](#footnote-17) Indeed, the potential exists for companies, and their marketing departments, to make claims relating to their social responsibility that may be difficult to verify.[[18]](#footnote-18) Moreover, despite efforts to the contrary, business-led conceptions of CSR frequently relate to mere philanthropy as opposed to addressing the impacts of their activities on society.

Carrol first introduced the concept of corporate social performance (CSP) as facet of CSR within his ‘pyramid of corporate social responsibility.’[[19]](#footnote-19) Wood elaborated on Carroll's model suggesting that CSP comprised a company’s “configuration of principles of social responsibility; processes of social responsiveness; and policies, programs, and other observable outcomes as they relate to a firm’s societal relationships.”[[20]](#footnote-20) The notions of responsiveness to social expectations relates to the notions of legitimacy and the social contract, discussed shortly. What is key in the present context is the significance placed by Wood’s work on outcomes, or the results of corporate efforts. Indeed, Swanson develops Wood’s model to emphasise the significance of values held by executives and thus more readily integrates questions of business ethics effecting such outcomes.[[21]](#footnote-21)

To a lesser extent, CSP faces the problems of dilution facing CSR. Aside from its interchangeable use with CSR by some commentators,[[22]](#footnote-22) this has largely arisen from Wood’s emphasis on *observable* outcome as reflected by an expansive approach to the measurement of corporate efforts. A significant problem arises, as considered in chapter 6, in relation to the divergent approaches taken to the measurement of a company’s performance. For this reason, CSP has been described as a “multidimensional construct” that involves “behaviours ranging across a wide variety of inputs.”[[23]](#footnote-23) Yet the requirement here is for a concept that denotes corporate attempts to prevent or mitigate the adverse impacts on society caused by their activities. This reflects a revised expectation of corporate behaviour as accepted by the United Nations (UN),[[24]](#footnote-24) European Union (EU),[[25]](#footnote-25) and the UK government.[[26]](#footnote-26) Taking this narrow interpretation of CSP as its starting point, it is suggested that the notion of CSP is best phrased in somewhat abstract terms familiar to economists. As such, as understood within this thesis, CSP may be taken to refer to the company addressing its adverse social externalities, which may also be termed as the internalisation of social cost, discussed further in chapter 3. The notion of social cost has a rather sterile ring to it as is typical within economic discourse. Of course, the reality of social costs is rather different and could include all manner of social harms from environmental pollution, to the displacement of indigenous people,[[27]](#footnote-27) to the use of death squads[[28]](#footnote-28) and forced labour.[[29]](#footnote-29) Nevertheless, the point being made is that the formulation of the term CSP as understood within this thesis may be said to reflect a unification of ethical and economic perspectives.

Another way to perceive the negative impact that business may have on the individual is through the language of human rights. Human Rights may be defined as a set of standards or entitlements which apply universally to every person as a consequence of being human. Human rights are framed as being as indivisible, interrelated and interdependent and ‘inalienable’ in that they may not be taken away other than within specific situations, such as the right to liberty being restricted where a person is found guilty of a criminal offence by a court of law.[[30]](#footnote-30) The formal expression of human rights stems from sources of international human rights law. For example, the International Covenant on Civil and Political Rights (ICCPR) provides the human right not to be held in slavery, servitude, or required to perform forced or compulsory labour.[[31]](#footnote-31) As John Ruggie, the architect of the United Nations key instruments in this area observes “there are few if any internationally recognised rights business cannot impact.”[[32]](#footnote-32) As such, where the breach of human rights law has occurred as a result of corporate activity, the notion of social cost may be viewed through this particular lens. In other words, poor CSP may manifest itself as the violation of human rights.

Other perspectives too may also be relevant to the consideration of CSP as the internalisation of social cost. This is particularly the case in relation to the imposition of a duty for a company to enhance its CSP, as discussed in chapter 3. Under a duty-based approach, the underlying objective of the law is arguably one of distributive justice.[[33]](#footnote-33) In contrast to the ‘righting of wrongs’ inherent in notions of corrective justice, distributive justice is concerned with equality of distribution within society. In essence, the concept relates to the fair apportionment of the benefits and burden of those activities undertaken within society that carry risk.[[34]](#footnote-34) Although not precisely aligned with the notion of distributive justice in that little action is taken in this regulatory sphere to address inequality of benefit, regulatory intervention in this sense may be said to relate to the redistribution of the burden away from the victims of forced labour (in terms of the costs of harm) and on to the company (in terms of the costs of prevention).

**1.3 Significance of Research Area**

It has been reported that 60% of global trade in the real economy (i.e. physical) is dependent on the global supply chains (GSCs) of the world’s major corporations.[[35]](#footnote-35) The extension of production in this way has come about through a strategic business model designed to maximise the extraction of value via the extensive use of global outsourcing. In labour-intensive industries, this value may ultimately be extracted from those persons vulnerable to exploitation, in countries that lack the resources or willingness to offer effective public protection. Workers along the supply chain may feel the adverse effects of global outsourcing in a variety of ways with low wages, long working hours, poor health and safety, inadequate sick and maternity provisions, and squalid worker accommodation are all too frequently reported.[[36]](#footnote-36) For some, the idea that these people have a choice in the matter is used to justify a lack of overt concern.[[37]](#footnote-37) Indeed, a key tenet of the capitalist system of production is the notion of free will based upon Locke’s ‘inalienable’ natural rights of life, liberty and property.[[38]](#footnote-38) However, whilst those working in such conditions may have little choice in reality, for those who are enslaved and thus do not offer their labour freely, no such doubt exists. This thesis does not concern itself with the working conditions of those legitimately employed within the supply chains of large multinational companies, but of those forced to do so through deceit, coercion or restraint. As such, this study is not concerned with the exploitation of labour in a Marxist sense,[[39]](#footnote-39) but in a sense that is largely irrefutable whomever the commentator: forced labour.

According to the International Labour Organisation (ILO) 20.9 million people are estimated to be held in conditions of forced labour around the world.[[40]](#footnote-40) Approximately 90% of these are exploited by individuals and companies within the private economy.[[41]](#footnote-41) Despite the disproportionate attention given to those forced to work in the sex industry, the ILO estimate that 68% of these are held for non-sexual economic exploitation.[[42]](#footnote-42) It has been estimated that the annual profits generated by forced labour in the agricultural and manufacturing industries alone amount to over US$43 billion per year.[[43]](#footnote-43) As this study focuses on the process of production within GSCs, those manifestations of forced labour that do not interact with GSCs will necessarily be excluded.[[44]](#footnote-44)

Key to this study is the manner by which the productive process over GSCs has been shaped by corporate strategy. Yet these corporate strategies do not exist within a vacuum and have been shaped by the broader regulatory context. The aim of corporate governance has been posited as “to align as nearly as possible the interests of individuals, corporations and society”[[45]](#footnote-45) yet the UK’s system of corporate governance places pressure on the boards of companies to maximise the delivery of shareholder value. It will be argued therefore that the productive process has thus been moulded to provide a key source of value to be extracted and distributed to capital interests.

It is reiterated that the issue of forced labour within the supply chain is considered in this thesis within the broader remit of CSP. As such, this thesis considers the issue of forced labour within the supply chain as a means to understand more broadly the regulation of CSP. It follows that where the areas of discussion relate to the social performance of companies more broadly, the term CSP will be used. As outlined above, this thesis defines CSP as the actions taken by a company to prevent or mitigate the negative impacts of its business operations. The focus is thus on performance; on actually doing something. It follows therefore that CSP may not be reduced to mere commitment, nor philanthropy, and certainly not marketing practice. Again, the focus is not on how companies interpret their social obligations to be, but what, in the sense of a regulatory objective, they should be.

Forced labour has been selected as a focal point for the consideration of CSP for a number of reasons. First, the uncontentious nature of forced labour is reflected in its prohibition by numerous widely accepted treaties at the international and regional level[[46]](#footnote-46) and its criminalisation at the domestic level in virtually every country of the world. Second, given the lack of legal risk in any traditional sense facing a company for the activities of its suppliers, the supply chain represents perhaps a particularly challenging ‘governance gap’[[47]](#footnote-47) to address. Third, and related to the potential significance of non-legal pressure to the regulation of CSP, the restriction of forced labour use is typically present within the supplier codes of conducts drafted by companies in reaction to high profile scandals relating to conditions of work within global supply chains. Fourth, the use of forced labour in the productive process provides an illustration of the effects of the globalised outsourcing of production in line with corporate strategies of value capture. The development of a business model designed to maximise the extraction of value from the supply chain to be redistributed to the shareholder has created a productive environment conducive to the labour abuse. Forced labour is arguably the most extreme example of the effects of this corporate strategy.

A fifth rationale for using forced labour within GSCs as a focal point for the consideration of CSP arises from the issue receiving particular attention amongst domestic regulators in California, Australia, and the UK, via the MSA. The disclosure-based approach taken to address forced labour thus represents a development in the wider regulation of CSP. As will be considered in detail, this model imposes a procedural requirement for companies to report their efforts to address forced labour use. As such, it may be said to offer an alternative to the purely voluntary model of regulation as reflected in the approach taken to the issue by the international human rights community. However, as with the voluntary approach, the disclosure-based model relies upon market-based actors imposing pressure on companies to undertake substantive action to address the issue through internalising their social costs. This reliance raises significant questions as regards the ability of market actors to apply sufficient pressure in this regard. Indeed, there have been calls by those who doubt the effectiveness of such models for the introduction of a legal duty-based model to the issue of inadequate human rights related CSP.[[48]](#footnote-48) Variants of such a model have recently been introduced by French and Dutch legislators.

The nature of the modern slavery statements required by the MSA lends itself to empirical study as a means to investigate its impact on CSP. Put simply they are documented by the company and are publically available. The difficulties in measuring the impact of a voluntary approach are quite evident, with significant reliance placed on ad hoc civil society and media investigation. The disclosure requirements found within the MSA, along with the guidance provided, allow for a study into how companies have complied with the procedural requirements of the Act, and allows for suggestions to be gleaned as to the extent companies have engaged with the issue through enhancing their anti-slavery CSP. The potential for documentary analysis arising from this particular piece of regulation thus represents the final rationale for the focus on forced labour in the supply chain as a facet of CSP.

**1.4 Research Questions**

The following research questions have been generated from the above discussion.

1. *How has the UK system of corporate governance contributed to the problem of forced labour use within the global supply chain?*
2. *To what extent is the current regulation of CSP related to the use of forced labour within the global supply chain likely to be effective in enhancing corporate social performance?*
3. *To what extent do the modern slavery statements, published in response to s54 of the UK’s Modern Slavery Act 2015, suggest that organisations have complied with the procedural requirements of the Act and its broader substantive aim to enhance anti-slavery CSP?*
4. *How might the regulation of UK based companies be improved to address the problem of forced labour within the global supply chain?*

**1.5 Original Contribution**

*The first research question asks how the UK’s system of corporate governance contributed to the problem of forced labour use within the supply chain.*

The study of forced labour use within the context of the global supply chain has increasingly received the attention of the research community. Whilst much of the work in this area has traditionally been limited to its more immediate consideration within a particular geographical area or sub-culture, a small but growing body of research, by political economy and management commentators, has taken a more systematic approach.[[49]](#footnote-49) Here, the issue of forced labour has been considered within the institutional and commercial context in which forced labour occurs, and at the micro-level, in its potential to be used as a management tool.[[50]](#footnote-50) The link between the company and forced labour within its supply chain provides the starting point for this thesis, yet the picture it paints is incomplete. Whilst the potential for the company to impose pressure on the supply chain is outlined, no consideration is given the pressures to do so *within* the company. The company is viewed as necessarily seeking to extract value from its supply chain with little regard to how such a position has been arrived upon. This is problematic as it fails to provide a holistic view of the situation in omitting the examination of potentially relevant factors relating to corporate governance. Put simply, the current research stops short of providing a comprehensive analysis of the problem. This thesis aims to fill this gap.

*The second research question seeks to investigate the extent to which the current regulatory approaches taken to enhance CSP encompassing the issue of forced labour use within the global supply chain are likely to be effective.*

If the first research question outlines the problem that this thesis seeks to address, the second and third research questions seek to critically evaluate the current approaches taken by regulators to the issue of aiming to ensure adequate CSP by companies over their global supply chains. The specific focus of these questions is thus on the globalised nature of supply chains that frequently operate beyond any one national jurisdiction. The core instruments in this area have been categorised by the underlying basis of their regulatory design. As such, in answering this particular question a comprehensive analysis will be undertaken of three approaches identified: the voluntary approach taken by the international human rights community; the disclosure-based approach taken by UK regulators; and a potentially influential duty-based approach stemming from a recent development in the French law. In undertaking an analysis of these three approaches, this thesis adds to the current understanding of the instruments in this area and their potential to enhance CSP.

However, this thesis moves beyond a doctrinal approach to the analysis of these instruments. Given the paradigmatic use of new governance techniques to enlist the management systems of the companies the instruments pertain to regulate, a consideration of the broader socio-economic context is necessary. Of particular significance is the ‘regulatory buy in’ to the existence of a business case for CSP over the supply chain based on the duality of social interest and corporate self-interest. Put simply, shareholders will choose to invest in ‘good’ firms and consumers will opt to buy from them; risk to society thus corresponds with risk to the company’s bottom line. It will therefore be highlighted that under both the voluntary approach and the disclosure-based approach, the question of CSP is essentially framed by market demand.[[51]](#footnote-51) In identifying this reliance placed on the business case, this thesis aims to provide greater understanding of the ‘bigger picture’ through a consideration of the extent to which the reliance placed upon investor and consumer actors by regulators in this area is justified.

The thesis also acknowledges the significance of a development in the French, and subsequently Dutch, law to the regulatory discourse in this area, and in particular, in its potential to influence future UK legislators. Given that the French Devoir de Vigilance, or Duty of Vigilance was only recently introduced, academic comment is currently limited. Furthermore, as the potential for a duty-based approach to cascade into the UK has been identified, this thesis also considers how the duty-based model may be implemented into domestic law. This has not yet been considered within the literature. More broadly, the potential for the duty-based model, as implemented in France or as envisaged within the UK, to enhance CSP is evaluated.

*The third research question enquires as to the extent that modern slavery statements, published in response to s54 of the UK’s Modern Slavery Act 2015, suggest that organisations have complied with the procedural requirements of the Act and its broader substantive aim to enhance anti-slavery CSP.*

As highlighted previously, the documentary form of the modern slavery statements published in response to the disclosure requirements of the MSA provide an opportunity for empirical study. Although three such studies have been undertaken previously, the samples used were far smaller than considered here,[[52]](#footnote-52) with the largest study comprising a majority of statements published voluntarily prior to the statutory requirements kicking in.[[53]](#footnote-53) In attempting to provide a more comprehensive analysis of the effectiveness of the Act, this thesis provides the largest analysis of modern slavery statements undertaken. The findings therein are used to inform further discussion within the thesis and serve to provide support for the inadequacy of the UK’s current approach. Furthermore, as the study is based on the first year of the Act’s application, it provides a baseline set of results to allow for comparison and contrast within future studies of this nature.

*The fourth research question seeks to investigate how the three models of regulation may be enhanced in order to improve the effectiveness of regulating anti-slavery CSP.*

Substantial consideration is given to the improvement of CSP regulation in this area through addressing some of the weaknesses of each of the three approaches identified within this thesis. It was decided that the issue of improvement would comprise a substantive research question, as opposed to a mere afterthought or, more positively, the ‘icing on the cake’. The overarching focus of the suggestions made is one of plausibility as opposed to more extreme notions of globalised economic change.[[54]](#footnote-54) As such, political discourse, policy, and what might be termed persuasive regulation elsewhere, are drawn upon to provide a set of recommendations that may appear genuinely palatable to policymakers. It is hoped that the palatability of these suggestions may thus influence future regulation in this area.

**1.6 Methodology**

Methodology can be understood as ‘the application of a conceptual apparatus or framework – a theory … to concrete problems.’[[55]](#footnote-55) Epstein and King[[56]](#footnote-56) offer a more technical focus in that a methodology should be explicitly orientated towards ensuring objective standards to ensure intellectual tenacity. It follows that the researcher’s implicit assumptions should be made explicit so to provide a consistent, repeatable and testable theoretical framework which could be perceived as analogous to a system of intellectual quality control.

This thesis takes a largely socio-legal approach to the research though one that is enhanced through political and economic insight. It is somewhat difficult to define a socio-legal approach with any precision given that it does not fit neatly within a set of well-established boundaries.[[57]](#footnote-57) It is clear however, that the ‘socio’ element of this approach focuses on the context in which the law exists, whether this context is sociological, economic, historical, geographical, or something else.[[58]](#footnote-58) Whilst the term ‘socio-legal’ has been used in a narrow sense,[[59]](#footnote-59) it is more readily used broadly as an “umbrella term” for a “wide-ranging and varied area of research activity.”[[60]](#footnote-60) As such, from a practical perspective, a socio-legal approach draws upon the diverse perspectives and methods of the wider social sciences. Indeed, one particular method utilised within this thesis is based upon the content analysis of documentary evidence. A more detailed consideration of the appropriateness of this method in undertaken prior to its use to analyse corporate disclosures required by the MSA in chapter 8.

It is conceded that a socio-legal approach to methodology is not without its pitfalls. The risk of a descriptive and atheoretical outcome has been identified by a number of writers as reflecting a lack of underlying intellectual and methodological sophistication leading to the generation and questionable analysis of poor quality data.[[61]](#footnote-61) It could be argued that this is a particular issue for law students often experienced in doctrinal study but blinkered to the wider context in which the law operates and unfamiliar with the range of social science investigative methods available. From an alternative perspective however, the variety of work being undertaken within socio-legal research can be perceived to be intellectually advantageous.[[62]](#footnote-62) As Cotterell states, “[an] important reason for the vitality of the socio-legal community in Britain … has surely been its rich, almost anarchic heterogeneity and its consistent openness to many different aims, outlooks, and disciplinary backgrounds.”[[63]](#footnote-63) It is clear that the socio-legal approach to methodology has become firmly entrenched within the legal academic community and thus Cownie and Bradley argue that the key challenge of this type of research is to conduct socio-legal study “of high quality which will have lasting interest and value.” [[64]](#footnote-64) It is contended that the notion of ‘high quality’ in the context of this thesis refers to a holistic and robust approach being taken to the research that is able to stand up to scrutiny and can be used to inform policy.

**1.7 Chapter Overview**

*Chapter 2: The Harmful Impact of a Problematic Business Model*

This thesis may be viewed as a problem-solution piece in which a problem is identified, the current solutions taken to the problem are evaluated, and then a number of potentially more effective solutions are proposed. The purpose of this chapter is thus to set out the social problem that must be addressed. It is observed that the UKs system of corporate governance drives corporate decision-making to be centred upon the maximisation of shareholder value. Although a variety of adverse social and environmental costs may stem from the prioritisation of shareholder interests, for reasons discussed at 1.2, the issue of forced labour use within the supply chain has been selected as a focal point in the consideration of CSP.

This chapter thus examines how the UK’s system of corporate governance has permitted a drift to a short-term focus on the satisfaction of shareholder interests. It will be argue that this has led to the development and refinement of a business model based upon the extensive use of globalised outsourcing as a means to maximise the redistribution of value from stakeholders to shareholders. The cost related pressures flowing along the supply chain as part of this business strategy has led to suppliers struggling to meet the demands placed upon them. The use of coping mechanisms such as subcontracting and labour outsourcing as a means to meet the productive demands of large global buyers has created an environment conducive to the use of forced labour. However, despite the role of corporate strategy in creating this productive environment, it will be highlighted that the absence of legal liability, in any traditional sense, in conjunction with ineffective host state protection for those stakeholders adversely impacted, has created a governance gap in the regulation of CSP.

*Chapter 3: Regulating Corporate Social Performance over the Supply Chain*

Chapter 3 seeks to justify regulatory intervention to enhance a firm’s CSP over the global supply chain in relation to forced labour abuse occurring beyond the national jurisdiction. This involves a consideration of the theoretical justifications for regulation intervention in this area. Following a brief consideration of the applicability of traditional command and control regulation in this context, the notion of CSP over the supply chain is placed within a new governance paradigm. Standing in contrast to state focused methods of ‘command and control’, a number of new governance techniques that inform the regulation in this area are highlighted prior to a high level overview of the voluntary, disclosure-based, and duty-based approaches to enhancing CSP. Seeking to frame the discussion that follows this chapter is intended to set the context of the further examination of these approaches and the specific legal instruments falling within them.

*Chapter 4: The International Voluntary Approach*

The first of the three current approaches taken to address the governance gap identified in chapter 3 is that of the international human rights community. This chapter considers the rejection of imposing direct obligations on the company in international law, and outlines the apparent rejection of a binding treaty to impose indirect obligations via signatory states. It is thus highlighted that the approach to CSP taken at the international level is unlikely to change in the foreseeable future. From this standpoint, the voluntary approach taken by the international community is then considered. Although the focus of this chapter is on the instruments of the UN, an overview of a number of other instruments is provided to illustrate the pervasiveness of voluntary approach at the international level.

It is acknowledged that the most recent UN initiative in this area, the UN Guiding Principles on Business and Human Rights (UNGPs), has made a significant contribution to the regulatory discourse in this area. The notion of corporate impact as a basis for CSP, along with the concept of due diligence as both a standard of conduct and a means of addressing risk stemming from the UNGPs will be considered. Reflecting more broadly on the risk-based incentive for the internalisation of social costs, it will be outlined that the equation of internal and external risk is at the heart of the business case for CSP. Given the lack of legal liability over the supply chain, it is then highlighted that the international voluntary approach is reliant on reputation as a means to incentivise companies to enhance their social performance.

*Chapter 5: The Disclosure Based Approach*

This chapter identifies that developments within UK domestic law have sought to incorporate corporate transparency requirements as a means to improve CSP. This mandatory disclosure-based approach attempts to achieve this through the reduction of informational asymmetries between a company and its stakeholders. Underlying the approach is thus a belief that the failure of market actors to pressure companies to internalise their social costs results from discrepancies in knowledge. This chapter considers the effectiveness of the current domestic disclosure-based regulation to effectively inform stakeholders. This necessarily involves a consideration of the UK’s non-financial annual reporting requirements, along with detailed examination of the UK’s attempt to regulate a specific aspect of CSP via Section 54 of the MSA. It will be suggested that the shareholder-focused nature of the annual reporting requirements has the potential to restrict the disclosure of CSP information. However, this issue may not necessarily be improved by increasing the scope of its audience. Deference to the corporate interests has led to a lack of standardisation which affords significant discretion as to the information disclosed.

Of course, a broader question relates to the capability of market-based actors to pressure companies to enhance their social performance. The following two chapters thus consider the ability and willingness of investors and consumers to do so.

*Chapter 6: The Potential of the Investor to act as an Agent of Change*

The UK’s system of corporate governance has emphasised the role of the investor in exerting pressure on companies to address their negative social externalities. Underlying the focus on this particular actor presumes both a willingness and capability to affect change. In contrast to the ethical arguments put forward to consumer activism considered in the following chapter, the overwhelming narrative of the responsible investment agenda has been based around the notion of rational self-interest and is thus wholly reliant on the business case for CSP. This chapter considers the empirical evidence for assertions of mutual social and financial benefit, and the reliability of CSP metrics used in this regard. In highlighting the inconsistency of the business case for investor action, this chapter goes on to consider capacity for investors to engage with companies to enhance CSP along with a number of the barriers to this engagement.

*Chapter 7: The Potential of the Consumer to act as an Agent of Change*

In extending the intended audience of mandatory corporate disclosure beyond the shareholder, the anti-slavery disclosure-based legislation considered in chapter 5 has more specifically targeted the consumer as an agent of change. The focus of this chapter is to evaluate the capability of the consumer to apply pressure on companies to internalise their social costs. This chapter highlights and considers a number of cognitive, situational and psychological barriers to ethical consumerism in which a desire to shop ethically is not reflected within actual purchase behaviour. The significance of collective action is acknowledged as a prerequisite for effective ethical consumerism. However, the inaccuracy of corporate disclosure is highlighted as a potential barrier to such coordination. It is also viewed as a potential impetus for consumer action. Unfortunately, there are a number of apparent limitations within current consumer law to ensure the veracity of corporate disclosures which may serve to restrict any expansion of the consumer’s role as a mechanism within the regulatory process.

*Chapter 8: An empirical study of modern slavery statements*

This chapter undertakes a large scale empirical study of modern slavery statements. This is used as a means to investigate the effectiveness of the UK’s current disclosure-based approach to forced labour within the supply chain as representing perhaps the UK’s most ambitious piece of CSP regulation. The study considers the level of compliance with the procedural requirements of the MSA as considered in chapter 5. The study also attempts to gain an insight into what may be termed substantive compliance, or compliance with the broader aims of the Act as regards enhancing anti-slavery CSP. Although the research confirms the presence of ‘market leaders’ in relation to their CSP disclosures, the study suggests that companies are generally not doing enough to tackle forced labour within the supply chain. Viewed within the context of the thesis, this finding suggests that a reliance on reputation and the potential for market–based actors to pressure companies to enhance their CSP, appears to be unwarranted within the UK’s current regulatory framework.

*Chapter 9: A Duty Based Approach*

The voluntary and disclosure-based approaches represent the law as it stands as applying to companies within the UK. However, a further potential development, and one which would encapsulate the issue of forced labour in the supply chain, stems from a piece of legislation recently enacted into French law. Following a consideration of the Devoir de Vigilance, or Duty of Vigilance, chapter 9 observes that a model of regulation imposing a corporate duty to undertake due diligence appears to be cascading into a number of other European states. It is suggested that this raises the potential for the introduction of a duty-based model to the UK in the future. As such, consideration is given as to how it might be implemented should it cascade into the UK’s legislative system. More broadly, this chapter considers the potential of a duty-based approach, both as implemented in France and as envisaged within the UK, to enhance CSP.

*Chapter 10: Recommendations*

This chapter reflects on the proceeding discussion to outline a number of proposals that may serve to increase the effectiveness of each of the three regulatory approaches considered within this thesis. As outlined previously, the underlying focus of these proposals is one of palatability to key regulators. For this reason, the recommendations attempt to use political discourse and regulatory precedent in other areas to build upon the three approaches. Firstly, it will be suggested that the disclosure-based approach may be improved through greater specificity requirements within modern slavery reporting and the empowerment of consumers to play a greater role in the regulatory process. Secondly, it will be suggested that the potential for the duty-based approach to enhance CSP may be increased through the incorporation of a mandatory verification process to ensure minimum standards are adhered to within a company’s due diligence process. Finally, it will be proposed that greater stakeholder voice at the board level may serve to increase the incorporation of stakeholder interests into the corporate decision-making process. As such, it will be suggested that the effectiveness of the international voluntary approach may be strengthened through the reconstitution of the board.

*Chapter 11: Conclusion*

This chapter revisits the research questions listed previously and considers how they have been addressed within this thesis. It will be highlighted that a number of areas for further research have been identified through the research process. This thesis will thus conclude by outlining a number of suggestions for future study.

**Chapter 2: The Harmful Impact of a Problematic Business Model**

**2.0 Introduction**

This chapter will consider the workings of an increasingly dominant model of conducting business on a global scale outside any single jurisdiction, and its effects on the use of forced labour. This argument may be divided into three broad sections. First, the driver of this business model will be considered. Here it will be outlined that the internal pressures facing a company to minimise costs derive from the mainstream corporate objective of short-term shareholder value maximisation. It will be illustrated that the UK’s system of corporate governance has embraced shareholder primacy and failed to constrain short-term decision-making. The alignment of director and shareholder interests has led to the creation and refinement of corporate strategies to maximise the value captured from the global supply chain. As such, the second section of this chapter will consider how the external globalised business environment has been strategically manipulated by large companies to maximise value throughput through the deliberate fragmentation of the supply chain. This value however has not been created through innovation or creativity in any socially beneficial sense, but redistributed from those who have limited ability to bargain to protect it. The final section will focus on a particular group of stakeholders that illustrate the impact of such strategies by focusing on one such source of value. Here, it will be illustrated how the design and operation of this problematic business model has created an environment conducive to the use of forced labour within the supply chain.

**2.1 The Good Company**

At the height of the industrial revolution in the mid-19th century, Sir Titus Salt relocated his textile company from the heavily polluted and dangerous industrial slums of central Bradford to the purpose built village of Saltaire in a rural location outside of the city. Despite the culture of the period acquiescing to the mass exploitation of both employee and environment, the relocation of the company provided the local workers with neat housing, washhouses, a school, a hospital, a gymnasium, and allotments designed to improve the workers’ diets. A town hall was built “at a large cost, by a company of shareholders, of which Mr. Salt was one.”[[65]](#footnote-65) Although the dividends arising from the company were often small, the “moral benefit to the community” was described as “inestimable.”[[66]](#footnote-66) Of course, Sir Titus understood the benefits of a healthy and contented workforce to the long-term profitability of the firm. Productive capacity of the firm would be enhanced through a collaborative workforce and the reduced risk of industrial action. However, his actions arguably went beyond mere corporate enlightenment. In seeking to benefit the company’s employees and the community at large, together with its shareholders, the company was run for the benefit of a broad range of stakeholders.

A century later, such views remained, both within the UK and across the Atlantic. For example, the classic study of the ‘American Business Creed’, reported a view widely held amongst corporate management that their responsibilities lay “to consumers, to employees, to stockholders, and to the general public” with each group’s interests “on an equal footing.”[[67]](#footnote-67) As such, the study concluded: “the function of management is to secure justice for all and unconditional maxima for none. Stockholders have no special priority; they are entitled to a fair return on their investment, but profits above a so-called fair level are an economic sin.”[[68]](#footnote-68)

Fast forward to the late 1970s and the success of the neoliberal movement, as spearheaded by the governments of Thatcher and Reagan, had created a business environment which prioritised capital interests over all else.[[69]](#footnote-69) Neoliberal policy created a diminished public sector and weakened trade union movement on the domestic front,[[70]](#footnote-70) and an accessible global labour supply through the dissolution of international[[71]](#footnote-71) and regional[[72]](#footnote-72) barriers to trade. A key component of this movement was the creation of a system of corporate governance in which the shareholder is held central: the notion of shareholder primacy. As will be discussed, the combination of an insatiable demand for shareholder value and a global labour supply vulnerable for exploitation has led to the strategic development of a productive environment conducive to the use of forced labour. For Sir Titus Salt, stakeholders were perceived as legitimate recipients of value, derived from their work towards the company’s success. The notion of shareholder primacy, as the accepted objective of the modern corporation, has increasingly redefined the stakeholder as a source of value for shareholders and little else.

**2.2 Shareholder Value as the Driver of Corporate Strategy**

It is necessary to consider in more detail the notion of shareholder primacy as the accepted corporate objective. This is important given that a central argument within this chapter is that the need to deliver value to the shareholder as the central driver of corporate strategy has created the problem that this thesis seeks to address. As such, the subsequent section will examine the arguments for holding shareholder interests to be central within a corporate governance system. Following this, consideration will be given to the impact shareholder primacy has had in shortening the timescales of the corporate decision-making process. As will be outlined, an excessive focus on cost reduction as a means to attain value has redistributed the risk of negative impact away from the company and its shareholders, on to its stakeholders. Although it will be highlighted that the UK’s company law allows significant discretion to the directors of companies in making business decisions, the successful alignment of executive and shareholder interests has ensured that short-term shareholder demands remain paramount. As such, the means by which these interests have been aligned will be discussed.

**2.2.1 The Basis of Shareholder Primacy**

Any discussion of the corporate objective is best considered with reference to the Berle and Dodd debate of the 1930s.[[73]](#footnote-73) Both writers acknowledged a separation of ownership and control within large public corporations and as such rejected the idea of a firm being conceptually an aggregation of its shareholders, as per the more traditional corporate model of the partnership. Berle and Dodd both acknowledged the need for the board to be held accountable for the management of the corporate entity yet differed in regards to whom they should be accountable. Whereas Dodd considered the company as a trustee for a wide range of societal interests, Berle argued that it was accountable solely to the shareholder. For Dodd, the role of the law was to address the public effects of incorporation and managerial responsibility thereof; for Berle, the fortification of the director-shareholder relationship was what mattered. Berle warned that “you cannot abandon emphasis on ‘the view that business corporations exist for the sole purpose of making profits for their stockholders’ until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else.”[[74]](#footnote-74)

Despite Berle suggesting, in the same year[[75]](#footnote-75) and increasingly over time,[[76]](#footnote-76) that managerial responsibility to society may be forthcoming, the notion of the firm as operating on behalf of shareholder interests became widely accepted as part of the resurgence of neoclassical economic thought. Most obviously embodied by the Chicago School of Economics, the reclassification of a company as a solely private affair fit well with a broader neoliberal revisionary agenda and its redefinition of the private-public divide.[[77]](#footnote-77) Aside from arguments harking back to Berle’s warning of the lack of a better alternative,[[78]](#footnote-78) there are essentially two lines of argument put forward in support of shareholder primacy. The first relates to ownership, or at least agency, and the second to economic efficiency.

The first argument is that shareholders are the owners of companies. Yet the equation of share ownership to corporate ownership is legally incoherent given the lack of ownership rights over the firm or its assets in any legal sense.[[79]](#footnote-79) As confirmed by the Court of Appeal, “shareholders are not, in the eyes of the law, part owners of the undertaking.”[[80]](#footnote-80) Thus the company, as a separate legal entity,[[81]](#footnote-81) can essentially be said to own itself.[[82]](#footnote-82) Following this category of argument is the notion that the company director acts as the agent of the shareholder. This has been linked to the idea of a shareholder’s residual claim, as discussed below.[[83]](#footnote-83) Whilst in economic terms the term ‘agency’ may hold some credence, in law there is no basis for such an assertion.[[84]](#footnote-84) Yet despite the ease by which this category of argument may be dispelled, such ideas appear to remain widely held.[[85]](#footnote-85)

The second argument was based on a more persuasive economic rationale[[86]](#footnote-86) that offered widespread appeal to a variety of influential groups within industry, government and academia. Building on the work of Coase, transactions between the individual factors of production within the firm were held to be akin to contracts.[[87]](#footnote-87) From this perspective, relationships between shareholders, employees, and creditors are seen as contractual relations with the terms of such relations freely negotiated therein. The firm was thus perceived as a nexus of contracts between parties rather than an entity that was capable of being owned. From this contractarian perspective, it was posited that creditors and employees can explicitly negotiate the terms of their contract and thus have fixed claims on the firm’s income.

However, the shareholder is reliant on an implicit contract providing only the right to what is left over. The right to the residual is held as necessary to secure the shareholder’s investment in light of the shareholder’s preference for a residual claim rather than becoming a creditor, with a fixed financial claim. In return for giving up the fixed financial claim, as a creditor enjoys, the shareholder bears the risk of loss. In return for bearing this risk of loss, the shareholder demands a share of the profits, or the right to the residual. As such, if the right to the residual did not exist, a shareholder would not invest in the company because they would have no assurance that managers would serve their interests. The agency costs to shareholders arising from a need to monitor management and enforce their interests would be undesirable from an efficiency perspective and further serve to dissuade investment.

This is desirable, as the argument goes, because as all the other claims on the firms resources are fixed, maximising the value of the residual generates increased wealth for society. In maximising the returns to the shareholder as the residual claimant, social welfare, in economic terms, is also maximised. The maximisation of shareholder value is thus held as the most economically efficient objective.[[88]](#footnote-88) It follows, therefore, that from this neo-liberal economic perspective, as Nobel Prize winning economist Milton Friedman stated, the “social responsibility of a company is to increase its profits.”[[89]](#footnote-89)

There are also numerous problems with this latter argument. First, from an economic perspective, empirical evidence casts serious doubt on the usefulness of a single objective both in terms of individual firm performance[[90]](#footnote-90) and more progressive notions of economic wellbeing.[[91]](#footnote-91) Second, the idea of the shareholder as residual claimant upon whom the first loss falls is highly problematic, given that the only time this is even close to the truth is when the firm is in actual bankruptcy.[[92]](#footnote-92) The idea that shareholders to whom the law affords limited liability along with a bundle of other rights, typically including the right to vote, would refuse to invest in the absence of the right to the residual, is somewhat questionable. Third, and perhaps most pertinent to our later discussion, the basis of the argument overstates the ability of other interested parties to negotiate the terms of their contract so that it fully protects their interests and expectations.

Those stakeholders who have a contract with the company are deemed to have negotiated and consented to the terms therein. However, this presumes that all of the potential ramifications of dealing with the company are foreseeable and thus be made explicit within the contract. Yet even for employees, drafting an explicit contract that would incorporate all the terms necessary to cover all possible contingency would be, at best, difficult.[[93]](#footnote-93) Underlying this difficulty is the economic idea of bounded rationality, which suggests that decision-making is necessarily a non-optimising process due to limitations on time, cognitive limitations, and the tractability of the issue at hand.[[94]](#footnote-94) This is perhaps best exemplified by the suggestion that employees make illiquid investments in a particular company, as their employer, that are not reflected in any corresponding claim on the company’s assets via an explicit contractual term.[[95]](#footnote-95) As no explicit contract is made to reflect this transaction, the employee relies upon an implicit contract for his or her due. This implicit contract is enforced by the desire by management to be considered trustworthy. As such, it is vulnerable to disruption, for example, in the event of a change of management. Put simply, the shareholder is not the sole bearer of residual risk.[[96]](#footnote-96)

This argument has been extended to suppliers who in developing their productive capabilities to better meet supply requirements, are themselves making firm specific investments.[[97]](#footnote-97) In other words, they are becoming more specialised to meet the requirements of a particular buyer or industry. Yet suppliers are unable to ensure that these investments made are contained within supply contracts, given their typically short-term nature. Moreover, the position of power large international buyers enjoy means that suppliers have little or no power to negotiate contractual terms. The use of standardised supply contracts provides a clear illustration of this point. Furthermore, even if the buyer was found to be in breach of contract there would likely be little comeback.[[98]](#footnote-98) Put simply, suppliers may also be said to have a residual claim.

Yet however flawed the idea may be conceptually, the maximisation of shareholder value has become the dominant rationale for corporate purpose in anglophile jurisdictions, and as a concept, increasingly influential elsewhere. Perpetuated by academics, empirical researchers, business schools and contemporary legal advice[[99]](#footnote-99) as the objective of the firm, the maximisation of shareholder value has been used to justify the use of irresponsible corporate practices designed to achieve this goal. Indeed, the notion of the share price as the single most significant barometer of corporate success[[100]](#footnote-100) has led to managerial obsession with those measures related to stock market performance. In managing the share price not the company, a natural preference for more immediate reward[[101]](#footnote-101) has manifested itself in a shareholder demand for short-term return exacerbating the pressures on corporate management to deliver. As will be considered subsequently, this has led to the imposition of corporate strategies designed to redistribute value from stakeholder to shareholder interests through the exploitation of a globalised market for labour as a means to minimise cost and risk.

**2.2.2 Shareholder Primacy and Short Termism**

A key failing of the shareholder value maxim is that the shareholder was viewed as a ‘platonic entity’[[102]](#footnote-102) whereby a generic shareholder interest is deemed to exist. More specifically, at least in its initial stages, shareholder value naively appeared to equate ‘investment in a company’ with ‘investment in a company’s future’. Shareholder patience was thus framed as both long term and static. However, the accepted ideological focus on shareholder value maximisation as the corporate objective as has led to shareholders quickly becoming impatient with non-performing shares and ‘offloading’ them with corresponding falls in value. [[103]](#footnote-103) Indeed, this situation has allowed for new types of financial investment vehicles to be concocted operating around far shorter time horizons. Hedge funds, in particular, had the ability to invest in a company, pressurise its directors to increase its share price in the short term then sell up at a profit.[[104]](#footnote-104) Advances in technology amidst the deregulation of the finance industry allowed for faster and cheaper equity transactions paving the way for **algorithmic or high frequency trading of shares. Indeed, in 2011, it was found that over 75% of UK equity transactions were undertaken in this fashion.**[[105]](#footnote-105)

By way of illustration, the FTSE index has seen the average holding period drop from nearly eight years in the mid-1960s to just over seven months in 2007.[[106]](#footnote-106) Similar figures can be given for the US whereby the average duration fell from seven years between 1940 and 1965 to seven months in 2007.[[107]](#footnote-107) Indeed, during this period the average holding period dropped significantly across the majority of the world’s major stock exchanges.[[108]](#footnote-108) Since the financial crisis, the duration of stock holding has increased to some extent. For example, the average duration of stockholding for the NYSE more than doubled to 1.92 years as of December 2014.[[109]](#footnote-109) Yet it remains difficult to describe such figures as ‘long term’.

The lengths to which corporate management will go to boost short-term share prices is evident by the extensive use of share buy-backs and merger and acquisition activity. Indeed the shift to shorter-term expectations is very clear with buy-backs coming close to usurping dividends[[110]](#footnote-110) as the primary method for US firms to redistribute cash to shareholders.[[111]](#footnote-111) Although cheap debt has played its part in the deliverance of shareholder wealth, such vehicles appear to be “overwhelmingly funded with internally generated funds.”[[112]](#footnote-112) Whilst the UK has not followed suit to the same extent as regards the use of share buy backs,[[113]](#footnote-113) dividend payments have increased to record levels in recent years[[114]](#footnote-114) and a surge in the issuance of long term debt in reducing the risks of corporate ‘refinancing’ could see increased levels of UK share buy backs in the future.[[115]](#footnote-115)

Society needs companies to take a long-term approach to investment and innovation in order to produce economically, socially and environmentally sustainable growth. However, managerial pursuit of shareholder value has led to immediate shareholder interests being prioritised at the expense of long-term growth[[116]](#footnote-116) as a means to create value. Lazonick describes this as being a move from an allocative regime of “retain and reinvestment”, to one of “downsize and distribute.”[[117]](#footnote-117) As such, companies that once retained and reinvested their earnings into the firm now downsize their workforce and distribute these earnings to shareholders via dividends and share buy-backs.[[118]](#footnote-118)

This short-term focus is more likely to lead to socially irresponsible corporate behaviour as the pressure to deliver shareholder value has led to an excessive focus on cost reduction. It is clear that this may have disastrous consequences for stakeholders. The BP Horizon oil spill provides a clear example, with dramatic cuts in research and maintenance significantly increasing the risk of social harm.[[119]](#footnote-119) In BP’s case, the costs to society were ultimately internalised through the imposition of appropriate legal sanctions.[[120]](#footnote-120) For future oil companies operating in US waters, therefore, it would appear that the social risks arising from cutting research and maintenance costs equate to business risk. However, this was due to the availability and significance of the legal sanctions imposed by the US government. This is by no means the norm. In those jurisdictions that lack such laws or the legal capacity to enforce them, negatively impacted stakeholders typically have little recourse. This is magnified when the harm manifests itself not within the company’s own operations but within its supply chain. Thus whilst the Company Law Review suggested that involuntary creditors[[121]](#footnote-121) should be protected by the use specific regulation,[[122]](#footnote-122) in practice, this may prove difficult, as will be illustrated in the subsequent chapters of this thesis.

**2.2.3 Enlightened Shareholder Value and the Business Judgment Rule**

The UK’s company law remains largely shareholder-centric. In acknowledging the potentially harmful effects on stakeholder interests by way of a short-term approach to attaining shareholder value, the Company Law Reform attempted to ‘enlighten’ companies into taking a longer-term, more sustainable view.[[123]](#footnote-123) The primary mechanism designed to achieve this aim was subsequently implemented within the UK Companies Act 2006. As such, section 172 of the Act provides in order to “to promote the success of the company for the benefit of its members”, a company director should “have regard to” a non-exhaustive list of factors when making a decision.[[124]](#footnote-124) Relevant factors for the present discussion include the impact of any decision on the long term, the impact on supplier relations, the environment and “other matters”[[125]](#footnote-125) thus permitting, but not mandating, the consideration of human rights impacts. Despite the significance of s172 in attempting to instil an enlightened variant of shareholder primacy into the law, it is limited in practice. Firstly, the relative ease of satisfying the requirement to “have regard to” means they are of little note in any substantive sense.[[126]](#footnote-126)Secondly, the Act provides that the objective of ‘having regard’ to these factors is to promote the success of the company for the benefit of its members.[[127]](#footnote-127) As such, strictly speaking, a director should only include stakeholder interests within a decision of the company where it would ultimately benefit the shareholders.[[128]](#footnote-128) The words ‘strictly speaking’ in the previous sentence are used given that the position at common law arguably undermines the statutory objective of s172 to enshrine shareholder primacy into UK law.

What might be deemed as the caveat of shareholder primacy is a long-standing reluctance of the courts to interfere with business decisions. In acknowledging its lack of expertise in the field of management, a presumption of competence in company management exists, thus the courts will not attempt to judge the merits of a business decision.[[129]](#footnote-129) The effect of this unwritten ‘business judgment rule’[[130]](#footnote-130) is that stakeholder interests are left to the discretion of corporate management. As such, providing a director could argue that a decision benefitting a particular stakeholder would also serve to maximise shareholder value in the long or short term, the court would not intervene.[[131]](#footnote-131) For advocates of shareholder primacy, this discretion forms the basis of the ‘agency problem’ of a widely held company, as considered earlier. Yet it also forms the basis of a counter argument that highlights the more socially responsible management of companies from yesteryear.[[132]](#footnote-132) In light of this managerialist caveat, s172 should be seen as indicative of neoliberal policy, rather than offering any conclusive change in the law in practice.

The beginning of this chapter outlined that prior to the advent of shareholder primacy, many directors perceived themselves to be trustees of an important social institution,[[133]](#footnote-133) and charged with the responsibility to satisfy a broad range of stakeholder interests.[[134]](#footnote-134) Yet if management possess the discretion to act in the interests of stakeholders, and indeed, have done so in the past, an important question is why they no longer do so.

**2.2.4 The Alignment of Shareholder and Executive Interests**

The answer to this question of why directors do not use their discretion to benefit stakeholder interests at the expense of shareholders is found within the context of less interventionist state and weaker trade union movement. This context has reduced the potential impact of public consensus on corporate management.[[135]](#footnote-135) Within this context, the UK has seen the decline of a more progressive system of corporate governance based upon a tripartite relationship of capital, labour and the state, to that which we have now.[[136]](#footnote-136) In the place of social acceptance are mechanisms of control that have been incorporated into the corporate governance system to ensure shareholder interests are held paramount. An essential element of this development has been the alignment of shareholder and executive interests[[137]](#footnote-137) creating a boardroom in which corporate strategy is designed to maximise the flow of value to the shareholder. This is reflected within a hostile takeover situation, and more obviously, through executive pay policies.

**2.2.4.1 Alignment of Interests: The Market for Corporate Control**

The UK’s takeover regime perhaps provides the best example of the centrality of the shareholder interest to the UK’s system on corporate governance. This is because a hostile takeover attempt may be said to provide a clear example of a situation in which director and shareholder interests are likely to conflict. For the shareholder of the target company, any offer for their shares would typically attract a premium of 20% to 40% above market prices. On the other side of the coin, the typical outcome of a hostile takeover is that the incumbent board is replaced thus the directors lose their jobs.[[138]](#footnote-138) In short, it is the shareholder’s short-term financial interests for a hostile takeover to be successful,[[139]](#footnote-139) but in the director’s interests for it to fail.

The aim of UK Takeover Code[[140]](#footnote-140) is to “ensure that shareholders in an offeree company are treated fairly and are not denied an opportunity to decide on the merits of a takeover.”[[141]](#footnote-141) Legally enforceable provisions are in place to prohibit the use of defensive measures[[142]](#footnote-142) by directors to ward off a potential takeover.[[143]](#footnote-143) Directors are restricted from, for instance, taking steps to raise the share price to ward off a potential predator. The regulation here is very strict, and any decisions made by directors fall outside the scope of the business judgment rule. The possibility that, in seeking to prevent a takeover, a director may be considering the employees or the local community interests, or even the macro-economic effects, is irrelevant. Essentially, therefore, the takeover regulation safeguards any encroachment on the shareholders interest arising from the market for corporate control.[[144]](#footnote-144)

The effects of the above mean that directors are incentivised to keep the price of a company’s shares high so to prevent it from being a takeover target. Furthermore, as shares can be used as currency to buy out another firm,[[145]](#footnote-145) a potential predator firm is incentivised to raise the price of shares in order to increase the value of its bargaining chips. Where a loan is used to finance a takeover (a leveraged buy-out), the interest rates of the loan may be inversely related to the predator company’s share price,[[146]](#footnote-146) again creating an incentive to raise the share price. Ultimately, therefore corporate directors are incentivised to keep the share price high, and thus deliver value to shareholders via capital gain, whether the company they represent is a potential target or a potential predator.

**2.2.4.2 Alignment of Interests: Executive Pay**

Perhaps the most obvious way shareholder and executive interests have been aligned is through the reformulation of executive pay. Prior to the advent of shareholder primacy, directors typically received fixed salaries and held relatively few shares.[[147]](#footnote-147) Yet, in order to keep managerial discretion in check executive pay structures have been redefined to ensure the prioritisation of shareholder value.[[148]](#footnote-148) Directors are now financially incentivised to deliver shareholder value in order to justify executive reward.[[149]](#footnote-149)

Most executive pay structures in public companies comprise three elements: a fixed salary, an annual cash bonus and a ‘long-term incentive plan’ typically based on total return to shareholders, or operational measures such as earnings per share. In order to incentivise share-price related performance, the fixed salary component commonly comprises the smallest part of his or her total wage. For example, base salaries within a median S&P 500 company in 2014 comprised approximately 12% of total executive remuneration[[150]](#footnote-150) with those of the median FTSE 100 firm in 2016 found to be around 20%.[[151]](#footnote-151) In contrast, maximum annual cash bonus for a FTSE 250 CEO is typically calculated at between 100% and 180% of base salary.[[152]](#footnote-152) Although performance criteria vary from firm to firm, the overriding determiners generally relate to those factors that have the potential to raise shareholder value. Typically, such performance measures refer to measures such as increased cash flow, strict management of investment and cost reduction. Whilst some firms include non-financial criteria in the calculation of cash bonuses, these tend not to represent a significant percentage of the total bonus. For example, in 2015 the criteria of ‘operational safety considerations’ represented a very small percentage of the total annual bonus calculation for BP executives relative to those variables explicitly linked to shareholder value.[[153]](#footnote-153) This had remained the case even in the aftermath of the Deepwater Horizon disaster highlighting the entrenchment of such norms within the corporate governance system. In the absence or marginalisation of CSP criteria within the bonus scheme, there is little financial incentive for directors to use the discretion afforded to them to act for the stakeholder interests, unless doing so also maximises shareholder value.

The final and largest component of executive pay is comprised of ‘long-term incentives’ (LTIs) and typically make up in excess of 50% of total executive remuneration.[[154]](#footnote-154) Whereas annual performance is linked to the cash bonus component, the use of share awards are designed to encourage performance over a longer period through the alignment of director and shareholder interests.[[155]](#footnote-155) As such, shares are awarded to executives upon meeting certain performance conditions within a particular performance period. Whilst the length of time is significant here, it does not necessarily follow that an increase in holding terms will incentivise longer-term decision-making. The performance conditions therein are highly relevant. For example, although less common in the UK, US stock options typically reward share price increases but provide no negative counter balance for share price decreases. As such, they have “encourage[d] risk taking that is more careless and uncontrolled than that envisioned.”[[156]](#footnote-156) Indeed, option pay has been linked to increased investment in short term, rather than long term, capital assets.[[157]](#footnote-157)

As there are no hard requirements in company law about the structuring of remuneration to reflect long-term interests, the task is left to the soft law of the UK’s Corporate Governance Code (CGC).[[158]](#footnote-158) The CGC takes a ‘comply or explain’ approach to corporate governance whereby firms should comply with the provisions of the code or explain to shareholders within their annual reports why they have not.[[159]](#footnote-159) Perhaps reflecting the weakness of many of the CGC’s requirements, most firms typically comply.[[160]](#footnote-160) The CGC has repeatedly highlighted the need for executive pay to reflect the “long term sustainable success” of the company[[161]](#footnote-161) yet has had little success in achieving this objective. As regards executive pay, the CGC increased the minimum holding and vesting period for LTIs ‘in normal circumstances’ from three to five years in 2018.[[162]](#footnote-162) However, it is suggested that this period remains decidedly short term in the context of the broader sustainability agenda.[[163]](#footnote-163) Moreover, senior executives typically leave a firm within five years,[[164]](#footnote-164) thus may have limited impact on decision-making in a broader sense. Finally, the holding period may be of limited significance based on the performance metrics of the executive pay policy. Certainly, a broad criticism of the CGC’s requirements in this area is that it fails to restrict the use of short-term metrics. Moreover, it does not mandate the use of any metrics related to CSP.

The CGC has long required the use of remuneration committee in the setting of pay policy. Indeed, the 2018 CGC requires an explanation by the remuneration committee of the strategic rationale behind the pay structure and performance metrics used.[[165]](#footnote-165) However, the restrictive nature of the composition of remuneration committee has been linked to the current practice of conceiving corporate performance in narrow financial terms.[[166]](#footnote-166) Indeed, it is quite evident that committee members typically lack experience in stakeholder issues.[[167]](#footnote-167) The 2018 CGC aimed to address this latter issue by requiring that a company should incorporate either: a worker director on the board; a stakeholder committee comprising representatives of the company’s identified stakeholder constituencies; or a non-executive director (NED) with responsibility for stakeholder issues.[[168]](#footnote-168) However, given the use of NEDs on corporate boards more broadly, as required by the CGC,[[169]](#footnote-169) it appears somewhat predictable that the third option will be taken by the majority of companies.[[170]](#footnote-170) It remains to be seen whether this will help incorporate greater inclusion of long-term and/or stakeholder interests within executive performance goals. However, given that the use of NEDs is already commonplace on existing remuneration committees, and this option requires no direct stakeholder representation, it appears unlikely.

The UK has sought to empower the shareholder as a monitor of executive remuneration through providing shareholders with a binding vote on a company’s pay policy. In contrast to the comply or explain approach of the CGC provisions discussed above, the right to a binding vote on executive pay policy has been put into hard law via an amendment of the Companies Act 2006.[[171]](#footnote-171) Amongst widespread public opinion that the level of executive remuneration was completely out of control,[[172]](#footnote-172) there was an underlying presumption that shareholders would engage with companies on the issue. Yet although shareholders have engaged, they have not done so in the way that was expected. In short, very few shareholders have used their vote to reject a company’s executive pay policy.[[173]](#footnote-173) Indeed, it is typical for at least 90% of shareholders to vote in favour of a company’s remuneration policy[[174]](#footnote-174) thus in the vast majority of cases it is simply approved.[[175]](#footnote-175) It appears that shareholders are generally happy with the current state of affairs. The decision to support or protest against a pay policy may thus be unrelated to the terms of the policy terms but rather upon positive or negative expectations of financial performance.[[176]](#footnote-176) Indeed, the financial incentives for executives in delivering short-term shareholder value are plain to see.[[177]](#footnote-177)

The provision of rights to the shareholder in determining executive pay policy is a further example of the shareholder being identified as a potential agent of change. This is but one of the attempts that have been made to incentivise shareholders to engage with corporate management in the belief they will drive a more sustainable agenda. Another attempt is the singling out[[178]](#footnote-178) of large institutional investors to act as regulatory gatekeepers and drive long-term decision-making[[179]](#footnote-179) through the introduction of the Stewardship Code in 2010.[[180]](#footnote-180) More broadly, regulatory intervention here has sought to empower the shareholder through viewing the problem as one of informational asymmetry. As will be considered in chapter 5, disclosure-based regulation has sought to increase the availability of non-financial information available to shareholders through changes made to corporate annual reporting requirements. Underlying this is a belief that such information will influence the investment decision or the decision to engage based on the business case for enhanced CSP[[181]](#footnote-181) and longer-term decision-making.[[182]](#footnote-182) Unfortunately, the utter failure of shareholders to contain the redirection of executive pay to such ends reflects a broader failing in their identification as agents of change. The notion that shareholders may be unsuitable as monitors of CSP is explored further in chapter 6.

**2.3 The Strategic Development of a Business Model Based on the Global Fragmentation of Production**

The singular corporate objective of shareholder value has served to legitimise the extraction of wealth, or value, from the stakeholder to the shareholder, and to the corporate directors whose interests align. An increasingly oligopolistic marketplace has limited the ability of multinational brands and retailers to generate economic rents, or value, through increasing the final prices charged to consumers. This has led to a noticeable shift towards cost minimisation as a method of value creation.[[183]](#footnote-183)

Since the late 1990s massive increases in shareholder returns has been accompanied by similarly large increases in global outsourcing.[[184]](#footnote-184) In the endless search for shareholder value, productive activity has thus been restructured to take advantage of the opportunities of a global marketplace, prised open by neoliberal international development policy. Companies once sought the vertical integration of the productive process based upon the efficiencies gained from spurning market transaction. However, a decline in asset specificity, in part due to technological developments, had led to the development of global supply chains as a means to deliver shareholder value. The refinement of global supply chains to permit the maximisation of value extraction through the upstreaming of cost pressures has culminated in forced labour as the logical endpoint of a cost-cutting model within a labour intensive process of production.

This section first outlines the theoretical underpinnings of the decision to outsource through considering the ‘make or buy decision’ through the prism of transaction cost economics. Following this, a detailed analysis of the strategic creation and refinement of a business model designed to maximise value extraction from the supply chain is undertaken. This will necessarily include a consideration of the development and refinement of the global supply chain. It will be suggested that the profits earned through cutting a company’s own productive capacity and reorganising the productive process in this manner have been utilised to satisfy shareholder expectations in line with the shareholder value ideology.[[185]](#footnote-185)

**2.3.1. The Outsourcing Decision**

The traditional understanding of the decision to produce in house or outsource to the market is based on the work of economist Ronald Coase. According to Coase, the commercial organisation exists as an alternative to contractual market exchange.[[186]](#footnote-186) Key to Coase’s hypothesis is the idea that the process of contractual exchange is not free. Transaction costs are “incurred in making an economic exchange … beyond the price of the product or service procured.”[[187]](#footnote-187) Exchange may be said to involve three steps with each corresponding to particular transaction costs.[[188]](#footnote-188) Such costs arise in relation to *searching* for a suitable partner to trade with, *bargaining* in terms of negotiating and concluding a contract, and *enforcing* the contract as regards monitoring and punishing non-performance. Whilst these costs still occur when production is organised within a firm, they are lessened by production being organised through longer term, wider spanning contracts. The firm is therefore used as a vehicle to direct productive resources by administrative fiat in order to avoid the additional costs associated with market procurement.

Over time, however, the costs of transacting with the market have fallen for a number of reasons.[[189]](#footnote-189) Technological developments have led to the decline of those transaction costs relating to transport and communications.[[190]](#footnote-190) Moreover, as will be returned to shortly, the delegation of the productive process to the “specialised input producers”, acting as intermediaries to the supply chain, has reduced the search costs of locating appropriate suppliers and coordinating production.[[191]](#footnote-191) Nevertheless, even with the decline in such costs, the costs of outsourcing from a transaction cost perspective are likely to remain higher than production in house.

It is clear that the underlying rationale for globalised outsourcing is thus not based on the reduction of transaction costs but on the reduction of cost more generally. As permitted by developments in computer-aided design and technology that have served to reduce asset specificity within large swathes of the productive process,[[192]](#footnote-192) more and more productive tasks have been outsourced to lower cost producers within global supply chains. The impact and continual refinement of lean production techniques in the quest to lower the costs of production has had a dramatic effect on those who work within the supply chain. As will be argued shortly, the creation of this flexible productive environment as a means to reduce costs is ultimately centred upon the exploitation of an increasingly vulnerable supply of labour within a globalised market.

The outsourcing of production has also permitted the company to shield itself from the risks associated with the adverse effects of the productive process. The restructuring of corporate operations to rely extensively on the use of supply chains has not merely minimised productive costs but also responsibility via the delineation of accountability. The boundaries of the corporate form have been utilised as a key method of risk reduction for a long time,[[193]](#footnote-193) yet the use of the global supply chain has perfected this model in extinguishing any notion of legal liability.[[194]](#footnote-194) The difficulty in imposing liability upon a company in tort for the adverse social impacts of its suppliers is outlined in chapter 3. This situation has created a ‘governance gap’ in which companies are shielded from liability in any traditional sense.

The Global Value Chain (GVC) or Global Production Network (GPN) literature considers the way in which production, trade and investment has been organised on a global basis and the value flows therein. The GVC/GPN concept is highly scalable with consideration being given within the research in this area to the roles of the state, the firm, and the worker in the context of globalised outsourcing. Global supply chains are perceived as providing a “stepping-stone” for these actors to integrate into the global economy.[[195]](#footnote-195) As such, much of the emphasis, at least initially, was on the notion of ‘economic upgrading’ whereby firms and workers attempt to capture greater amounts of value through attempting to engage in higher value tasks or stages within the productive process. This, of course, presupposes an ability for these actors to capture the gains of participation within globalised systems of production.[[196]](#footnote-196) Some of the work in this area refocused the research focus onto the potential for ‘social upgrading’ as the process of improving the rights of workers as social actors, and enhancing the quality and conditions of their employment.[[197]](#footnote-197) A number of critical commentators have highlighted the difficulties faced by workers in achieving social upgrading, along with the potential for ‘social downgrading’,[[198]](#footnote-198) which may be understood more simply as labour exploitation.[[199]](#footnote-199) These issues will be returned to shortly. Of particular relevance to the more immediate discussion is the observation within the GVC/GPN literature of how a ‘lead firm’, at the head of a supply chain, may coordinate the productive activity of those entities that supply it.[[200]](#footnote-200) Central to these notions of supply chain governance, is the idea that “authority and power relationships … determine how financial, material and human resources are allocated and flow.”[[201]](#footnote-201)

For economic commentators, the outsourcing decision may “be seen in terms of the enterprise’s specific *capabilities* and *needs* at the time of the transaction.”[[202]](#footnote-202) However, the determination of a firm’s capabilities are highly related to longer-term decisions regarding the distribution of resources within the firm. Indeed, Coase’s work highlights the significance of planning and organisation in the direction of business activity, thus as Cowling and Sugden reflect, “the firm is not primarily about of a set of transactions … [but rather] strategic decision making.”[[203]](#footnote-203) Moreover, the enterprise’s needs, from a high-level perspective, may be set from the company’s broader situational context. This is significant, as the practice of shareholder value maximisation has unquestionably had an impact on corporate strategy,[[204]](#footnote-204) resulting in an asset-light variant of the firm. Put simply, the ‘need’ to deliver shareholder value, as discussed earlier, forms the key driver of the systemic restructuring of the productive process to maximise the extraction of value from the supply chain. This will now be discussed in detail.

**2.3.2 A Strategy Based on External Opportunity**

It is insightful to consider issues of corporate strategy, decision making and operational practice within the broader conceptual notion of the business model.[[205]](#footnote-205) A business model may be defined simply as “a blueprint of *how* a company does business.”[[206]](#footnote-206) It depicts “the content, structure, and governance of transactions”,[[207]](#footnote-207) ranging from procuring raw materials to satisfying the final consumer[[208]](#footnote-208) in attempting to achieve its key objective of value[[209]](#footnote-209) creation.[[210]](#footnote-210) As a representation of the underlying logic for the manner by which the firm exploits its business opportunities,[[211]](#footnote-211) the business model concept not only permits the consideration of a firm’s internal structure and governance[[212]](#footnote-212) but also the consideration of causal links between those elements within the firm and those outside it.[[213]](#footnote-213) It therefore may be used to elucidate the relationship between a commercial organization and its external stakeholders.[[214]](#footnote-214)

In order to reduce the input costs of production, the productive process has been intentionally fragmented[[215]](#footnote-215) allowing cross-border production that can take place beyond the legal limits of the company or corporate group. Initially this was done on a regional basis but rapidly internationalised (as measured by foreign value-added content of production) through the 1990s[[216]](#footnote-216) becoming truly global in the new millennium.[[217]](#footnote-217) The objective of this strategy is to maximise the creation of value in each step of production through the vertical disintegration of the supply chain.[[218]](#footnote-218) When combined with a focus on organisational core competencies[[219]](#footnote-219) the result of this strategy has been the outsourcing of non-core activities to not only exploit geographical comparative advantage,[[220]](#footnote-220) but to maximise value creation through a “focus on global network efficiency and coherence.”[[221]](#footnote-221)

In many supply chains, the global buyer or ‘lead firm’ typically retains the majority of the value of a product[[222]](#footnote-222) by way of its oligopolistic[[223]](#footnote-223) position over a fragmented global supply base[[224]](#footnote-224) and the protection of its brand through the strengthening of domestic laws relating to intellectual property.[[225]](#footnote-225) The distribution of value may be used as a proxy for corporate bargaining power within, and thus control over, the supply chain.[[226]](#footnote-226) This reflects the classic notion of power-dependency theory whereby one party’s power to control relates to the extent of the other party’s dependence on the first party for what it wishes to gain.[[227]](#footnote-227) As the most likely result of any power imbalance is the appropriation of a relatively larger proportion of the benefits of the exchange[[228]](#footnote-228) the share of value secured by one company relative to another within the process of production may thus be used to reflect the dyadic power relationship[[229]](#footnote-229) between two business actors.[[230]](#footnote-230)

Early global supply chains most often reflected a simple model of vertical disintegration. This involved a direct relationship between the lead entity and its suppliers in the production of basic products less customised to the demands of the lead firm.[[231]](#footnote-231) However, the productive capabilities of suppliers in less developed countries increased, to a limited extent, through their participation within the productive process.[[232]](#footnote-232) Alongside this, came technological developments that boosted the managerial capabilities of the lead firm. These advances allowed the creation and communication of detailed product specifications to the supply chain.[[233]](#footnote-233) This created a productive environment whereby suppliers were able to provide customised products in line with lead firm demand. Put simply technological changes and the growing expertise of suppliers allowed the business model to be refined. The benefit of this change to the lead firm was a reduced requirement for explicit coordination and control, thus lowering those costs associated with managing outsourced production.[[234]](#footnote-234) Production costs were further reduced through the promotion of global competition between lower level suppliers[[235]](#footnote-235) across different countries. This model thus offers the lead entity many of the price and flexibility related benefits of a commodities market but allows a level of coordination to ensure effective supply.[[236]](#footnote-236) This competitive environment allows input prices to be pushed down as suppliers vie for the lead entity’s business whilst the lead entity itself focuses on the generation of consumer demand and the transmission of this demand to its subcontracted supply base through the purchase order.

Of course, the buyer-supplier relationship is rarely so simple. Although a modern supply network may involve many levels or tiers of suppliers,[[237]](#footnote-237) in many cases a mega-supplier is involved[[238]](#footnote-238) within a so-called ‘triangular chain’ of production.[[239]](#footnote-239) These tier 1 suppliers receive orders from the lead firm and manage an extensive number of producers across a wide variety of locations[[240]](#footnote-240) to meet them. This model represents a growing trend as lead firms move to both increase the economies of scale[[241]](#footnote-241) and reduce transaction costs via an increased concentration of their direct supply base. In some cases, the tier 1 supplier does not actually produce anything for the brand itself and so acts in an intermediary capacity. Effectively the managerial responsibility for resource allocation (along with the risk of that allocation going wrong), which for Coase was the “nature of the firm”[[242]](#footnote-242), is contracted out by the lead firm to the first tier supplier. Reflecting considerations of geographic or site specificity once linked to the integration of productive tasks,[[243]](#footnote-243) the locations of these intermediaries are frequently strategically located near to regional manufacturing hotspots[[244]](#footnote-244) and emerging markets.[[245]](#footnote-245) The consolidation of supply chain and outsourcing functions to such intermediaries has resulted in the use of larger and more capable tier one suppliers.[[246]](#footnote-246) In many cases, a supplier may produce goods for a number of lead firms with only a small percentage of productive capacity designated to each brand.[[247]](#footnote-247) However, an intermediary provides a vehicle for the coordinated pooling of such demands resulting in an increased level of bargaining power, a fact not lost on the management of lead firms.[[248]](#footnote-248)

Indeed, the use of intermediaries simply represents the outsourcing of the coordination of production to enable an increased focus on the maximisation of shareholder value through a focus on those high value core competencies such as branding and in some cases, retail. Although these intermediaries are themselves large firms, evidently they may not offer a level of asset specificity that precludes their replacement by a competitor.[[249]](#footnote-249) Indeed, the degree of power that the lead firm has over the supply chain may be illustrated by the value distribution between itself and the lead firm.[[250]](#footnote-250) For example, Apple’s net profit margin in 2011 was in excess of 25%[[251]](#footnote-251) whereas Foxconn, at the time, a key intermediary, experienced just 1.1%.[[252]](#footnote-252) Although it is accepted that the benefits accruing to tier 1 suppliers in terms of technological transfer may encourage the acceptance of lower profit margins, the high value components utilised in such devices are often beyond the remit of the subcontracting arrangements. Moreover, it may be observed that narrow profit margins are replicated in less technologically advanced industries. For instance, Li and Fung, the world’s largest supplier of clothing and toys operated at a profit margin of 2.5%[[253]](#footnote-253) in 2011 and reported a further profit decline in 2012,[[254]](#footnote-254) whilst the large western retailers it supplies reported significantly higher profit levels.[[255]](#footnote-255)

At a macro-level, high levels of concentration within a variety of industries,[[256]](#footnote-256) partly due to extensive merger and acquisition activity,[[257]](#footnote-257) has ensured oligopsonistic conditions are persistent in the majority of supplier markets.[[258]](#footnote-258) This has afforded large companies significant bargaining power, compounded by the possibility of using one of a limited number of intermediary buyers to concentrate pressure on individual suppliers. This is particularly the case within more developed global supply chains, such as textiles, clothing and footwear (TCF) or consumer electronics, in which supply is highly dispersed in a spatial sense, reflecting a wider participation of developing countries in global trade with the likely result of increased price competition amongst suppliers.[[259]](#footnote-259) The consequences of these downward pressures on input prices are evident in falling import unit values relative to the prices of final goods and services. For instance it has been estimated that annual import inflation in manufacturing goods fell by an average of 0.7% between 2000 and 2006 due to the increased level of UK imports from ‘low-cost’ economies[[260]](#footnote-260) with similar studies for the US[[261]](#footnote-261) and Eurozone[[262]](#footnote-262) reaching the same conclusion.

At a micro-economic level, the power imbalance between lead firm and supplier is closely linked to the ability to manage internal cost and pricing structures. Here, the lead firm may have *some* ability to utilise mark-up pricing strategies in order to maintain profit levels.[[263]](#footnote-263) It is acknowledged however that there may be market-based limitations on the ability for the lead firm to raise prices.[[264]](#footnote-264) This is largely due to expectations of persistently low prices amongst western consumers,[[265]](#footnote-265) set by lead firms to maximise value and permitted by the cost reductions associated with extensive outsourcing.[[266]](#footnote-266) Falling disposable incomes is also relevant to the ability of firms to raise prices with the UK experiencing long-term wage stagnation within an increasingly financialised economy.[[267]](#footnote-267) In some cases, alternative methods to price increases have been used by the lead firm to maintain value share in the face of increased cost of raw materials. This is perhaps best exemplified by recent trends in shrinking of portion sizes of food products.[[268]](#footnote-268) More broadly, given their position of strength over the supply chain, lead firms are able to address this ‘price-cost squeeze’ through placing even more pressure on suppliers.[[269]](#footnote-269) As a result, first tier suppliers may be under constant pressure to reduce costs and enhance flexibility but lack any control over final pricing.[[270]](#footnote-270)

**2.4 Squeezing the Global Supply Chain**

The need to deliver short-term shareholder value has led to the creation of a business model designed to ensure the constant imposition of downward pressure on production costs. Such arrangements made between lead firm and tier one suppliers have far-reaching implications for lower tier suppliers within the supply chain.[[271]](#footnote-271) The imposition of pressure on the tier 1 intermediary to supply to the lead firm at lowest cost is pushed onto the next tier of the supply chain.[[272]](#footnote-272) In turn, the second tier supplier may be forced to outsource production, or its labour requirements, to meet the cost and delivery times demanded on it. As the pressures flow along the supply chain, the value share available to the supplier is progressively squeezed at every stage of production. As will be illustrated, the supplier is forced to develop its own strategies to cope with such pressures. Where this involves further outsourcing of its labour requirements or of production itself, the share of value available to the next tier along becomes less and less. Ultimately, this can have dramatic effects on those who are least able to safeguard their own interests.

**2.4.1 The Effect of Lead Firm Pressure on Workers within the Supply Chain**

The procurement strategies of lead firms are closely integrated with its consideration of marketing, product range, and logistics. Final product consumer demand has been stoked by increasing product ranges, endless sales and discounts, faster product introductions,[[273]](#footnote-273) and the multiplication of ‘seasons’ within the retail environment.[[274]](#footnote-274) This has resulted in greater rates of stock turnover within stores. Timely delivery is essential for brands operating within these highly dynamic markets and technological developments, such as real time data about sales, ensure that lead firms are well connected to consumer demands in the dictation of production schedules. The system of production has thus been designed to incorporate strategy in order to reduce any reputational risk (and lost sales) of not meeting consumer demand in a timely manner.[[275]](#footnote-275)

Rapid replenishment and quick turnaround strategies also serve to minimise the inventory holding. This system has thus been designed to allow much smaller inventories,[[276]](#footnote-276) and so reduce storage costs and insulate against the risk of commercial failure resulting from holding an excess stock of poorly selling products. The supply chain is therefore required to respond very quickly to consumer demand for varied and quickly changing products but restrictions are placed on the levels of production. Initially linked to ‘fast-fashion’, it is clear that the fashion industry was merely a pioneer[[277]](#footnote-277) of this Quick Response (QR) model of procurement.[[278]](#footnote-278) These requirements have created a highly volatile productive environment. Suppliers are expected to produce a variety of products[[279]](#footnote-279) in smaller and smaller batches with ever-shortening lead times.[[280]](#footnote-280) Inefficient practices,[[281]](#footnote-281) from the suppliers’ perspective at least, mean that last minute orders, changes or cancellations may cause further volatility. Indeed, a study of a large European electronics firm by Kaipia, Korhonen and H Hartiala, found changes in production by up to 80% occurring on a weekly basis.[[282]](#footnote-282)

The pressures such practices apply to the supply chain are significant. The demands for low cost, flexible production are typically placed on the first tier, perhaps upon intermediaries, whose core competences relate to the coordination of production.[[283]](#footnote-283) These firms have become very efficient at “squeezing” upstream suppliers. The concurrent demands for lower costs and increased flexibility means that productive suppliers are asked to do more and more with less and less. Indeed, Harney reports an industry consultant in the Chinese export industry stating: “Almost every small and medium sized supplier that we talk to has a cash flow problem.”[[284]](#footnote-284) In some cases, buyers stretch out their payment schedules to delay payment to suppliers until long after the goods are shipped.[[285]](#footnote-285) In order to maintain production suppliers frequently have to revert to various coping mechanisms in order to deliver goods in the timeframe, quantity, and price demanded by their immediate buyer.

In those industries where there is less potential to cut labour costs in order to increase value extraction, the pressure to reduce costs may manifest itself in ‘corners being cut’. This may result in externalities such as the release of harmful chemicals into the environment[[286]](#footnote-286) or greater infections within livestock through the overuse of antibiotics to allow for greater animal density.[[287]](#footnote-287) In labour intensive industries, however, the only area in which the supplier can enhance its cost effectiveness relates to its labour supply.[[288]](#footnote-288) Flexible production capabilities relating to seasonality, product updates or rapid changes in demand may be enhanced through the use of an informal or temporary workforce of which there has been a rise in both developed[[289]](#footnote-289) and developing[[290]](#footnote-290) countries. The widespread use of zero hour contracts in the UK provides an example in which workers are ‘permanently temporary’.[[291]](#footnote-291) Aleksynska and Berg observe that the use of a temporary workforce is increasingly used as a strategic tool rather than a ‘fall back’ mechanism to deal with unexpected fluctuations in demand.[[292]](#footnote-292)

In seeking to react to these productive pressures in labour intensive industries, suppliers have little choice but to enhance flexibility and cut labour costs through the increased use of temporary or casual workers. In doing so, production may be quickly scaled up and down and labour costs are typically the only cost area over which a productive supplier has much control. Ultimately, workers are the ones who are “leaned on.”[[293]](#footnote-293) It is of little surprise, within such an environment, that a study by Oxfam found that “sourcing strategies designed to meet ‘just-in-time’ delivery (premised on flexibility and fast turnaround), combined with the lowering of unit costs, are significantly contributing to the use of exploitative employment practices by suppliers.”[[294]](#footnote-294)

In what might be termed the supply chain for labour, temporary workers may be recruited to work alongside permanent employees albeit under very different terms and conditions.[[295]](#footnote-295) This flexible labour may be sourced directly or via labour subcontracting arrangements involving recruitment agencies and labour brokers. Put simply, suppliers will subcontract to manage production[[296]](#footnote-296) by re-outsourcing to sub-suppliers further upstream.[[297]](#footnote-297) This is necessary “to meet tight deadlines or to be able to complete unanticipated or last-minute orders.” [[298]](#footnote-298) In some cases, production will be shifted to other factories without informing the buyer.[[299]](#footnote-299) Such factories may be unregistered ‘shadow factories’ away from the gaze of corporate audits into labour standards.[[300]](#footnote-300)

The final part of this narrative outlines an extreme impact of a corporate strategy designed to extract the maximum value from the supply chain to be redistributed to the shareholder. The impact of lead firm pressure is progressively amplified along the supply chain.[[301]](#footnote-301) This may ultimately cause demands to be imposed on the worker that impede their freedom to withdraw their labour. As the ultimate means of reducing labour costs, deceit, coercion or restraint may be used to force workers into accepting the pay and working conditions required to operate.

In the absence of any alternative rationale,[[302]](#footnote-302) the primary motivator of labour exploitation is financial. Forced labour is thus an economic ‘improvisation’ [[303]](#footnote-303) or systemic coping mechanism utilised in response to the pressures pushed along the supply chain from the lead firm. Ultimately, therefore, the use of forced labour provides an extreme way of cutting labour costs to enable suppliers to win business from further up the supply chain. Indeed, forced labour is related to the distribution of value along the supply chain with those stages of production associated with low value capture more likely to be associated with its use.[[304]](#footnote-304) The largest proportion of forced labour has been found to be located at the lower echelons of the supply chain[[305]](#footnote-305) where the pressures transmitted by lead firm value-capture strategies are felt the strongest. This value, which ultimately flows to the shareholder as demanded by shareholder primacy, is thus captured from those forced to work.

**2.4.2 The Use of Forced Labour**

A conventional understanding of forced labour emphasises the direct relationship between a victim and their exploiter. As was observed in chapter 1, this exploitative relationship may exist between the victim and the supplier, a sub-supplier, a labour agency or a recruitment broker.[[306]](#footnote-306) However, a focus on the issue comprising merely victims and criminals ignores the structural causes of forced labour.[[307]](#footnote-307) Put simply, a restrictive focus on this direct relationship between worker and immediate oppressor ignores the impact of powerful corporate actors and an obliging international neoliberal agenda on the creation of vulnerability and on the imposition of pressures to exploit it. Indeed, extreme wealth concentration along with a rapidly expanding and an impoverished global labour force are key features of modern global capitalism. Neoliberal institutions have encouraged developing countries’ integration into global supply chains as part of a development agenda most often associated with the Washington Consensus. Yet participation in these ‘global poverty chains’[[308]](#footnote-308) has exacerbated inequality through a strategy of value capture on the part of lead firms which has led to the creation of a highly vulnerable labour force with lower levels of GDP per capita shown to translate into higher instances of forced labour.[[309]](#footnote-309) As Lebaron et al. surmise: “forced labour in global supply chains is a structural phenomenon that results when predictable, system-wide dynamics intersect to create a supply of highly exploitable workers and a business demand for their labour.”[[310]](#footnote-310) The writers go on to provide that as a “stable and predictable feature of many global supply chains” its use is “not the simple outcome of immorality among criminals or ‘bad apple’ employers.”[[311]](#footnote-311) Put simply, it should not be viewed in isolation of the corporate strategies that drive it.

The type of work offered within the global supply chain is highly relevant to the issue of vulnerability.[[312]](#footnote-312) It is evident that forced labour is more prevalent within lower skilled, labour intensive industries such as agriculture, extraction, [construction] and manufacturing[[313]](#footnote-313) yet it is significant to note that the nature of this work has also become increasingly precarious. Certainly, the relationship between the proliferation of precarious forms of work and neoliberal market restructuring has been well documented.[[314]](#footnote-314) ‘Non-standard’ forms of work are now deemed by the ILO to be a prominent feature of the labour markets found in developing countries.[[315]](#footnote-315) This type of workforce is required by lead firms to meet their productive requirements of minimum cost and maximum flexibility. Indeed, a recent study of the supply chains of fifty large multinational companies undertaken by the International Trade Union Conference (ITUC) found only 6% of supplier workers to be directly employed.[[316]](#footnote-316)

On the supply side, the rapid expansion of industrial activity associated with integration with global supply chains has resulted in the increased relocation of workers, particularly to urban centres. Yet where an abundant labour supply exists, as is the case in relation to low-skilled work in many developing countries, [[317]](#footnote-317) alternative employment opportunities are limited[[318]](#footnote-318) enhancing levels of vulnerability.[[319]](#footnote-319) This vulnerability may be even more pronounced in those minority groups or indigenous people that face discrimination.[[320]](#footnote-320) For example, almost 60%[[321]](#footnote-321) of Sumangali garment workers in India belong to the so-called ‘untouchable’ group of the Indian caste hierarchy.[[322]](#footnote-322) For these people the lack of alternatives is a clear driver of their recruitment into the Indian textile industry.[[323]](#footnote-323) More generally, migrant workers, facing a lack of alternative employment in their home region or state, may seek work overseas. In such cases, their status as a foreign national is also a source of vulnerability due to the potential for it to be used against them. The creation of vulnerability may occur prior to their employment. Here, the trafficking of persons is closely intertwined with the creation and maintenance of vulnerability. As such, victims of forced labour may also be victims of human trafficking.[[324]](#footnote-324)

**2.4.3. The Business Model in Action**

The recent high profile scandal involving the Thai prawn industry offers a relatively straightforward example of the business model in action. Small fishing vessels plying the international waters off the coast of Thailand net vast amounts of small or inedible fish, which is then sold to factories that grind the catches into fishmeal. The fishmeal is then supplied to large prawn farming companies, such as Charoen Pokphand (CP), which acts as an intermediary to large food brands such as Nestle and retailers such as Walmart, Carrefour, Costco and Tesco. The narrow margins on offer meant that there was a shortage of Thai labour prepared to work under the wages and conditions on offer[[325]](#footnote-325) leading to the use of labour contractors, or brokers,[[326]](#footnote-326) who provided supplier boat owners with migrant labour from Burma and Cambodia. A study by the International Labour Organization (ILO) found the use of forced labour in a variety of manifestations. Firstly, it was found that approximately 6% of the workers surveyed entered the industry involuntarily by being tricked or forced by a broker or family member.[[327]](#footnote-327)Almost a quarter of respondents who answered questions regarding the use of brokers had some or all of their monthly salary withheld to pay off the brokerage fees.[[328]](#footnote-328) Although many of the remaining workers paid this amount upfront, almost half did so via a loan with many of these loans provided by brokers (15.9%) or the employers themselves (40%).[[329]](#footnote-329) The ILO study concluded that 72 of 596 of the workers surveyed were being forced to do so via the threat of a financial penalty.[[330]](#footnote-330) The study also found a further 29 respondents being forced to work[[331]](#footnote-331) through non-financial means, such as the withholding of documents, denunciation to authorities or the threat of violence.[[332]](#footnote-332)

Despite the findings, along with allegations of forced labour within other parts of the prawn supply chain,[[333]](#footnote-333) the Thai government did little to interfere with a seafood export industry which in 2013, according to Seafish,[[334]](#footnote-334) was worth approximately $7 billion.[[335]](#footnote-335) This is despite its apparent knowledge of some of these practices prior to the release of the report.[[336]](#footnote-336) Yet governmental inaction was not the root cause of the issue. Large brands at the heads of supply chains were squeezing suppliers in order to fulfil growing consumer expectations for cheap prawns in the European and American markets[[337]](#footnote-337) in order to deliver shareholder value. Indeed, at the same time, more immediate measures relating to share buy-backs and dividend hikes were being used.[[338]](#footnote-338) As Bob Miller, Managing Director of CP Foods, UK eventually conceded, "there's no doubt commercial interests have created much of this problem."[[339]](#footnote-339)

**2.4.4 A Lack of Host State Protection**

The risk of exploitation stemming from precarious employment is exacerbated by a lack of protection elsewhere. In contrast to the protection offered to those within a lead firm’s home state, protection overseas in what may be termed the ‘host state’ is frequently less developed and less well enforced.[[340]](#footnote-340) In some cases, host state labour laws may directly enhance the vulnerability of workers to circumstances of forced labour, for example, under the kafala system of sponsorship found in a number of Middle Eastern states.[[341]](#footnote-341) Elsewhere, neoliberal dogma and the global mobility of capital[[342]](#footnote-342) has created an imperative for governments to compete to attract overseas investment which has led to economic considerations being incorporated into the setting and systematic enforcement of labour standards.[[343]](#footnote-343) This is perhaps most obvious within increasingly prevalent[[344]](#footnote-344) Export Processing Zones (EPZs) designed to appease global capital through reduced tax and reduced regulation.[[345]](#footnote-345) Where adequate labour laws do exist and the will to enforce them is present, the monitoring and enforcement of the standards therein is compromised by a lack of available resource to host states. This is particularly true given the difficulty in identifying forced labour due to its hidden nature.[[346]](#footnote-346)

Trade unions, the traditional protectors of workers’ rights have been marginalised through changes in the nature of employment and of the limitation of collective action and organisation by host state governments eager to attract foreign capital. The fragmentation of the productive process across increasing numbers of suppliers and subcontractors, production sites and countries, has resulted in the increased isolation of workers acting as a barrier to solidarity.[[347]](#footnote-347) Moreover, unionisation is more prevalent in those less vulnerable sectors with greater permanency within the workforce.[[348]](#footnote-348) For the transitory or temporary worker, the possibility of unionisation is likely to be perceived as untenable by both the worker and the union.[[349]](#footnote-349) This creates a catch 22 situation as regards the continuation of vulnerability amongst vulnerable worker groups. Even where workers attempt to organise they may be discriminated against or threatened with replacement.[[350]](#footnote-350) This is particularly straightforward for those employed on a temporary or casual basis. This anti-union sentiment may be directly imposed by upstream supply chain pressure with lead firms including anti-union clauses within supply contracts,[[351]](#footnote-351) underwritten by the supplier’s desire for continued business. Indeed, a study by the Asia Floor Wage Alliance reported that South East Asian workers within the supply chain for the world’s largest retailer, Walmart, have been threatened with removal for exercising their right to freedom of association.[[352]](#footnote-352)

Global supply chains have extended production into an environment in which the protection afforded to labour via long-term employment contracts, trade unionism, or the effective application of labour rights is absent. Eventually those same companies that have so ruthlessly exploited this governance gap stepped in to take charge of its regulation. Following the high profile civil society exposure of labour standards in Nike’s supply chain in the late 1990s, along with the public rejection of corporate denials of responsibility over supplier conduct, big business began to implement its own agenda via the idea of Corporate Social Responsibility (CSR). In this regard, companies drafted codes of conduct to outline the social standards a firm expected of its suppliers. Suggesting a commitment to address violations should they be found to occur, supplier audits were implemented to illustrate that a company was monitoring its supply chain. Some codes referenced contractual provisions within supply contracts relating to human rights and labour standards. However, such provisions are not so reliably enforced.[[353]](#footnote-353) Suppliers have little choice but to meet the flexibility and cost demands of the lead firm’s procurement function but considerable leeway as regards the requests of its CSR department, business requirements may take priority over social standards.[[354]](#footnote-354) This appears to be relatively well known with, for example, a study by the Clean Clothes Campaign finding that a number of large retailers had observed that upstream business practices based upon lower unit costs and quick response production undermined the ability of suppliers to comply with the companies’ codes of conduct.[[355]](#footnote-355)

**2.4.5** **Worker-Driven Social Responsibility (WSR) as a Means of Regulating the Host State**

This thesis focuses on the three approaches to regulating CSP over the global supply chain beyond the national jurisdiction. In other words, the approaches reflect a number of different ways in which the lead firm itself is regulated. It was highlighted in chapter 2 and reiterated in section 3.3 of this chapter that a lack of willingness and/or resource acts a barrier to the implementation and effective enforcement of regulation in those states where production takes place. It is necessary to briefly consider the notion of worker driven social responsibility (WSR) as a means to overcome these barriers through privately regulating the host state.

The aim of WSR is to enlist workers to uphold the commitments expressed by lead firms over production within their supply chains. According to prominent civil society organisation WSR Network, WSR comprises three key principles.[[356]](#footnote-356) Firstly, reflecting the nomenclature of the concept, any initiative introduced within a supplier must be worker-driven in the development and enforcement of practical solutions to poor labour conditions. On this point, it is notable that the vulnerability of workers and barriers to collective action as discussed previously may impose a significant restriction to putting this principle into practice. This is seemingly recognised by commentators in the field with WSR Network observing that “Where workers are unable to participate freely because of repressive laws or practices, companies sourcing from those places should nonetheless embrace all other aspects of WSR, including, most importantly, an effective enforcement mechanism.”[[357]](#footnote-357)

This leads onto the second principle whereby any WSR initiative must be enforcement-focused permitting worker organisations to enforce the commitments of lead firms as a matter of a contractual obligation. This would require a whistleblowing facility that permits such workers to raise a complaint directly with the contracting lead firm. As the empirical study in chapter 8 observes, whistleblowing facilities within lead firms catering for those beyond the immediate employee do not appear particularly widespread. As regards the enforcement mechanism, WSR Network provide that “Only programs that include such economic consequences can ensure real human rights protections for workers at the base of global and domestic supply chains.”[[358]](#footnote-358) This would seem to require a disengagement policy to be included within the supply contract. This is problematic as the threat of disengagement for non-compliance with a supplier code of conduct is rarely carried out by lead firms. Moreover, should actual disengagement become more prevalent, this arguably provides a disincentive for supplier workers to whistle blow given that their own positions may be at risk from a potential reduction in orders. Indeed, there may be too much faith placed within the workers to whistle blow more generally. In the context of the Bangladesh Accord, safety inspectors found 122,000 violations between 2013 and 2017 yet in contrast only 290 complaints were brought by workers or their representatives.[[359]](#footnote-359) It is clear that whistle blowing plays just one part of any effective social standard monitoring regime.

Finally, responsibility must be placed at the top of the supply chain with lead firms required to support WSR initiatives through incentivising suppliers “to respect human rights through a price premium, negotiated higher prices, and/or other financial contributions.”[[360]](#footnote-360) As was considered in the previous chapter, suppliers are both squeezed in relation to price and expected to invest in their own facilities to abide by the social provisions with corporate codes of conduct. Indeed the problematic business model discussed in chapter 2 ensures that this principle represents perhaps the most difficult to overcome. Clearly, the payment of a price premium or financial contribution does not fit with a broader strategy to extract value from the supply chain through the minimisation of costs. In both acknowledging the pressures placed by lead firms on their suppliers and the reality that vulnerable workers may not be able to do anything but whistle blow, WSR relies on the willingness of the lead firm to enter into such an agreement.

It should be borne in mind that ever since proposing self-regulation as the solution to the problem of inadequate CSP, large companies have long sought to control the regulatory agenda. For many years now big business has essentially empowered itself with the discretion to set and enforce its own rules.[[361]](#footnote-361) Acting in concert with neoliberal political forces that espouse a new governance approach to regulation, as outlined in chapter 3, the devolution of regulatory responsibility to private companies has freed them from traditional regulatory oversight whilst allowing them to enhance their legitimacy through marketing themselves as ‘socially responsible’.[[362]](#footnote-362) For companies to cede regulatory capacity to workers and their representatives within the supply chain, it appears that they must be pressurised to do so.

The WSR model has been successfully utilised to address the use of forced labour, but not necessarily within the context of the *global* supply chain. For example, the Coalition of Immokalee Workers’ (CIW) Fair Food Program was set up to improve the labour conditions of workers in the tomato fields of Florida.[[363]](#footnote-363) Of particular relevance was the prevalence of human trafficking and use of forced in the Immokalee region that, amongst other issues, the initiative sought to address.[[364]](#footnote-364) In creating an alliance between the program and coordinated consumer boycotts through the Campaign for Fair Food, the Program successfully created an agreement with large US retailers. The agreement required participating buyers such as McDonalds and Walmart to pay a ‘Fair Food Premium’ on the price paid for tomatoes and agree to suspend procurement from those farms that do not meet the standards of the Fair Food Standards Council as the dedicated third party inspector. However, the transferability of this particular WSR model to the global supply chain remains somewhat unclear. It is suggested that the climate and growing conditions of the region may mean that it is difficult to shift production elsewhere. Indeed, ninety percent of winter tomatoes consumed in the United States come from Florida in spite of the premium paid for a large percentage of Florida’s tomato crop.[[365]](#footnote-365) It may also be the case that the geographical proximity to US consumers may have helped bolster support for the initiative in the first place, thus placing pressure on US retailers to sign up.

In terms of circumventing a lack of resource or willingness to regulate within a host state in the global south, the Bangladesh Accord on Fire and Building Safety provides perhaps the pinnacle of success for WSR. As will be seen, the Accord is not entirely a worker-driven model representing more of a genuine collaboration between worker and corporate interests. Nevertheless, the significance of this initiative to the present area of discussion necessitates its consideration.

On the 24th April 2013, the Rana Plaza garment factory in Dhaka collapsed due to weaknesses in the building’s structural integrity. The factory supplied many western brands and retailers. It had been audited by Primark on two occasions prior to its collapse.[[366]](#footnote-366) The tragedy killed 1,133 people and left thousands of others critically injured. Although certainly not the first such tragedy with over hundred people killed less than a year earlier in a fire at Tazreen Fashions, the level of media coverage and ensuing public and political outrage sparked companies to act.[[367]](#footnote-367) The result was an agreement signed by over 50 international brands and retailers who committed to invest in safer factories in Bangladesh for a five-year period. Under the Accord, workers, management and security staff were trained in basic safety procedures and precautions with procedures being implemented to allow workers to voice concerns and actively participate in ensuring their own safety.[[368]](#footnote-368) Supplier factories were certified as adhering to fire, electrical and structural standards by a team of independent inspectors as managed by the Accord’s steering committee. A full list of these factories was made available to the public[[369]](#footnote-369) and the written inspection reports, including any recommendations that should be implemented were to be made public within six weeks of the inspection.[[370]](#footnote-370)

Significantly, the Accord provided that it was the lead firm that was responsible for improving the safety conditions in their suppliers. The means by which these improvements were financed was thus the responsibility of the brands and retailers that sourced from the particular supplier factories. Within the Accord, the lead firm was required to *“*ensure that it is financially feasible for the factories to maintain safe workplaces and comply with upgrade and remediation requirements.*”* Essentially this meant that the lead firm was to either renegotiate the terms of its supply contract with its supplier, lend the supplier the money to undertake the improvements, or pay for some or all of the improvements itself.[[371]](#footnote-371) Finally, where a supplier failed to allow training, inspections or to undertake the repairs and renovations necessary to meet the required fire and building safety standards, the lead firm was required to cease purchasing from it.

A unique aspect of the Accord was its enforceability. Put simply, the Accord was the first initiative in which multiple lead firms made detailed and legally enforceable commitments to protect workers in the supply chain. Section 5 of the Accord explicitly outlined the process of dispute resolution whereby a dispute could be submitted to the Accord’s steering committee. The steering committee comprised seven persons, three of whom were chosen by trade union representatives, three by the company signatories with the final member being a representative of the ILO serving as a neutral chair. As such, non-corporate interests were represented at the highest level of the initiative, with the ILO providing oversight of proceedings. Significantly, the outcomes of the dispute resolution process could be enforced against a company within a court of law.[[372]](#footnote-372) Governed by the rules of the UN Commission on International Trade Law, the action could be brought in the domicile of the signatory company. As such, the Accord did not rely upon the willingness and resources of the Bangladeshi host state to facilitate such matters.

The Bangladesh Accord undoubtedly represented a successful development in the regulation of supply chain activities within the host-state. At the end of its remit, over 37000 inspections had taken place resulting in 273 factories being remediated to meet the necessary fire and safety standards.[[373]](#footnote-373) Over 1600 supplier factories in Bangladesh were covered by the Accord and certified as meeting minimum standards of fire and building safety. However, it remains unclear to what extent lead firms had been providing the financial support to make the improvements recommended by inspectors. Indeed, according to James et al. tensions between safety improvements and the financial objectives of lead firms remained “both in relation to the continuation of existing pricing models and differing perceptions among union and company signatories regarding the provision of such support.”[[374]](#footnote-374)

Moreover, it should be made clear that many large brands that source from Bangladesh did not sign up.[[375]](#footnote-375) Indeed, a rival initiative set up was by a number of large North American brands in the form of Alliance for Bangladesh Worker Safety (AFBWS).[[376]](#footnote-376) In contrast to the Accord, the AFBWS was largely like any other industry initiative with any commitments made to finance fire and safety improvements ultimately voluntary and completely unenforceable by stakeholders.[[377]](#footnote-377) Indeed, the 28 signatory companies of the AFBWS retained all control of the inspection process. This meant that lead firms could simply continue to audit supplier factories as before. As is considered in chapter 4, the audit regime used by the vast majority of lead firms in respect of their immediate suppliers is highly susceptible to bias and frequently cost-driven approach to auditing suppliers could continue as before. Clearly, the AFBWS sought to reinforce the notion of corporate social responsibility as opposed to any worker-driven alternative.

As a model for replication, the Accord suffered from a number of further barriers to its effectiveness. First, and most obviously it was limited to a five-year period (as was the AFBWS outlined above). Second, as with the lack of comprehensive coverage over global buyers discussed previously, the same may be observed in relation to Bangladeshi suppliers. Whilst the 1600 supplier factories covered by the Accord was impressive, this represented only a fraction of the estimated 5000-6000 factories producing for export in Bangladesh.[[378]](#footnote-378) Third, and pertinent to any consideration of the model’s potential transposition to the issue of forced labour, the Accord did not cover the lower tiers of the supply chain where forced labour is more prevalent. Indeed, the investigation of adequate fire exits and structural integrity is arguably far more straightforward that the uncovering of forced labour abuse. Fourth, the Accord was very much a single issue initiative.[[379]](#footnote-379) Lead firms could have used the opportunity to address further labour issues within the supply chain yet did not do so. As Rühmkorf highlights in all other respects, the firms maintained a “business-as-usual approach.”[[380]](#footnote-380) This stems from the fifth and somewhat undeniable weakness of the Accord in terms of transferability. Put simply, the magnitude of the Rana Plaza disaster as a single event and the extent of the media coverage “prompted unprecedented international efforts to improve health and safety in the Bangladeshi garment industry.”[[381]](#footnote-381) It is significant to note, for example, that no similar initiative was set up in Pakistan in the aftermath of the Ali Enterprises factory fire in which 250 workers lost their lives. The magnitude of forced labour abuse within global supply chains has been outlined within chapter 1. Indeed, the US Government sponsored and publically available Global Slavery Index provides information on the scale of the problem in particular countries. Somewhat notably, Pakistan and Cambodia, two major sourcing locations, are rated by the Index as having the highest level of prevalence of forced labour.[[382]](#footnote-382) However, in the absence of pressure generated by media coverage and public outrage, no equivalent model of WSR regulation has arisen.

It is contended that variants of the WSR model may serve to enhance the regulatory framework relating to forced labour within host states. However, questions arise as to the transferability of past initiatives to the global sources of production. As such, it is clear that further research in this area is required.

**2.5 Conclusion**

It has been argued that a system of corporate governance that prioritises shareholder interests has contributed to the development of a globalised business model which focuses on core competencies such as branding and design, with production extensively outsourced to low skilled workers employed within the extended supply chains of the developing world. The pressures placed on the supply chain as part of a strategy of value extraction designed to deliver value to the shareholder has created an environment conducive to the use of forced labour. However, the absence of legal liability and effective host state protection has created a governance gap over adverse corporate impacts within the supply chain, creating an ideal focal point for the study of CSP. Attempts to fill this gap may be categorised into three regulatory approaches as considered from a broad perspective in the following chapter (chapter 3). The remainder of this thesis will consider the attempts to regulate CSP, both specifically in the area of forced labour and within broader instruments that would seemingly include this issue within their remit.

**Chapter 3: Regulating Corporate Social Performance over the Global Supply Chain**

**3.0 Introduction**

The previous chapter has outlined the problem that this thesis seeks to address. The aim of this chapter is to both reflect on this problem from a theoretical standpoint and to frame the discussion that follows. This will be achieved through a consideration of the main theoretical justifications for regulatory intervention to ensure the adequacy of CSP. Reference will be made where appropriate to forced labour within the global supply chain as the facet of CSP that forms the focus of this thesis. This then raises the broader questions of form in relation to the regulatory intervention used. Following a brief consideration of more traditional command and control regulation in enhancing CSP in this area, it will once again be highlighted that this may be precluded by the barriers to regulating the host state in which production takes place. Following an acknowledgement that worker-driven social responsibility may be used to overcome these barriers in specific situations, it will be highlighted that the regulation of CSP more broadly falls within a new governance regulatory paradigm. In order to help frame subsequent discussion on regulating the CSP of lead firms over their supply chains beyond the national jurisdiction, a number of new governance techniques found within this paradigm are examined.

The final part of this chapter provides a high-level analysis of the three approaches taken to address the inadequacy of lead firm CSP over globalised supply chains operating beyond the national jurisdiction. The specifics of each approaches in relation to the use of forced labour within the corporate supply chain will be examined in subsequent chapters of this thesis. The aim of this chapter in relation to these approaches is to provide a more general, high-level consideration of the models of regulation themselves. In sum, the ‘voluntary’ approach is based upon the assumption that companies voluntarily self-regulate because it is in their commercial interest to do so. The ‘disclosure-based’ approach is based on the imposition of a procedural disclosure requirement that mandates the public reporting of corporate performance, with the aim of informing relevant stakeholders. The ‘duty-based’ approach imposes a legal duty on the company to use its management systems to fulfil the overarching regulatory objective.

**3.1 Socio-Political Justifications for Regulatory Intervention**

A number of socio-political justifications exist to justify the use of regulation in order to ensure adequate CSP by companies over their global supply chains. The following sections will consider Stakeholder Theory, Legitimacy Theory, and Social Contract Theory in this regard.

**3.1.1 Stakeholder Theory**

Freeman viewed the firm as a series of connections or relationships between various stakeholders.[[383]](#footnote-383) A stakeholder is defined as “any group or individual who can affect or is affected by the achievement of the organization’s objectives.”[[384]](#footnote-384) Following on from the previous chapter, the primary stakeholder in the context of this thesis are those victims who are forced to supply their labour under the menace of penalty as defined in chapter 1. However, three further stakeholders must be identified that are pertinent to a consideration of forced labour within the global supply chain occurring beyond the national jurisdiction. Firstly, and perhaps most obviously, suppliers are relevant here. Secondly, as previous chapter has indicated the consideration of shareholders is highly pertinent to the issue. A further question here relates to the designation of the shareholder as being distinct from other groups of stakeholders or simply one of many. As was illustrated in chapter 2, the UK’s system of corporate governance as positioned the shareholder as the primary interest in a company’s strategic operations. Thirdly, the consumer has been increasingly highlighted as a key stakeholder, and as the disclosure-based approach of the MSA (discussed in chapter 7) illustrates, has seemingly been afforded regulatory responsibility accordingly.

As the company has the potential to harm or benefit its stakeholders, they have a moral claim on the corporate objective. From a managerial perspective, the support of these stakeholders is necessary for the “continued survival of the firm”[[385]](#footnote-385) and thus their interests should be incorporated into corporate decisions. Stakeholder Theory rejects rejection of the idea that a firm should be run solely for the benefit of its shareholders, instead advancing a pluralist conception of the firm in which the company is to be managed in the interests of its stakeholders.[[386]](#footnote-386) A key aspect of Stakeholder Theory thus involves mitigating the potential negative impacts of corporate activity and thus may be viewed as a theory of adequate CSP.

Particular issues arise as to the coherency of Stakeholder Theory,[[387]](#footnote-387) in particular as to whether it is a normative theory based on ethical foundations or an instrumental theory based, ultimately, on rationality.[[388]](#footnote-388) The theory asserts that stakeholder management is based on a moral obligation to respect human rights, and uphold the various tenets of integrity, fairness, and the assumption of responsibility for the consequences of business decisions.[[389]](#footnote-389) However, it is instrumental as “it prescribes action for organizational managers in a rational sense”[[390]](#footnote-390) and thus the incentive for socially desirable behaviour is linked to, for example, competitive advantage.[[391]](#footnote-391) The appeal of a win-win situation arguably undermines the moral argument for a company to be run for the benefit of those it impacts on and thus contrasts with the ideas or societal legitimacy or the existence of a social contract, as discussed below.

Perhaps the most significant impact of Stakeholder Theory is that stakeholder value has been acknowledged within corporate governance as being commercially ‘material’. Indeed, for many writers, the primary aim of stakeholder theory is its potential for practical application. It “aims to be useful [and] to provide tools that managers can use”[[392]](#footnote-392) and thus is often phrased in terms of ‘stakeholder management’. Given the scope of corporate power, companies have the potential to affect virtually everyone, which for its critics, would be unworkable on the basis that multi-party accountability is not accountability at all. For this reason, many scholars explicitly argue for a narrow, and more workable, conception of the stakeholder.[[393]](#footnote-393) These views frequently highlight the direct relevance of the stakeholder to the economic interests of the firm and thus may refer to their necessity to the survival of the firm.[[394]](#footnote-394) For some, a contractarian view of the firm has been utilised to highlight the principle of stakeholder-firm exchange[[395]](#footnote-395) and its significance to the ‘extended balance sheet’.[[396]](#footnote-396) In some cases, broad notions of the stakeholder have been incorporated into the discussion but with certain interests reduced to ‘secondary’[[397]](#footnote-397) or ‘illegitimate’ concerns.[[398]](#footnote-398) Certainly, according to Freeman, there is no requirement for stakeholders to be given equal weighting in management decisions; inequalities amongst stakeholder groups are justified providing the least well off benefits from the process of engagement.[[399]](#footnote-399) From this perspective, it is appropriate to deliver increased value to the shareholder so long as workers in the supply chain benefit. Proponents of globalisation point out the economic benefits to host states that participation in global supply chains have brought, yet it is difficult to apply this argument in any convincing way to those forced to work.

A number of studies seek to limit the scope of a company’s stakeholders by reference to the saliency of their claim.[[400]](#footnote-400) This highlights that the stakeholder’s importance to the success or survival of the firm may change over time.[[401]](#footnote-401) Indeed, early narrower definitions of a firm’s primary stakeholders of “employees, financiers, customers… and communities”[[402]](#footnote-402) have been extended to cover suppliers in response to corporate strategies that seek value from the supply chain. This is arguably a result of the increased urgency of the supply chain as an area of concern following the consumer boycotts of Nike Inc. in the late 1990s. The notion of saliency as a mechanism to select which stakeholder interest should be incorporated within managerial decisions may also be criticised from an accountability perspective. Saliency is essentially equated to materiality, or the ‘business case’ for delivering stakeholder value. Such a perspective gives credence to the prioritisation of shareholder interests as discussed in the previous chapter.

**3.1.2 Legitimacy Theory**

Legitimacy theory highlights that the economic sphere exists within a political, social and institutional framework and thus cannot be deliberated outside of this context.[[403]](#footnote-403) Suchman defines legitimacy as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs and definitions.”[[404]](#footnote-404) For Suchman, the challenges of legitimacy management are to gain, maintain, and where necessary, repair legitimacy. Indeed, where a perceived disparity exists between a company’s actions and a corresponding social expectation, a threat to the legitimacy of the entity exists.[[405]](#footnote-405) These gaps may arise either because of a change in societal expectations over time, or when previously unknown information comes to light, perhaps due to media exposure, shedding new light on the company’s social impact.[[406]](#footnote-406) The company should then use its power to fill these gaps to maintain its legitimacy. It follows that this legitimacy may be lacking where the company does not use its resources to enhance its CSP.

The central argument of legitimacy theory is thus that external factors force corporate management to seek legitimacy for the company’s activities.[[407]](#footnote-407) This may be questioned where the seeking of legitimacy corresponds with a benefit flow to the company. As with the normative aims of stakeholder theory in which profit may be derived from stakeholder value, the protection or enhancement of business reputation through legitimation activities may increase the benefit flow to the company. However, the need to provide value to the shareholder, as discussed in chapter 2, appears to be in the underlying motive for enhancing corporate social performance and thus is limited to those situations which are mutually beneficial to shareholders and society alike. Indeed, if one takes the view that law is society, the prioritisation of shareholder interests within the UK’s corporate governance regime provides legitimacy to this very position. The opposing view, of course, is that society is greater than law. From this perspective, the importance of social norms may be highlighted without such expectations necessarily forming part of the legal system taken to equate the modern legislative state,[[408]](#footnote-408) which has increasingly sought to prioritise capital interests.

It should also be stated that firm itself is not benign in establishing perceptions of legitimacy. According to Lindblom,[[409]](#footnote-409) where such a threat to legitimacy exists the firm may respond in a number of ways. The company may seek to communicate an intention to improve its performance in the area of public concern. Alternatively, it may modify its own perceptions of the event without altering its activities. Further, it may seek to manipulate or distract attention away from the issue of concern or alter external expectations of performance. In other words, a firm may use communication strategies to actively seek to set its own standards of behaviour within society or to change social perceptions of its actual activities. This communication is reflected within a corporate-led CSR agenda. For example, BP’s 2008 sustainability report quoted former CEO Tony Haywood asserting “I don’t see a distinction between sustainability and performance”[[410]](#footnote-410) just two years before the BP Horizon oil disaster for which BPs cost cutting measures were blamed.[[411]](#footnote-411) The notion of the win-win argument of social and financial performance is examined further in chapter 6.

**3.1.3 Social Contract Theory**

From the perspective of social contract theory (SCT), society is viewed as “a series of social contracts between members of society and society itself.”[[412]](#footnote-412) The theory stems from the work of Hobbes,[[413]](#footnote-413) Locke,[[414]](#footnote-414) and Rousseau,[[415]](#footnote-415) in considering the relationship between citizen and state and the mutual respect of each party’s rights. Given the power of the company within the modern world, the transposition of the theory to the field of business ethics was an obvious development, most notably achieved through the work of John Rawls and David Gauthier.[[416]](#footnote-416) For Rawls, the theory is utilised to justify a societal obligation to those less well off within society; for Gauthier, to justify moral constraints on the rational economic man based on an enlightened form of self-interest. Donaldson applies a refined version of the theory to consider a particular set of stakeholders as contracting parties with the firm.[[417]](#footnote-417) Although Donaldson’s work was restricted to employees and consumers as stakeholders, subsequent work has expanded the parties to the social contract to incorporate a broad range of stakeholder interests.[[418]](#footnote-418)

There is some overlap with legitimacy theory discussed above with legitimacy understood in terms of an implied agreement between society and the company. This has led to some writers to conflate the two,[[419]](#footnote-419) yet arguably, the key difference is one of emphasis. Whilst legitimacy theory emphasises the firm as *seeking* legitimacy from society, SCT places the emphasis on society *granting* this legitimacy. Put simply, the company has been granted its power as part of a contract between itself and the society of which it is part. The company has been granted the rights to operate and in return owes a number of “indirect obligations”[[420]](#footnote-420) to society in return. The indirect obligations are based upon an “unwritten charter of societal expectations that determines the values to which the corporation must adhere to.”[[421]](#footnote-421) If the terms of the social contract are not met, through inadequate CSP, according to the theory the contract may be revoked.[[422]](#footnote-422) This revocation may involve the imposition of sanctions in the form of legal restrictions on a firm’s operations, restrictions on the provision of resources, such as labour and financial capital, and a reduced demand for its products.[[423]](#footnote-423) Indeed, Marjorie Kelly even argues that, at least in the US, companies could be abolished altogether, given the right to revoke corporate charters present in all state constitutions.[[424]](#footnote-424)

Donaldson and Dunfee have attempted to revise the concept of SCT in order to turn it into a more practical tool to aid managerial decision-making. In their work on Integrative Social Contract Theory (ISCT) they differentiate between the hypothetical macrosocial contract, and actual, ‘microsocial contracts’.[[425]](#footnote-425) The integration of smaller scale contracts allows for “significant moral free space”[[426]](#footnote-426) in which the terms of the contract may be tailored to the cultural norms of localised economic communities. The macrosocial contract would thus provide a broad-brush expectation with the specific details of conduct required to meet this expectation found within the microsocial contract. This is perhaps best exemplified via the notion of a ‘social licence to operate’, a term that first arose in relation to the relationship between companies in the extractive industry and host communities.[[427]](#footnote-427)

As Donaldson and Dunfee suggest, any micro-social contract must be compatible with a set of hypernorms that are reflective of culturally invariant moral concepts. The writers give these as “Core human rights, including those to personal freedom, physical security and well-being, political participation, informed consent, the ownership of property, the right to subsistence; and the obligation to respect the dignity of each human person.“[[428]](#footnote-428) This would seemingly preclude forced labour. An understanding of a company’s supply chain as a contractual relationship that spans beyond merely the first tier, has been suggested as denoting more concrete moral responsibilities for companies to act.[[429]](#footnote-429) Those forced labourers who provide a source of value for the operation of the business model discussed in the previous chapter may be said to have a moral claim upon those companies whose strategies have created the productive environment leading to their predicament.

**3.2 Economic Justifications for Regulatory Intervention**

The economic justifications for regulatory interference are based upon enhancing the efficiency of resource allocation. Where individuals are free to enter transactions to meet their own preferences, resources will be progressively allocated to higher value uses and total social welfare in society will be maximised.[[430]](#footnote-430) This is considered in more detail in relation to consumers and the purchase decision in chapter 7. If resources are allocated to their highest value uses, within a hypothetical state of perfect competition, Pareto efficiency is achieved. In other words, the standard of living within society is at its optimum level. The ‘invisible hand’ of the market is perceived by neo-classical economics as the most efficient means to coordinate transactional activity[[431]](#footnote-431) thus regulatory intervention is only justified where there is market failure.

From the neo-classical perspective, three types of market failure exist.[[432]](#footnote-432) The first relates to insufficient competition within the market because monopoly permits an individual firm, as opposed to the demands of the market, to dictate market price and the level and quality of production. This is undesirable as higher prices or lower quality will lower the quantity demanded leading to a sub-optimal rate of welfare within society. The move to oligopoly in many consumer goods markets is relevant to the position of power large companies now enjoy at the top of their supply chains. However, a consideration of this development or the inadequacy of the competition law response is beyond the remit of this thesis.

The remaining types of market failure are more relevant to the contents of this thesis. Regulatory intervention may justified where the costs of production are externalised. Here a producer’s activity imposes costs on third parties to which they have not consented and these costs are not reflected within the market price. As the price does not represent the true cost of the product to society, there is a misallocation of resources in which more products are produced and sold at a lower price than they should be, based on the cost of their inputs. Regulatory intervention is thus appropriate in order to force companies to internalise the adverse social costs so that the price mechanism accurately reflects the total cost of production. A lack of adequate CSP may thus be equated to this type of market failure.

Regulatory intervention may also be justified where information asymmetries exist within the market. Although information may be privately generated yet once disseminated into the public sphere, the information disclosed may be regarded as a public good.[[433]](#footnote-433) This essentially means that other users of the information may not be excluded from using it and its use by one person does not diminish its use by others.[[434]](#footnote-434) This creates a disincentive to producers to bear the costs of generating and supplying information to the market, and thus information is typically undersupplied. In economic terms, a less than optimal amount of information within the market[[435]](#footnote-435) leads to allocative inefficiency as consumers are prevented from accurately communicating their wants to the market.[[436]](#footnote-436) Put simply, what is supplied is not what is demanded. From a utilitarian perspective, this leads to net social welfare loss based upon the reduced satisfaction gained from a transaction where a sub-optimal level of information is available.[[437]](#footnote-437)

From an economic perspective stakeholder interests are protected through regulatory intervention to address these market failures. Externalities may be directly addressed through regulation, most obviously prohibition, or via the imposition of a Pigovian tax. A Pigovian tax forces the pricing mechanism to better incorporate the social cost of the externality by taxing the good or service in question.[[438]](#footnote-438) This has the effect of raising the price of the good or service leading to a reduction in demand, and a corresponding loss of profit. The tax revenue is used by the state to address the effects of externality and the firm is thus incentivised to ‘clean up’ its activities in order to secure a greater total profit. A common example is the use of an environmental tax on polluters.

Although, in some cases straightforward, the complexity of the externality may preclude the use of tax or direct regulation as a means to control it, or the political will to impose such measures may not exist. In such cases, a focus may be placed on informational requirements as a means to address the negative impact of corporate activity. Regulatory intervention here is designed to empower stakeholders through enhancing the flow of information to the market. Regulation here typically imposes rules to mandate corporate disclosure which reduces the costs to the stakeholder of information generation. Moving beyond Coasian notions of private bargaining to reallocate social cost between parties to an externality,[[439]](#footnote-439) regulation to increase the flow of information seeks to inform a wide variety of decision-making behaviour in stakeholders, the most pertinent being consumers, investors and civil society. This information is thus intended to inform decisions to buy, sell, engage, boycott or campaign which then imposes market-based pressure on companies to enhance their CSP. A disclosure-based model of regulation is considered further later in the present chapter, with the UK’s disclosure-based regime in this area examined in detail in chapter 5.

Section 3.5 will observe a shift towards what has been termed a ‘new governance’ approach to corporate regulation, reflecting the market driven logic of the neoliberal agenda. Prior to this, however, it is necessary to briefly consider the use of a more traditional ‘command and control’ regulatory approach to CSP and its potential applicability to the problem of forced labour within the global supply chain.

**3.3 The Applicability of a Traditional Regulatory Approach**

Although diminishing in use, traditional law in the regulation of corporate conduct remains in a variety of areas. Environmental protection provides an obvious example in which public regulatory agencies seek to enforce binding environmental standards directly imposed on companies by the state. A second and perhaps more pertinent example in the context of this thesis is the regulation of health and safety at work. Here, public inspectors conduct physical visits to places of work in order to ensure compliance with regulatory standards legislated in the traditional way through, for example, the Health and Safety at Work etc. Act 1974. Inspections uncovering a failure to comply with any requirement provided for within the regulatory regime may result in inspectors issuing improvement notices to remedy the situation. A failure to comply with such notices, along with more serious violations of the relevant regulatory regulations, is then typically enforced by the threat of fines and/or imprisonment.

This model could in theory be applied to the use of forced labour with legislators providing for public monitoring and inspection mechanisms and enforced by the state through the criminal law. Indeed, regulatory control of forced labour more broadly has traditionally centred upon criminal justice and prosecution (most obviously reflected by the widespread ratification by countries to the ILO Forced Labour Convention 1930, (No 29)).[[440]](#footnote-440) However, the applicability of this model to the issue of forced labour within the global supply chain raises two distinct problems relating firstly, to the nature of forced labour and secondly, to the globalised nature of supply chains operating beyond the national jurisdiction in which the lead firm is based.

On the first issue, both the identification and determination of forced labour is not necessarily straightforward. For example, the point at which exploitative labour practices tip into being classified as forced labour is not always clear. A move towards specialist public inspection teams could, in theory, help identify indicators of forced labour such as restrictions on workers’ movement, the withholding of wages or identity documents, or physical violence, threats and intimidation. However, there may be disagreement as regards such indicators, with the repayment (and level of repayment) of recruitment fees permissible being a particularly contentious issue between different national regulatory frameworks. In addition, the hidden nature of forced labour[[441]](#footnote-441) means that, even where indicators are agreed upon, uncovering evidence of these indicators may prove difficult. In contrast to say, food quality standards, whereby the product itself may be tested for harmful bacteria or the like, the use of forced labour in its production remains unrelated to any of its physical aspects. As will be considered in chapter 4 in relation to the use of private-sector auditors, this problem is exacerbated where bias exists within the investigative process.

The second problem arises from the globalised nature of the productive process meaning that the supply chains and the instances of forced labour therein, span beyond those home states in which large brands and retailers are typically based. Aside from the difficulty in ensuring legal standards relating to the indicators of forced labour are mirrored across different jurisdictions, the distinction between home and host states, where production is undertaken,

Firstly, as was considered in chapter 2, the lower production costs of host states are a key determiner of the global sourcing policies of large companies. As lower labour standards in the host states help to keep production costs down, the desire for such states to attract foreign capital may impact on the willingness to act. Certainly, the creation of low-regulation Export Processing Zones (EPZs) exemplify how far host states will go to attract large foreign buyers. Indeed, suggestions of a ‘race to the bottom’ in attracting sourcing decisions have long been made by observers in this area.[[442]](#footnote-442) Secondly, even where a willingness to act to enhance labour standards exists, the lack of resources found in many host states may act as a barrier for effective domestic regulatory intervention. As such, where the enforcement of forced labour regulation within a relatively wealthy home state may involve the use of public inspectors or specialised police units,[[443]](#footnote-443) host states may lack the capacity to effectively fund such measures.

As was considered in the previous chapter, the idea worker-driven social responsibility (WSR) has been put forward as a means to enforce CSP commitments made by the lead firm within the host state where production takes place. However, a number of limitations were identified in as regards its transferability to the problem at hand. For this reason, subsequent discussion within this will focus on the regulation of the company over its supply chains beyond any single national jurisdiction.

**3.4 A New Governance Approach to Corporate Regulation**

Whilst a state-centric ‘command and control’ model of regulation of CSP has been used within the UK to address a variety of adverse corporate impacts, much of this ‘hard’ regulation was implemented by a reinvigorated state in the aftermath of the Second World War. As such, it may be perceived as a seemingly representing a blip in a largely uninterrupted move towards what Foucault terms frugality within the liberal art of government.[[444]](#footnote-444) The move to frugality of government is based upon what Foucault calls the ‘veridiction’, or perceived truth, in the market as the cornerstone of governmental reason. For Foucault therefore, modern government was “limited by the calculus of utility”[[445]](#footnote-445) meaning that state intervention had become anchored in the need to maximise utility,[[446]](#footnote-446) a concept discussed further in relation to consumers in chapter 7. This development reflected the increasingly influential views of neoliberal commentators of state regulation as an impediment to the efficient operation of the market.[[447]](#footnote-447)

With the shift to neoliberalism, a revised perspective on the role of the state has brought about a revised model of regulation. As such, the regulation of corporate conduct has increasingly shifted from *government* to a new system of *governance*.[[448]](#footnote-448) Situated within a broader deregulatory agenda,[[449]](#footnote-449) the concept of new governance reflects a move away from a rule-based hierarchical model of command and control[[450]](#footnote-450) to a collaborative and dynamic model based on flexibility and market competition.[[451]](#footnote-451) It follows that an increased reliance is placed upon private actors in the achievement of public goals. Regulation of these private actors tends to be procedural rather than substantive leading to suggestions that the approach is designed to meet the demands of the regulated as opposed to the wider interests of society.[[452]](#footnote-452) For others, however, a new governance approach has been deemed to better reflect a modern reality in which state law is not the only significant, or necessarily dominant, consideration.[[453]](#footnote-453)

**3.4.1 Meta-Regulation**

A key element of a new governance approach is the proliferation of meta-regulation which may be thought broadly as “the state's oversight of self‐regulatory arrangements.”[[454]](#footnote-454) Meta-regulation is ultimately reliant on corporate self-regulation to achieve its objectives. For some commentators, it differs from self-regulation as the regulator and regulatee are not one and the same.[[455]](#footnote-455) Indeed, pure and unsupervised self-regulation finds the entity imposing commands, and the consequences of non-compliance with those commands, upon itself. In such circumstances, as Freeman notes, the state “yields none of its own authority to set and implement standards”[[456]](#footnote-456) therein. In contrast, within a meta-regulatory approach, there is focus on external regulators as distinct from the regulatory ‘target’.[[457]](#footnote-457) However, meta-regulation “incorporates the insight from self-regulation that targets themselves can be sources of their own constraint.”[[458]](#footnote-458) Meta-regulation thus involves an external regulator deliberately[[459]](#footnote-459) enlisting the use of the internal systems of management and control within organisations to align corporate and social goals.[[460]](#footnote-460) This has led some commentators to equate meta-regulation with management-based regulation,[[461]](#footnote-461) discussed below. However, Gilad distinguishes between the two terms with the assertion that meta-regulation requires a continuous process of improvement based on the shared experiences of companies operating under a management-based regulatory regime.[[462]](#footnote-462)

Within a meta-regulatory approach, different legal, non-legal and quasi-legal mechanisms are utilised in order to achieve a set of circumstances conducive to the achievement of regulatory objectives. In a simple sense, meta-regulation may be said to concern the regulation of regulation whereby “the process of regulation itself becomes regulated.”[[463]](#footnote-463) Meta-regulation may incorporate the interactions between different actors or levels within a regulatory model, “whether they be public agencies, private corporate self‐regulators or third party gatekeepers.”[[464]](#footnote-464) Thus as Parker and Braithwaite outline: “each layer [of regulation] regulates the regulation of each other in various combinations of horizontal and vertical influence.”[[465]](#footnote-465)

The idea of meta-regulation shares many similarities with Teubner’s concept of reflexive law.[[466]](#footnote-466) The concept of reflexive law is at the same time both a positive and a normative theory.[[467]](#footnote-467) In the former sense, it seeks to explain how the legal system relates to other subsystems, such as the economy. In the latter sense, it seeks to guide decision-makers on the appropriate form of legal regulation within a complex and heterogeneous environment. The difficulty in regulating such environments leads the reflexive practitioner to reject the imposition of formal, substantive rules[[468]](#footnote-468) through what Teubner describes as “a kind of legal self-restraint.”[[469]](#footnote-469) Reflexive law thus attempts to ‘frame’ or ‘steer’ the process of self-regulation through the use of procedural norms. These measures are thus used to mobilise organisations to use their “self-referential capacities”[[470]](#footnote-470) in constructing a response to complex social problems. As with a meta-regulatory approach therefore, the implementation and substantive form of any action taken is left to the individual organisation yet the frame is institutionally constructed as opposed to being left purely to spontaneous forces.[[471]](#footnote-471)

As with a meta-regulatory approach, reflexive law does not impose a specific outcome. Thus within the boundaries of the procedural norms, the individual organisation is left to decide upon the substantive form of any action taken.[[472]](#footnote-472) As such, according to Barnard and Deakin, “the preferred mode of intervention is for the law to underpin and encourage autonomous processes of adjustment.”[[473]](#footnote-473) In particular, this may be achieved through “supporting mechanisms of group representation and participation.”[[474]](#footnote-474) A commonly cited example is the imposition of procedural norms of collective bargaining between employer and trade unions, whereby the reflexive regulation prescribes the procedure but not the outcome.

**3.4.2 Meta-Regulatory Techniques**

A meta-regulatory approach incorporates a variety of techniques within its regulatory toolbox. A number of these techniques are relevant to the design of the regulatory instruments considered within this thesis. These will now be considered.

**3.4.2.1 Principles-Based Regulation (PBR)**

A meta-regulatory approach frequently uses principles in defining the expectations of corporate behaviour. In contrast to ‘bright-line rules’ which provide fixed standards of behaviour, standards in a principles-based approach to regulation (PBR)are derived from the broader principle itself. In exemplifying the difference between the two, Ford equates a bright line rule to a fixed speed limit (or standard of behaviour) whereas a principle could outline that the driver should travel at a speed which is prudent in the circumstances, leaving the driver to set his or her own speed (or standard of behaviour). PBR is thus said to express the substantive objective of the regulation itself without the need for rigidly prescribed standards.[[475]](#footnote-475)

Advocates of PBR thus suggest a greater focus on the purpose of the rule rather than on a detailed provision that may lead to over or under inclusivity, could quickly become outdated, and may impose a burden on both regulator and regulated entity.[[476]](#footnote-476) In acknowledging the autonomy of the regulatee, such a model seeks to avoid Teubner’s regulatory trilemma[[477]](#footnote-477) and thus aims to minimise exercises in box ticking or ‘creative compliance’ through increased emphasis being placed on the question *how* to comply rather than merely the outcome of compliance.[[478]](#footnote-478) This also allows the regulator to utilise the regulated party’s knowledge and experience of the operational context in translating the principle into a more appropriate standard of action.[[479]](#footnote-479) The response is thus tailored to the localised circumstances and activities of the regulated entity in question.

Flexibility and discretion on the part of the regulated party is said to help avoid any over-inclusivity within the standards that may serve to stifle enterprise and competition.[[480]](#footnote-480) However, a key issue with PBR is the discretion available to the regulated party in interpreting the regulatory principle. Too little discretion negates the benefits of a principles-based approach whereas too much discretion could lead to uncertain application of the law.[[481]](#footnote-481) This could lead to one of two polar outcomes. Firstly, and particularly in circumstances where the effects of non-compliance would have severe ramifications, excess discretion could lead to the regulatee interpreting the principle conservatively thus effectively treating it as a bright line rule (with the associated risk of creative compliance).[[482]](#footnote-482) Secondly, if sufficient incentives do not exist, the freedom permitted could allow the strategy to slip into the realms of ‘light touch’ regulation.[[483]](#footnote-483) The use of guidance or associated rules must therefore attempt to balance the level of discretion accordingly.

The UK’s Corporate Governance Code (CGC) considered in the previous chapter provides a good example of PBR. The 2018 CGC outlines eighteen principles covering five different areas related to corporate governance. The use of more specific provisions as rules are then used in an attempt to narrow the discretion available to companies in adhering to the principles. Taking the area of executive pay as an example, one of the principles provides that “Remuneration policies and practices should be designed to support strategy and promote long-term sustainable success. Executive remuneration should be aligned to company purpose and values, and be clearly linked to the successful delivery of the company’s long-term strategy.”[[484]](#footnote-484) Provision 35, acting as an associated rule, attempts to reduce the discretion available in the design of remuneration policies by requiring a minimum vesting period of five years.[[485]](#footnote-485) Although this is not particularly long-term as was argued within the previous chapter, it nevertheless restricts the level of discretion in this area. However, the comply or explain basis of the CGC prevents the provision from becoming a bright line rule given that the company may opt not to comply providing that it explains to investors why it has not. In contrast, if an objective was to enhance the consideration of stakeholder interests as a means to deliver long term value (reflecting regulatory discourse in this area) through the inclusion of social and environmental metrics in remuneration policies, the associated provision stating “Remuneration schemes should promote long-term shareholdings by executive directors that support alignment with long-term shareholder interests”[[486]](#footnote-486) utterly fails to restrict the discretion permitted by the principle in achieving this aim.

**3.4.2.2 Management-Based Regulation (MBR)**

In its emphasis on the use of a firm’s informational resources in the setting of precise standards and achieving them, a meta-regulatory approach places a conscious and deliberate focus on a company’s internal systems of management and control. [[487]](#footnote-487) Also termed process-based regulation, the focus of management-based regulation (MBR), is upon influencing corporate process as opposed to outcome. Its focus is thus upon prevention as opposed to reaction.

The law’s contribution here could be as simple as requiring a corporate statement of policy or code of conduct[[488]](#footnote-488) to be produced.[[489]](#footnote-489) Typically, however, the law will impose more far-reaching procedural requirements. For example, the regulated body may be required to review its own internal systems and undergo a process of self-critical reflection concerning its performance.[[490]](#footnote-490) The company then responds to these procedural promptings by regulating itself. In this example, therefore, the company would utilise the information generated to develop an organisational initiative and rule-based operational environment likely to achieve the overarching regulatory objective.[[491]](#footnote-491) The end-result is thus that regulatory considerations are incorporated into the productive process.[[492]](#footnote-492)

A reliance on the management systems of the regulated company has “invoked … a reframing of the regulatory relationship from one of directing and controlling to one based on responsibility, mutuality, and trust.”[[493]](#footnote-493) *Responsibility* is said to be placed in the hands of the party with the greatest contextualised knowledge of both the regulated risk and the potential ways to control it[[494]](#footnote-494) and thus is argued to be a more suitable approach for heterogeneous regulatory environments[[495]](#footnote-495) or those where uncertainty exists as regards the nature of the issue to be regulated.[[496]](#footnote-496) In this sense, the regulators’ reliance on internal management systems as a consequence of the shift of regulatory responsibility to the regulatee[[497]](#footnote-497) is perceived to be a key strength.[[498]](#footnote-498) Moreover, an emphasis on internal management systems is essential to the concept of *mutuality* and cooperation in the creation and sharing of information to both further understanding between regulator and regulatee, and allow for more targeted regulatory oversight.[[499]](#footnote-499) The problem lies with the third element, *trust*.

Proponents assume that the procedures set will sufficiently steer the self-regulatory process so as to achieve the regulatory objective, more effectively and at lower cost.[[500]](#footnote-500) However, it will be appreciated that, by its very nature, procedural regulation cannot guarantee this. Clearly, this may stem from inadequacies of design in relation to the procedural requirements put in place. However, a lack of effectiveness may also arise due to issues of trust, either within the organisational, or more fundamentally, in relation to the reliance placed on the entity by the regulator.[[501]](#footnote-501)

Where management are steered to implement MBR into existing corporate systems, the effectiveness of such implementation is highly related to inter-organisational trust. A meta-regulatory approach posits that both management and employees are more likely to see a company’s internal rules as reasonable. This can result in greater compliance with regulatory objectives.[[502]](#footnote-502) However in their study into Occupational Health and Safety (an area likely to be of high personal importance to employees), Gunningham and Sinclair[[503]](#footnote-503) found that a lack of organisational trust could be a severe barrier to effective MBR implementation. This is despite the existence of domestic tort law on health and safety at work acting in a meta-regulatory capacity[[504]](#footnote-504) to incentivise organisational compliance through the risk of litigation.[[505]](#footnote-505) Indeed, as an “important manifestation”[[506]](#footnote-506) of corporate culture, trust is necessary to encourage workforce cooperation,[[507]](#footnote-507) knowledge sharing,[[508]](#footnote-508) and the acceptance of managerial decisions;[[509]](#footnote-509) all of which are key factors in ensuring staff ‘buy in’ to the implementation of revised systems of management and control. The promotion of reflexive learning can be an important element of effective MBR yet organisational trust, as with organisational culture as a whole, has been argued as difficult to change, even with a sufficient level of senior managerial commitment.[[510]](#footnote-510) As such, corporate culture and subculture may act as a barrier to regulatory aims. This issue may be exacerbated when the scope of the relationship is extended beyond the company or corporate group, to cover buyer-supplier relations.

Perhaps a more fundamental weakness is the reliance placed on the internal management of the company by the regulator. Although as has been discussed, the whole argument for MBR rests upon the use of internal management systems to address negative corporate impacts, this strength is also a potential weakness.[[511]](#footnote-511) For the regulatory objectives of MBR to be met, and for regulator-regulatee trust to be warranted, corporate management must be sufficiently incentivised. Yet even where MBR is mandatory, as opposed to simply encouraged,[[512]](#footnote-512) its mere presence as an alternative to more traditional forms of regulation does not guarantee the existence of managerial commitment towards regulatory objectives.[[513]](#footnote-513) Indeed, companies already have the motivation to effectively manage their operations but these control systems are designed to achieve the private goals of profit maximisation and share price increment. A management-based approach recognises that motivation for effective compliance may be derived from external pressures such as the risk of litigation or prosecution or the active use of market-based instruments to induce such motivation. However, where these incentives are lacking and a clear divergence of regulator/regulatee objectives exists, it may be difficult to manufacture commitment through any ‘corporate crises of confidence.’[[514]](#footnote-514)

A key consideration, therefore, is the level of overlap between the firm’s private interests and the social concerns of the regulator. [[515]](#footnote-515) In other words, how ‘win-win’ is the regulatory objective? If the situation is sufficiently so, the balance of regulator/regulatee responsibility may be shifted further towards voluntarism instead of regulatory enforcement. However, it must be noted that even in a win-win scenario the costs to the firm of analysing and changing internal processes may not justify the expected gains of implementing them.[[516]](#footnote-516) A lack of incentive to implement MBR is therefore likely to result in a somewhat half-hearted implementation.[[517]](#footnote-517) Here, compliance systems may run parallel to the firm’s core operations rather than being intrinsic to them,[[518]](#footnote-518) and thus increase the danger of under-inclusivity and a minimal level of compliance.[[519]](#footnote-519) Black provides the example of banks being found to lack the systems, models and information to undertake stress tests at the height of the financial crisis. As a result of this investigation, it became evident that previous requirements for banks to provide such models had led to the production of largely fictional models solely to satisfy the regulator.[[520]](#footnote-520) As such, “Management‐based regulation was shown to have been myth‐based regulation.”[[521]](#footnote-521)

**3.4.2.3 Risk-Based Regulation (RBR)**

The concept of ‘risk’ has increasingly been advocated in both the private[[522]](#footnote-522) governance and public regulatory[[523]](#footnote-523) sector to determine the likelihood and level of impact of externalities. A more harmful pollutant or one that is more likely to be emitted should be prioritised by regulators than in regards to one that is less so. For policy-makers,[[524]](#footnote-524) questions of risk may therefore be said to be “at the heart of regulatory activity”[[525]](#footnote-525) and is evident across the regulatory spectrum, from occupational health and safety, to environmental policy and financial services.[[526]](#footnote-526) In its most simple iteration therefore, a risk-based approach to regulation (RBR) allows the regulator to identify the greatest risks to regulatory objectives and determine the allocation of resources and effort accordingly.[[527]](#footnote-527)

Yet RBR goes beyond merely the use of risk to organise, dictate and prioritise regulatory action. Within a meta-regulatory focus on management-based regulation, risk management systems are highly pertinent to the achievement of regulatory objectives. In seeking to utilise management systems of companies to address a particular negative externality, the organisation is necessarily being asked to incorporate questions of social or environmental risk into its risk assessment and management processes. It follows therefore that RBR can be seen as a stable mate to MBR[[528]](#footnote-528) with the function of the regulator said to be “risk managing the risk management of individual enterprises.”[[529]](#footnote-529)

A weaknesses of RBR stems from the nature of risk itself. The International Standards Organization (ISO) define risk as “the effect of uncertainty on objectives.”[[530]](#footnote-530) Some risks may be easily measurable (particularly in economic theory) but many are fundamentally unquantifiable and thus uncertain in the Knightian sense.[[531]](#footnote-531) The basis of risk management is past information of known risks thus it may be difficult to cater for risks that are new or previously unknown. Yet even gauging risks on the basis of the past is problematic. Risks are dynamic and what was low risk yesterday may be high risk today.[[532]](#footnote-532) Moreover, we do not exist within a laboratory or upon a roulette table, thus any risk assessment may ultimately prove to be incorrect, particularly where complex issues of causation exist.

A second issue relates to the inherently political aspects of the classification of risk. Despite the use of advanced technical methods to identify levels of risk and resultant perception of risk as a rational decision-making tool,[[533]](#footnote-533) the categorisation of activities as high or low may give rise to normative conflict. For example, a regulator’s classification of risk may be strongly contested by industry, politicians or interested stakeholders,[[534]](#footnote-534) and even other regulators.[[535]](#footnote-535) In seeking to protect its legitimacy,[[536]](#footnote-536) a regulator, or the company in its role as pseudo-regulator, may focus on high impact, low likelihood activities at the expense of high likelihood, low impact behaviours due to the saliency of the public eye.[[537]](#footnote-537) This this may serve to ignore the cumulative effect of such behaviours with the materialisation of a series of low impact risks resulting in a high impact occurrence.[[538]](#footnote-538)

The final weakness of RBR is the difficulty in aligning the risks identified within regulatory objectives to those assessed and managed with a company’s system of risk management. Put simply, regulatory aims are concerned with the public risks to society or the environment, whereas the private risk to the company revolves around the risk of financial detriment. A company’s internal systems are designed and operated on the basis of private risk, yet RBR calls for the incorporation of public risk into the processes of risk assessment, prioritisation and management. For this to be undertaken effectively the company must arguably be convinced that the two align. The significance of incentive is once again evident.

The two techniques of MBR and RBR are very evident within the three regulatory approaches outlined at 3.5 and discussed in detail within subsequent chapters of this thesis. The use of corporate management systems to identify, quantify, and manage the risk of forced labour violations within the supply chain is the central means of achieving this objective each approach. The use of such systems to enhance CSP over the supply chain is encompassed by the concept of due diligence. Emanating from the United Nations Guiding Principles on Business and Human Rights, the concept of due diligence will be considered in more detail in chapter 4.

**3.4.2.4 Gatekeepers**

A reliance on internal management systems is advantageous given the informational and resource-based advantages possessed by the company in addressing complex social issues. From a legal approach, the globalised nature of the problem and the difficulty in assigning liability for wrongs beyond the boundaries of the corporate entity, or out of reach in terms of legal jurisdiction, means that such an approach may be the best, or even only, option available to the regulator. However, as has been highlighted, a key weakness is that, whilst a company may have the expertise to address a social issue it may lack the incentive to expend its resources in doing so. Indeed, if sufficient incentives existed in the first place, the imposition of regulation would be unnecessary.[[539]](#footnote-539)

A meta-regulatory approach necessitates discretion to be afforded to the target entity in deference to its superior position to effect change. According to Coglianese and Mendelson, a core challenge of meta-regulation is to restrict this discretion to ensure consistency with the regulatory objective.[[540]](#footnote-540) In the absence of such restrictions, the company may simply act in its own self-interest, or as has been suggested in chapter 2, in the interests of its shareholders. The enrolment of third parties is a common meta-regulatory strategy to enhance regulatory capacity[[541]](#footnote-541) in this regard.

Gatekeepers may be defined as “those who are not directly the subject of regulation, but have a strategic position over those who are.”[[542]](#footnote-542) The rationale, therefore, is to reduce pressures on regulatory resources by utilising other influential actors to monitor corporate activities in order to negatively influence misconduct. [[543]](#footnote-543) Examples of gatekeepers include credit rating agencies to evaluate the creditworthiness of companies or securities analysts who assess the future prospects of its line of business. Yet perhaps the most obvious example of a gatekeeper in the corporate context is the auditor whose role it is to review and verify, amongst other matters, a company’s accounts and annual reports.

Gatekeepers are not public entities in the traditional sense, and thus stem from the private sector or, potentially, civil society. However, either source gives rise to potential problems in relation to pre-existing relationships between the gatekeeper and the target entity it is to monitor. This gives rise to the danger that a gatekeeper may operate from a positive or negative premise as regards the target entity and so potentially undermining the effectiveness of the regulatory technique.

Dependencies and vulnerabilities may be created between the gatekeeper and the target entity.[[544]](#footnote-544) In the traditional state-centred ‘command and control’ regulatory relationship this issue would be known as regulatory capture.[[545]](#footnote-545) Here, however, the issue may be seen as purely relating to a conflict of interest. Put simply, the interests of the gatekeeper may be directly or indirectly aligned with those of the regulated entity. The question then becomes how to incentivise gatekeeper impartiality where partiality is in the gatekeepers’ self-interest. Imposing liability to the gatekeeper is one option[[546]](#footnote-546) or indeed, regulating the gatekeeper itself.[[547]](#footnote-547) At present, however, there exists meagre levels of oversight and a reliance upon codes of ethics and the broad principles espoused therein.[[548]](#footnote-548) Reflecting the market-based orthodoxy of the new governance approach more generally, competition is deemed to keep the gatekeepers in check.[[549]](#footnote-549)

Yet such competition is not always forthcoming with a prominent example being the undeniably oligopolistic nature of the UK audit market.[[550]](#footnote-550) Certainly, the inappropriate level of proximity between auditors and those firms they were supposed to monitor has been clearly illustrated within a number of recent scandals.[[551]](#footnote-551) Underlying this proximity is the nature of the relationship. As the appointment of the auditor being a board decision, an incentive exists for audit firms to curry favour with directors in under scrutinising their performance to the detriment of other stakeholders. Indeed, the Parliamentary Chair of the Business, Energy and Industrial Strategy Committee, Rachel Reeves, has described the ‘Big four’ audit firms,[[552]](#footnote-552) which provide audit services to all but one of the companies listed on the FTSE 100 and 98% of those within the FTSE 350,[[553]](#footnote-553) as having a “parasitical”[[554]](#footnote-554) relationship with those firms they are supposed to scrutinise.[[555]](#footnote-555) The existence of such bias within the social auditing processes used by lead firms over the supply chain is considered in chapter 4.

Alternatively, there is the potential for prejudice which may lead to a conflictual relationship between gatekeeper and the regulated entity. Such negative partiality would be frowned upon from a new governance perspective due to its adverse impact on collaboration and the potential economic impact on the business. Although this may be understandable as regards *animosity* on the side of the gatekeeper, it also works to prevent actionable gatekeeper *suspicion* in that such a desire for gatekeeper impartiality along with the rational logic of a risk-based model of analysis may largely prevent the application of any precautionary principle.[[556]](#footnote-556) As such, a new governance approach typically neglects the use of gatekeepers who may interfere with business as usual. This is perhaps best exemplified by the lack of stakeholder representation in the constitution of the UK’s corporate boards. It is also evident where civil society has been denied a formal role in a monitoring and enforcement of corporate behaviour. This is perhaps most obviously illustrated by the United Nations rejection of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights[[557]](#footnote-557) as considered in chapter 4.

**3.4.3 The Weakness of Meta-Regulation: A Reflection upon the Problem at Hand**

Chapter 2 outlined the strategic development of a business model designed to maximise the extraction of value from the supply chain and its redistribution to shareholders. Yet this model has also been designed in a way that has extinguished all legal accountability in any traditional sense. The global nature of the problem and the reluctance of the international community to create legal obligations for corporate actors, as discussed in chapter 4, along with the barriers to implementation in host states precludes the use of traditional models of regulation to address the issue.

However, the flexibility afforded to companies and their governance structures by a meta-regulatory approach has allowed corporate regulation to be tailored to ensure specific ‘organisational fit’ and is therefore less likely to interfere with ‘business as usual.’ The issue here is that a ‘business as usual’ mentality to the continued prioritisation of short term shareholder interests is precisely what must be interfered with. The inherent politicisation of a regulatory approach which effectively sets the boundaries of public and private accountability results in a system that ‘properly balances protection and prosperity’[[558]](#footnote-558) firmly on the side of capital interests.[[559]](#footnote-559) The relative ease of demonstrating compliance with such processes and a reluctance to impose administrative burden leads to an inability to effectively appraise the effectiveness of a regulatory initiative. These outcomes therefore are much harder to assess.[[560]](#footnote-560) The flexibility inherent within such an approach gives rise to the potential for creative or bureaucratic compliance in the absence of a sufficient incentive to comply. The issue of incentive and the pressure to comply is the underlying focus of chapters 6 and 7 in which the ability of shareholder and consumers to apply pressure on companies to enhance their CSP is considered.

**3.5 Approaches to Regulating CSP over the Global Supply Chain beyond the National Jurisdiction**

This thesis considers three approaches taken to the regulation of corporate social performance in relation to the use of forced labour within the supply chain. All three approaches are based on the notion of self-regulation in that they seek to utilise the management systems of the regulated entity to meet the objective of enhanced corporate social performance. However, as Page observes, self-regulation is “a matter of degree.”[[561]](#footnote-561) Thus, as Ogus states, there is no clear dichotomy between traditional state-based command and control regulation but rather a “spectrum containing different degrees of legislative constraints, outsider participation in relation to rule formulation … and external control and accountability.”[[562]](#footnote-562) The models are thus considered in order of the relative autonomy available to the regulated entity.

**3.5.1 The Voluntary Approach**

Self-regulation involves an entity operating independently of the state in using its internal management systems to regulate itself. The decision to self-regulate is undertaken by the organisation but may not be entirely voluntary. Proponents of the voluntary approach claim that it is in the enlightened self‐interest of business do so.[[563]](#footnote-563) For instance, self-regulation may occur in response to a perceived threat of mandatory regulation.[[564]](#footnote-564) Alternatively, it may be in response to a perceived reputational threat or anticipated stakeholder response and may form part of a firm’s wider CSR strategy. Indeed, reputational threat and consumer loyalty were frequently mentioned responses to a survey undertaken by the OECD on the motivations behind the voluntary imposition of corporate codes of conduct.[[565]](#footnote-565) Furthermore, attempts may be made to incentivise the target entity to voluntarily self-regulate through the imposition of social or political pressure. Nevertheless, the key defining feature of this model is that ultimately any decision to self-regulate is made by the entity itself. Although the incentives for this decision largely map on to rationale for corporate-led CSR more broadly, it is perhaps obvious, but nevertheless significant, that self-regulation is restricted to the particular externality in question. It is thus not purely discretionary but is guided by societal expectations of corporate behaviour.[[566]](#footnote-566) In practice, this means a firm focusing on addressing the negative impacts resulting from its corporate activity, and not mere philanthropy.

Voluntary self-regulation is neither monitored nor enforced by the state, given the lack of any mandatory requirements. Yet according to Baldwin, Cave and Lodge, the informality of a voluntary approach may provide suitable solutions in circumstances where more formal systems would not.[[567]](#footnote-567) The writers cite Lord Wakeham, Chairman of the UK’s Press Complaints Commission (PCC)[[568]](#footnote-568) in support of a voluntary model of regulation.[[569]](#footnote-569) According to Lord Wakeham, dispute resolution within voluntary self-regulation is characterised by a communicative process between the self-regulator and the affected stakeholders. This dispenses with the confrontational issues linked to a focus on legal defensiveness as found within the courts. Relatedly, Lord Wakeham notes, the financial resources available to stakeholders as a potential barrier to (legal) forms of redress are irrelevant.

A key argument for voluntary self-regulation in sphere of globalised business is the way in which it can reach places beyond the boundaries of the law, or at least beyond where the law can be effectively enforced. Perhaps most obvious in relation to corporate operations within conflict zones lacking a centralised regulatory body, this argument extends to all situations where productive operations occur within those jurisdictions in which laws, or the capacity to enforce them, are lacking. Similarly, and pertinently for this thesis, is the difficulty in attributing any legal liability to a firm in relation to the activities of its suppliers, regardless of jurisdiction.

It is significant to note that voluntary regulation may not necessarily be standalone in the sense that it is developed wholly independently. Attempts may be made by regulatory bodies or civil society organisations to guide the development of management information systems. For example, early analyses of voluntary codes of conduct observed that those more likely to incorporate the real concerns of workers in global supply chains were those drawn up by civil society organisations and labour advocates.[[570]](#footnote-570) As such, the voluntary approach was supplanted by an organised attempt to standardise the contents of codes of conduct to reflect industry best practice. Regulatory attempts stemming from the international community to guide and incentivise voluntary corporate self-regulation of the supply chain are considered in chapter 4.

A significant problem with a purely voluntary approach is its lack of comprehensiveness. As Vogel observes the pressure to self-regulate is patchy with consumer facing industries and market leader brands under the most pressure to do so.[[571]](#footnote-571) As such, certain members of a particular sector or industry may opt to self-regulate, leaving those less responsible entities to continue as before. In other words, the most socially responsible entities are regulated, and the least socially responsible are not.[[572]](#footnote-572) This may lead to ‘market leaders’ in self-regulation to call for formal laws to be imposed in order to ‘level the playing field’ and thus remove the voluntariness from the equation.[[573]](#footnote-573) A further issue regards the extent to which self-regulators, actually self-regulate. A full role in this regard would require the promulgation of rules and their enforcement, together with a monitoring and evaluation of the regulatory process.[[574]](#footnote-574) However, the extent to which the company may undertake these roles is dependent on its willingness to allocate resources to address its social or environmental impact. This is likely to be determined by the perceived advantages to the firm in undertaking such efforts, or in other words, the business case for CSP.

**3.5.2 The Disclosure-Based Approach**

From a legitimacy theory perspective, companies voluntarily disclose information in order to show society that the company is conforming to its expectations.[[575]](#footnote-575) As such, where a discrepancy exists between corporate behaviour and societal expectation, disclosure may be utilised as a means to alleviate societal concerns.[[576]](#footnote-576) From this line of argument, companies should choose to be transparent because it is in their interests to do so. Indeed, according to the European Commission, increased transparency can bring both “reputational benefits for companies and more legitimacy in the eyes of stakeholders and society as a whole."[[577]](#footnote-577) Moreover, disclosure to particular stakeholders, such as employees, has been argued to build trust and cooperation between corporate management and the stakeholder group.[[578]](#footnote-578) However, given the attention placed upon corporate transparency by regulators at the domestic, European and International level, it is quite evident that the voluntary disclosure of sufficient amounts of reliable non-financial information has not been forthcoming.

This lack of voluntary disclosure may be due to the fact that organisational resources are likely to be required in the generation of information. The use of corporate resources in this way is clearly envisaged with a management-based approach to regulation more broadly. However, as has been highlighted throughout this chapter, the incentive to redirect such resources to such ends may simply not be present. This problem may be exacerbated by the competitive nature of the business context as firm-specific innovation in the development of internal management systems has the potential to provide the company with a competitive advantage.[[579]](#footnote-579) This may lead to a restrictive stance being taken to the sharing of ‘best practices’ between regulated parties on the identification and management of dynamic social risks. Yet despite access to such information being necessary to better achieve regulatory objectives,[[580]](#footnote-580) even where a company has invested in its risk management systems, it may have little incentive to share its findings with competitors. Finally, and relatedly, it is likely that any public disclosure that has the capacity to negatively affect a company’s reputation is also likely to be withheld. Mandatory disclosure-based regulation thus seeks to address the informational market failure stemming from these barriers to disclosure.

Initially limited to financial information such as the publication of annual accounts, regulatory attention in this area has increasingly sought to increase the flow of non-financial information from the company to its stakeholders. A disclosure-based approach seeks to use the knowledge and the resources of the company in the generation of information. The approach is favoured by policy makers as it requires less use of public resources and is less interventionist than other regulatory alternatives. As such, it interferes less with the competitive workings of a free market economy. This falls very much in line with the broader political agenda behind a new governance model of regulation. For example, the UK’s Department of Trade and Industry[[581]](#footnote-581) in 2000 believed that “transparency should lead to the efficient operation of market forces and the exercise of beneficial economic choices without the need for legal or regulatory intervention with its distorting and costly effects.” [[582]](#footnote-582) Unsurprisingly, this model of regulation has proved to be more palatable in a political sense with, for example, EU policy makers agreeing to enhanced disclosure requirements where agreement cannot be reached upon more stringent types of regulation.[[583]](#footnote-583)

As observed previously, information may be perceived as a public good. However, its disclosure is frequently targeted at one particular stakeholder group, typically consumers or investors. For instance, consumers may be informed on the health properties of a food product or the processes employed in its production via the mandatory use of labelling. A further example would be the provision of information aimed at investors via a requirement to disclose within the annual report. Indeed, the perceptions of an agency relationship between shareholder and corporate management arising from a separation of ownership and control,[[584]](#footnote-584) has been justified to prioritise this particular stakeholder within corporate disclosure regulation. Whilst originally limited to financial information, the disclosure of ‘non-financial’ information has increasingly been mandated.[[585]](#footnote-585) In enhancing the provision of such information, the investor is encouraged to influence managerial decision-making in the context of social and environmental performance. In asking investors to do so, they have been identified as potential agents of social change.

Baldwin, Cave and Lodge outline a number of possible weaknesses of a mandatory disclosure-based regulatory approach.[[586]](#footnote-586) The first potential barrier concerns the ineffective use of the information. The users of information may make mistakes, perhaps in the assessment of risks, or fail to understand the implications of the data provided. Moreover, they may neglect to collect and consider the full range of available information or lack the expertise to properly research pertinent issues therein. The second potential weakness relates to cost of processing the information as users may be overwhelmed by the sheer amount of information provided. Similarly, the cost burden to the enterprise is a key concern amongst policy makers. The third issue is the potential for inaccurate or misleading information to be provided by the regulated entity. Disclosures may be utilised as a mere public relations exercise in line with the firm’s marketing function.[[587]](#footnote-587) Moreover, the information content may contain unjustified claims that do not reflect the reality of corporate practices. This may necessitate that the quality of the information be policed in some way, potentially increasing the cost of a disclosure-based regime. The fourth issue is that standards may have to be designed, implemented and imposed in order to permit users to make appropriate use of the data. This is particularly true in relation to an information user’s ability to benchmark. As Villiers notes, a system which requires companies to provide specific information is more likely to result in greater quantity of standardised data across companies.[[588]](#footnote-588) Without standardised requirements, the potential exists for a far-reaching transparency requirement to actually reduce the quality of available information as firms attempt to minimise the potential for it to be exposed as inaccurate in the future.[[589]](#footnote-589) Finally and perhaps most damningly, is the potential for users to respond to the information in a way that was not anticipated by the regulator. Despite pertinent social information being provided, other factors, most notably economic, may shape their decisions despite their knowledge of the social harm caused. Alternatively, the recipients of the information may simply not care about its contents nor its underlying regulatory aims.

**3.5.3 The Duty-Based Approach**

The final approach considered seeks to protect stakeholder interests via the imposition of a duty to take reasonable care. A duty of care is a legal obligation imposed on a party to act towards another in a particular way so to prevent them from incurring harm. In such cases, the state is providing a legal framework for private parties to enforce rights given to them by the law. In the tort of negligence, the duty may be established by the English courts where the harm is foreseeable, sufficient proximity exists between the parties and it is ‘fair, just and reasonable’ for a duty to exist.[[590]](#footnote-590) Liability may be determined through fault based upon the defendant’s conduct falling below the necessary standard of care. The aim of the law here is thus to raise the standard of care taken by companies so that losses fall on the company in terms of prevention costs, rather than on the victims, in terms of harm. This may be achieved through the redistribution of legal duties and corresponding legal rights designed to require companies to bear the costs of prevention over harms incurred.[[591]](#footnote-591) Thus, for example, in tort, a breach of duty of care would give rise to a right of action permitting the harmed party to seek private redress from the tortfeasor for breaching its duty of care.

Attempts have been made to put forward an argument for the existence of a tortious duty of care over the supply chain based on an application of existing legal principles.[[592]](#footnote-592) Yet this argument is not reflected in the legal precedents in this area. It is acknowledged that a duty-based approach has already been utilised by the UK courts to extend liability beyond the confines of the separate legal entity to activities conducted by subsidiaries overseas. The case of *Chandler v Cape*[[593]](#footnote-593) established that a parent company could owe a duty of care over the employees of its subsidiary in a distinct set of circumstances. However, the difficulty in determining sufficient proximity between the parties has so far prevented the extension of the duty to a broader set of circumstances[[594]](#footnote-594) and non-employee stakeholders.[[595]](#footnote-595) Even a cursory reading of these cases highlights the difficulty in extending liability beyond the corporate group, following the reasoning outlined by the courts in *Chandler v Cape*. Indeed, the notion of a duty of care existing in relation to workers with a company’s supply chain was roundly refused by the American courts in the case *Doe I v Wal-Mart Stores*.[[596]](#footnote-596)

The difficulty in establishing the existence of a duty of care within a common law system may lead to the imposition of a statutory duty by the legislator. In some instances, this may simply reflect the tort of negligence but in a statutory form.[[597]](#footnote-597) In other cases, notable differences may exist. For example, in environmental law the statutory duty of care relating to the management of waste may be enforced by the Environmental Agency.[[598]](#footnote-598) As such, penalties, in this case a fine,[[599]](#footnote-599) are imposed by the public regulator for the breach of duty in contrast to a private claim for damages being brought under the tort of negligence. The statutory duty may be located within the criminal law as found within the UK’s Bribery Act 2010.[[600]](#footnote-600) Here, a strict liability, rather than a fault-based, offence is created in relation to the failure of commercial organisations to prevent bribery. Where an offence is alleged, it is a defence to show that the company had in place ‘adequate procedures’ to prevent such an occurrence. As such, the law is creating an incentive for preventative measures to be implemented within the company’s management system; in essence a positive duty to do act. This represents a form of procedural regulation as discussed above.

The law is generally more reluctant to impose a positive duty as it interferes with the autonomy and liberty of the duty holder. [[601]](#footnote-601) Nevertheless, it may do so where one party is highly dependent on the power or expertise of the other, with the doctor-patient relationship being a particularly obvious example.[[602]](#footnote-602) It seems likely that any duty-based approach to a company in relation to its supply chain will necessarily involve a positive obligation to utilise its resources to address its adverse impacts. Practically, France has recently introduced into legislation a duty for large companies to identify and manage the risks of social and environmental harm, as considered in chapter 9. From a conceptual perspective, the cost of burden is thus reframed from one of being harmed to one of preventing the harm. In requiring the company to internalise its social costs through financing their prevention, CSP within a duty-based model, may be said to take the form of distributive justice, at least as regards the burden of corporate activity.

However, the effectiveness of this approach to attain its objective may be limited by a number of factors relating to enforcement. The availability of a civil right to bring legal action does not necessarily correspond to that right being used. For instance, victims may lack knowledge of the legal rights available to them[[603]](#footnote-603) or in some way fear the effects of legal intervention on their situation.[[604]](#footnote-604) Moreover, the claimant must have the financial means to litigate.[[605]](#footnote-605) For those who lack the resources to do so,[[606]](#footnote-606) the ability to pursue a claim may depend on the availability of certain mechanisms such as insurance cover; the provision of ‘no win, no fee’ legal services, and state-funded legal aid. However, in many cases these may be unavailable or inapplicable to circumstances of the tort, or overseas claimant, in question. Relatedly, the traditional principles of the UK’s tort law may also act as a barrier to representative bodies such as civil society organisations (CSOs), as they do not have standing to litigate civil claims.

Moreover, there may be difficulty in outlining what exactly is required of companies in meeting their standard of care. Even where this may be ascertained, the law may be unwilling to find sufficient proximity to warrant the scope of the duty being extended beyond the first tier of the supply chain to those lower down. Case law shows how carefully the courts scrutinise the legal and factual relationship between a lead company and employees of subsidiaries and companies within the supply chain. Thus, evidentially, there may be considerable difficulties in establishing causation between the ineffectiveness of the measures in place and the harm incurred. Certainly, the evidential burden of bringing a claim or justifying a criminal investigation may be difficult to satisfy given the difficulty in accessing the company’s internal information systems, or those of its overseas suppliers. Finally, the remedies available may prove inadequate to redistribute the costs of harm away from the victim.

**3.6 Conclusion**

The previous chapter argued that the use of forced labour within the supply chain arises from a business model designed to maximise the delivery of shareholder value through its extraction from the supply chain. This chapter has sought to reflect on the problem identified though outlining the theoretical justifications for regulatory intervention to bridge the governance gap that has arisen. Following a brief consideration of the inability of traditional regulatory models to address the issue given the globalised nature of the problem, this chapter has sought to frame the discussion that follows within this thesis. As such, the meta-regulatory techniques that have informed the current domestic and international approaches to addressing the issue have been outlined permitting reference to be made to these techniques in later chapters. Finally, this chapter has sought to prepare the reader for the specific discussion and evaluation of the three regulatory approaches taken to regulate the lead firm over the global supply chain beyond the national jurisdiction. This has been achieved through a high-level consideration of the bases of the three regulatory approaches considered within this thesis. The specifics of the international voluntary approach, the disclosure-based approach, and the duty-based approach are considered in chapters 4, 5 and 9 respectively.

**Chapter 4: The International Voluntary Approach**

**4.0 Introduction**

Chapter 2 has outlined the use of a business model based upon the extraction of value from stakeholders within the global supply chain and its redistribution to the shareholder. This model has been designed to minimise the total costs of production through the imposition of pressures on the supply chain. These pressures force suppliers to maintain their viability of their own businesses through the reduction of labour costs, thereby creating an environment conducive to “highly precarious, unprotected and exploitative forms of work.”[[607]](#footnote-607) At the very bottom of this productive pyramid, lie those who are forced to provide their labour in conditions of modern slavery. The absence of legal liability, in any traditional sense, for those companies at the helm of the supply chain combined with inadequate levels of host state protection has created a governance gap in the regulation of CSP.

International human rights law has traditionally been based on imposing state-based obligations to protect rights afforded to individuals therein. From an international legal perspective, there has always been a problem as regards the regulation of the non-state actor,[[608]](#footnote-608) the company being a prominent example. Nevertheless, following a number of high profile scandals illustrating the existence of a governance gap allowing for the corporate violation of human rights, the international community responded.

This chapter will first consider the United Nations’ (UN) apparent rejection of a binding approach to the regulation of CSP via an examination of the draft UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms),[[609]](#footnote-609) and, more recently, a binding treaty in this area. The focus will shift to the UN’s current, voluntary approach to the regulation of human rights-related CSP via a consideration of the UN Global Compact and the UN Guiding Principles on Business Human Rights (UNGPs). It will be suggested that in essence the former merely represented a means to standardise corporate codes of conduct, and encourage a minimal level of corporate disclosure. In contrast, the latter has attempted to standardise understandings of CSP as one of a company addressing its adverse social impact, and instils the notion of due diligence as a minimum standard of behaviour expected of companies in regards to their supply chain. Ultimately, a reliance is placed by both instruments on corporate reputation for the enhancement of self-regulation in line with the provisions therein. Finally, brief consideration will be given to a number of other prominent international instruments beyond those emanating from the UN. It will be observed that the OECD Guidelines for Multinational Enterprises represents an improvement over the UN model in a procedural sense, but once again relies upon the business case for substantive corporate action.

**4.1 The Rejection of a Binding Approach to Business and Human Rights**

The UN approach to corporate human rights abuse has taken a voluntary approach to the issue of corporate rights abuse. Nevertheless, two significant attempts have been made to create stronger obligations for companies. As “the preeminent institution of multilateralism”,[[610]](#footnote-610) the International Legal framework of the UN has been developed with the state as its central focus, stemming from its original purpose as a mechanism of world peace.[[611]](#footnote-611) This focus on the state as both a partner and a target has proved to be problematic in two ways. Firstly, there has been significant opposition to the direct regulation of companies by the UN and secondly, the uneven distribution of power between UN member states has led to calls for stronger regulation from those states most susceptible to adverse corporate human rights impacts to be rejected by those powerful states in which those companies are based. This has served to preclude the direct regulation of companies by the UN and, in all likelihood, their indirect regulation via a binding international treaty.

**4.1.1 Direct Corporate Regulation: The UN Norms**

In 1998, a Sub-Commission of the UN Commission on Human Rights[[612]](#footnote-612) established the Working Group on the Working Methods and Activities of Transnational Corporations. The Working Group was initially mandated to propose recommendations to ensure that the operations of transnational corporations correlated with the social objectives of their host countries and that they promoted human rights.[[613]](#footnote-613) This mandate was extended in 2001 to provide the authority to compile a list of human rights instruments and human rights norms relating to transnational corporations.[[614]](#footnote-614) However, the outcome of the work arguably pushed the boundaries of what had been requested.[[615]](#footnote-615) As approved by the Sub-Commission in 2003 and presented to the UN Commission on Human Rights, the draft UN Norms created an opportunity for the UN to consider a shift in the regulatory paradigms that had dominated the discourse on CSP regulation until that point.[[616]](#footnote-616)

Most significantly, the UN Norms introduced a number of general[[617]](#footnote-617) and specific obligations on companies operating transnationally to promote and ensure the respect of human rights. These obligations were phrased using the binding language of ‘shall’ instead of the previously accepted terminology of ‘should’,[[618]](#footnote-618) and in terms of ‘duty’ rather than ‘responsibility’. This is of key significance as it suggested a tentative first step towards the direct regulation of companies at the international level.

Those most relevant to the present context are the specific obligations for companies to protect the right to security of persons, the labour rights of workers, the right of fair remuneration, and certain obligations relating to consumers of the final products. Under the Norms, companies were required to promote and respect those persons who were indirectly affected by their operations,[[619]](#footnote-619) suggesting that these positive duties extended beyond the company and its subsidiaries, to its supply chain. Indeed, the commentary to the UN Norms outlined that companies must undertake to monitor its supply chain, “to the extent possible.”[[620]](#footnote-620) It was also stated that companies should provide “prompt, effective and adequate reparations to those persons, entities and communities” to those negatively affected by any lack of compliance.[[621]](#footnote-621) A central reporting mechanism was to be established to permit Civil Society Organisations (CSOs) to submit information on those companies that performed poorly in relation to this, or any other obligation.[[622]](#footnote-622) More generally, companies were to be subject to “periodic monitoring and verification by United Nations and other international and national mechanisms already in existence or yet to be created regarding the application of the Norms.”[[623]](#footnote-623)

The Norms ultimately represented a soft-law instrument yet the premise that companies could be directly regulated at the international level proved to be its demise. Merely the notion that companies might actually be held liable for their international human rights impacts “sent shockwaves through business communities”, particularly in relation to the idea that liability could extend to the activities of suppliers.[[624]](#footnote-624) In crossing the boundary into the direct imposition of obligations on companies, the sub-commission was effectively asking the UN’s member states to permit the international regulation of companies beyond their borders beyond mere voluntarism. In essence, this would transform the authority to regulate the corporate world.[[625]](#footnote-625) Deva acknowledges that the UN Norms lacked clarity as regards their practical application,[[626]](#footnote-626) yet as a draft document, the potential existed for the instrument be clarified (or even watered down). The problem, it seemed, was with its very foundation. As such, along with the inevitable business opposition, the opposition of many UN member stats, particularly the United States,[[627]](#footnote-627) was vehement.[[628]](#footnote-628) The Norms were subsequently abandoned by the UN Commission of Human Rights in 2005.

**4.1.2 Indirect Corporate Regulation: A Proposed Binding Treaty**

In 2014, a binding instrument on business and human rights was proposed by Ecuador and South Africa. In contrast to the UN Norms, the proposal utilised a more conventional treaty-based approach, which centred on the state. As such, the obligations therein would not be placed upon the company directly, but indirectly via the domestic legislature. Following the adoption of the proposal, an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises was established. A ‘zero draft’ of the treaty was released in 2018.[[629]](#footnote-629)

The draft treaty essentially takes the notion of due diligence which is central to the UN’s current voluntary approach, and mandates its use. This would be achieved by creating obligations for signatory states to obligate the use of human due diligence. As will be considered in more detail shortly, the concept of due diligence entails a company monitoring its actual and potential human rights impacts, identifying and assessing actual or potential human rights impacts and preventing human rights violations occurring. Under the proposed treaty, such measures would be made mandatory by the signatory state through their inclusion domestic civil and criminal law. Moreover, states would also be required to guarantee the rights of victims to bring actions within the domestic courts and provide legal assistance to them both directly and indirectly through an international fund.

Unsurprisingly, the draft treaty, along with its optional protocol, has received strong opposition from the business community.[[630]](#footnote-630) Moreover, whilst many states from the so-called “global south” contributed to negotiations following the release of the zero draft, western states including the European Union, US and Australia were either absent or dissociated themselves from the conclusions drawn.[[631]](#footnote-631) Indeed, the idea of a draft treaty has received strong opposition since its proposal from the United States,[[632]](#footnote-632) the UK, Canada, and a number of European countries.[[633]](#footnote-633) Perhaps more damningly, the EU as a body has reportedly joined the US in withdrawing from any further UN negotiations on the matter.[[634]](#footnote-634) Given that the majority of the world’s largest companies are based within these regions, it is difficult to see how any treaty in this area could be effective. The UN Norms appeared to remain on the table for some time before they were quietly abandoned. Everything suggests that the same fate is likely to befall the proposed binding treaty.

**4.1.3 The Lack of Potential for a Binding International Instrument**

The acceptance of the UN Norms into the international legal framework would have been highly symbolic in moving towards a direct regulatory relationship between the UN and the company. The direct regulation of international law in this manner may be enforced via the establishment of international court or tribunal. Alternatively, the imposition of a direct obligation under international law may be enforced at the domestic level where a state’s legal system allows for the direct application of international law.[[635]](#footnote-635) However, this may be better serviced by a binding treaty as a means to enact more comprehensive coverage of the law as derived from an international legal instrument into domestic law. Indeed, a binding treaty would reinforce the role of the significance of the UN as a body to shape the CSP regulation.

It is accepted that with the requisite support and resources that such an approach could help enhance human-rights related CSP. It is however, emphasised that given the level of opposition to either instrument, it is extremely unlikely to be implemented. Primarily based upon a reluctance of states to relinquish their sovereignty over the regulation of corporate interests, there is currently “no political prospect for ‘hard’, legally binding treaties in this sense.”[[636]](#footnote-636) Moreover, the most vehement opposition has come from those states that are home to some of the world’s largest companies. Put simply, many lead firms would thus fall outside of the regulatory scope. Further, the jurisdictional complications of having some states as signatories and others not, within a globalised system of production would likely render such an instrument unworkable. Given the strength of such barriers to the implementation (let alone effective implementation) of an international instrument in this regard, this avenue will not be considered further. It is therefore not included within the recommendations made in chapter 10 of this thesis.

**4.2 The UN’s Voluntary Approach**

In its rejection of a binding approach, the UN has taken a voluntary approach to the regulation of human rights related CSP. This voluntary approach was initially taken by the UN Global Compact, shortly before the Norms were quietly abandoned, and has seemingly been set in place with introduction of the UN Guiding Principles on Business and Human Rights (UNGPs). These two instruments will now be considered.

**4.2.1 UN Global Compact**

The UN Global Compact was adopted on 26th July 2000 and as of 2015 had over 8000 corporate members.[[637]](#footnote-637) The instrument requests that business organisations accept ten voluntary principles into their operations. These principles covering human rights, labour rights, environment and anti-corruption are derived from a universal consensus based on the Universal Declaration of Human Rights; ILO Declaration on Fundamental Principles and Rights at Work; and the Rio Declaration on Environment and Development. This led to criticism from some quarters that the initiative essentially contained ‘nothing new’.[[638]](#footnote-638) However, this was arguably not its objective. Firstly, as acknowledged by the previous Secretary-General of the UN, Kofi Annan, the UN wished to create a collaborative relationship with the business world.[[639]](#footnote-639) As such, one of its architects, John Ruggie, stated that the Global Compact was thus “an invitation, a reaching out to business.”[[640]](#footnote-640) As a result of this engagement, the instrument was developed with significant corporate involvement. Secondly, and as a consequence, the crux of the Global Compact was to encourage firms to adhere to best practice across the business world. At the time of its introduction this revolved around the corporate code of conduct along with a minimal level of disclosure. As such, the initiative revolved around the idea that ‘core firms’, as CSP ‘market leaders’, could play a key role in driving change within the supply chain.[[641]](#footnote-641)

A code of conduct may be defined as a set of guidelines that the company commits to in relation to its global sourcing and operations. A number of corporate scandals relating to labour abuses in the supply chain in the 1990s led to the introduction of codes of conduct as a means to safeguard reputation and market position.[[642]](#footnote-642) For example, in 1991, a Levi supplier was cited within a report by Department of Labor in relation to a finding of substandard working conditions in the Northern Mariana Islands, a US Territory.[[643]](#footnote-643) Soon after, it became the first global apparel company to publish a code of conduct. As such, the introduction of a code may be viewed as a form of defensive CSR.

However, as other companies followed, it became evident that all codes were not created equally. Research suggested that the more inclusive codes, which were more likely to reflect the real concerns of workers and their working conditions, were drafted by civil society groups and labour advocates rather than by corporate interests.[[644]](#footnote-644) Moreover, individually drafted codes caused difficulties for suppliers given that the same factory may have to deal with multiple different codes with regard to the different companies it supplied. As such, the Global Compact asked “companies to embrace, support and enact … a set of core values in the areas of human rights, labour standards, the environment and corruption.”[[645]](#footnote-645) In other words, it attempted to standardise those more inclusive corporate codes of conduct across the business world.[[646]](#footnote-646)

Similarly, best practice around the turn of the millennium had begun to incorporate the voluntary disclosure of information relating to a company’s approach to CSP. This was most obviously evident in companies signing up to the Global Reporting Initiative (GRI), following its establishment in 1997. As such, the Global Compact required, as the sole obligation of membership, for companies to provide an annual self-assessment, or ‘Communication on Progress’ (COP) which was then made accessible on the Global Compact website. The COP should comprise three components: a statement by the CEO, the steps taken to implement the ten principles, and a measurement of outcomes. The Global Compact does not attempt to monitor or verify the actions of corporations nor the contents of the COP beyond the three minimum requirements stated.[[647]](#footnote-647) Failure to provide a COP or the provision of one that does not meet the three requirements will eventually[[648]](#footnote-648) lead to the company being delisted with its failure to disclose being publicised on the Global Compact website.[[649]](#footnote-649) This may be said to represent a best practice emanating from civil society, the notion of ‘naming and shaming.’ Indeed, in the first eleven years of its operation, following accusations of ‘bluewashing’,[[650]](#footnote-650) 2000 or 15% of member companies were delisted for failing to satisfy the COP requirements. This figure currently stands at 11,693[[651]](#footnote-651) with the current total membership of the Global Compact not much more, at 13,416 firms.[[652]](#footnote-652) Evidently, for some firms even this minimal level of reporting was simply “not worth the effort.”[[653]](#footnote-653)

It is perhaps unsurprising that the Global Compact has been described as a purely aspirational model of regulation.[[654]](#footnote-654) This may be a little harsh given that it contains procedural requirements relating to the acceptance of a standardised set of human-rights CSP commitments, and a minimal reporting requirement. Moreover, the draw of being associated with the UN as an incentive to sign up offered a further reflexive element. However, as Woods observes, many large firms in the United States refused to sign up to the Global Compact until legally insulated from any legal action based on a failure to adhere to the principles therein.[[655]](#footnote-655) Moreover, in the desire to get business ‘on board’, the multistakeholder arrangement utilised in the instrument’s development has been criticised as a ‘regrettable ideological shift on the part of the UN’[[656]](#footnote-656) which moved the organisation’s approach to corporate human rights abuse away from regulation in any traditional sense to a collaborative and ultimately voluntary model. This approach appeared to be cemented in place with the rejection of the UN Norms, and the development of the most recent and highest profile initiative to date, the UN Guiding Principles on Business and Human Rights (UNGPs).

**4.2.2 UN Guiding Principles on Business and Human Rights**

The UNGPs were unanimously endorsed by the Human Rights Council in 2011 and were the product of an extensive multistakeholder consultation process. Professor John Ruggie, fresh from his work on the Global Compact, was made UN Special Representative on Business and Human Rights and placed at the helm. The result was the 31 principles of the UNGPs which were based upon three pillars: the state duty to protect human rights, the corporate responsibility to respect human rights, and the joint responsibility to provide a remedy to the victims of corporate human rights abuse. The instrument is clearly designed to encompass the supply chain within the scope of the ‘corporate responsibility to respect human rights’ and accepts the way corporate operations may impact on supply chain activities. The document states that companies should ‘Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.’[[657]](#footnote-657)

The instrument reflects a very broad range of human rights standards including the International Bill of Rights and the eight core ILO conventions as set out in the 1998 Declaration on Fundamental Principles and Rights at Work. It applies to all businesses ‘both transnational and others, regardless of their size, sector, location, ownership and structure’[[658]](#footnote-658) and thus aims to create a blanket responsibility for the corporate human rights abuse. However, the instrument also acknowledges the superior capacity of larger firms to affect change in stating that the actions required of companies to meet the responsibility to respect ‘will be proportional to, amongst other factors, its size.’[[659]](#footnote-659)

A welcome clarification put forward by the UNGPs relates to the basis of the responsibility for corporate action.[[660]](#footnote-660) In contrast to the notion of ‘sphere of influence’ as a basis for corporate action, as taken by the Global Compact and draft UN Norms,[[661]](#footnote-661) the UNGPs emphasise the significance of corporate ‘impact’ on human rights. This correlates with the idea of internalisation of human rights externalities and thus the understanding of CSP put forward within this thesis. For Ruggie, impact is preferable as a practical tool for the designation of corporate responsibility because impact is *determinable*. The UNGPs provide that a firm should “identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships.”[[662]](#footnote-662) It follows therefore that so long as impact or potential impact may be identified, it may also be prevented, mitigated and accounted for.[[663]](#footnote-663)

Ruggie identifies three types of actual or potential impact within the UNGPs with each requiring a different level of responsibility. Firstly, where the company caused or may cause the harm, secondly where the company has contributed or may contribute to the harm, and thirdly, and most pertinently, where the company has identified a linkage between the harm and the company’s operations, products or services but with no cause or contribution.[[664]](#footnote-664) This last type of impact would thus apply to the majority of supply chain violations, and significantly, acknowledges the indirect effect that business operations can have on the supply chain. Here, the UNGPs provide that in deciding upon ‘appropriate action’ the enterprise should consider the importance of the business relationship, the severity of the abuse, and the adverse human rights effects of terminating the relationship. More broadly, the initiative builds on the established principle at international law that companies must ‘do no harm’,[[665]](#footnote-665) through providing that positive steps are required to comply with this corporate ‘responsibility to respect human rights’.

**4.3 A Focus on Due Diligence**

According to UNGP 17, “In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence.” Before proceeding, it is important to note that the concept of due diligence represents an international consensus on the standard of behaviour expected of companies in relation to their social responsibility.[[666]](#footnote-666) Illustrative of Ruggie’s work in aligning the initiatives, due diligence is central to corporate action within the ILO MNE Declaration,[[667]](#footnote-667) OECD guidelines[[668]](#footnote-668), ISO 26000,[[669]](#footnote-669) ISO 20400,[[670]](#footnote-670) and, with specific reference to forced labour, the ILO’s 2008 supplementary guide to the UN Global Compact.[[671]](#footnote-671) The concept of due diligence plays a prominent role in both voluntary[[672]](#footnote-672) and disclosure-based[[673]](#footnote-673) regulation in this area. It has also become central to the regulation of CSP in both the UK[[674]](#footnote-674) and the EU.[[675]](#footnote-675) The concept has also received support at a global political level. For example, the G7 Leaders declaration in 2015 “urge[d] private sector implementation of human rights due diligence” and “encourage[d] enterprises active or headquartered in … [G7] countries to implement due diligence procedures regarding their supply chains.”[[676]](#footnote-676)

The concept of due diligence in the business context refers to an investigative process that is conducted to identify, assess, and manage commercial risk, typically in advance of a merger or acquisition.[[677]](#footnote-677) Yet an alternative conceptualisation of due diligence is that of an objective standard of conduct used to discharge an obligation, stemming from Roman law as a precursor to the modern tort of negligence.[[678]](#footnote-678) Perhaps reflecting a “clever and deliberate tactic”[[679]](#footnote-679) to build consensus amongst business, state and civil society, the two are seemingly conflated within the UNGPs. For some commentators there exists a lack of clarity as regards the relationship between the two conceptions,[[680]](#footnote-680) yet it is respectfully suggested that this conflation is simply reflective of the business case for enhanced CSP as the underlying basis of the instrument. Although the UNGP’s attempt to highlight the idea that human rights stakeholder risk goes beyond materiality to business interests,[[681]](#footnote-681) this contrasts with the reliance on business reputation, in the absence of any legal liability in the traditional sense, as a means to incentivise self-regulation. The UNGPs’ reliance on the business case for enhancing CSP in relation to human rights will be considered further at 4.7.

The concept of due diligence as a standard of behaviour to address risk, as drafted, is a somewhat imprecise one given the broad-brush principles-based approach of the UNGPs. According to the UNGPs the due diligence process comprises three elements: a human rights policy, an ongoing human rights impact assessment (HRIA), and the prevention or mitigation of actual or potential impacts in accordance with the findings of the assessment. Initially, the company must make a policy commitment to undertake due diligence and outline its expectations of its personnel and suppliers. This commitment should be signed off by senior management and be publically available. The policy should be communicated to “those with whom it has contractual relationships or are linked to its operations.” These essentially involve the drafting or modification of a corporate code of conduct, and its communication to suppliers, perhaps through reference within a supply contract. Once these standards have been set, the notion of due diligence essentially requires firms to voluntarily incorporate human rights considerations into their risk management systems, and thus incorporates the management-based and risk-based regulatory techniques, considered in chapter 3, into its design.

From a practical perspective, the role of developing specific due diligence guidance for particular human rights or industrial sectors has been left to other stakeholders.[[682]](#footnote-682) It is clear, however, that the identification, assessment, and management of risk, as the key elements of the due diligence process, are reliant on the acquisition of information. Information acquisition in this sense reflects a process of discovery on the part of the lead firm which necessitates the provision of information from suppliers further along the chain. This process requires the use of tools of detection, which through a Foucauldian lens of power and governmentality,[[683]](#footnote-683) may be explained as ‘techniques’ of governance that have necessarily arisen in the absence of state control.[[684]](#footnote-684) From this perspective, the neoliberal regulatory environment has made particular use of calculative techniques such as indicators, standards, and benchmarks[[685]](#footnote-685) in seeking to translate the ‘social’ into that which can be measured, understood and consequently, made governable.[[686]](#footnote-686) Many such techniques have been ported across from the financial industry and are designed to facilitate governance from a distance.[[687]](#footnote-687) However, where these techniques were once restricted to the monitoring of internal organisational performance, in an era of globalised new governance, they now occupy a central role in addressing the issue of international corporate accountability. Chief of such techniques, and thus the cornerstone of the impact and performance assessments that may be associated with the due diligence process, is the audit.[[688]](#footnote-688)

**4.4 Current Best Practice: Audits and Certification**

At the time the UNGPs were developed, best practice in attempting to identify and human rights issues and monitor performance within the supply chain was (and in most respects, still is), centred upon the audit. The use of such audits may be described as the ‘next step’ in the attempt to address issues within the supply chain following the introduction and development of supplier codes of conduct. Whereas codes of conduct reflected a set of expectations that suppliers were expected to comply with, social audits represented an attempt by companies to monitor supplier compliance with these expectations. However, where best practice has involved the use of social audits in a genuine attempt to discover issues of non-compliance,[[689]](#footnote-689) other less committed companies have been accused of using them simply to allow for what Bartley terms “plausible deniability”*[[690]](#footnote-690)* against future accusations of labour abuse. It is clear therefore that the audit regime cannot be described as a neutral process[[691]](#footnote-691) thus the information generated may be “fundamentally shaped by the retail audit client.”[[692]](#footnote-692)

There are a number of further problems associated with the collection of information through audit beyond the issue of partiality. Perhaps most basically, an audit merely reflects what may be observed on one particular day.[[693]](#footnote-693) This snapshot may not accurately capture conditions within the supplier and is at odds with the large shifts in output quantities necessary to meet the highly flexibility demands of production, seasonality and ever shortening of product lifecycles. It follows that an audit in a quiet period will likely show different results than in the pre-Christmas rush.[[694]](#footnote-694) In such circumstances, suppliers may drift in and out of compliance. Moreover, although audits may be unannounced, suppliers are typically given advance notice of any visit.[[695]](#footnote-695) Certainly, the scope, length, frequency and intensity of audits vary considerably from firm to firm.[[696]](#footnote-696) Put simply, not all audits are equal.

Although the auditor may be internal to the lead firm or its supplier, it is more commonly[[697]](#footnote-697) undertaken externally by a third party.[[698]](#footnote-698) The need to monitor large numbers of suppliers had led to a reliance on high volume, low cost professional auditing firms[[699]](#footnote-699) derided as providing “tick the box” audit inspections.[[700]](#footnote-700) Essential questions surround the ability of these professional services auditors to uncover the truth. Indeed, various studies have questioned for instance, their background and training,[[701]](#footnote-701) or their susceptibility to corruption.[[702]](#footnote-702) The site audit market is big business. Indeed, Bartley observes that in China, these low cost auditing companies have succeeded in cornering the market.[[703]](#footnote-703) As a result, the market value of firms such as SGS, Intertek and Bureau Veritas has increased massively over the last decade or so.[[704]](#footnote-704)

A number of bodies have arisen to attempt to standardise the audit process. Preferred by many companies,[[705]](#footnote-705) are industry led certification initiatives,[[706]](#footnote-706) such as the Business Social Compliance Initiative (BSCI). Others have arisen from Multi-Stakeholder Initiatives (MSIs), reflecting business and civil society collaboration. The Ethical Trading Initiative (ETI) or Fair Labor Association (FLA) are obvious examples here. However, in many cases this standardisation has merely involved a standardised code of conduct. These certification bodies thus set the standards but then typically rely on the low-cost audit companies considered above to check compliance with them. As a result, non-compliance with codes of conduct has been found within a number of previously certified production facilities.[[707]](#footnote-707) Indeed, for the vast majority of audits, the auditors operate within a limited capacity that essentially involves the verification of information provided to them by supplier firms. This situation creates an over-reliance on the information provided by the management of suppliers,[[708]](#footnote-708) who in many cases have become skilled at masking non-compliance. This may be achieved through, for example, coaching or bribing workers,[[709]](#footnote-709) or telling underage workers not to turn up on the week of the audit.[[710]](#footnote-710) Yet although the audit process has created an environment conducive to manipulation, a focus on objective, and typically documentary, evidence has meant that even where suspicions of falsification are raised, they may not alter the audit result.[[711]](#footnote-711)

However, this is not to say that auditing organisations providing a more rigorous social audit do not exist. Through employing more methodical practices undertaken by experienced employees, the expertise of specialist social audit companies can significantly improve their effectiveness. The UK-based ethical trade consultancy, Impactt Ltd and US-based non-profit Verité provide two such organisations. An example of the more stringent standards applied by these bodies are the use of off-site interviews with supplier workers to better enable confidentiality and a willingness to speak out.*[[712]](#footnote-712)* However, according to Bartley, in China at least, these high-end audit providers have been priced out of the vast majority of work.*[[713]](#footnote-713)* As Clifford and Greenhouse observe, the additional costs of a high-end audit multiplied by a large numbers of supplier factories creates a significant incentive for firms to economise in this area.*[[714]](#footnote-714)*

**4.5 The Conflicting Pressures of Efficient Production and Corporate Social Performance**

According to the UNGPs, a firm’s human rights policy should be “reflected in operational policies and procedures necessary to embed it throughout the business enterprise.” However, many firms already had CSR departments with regular communications channels. The key issue is that the problem arises where a firm’s social policies come into conflict with the strategic demands of the problematic business model described in chapter 2, as operationalised through the firm’s sourcing and procurement function. The underlying rationale for supplier non-compliance and the manipulation of the audit process relates to the pressures placed upon the supply chain by lead firms. A lead firm’s procurement and CSR functions typically exist as separate departments within the organisation. This raises the possibility of a lack of coordination between the two resulting in communicative confusion for the supplier. However, it is clear from empirical research in the area that the real problem is not one of coordination but subordination in the minds of lead firm decision-makers.[[715]](#footnote-715) The power imbalance between procurement functions and CSR departments in corporate sourcing decisions is illustrative of the corporate perspective on social impact. That these two departments are even able to make incompatible demands[[716]](#footnote-716) has served to institutionalise an inherently contradictory situation.[[717]](#footnote-717) In performing the contract, suppliers have no real choice but to prioritise the delivery of the products requested over compliance with terms relating to social performance. [[718]](#footnote-718)

As was considered in chapter 2, these pressures are systemic within buyer-driven global supply chains. The lead firm captures the vast proportion of value from productive process by ‘squeezing’ its supply chain. A number of writers[[719]](#footnote-719) have identified the inherent contradiction between pressures for lower costs and greater flexibility, and the demands for ethical standards via codes of conduct and contractual terms. It is clear that the incentive for suppliers to comply with labour and human rights standards is based on reward or punishment, flowing up the supply chain. However, it is an ‘open secret’ that firms very rarely exit factories due to non-compliance and there is very limited evidence that compliance leads to longer term contracts and an increased number of repeat orders.[[720]](#footnote-720) Yet where a supplier fails to meet the productive requirements imposed upon it, it faces the very real risk of unfulfilled and lost future orders. Reflecting the lead firm’s cost-minimisation strategies more broadly, the costs of compliance with ethical standards are typically shifted onto suppliers.[[721]](#footnote-721)

**4.6 Supplier Compliance**

The lead firm’s relationship with its direct supplier is typically one of arm’s length and distrust.[[722]](#footnote-722) Yet supplier cooperation is essential in the elimination for forced labour within the supply chain. As was observed in chapter 2, forced labour is more likely to be found lower down the supply chain, for example, within outsourced labour arrangements or those involving the subcontracting of production. The former is typically unrecorded in company accounts[[723]](#footnote-723) and the latter is undertaken regardless of authorisation. The inclusion of provisions relating to these factors may be ignored when it is necessary to meet buyer demands. Indeed, a recent example found Inditex, the world’s largest clothes producer, to be unaware of unauthorised outsourcing to subcontractor factories in Sao Paolo. An investigation undertaken by Brazil’s Ministry of Labour found these factories to be staffed with forced labour who had been trafficked in from neighbouring Bolivia.[[724]](#footnote-724)

The hope under the regulatory approach is for a cooperative approach designed in order to increase supplier commitment to provisions within supply contracts or codes of conduct that relate to, for example the prohibition of sub-contracting, restrictions on the payment of recruitment fees, or obligations to monitor the upstream supply chain. Best practice thus positions the lead firm playing the role of CSP champion,[[725]](#footnote-725) with suppliers treated as partners rather than resources to be exploited.[[726]](#footnote-726) In a detailed study of the supply chains of Nike and ABC, Locke found that repeated interactions and long term, mutually beneficial relationships were essential in the building of trust between lead firm and supplier.[[727]](#footnote-727) Yet such long term relationships are atypical[[728]](#footnote-728) given their position of contradiction with a business model that seeks to achieve production at the lowest possible cost.[[729]](#footnote-729) Even where some level of cooperation is achieved between buyer and supplier, the inequality of power remains[[730]](#footnote-730) leaving suppliers with little voice to influence productive pressure. It has been suggested that increased auditing leads to increased levels of mistrust within suppliers,[[731]](#footnote-731) yet perhaps more significantly, such a focus on looking ‘under the lamp post’ ignores the root of the problem.[[732]](#footnote-732)

The miscalculation of the productive capacity of suppliers by the lead firm has been suggested as contributing to supplier non-compliance with supplier codes of conduct.[[733]](#footnote-733) Certainly, this lack of understanding of capacity is likely to be exacerbated in the absence of accurate audit information. However, even where the conflicting pressures of production and compliance are formally acknowledged by the more responsible lead firm[[734]](#footnote-734) problems remain. For instance, Nike found in 2006 that “perhaps in as many as one out of two instances of serious non-compliance the problem can be traced back to things the brand does: flexible production, fast turnaround, surge orders, changed orders, and all the rest of it.”[[735]](#footnote-735) Although commendable, a cursory look at Nike’s wording underplays the significance of such pressures in suggesting that they are the exception rather than the norm. Nike’s suggestions are seemingly undermined by Locke’s observation that the more reliant a supplier was on Nike for its orders, the lower its compliance with social standards.[[736]](#footnote-736) If this is true for Nike as a market leader in this area, the overarching question appears to centre on, not simply supplier commitment to change, but on the commitment of the lead firm itself. After all, even at its most effective, the audit is merely a diagnostic tool; it does not, by itself, fix anything. Civil society has called for lead firms to “go beyond the audit”,[[737]](#footnote-737) yet the only incentive for firms to do so within the voluntary model, is based upon the notion of a business case for CSP.

**4.7 The UN Approach and the Business Case for Compliance**

As has been considered, the UNGPs place risk as the central mechanism for enhanced human rights related CSP. Very much an example of risk-based regulation, the model seeks to incorporate human rights risk into corporate risk management systems as a means to address the issue of corporate human rights abuse. As stated by the UNGPs “due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.”[[738]](#footnote-738) Yet as has been suggested, this is arguably achieved, superficially at least, through the use of social auditing. The UNGPs state that the level of due diligence required to meet the responsibility to respect human rights must be that which “a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors).”[[739]](#footnote-739) However, it appears that from the consideration of the approach taken to the auditing process, this standard may not be particularly high.

Moreover, according to the UNGPs “business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships.” Yet, this stands in contrast to the use of a business model to maximise value extraction from the supply chain to satisfy shareholder expectations. Best practice may involve the assignment of resources in an attempt to enhance supplier compliance with code of conduct and audit requirements, typically through awareness-raising or training.[[740]](#footnote-740) However, as Ruggie observes, no amount of capacity building will increase the suppliers control over external productive pressure.[[741]](#footnote-741) Why then, according to Ruggie’s two regulatory instruments, should companies seek to prioritise the social performance of their supply chain over the maximisation of value extraction? Why should companies go beyond minimal, and potentially superficial, due diligence to more readily interfere with the workings of their business model?

Underpinning both the UNGPs and the Global Compact is the notion of a ‘business case’ for adequate CSP, and the exercise of due diligence in relation to human rights in particular. In other words, the notion of external or social risk is equated to the internal or business risk facing the company. This is made quite clear in Ruggie’s work around the time he started work on the UNGPs. Writing with Beth Kytle, he argues that: “As the ability to listen to corporate stakeholders' perspectives on social issues becomes a competitive necessity, managing social risks will need to become more fully embedded in corporate strategy.”[[742]](#footnote-742) The first principle of the UN Global Compact asserts that human rights-related CSP is a “business issue” and that “not respecting human rights poses a number of risks and costs for business.”[[743]](#footnote-743) Indeed, the FAQs accompanying the UNGPs outline that a failure to do so “can subject companies to the courts of public opinion - comprising employees, communities, consumers, civil society, as well as investors,”[[744]](#footnote-744) a set of assertions mirrored within the Global Compact.[[745]](#footnote-745) As such, in the absence of legal risk, the notion of external business risk essentially centres upon corporate reputation as a means to incentivise CSP.

The Global Compact and the UNGPs have enjoyed a high level of business and industry support.[[746]](#footnote-746) However, it has been argued that his support came at a high price.[[747]](#footnote-747) Although achieving consensus on the matter of business and human rights has been applauded by some, others have criticised that this has been achieved by resorting to the lowest common denominator.[[748]](#footnote-748) In rejecting a more stringent model of regulation, the instruments put forward by the UN do not directly increase legal risk.[[749]](#footnote-749) As such, the voluntary approach taken is ultimately reliant on corporate reputation for incentivising enhanced CSP. The weakness of such reliance is explored in chapters 6 and 7 in which the capability of investor and consumer actors to apply pressure upon companies to enhance their CSP is called into question.

**4.8 Beyond the United Nations**

In 2011, the European Commission identified a ‘core set’ of five international initiatives in this area. Along with the UNGPs and Global Compact, the EU highlighted the significance of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises on Social Policy (the ILO MNE Declaration), the ISO 26000 Social Responsibility Guidance (ISO 26000), and the OECD Guidelines for Multinational Enterprises (OECD Guidelines).[[750]](#footnote-750) The aim of this section is to provide a complete picture of the international regulatory environment by providing a brief overview of these instruments.

**4.8.1 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy Declaration**

The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy Declaration (ILO MNE Declaration) was originally adopted in 1977 and has undergone a number of revisions with the fifth and most recent being in 2017.[[751]](#footnote-751) The ILO MNE Declaration is the only ILO instrument that attempts to provide direct guidance to companies on social policy and responsible workplace practices.[[752]](#footnote-752) In essence, the instrument calls for the direct acceptance of fundamental labour standards by corporations and therefore includes the prohibition and abolishment of forced labour within its remit.[[753]](#footnote-753) It is described by the ILO as its ‘key tool for promoting labour standards and principles in the corporate world’.[[754]](#footnote-754) Although lacking specific reference to the supply chain in its previous incarnation, [[755]](#footnote-755) the 2017 update “recognizes that multinational enterprises often operate through relationships with other enterprises as part of their overall production process.”[[756]](#footnote-756) It goes on to state that companies “should take immediate and effective measures within their own competence to secure the prohibition and elimination of forced or compulsory labour” within such operations.[[757]](#footnote-757)

The ILO MNE Declaration has been criticised for its lack of complaint mechanism[[758]](#footnote-758) which perhaps reflects the ILO’s global position as a monitoring or coordinating body rather than an enforcer of labour rights. The ILO should consider periodic reports on corporate operations as generated by government or trade union associations. However, both the quantity and quality of information generated through this process has received significant criticism, perhaps most obviously in relation to the anonymization of companies therein.[[759]](#footnote-759) As such, even the basic sanction of corporate ‘naming and shaming’ is seemingly beyond the remit of the initiative.[[760]](#footnote-760)

**4.8.2 International Standards Organisation: ISO 26000 and ISO20400**

IS0 26000: Social Responsibility was launched following five years of development by the world’s largest producer of voluntary standards. The instrument accepts the capacity of larger firms to affect the actions of suppliers and includes supply chain labour issues within the scope of corporate responsibility. However, in contrast to the organisation’s typical output, the aim of IS0 26000 is merely to provide guidance for firms in the design and implementation of its social responsibility policy. The ISO26000 instrument was originally proposed as a management system standard that would have required the certification of compliance, thus serving to inform stakeholders of a company’s practices in this area.[[761]](#footnote-761) In its final manifestation, however, it contains no such requirements and thus is explicitly[[762]](#footnote-762) “not intended or appropriate for certification purposes or regulatory or contractual use.”[[763]](#footnote-763) As with the UN’s voluntary initiatives, the business case for enhancing CSP runs through the instrument.[[764]](#footnote-764) Although over 10,000 copies of the guidance document were sold within in its first two years of operation,[[765]](#footnote-765) the lack of any monitoring or verification procedure makes ascertaining its effects exceedingly difficult.

The ISO 20400 Sustainable Procurement Guidelines were introduced in 2017 and align with ISO 26000.[[766]](#footnote-766) ISO 20400 provides guidance to the company on the specific issue of integrating sustainability concerns into the supply chain.[[767]](#footnote-767) As guidance, there is once again no monitoring or enforcement mechanism and thus echoes the aspirational nature of ISO 26000. The ISO 20400 guidance attempts to reframe the concept of value in its definition of sustainable procurement as that which “has the most positive environmental, social and economic impacts”.[[768]](#footnote-768) Unfortunately, this stands in marked contrast to the underlying rational of globalised outsourcing as a business model discussed in chapter 3. Indeed, despite the broadened definition of value, many of the benefits outlined appear to reflect more the traditional notion of value. For example, according to the ISO, adherence to the guidance may increase productivity, optimise costs, improve purchasing performance, and reduce the risk of disruptions due to product recall or supplier failure.[[769]](#footnote-769) It is somewhat difficult to reconcile, in any concrete fashion, the use of corporate resources to prevent the use of forced labour within the supply chain to these benefits. More broadly, however, sustainable procurement in line with ISO 20400 is linked to corporate self-interest. For instance, according to the guidance, “sustainability issues can influence brand value and reputation, market share, market capitalization, legal exposures, price volatility and access to supply, financial liabilities, moral/ethical exposures and the risks associated with operating licences.”[[770]](#footnote-770) Sales figures for the ISO 20400 guidance have not yet been published and so even the most basic understanding of corporate interest in the initiative is unavailable.

**4.8.3 OECD Guidelines for Multinational Enterprises**

Perhaps offering a more robust foundation for regulation in the traditional sense, the OECD Guidelines for MNEs were adopted by a number of governments in 1976 and apply to multinationals operating in or from the 34 OECD member states and the 12 non-OECD signatories to the OECD Investment Declaration (of which the OECD Guidelines are part). Although the 2000 guidelines requested multinational enterprises to encourage suppliers to act in accordance with the guidelines ‘where practicable’[[771]](#footnote-771) and encouraged the use of social reporting which “may also cover information on the activities of subcontractors and suppliers”[[772]](#footnote-772) the instrument effectively excluded any further notion of supply chain responsibility[[773]](#footnote-773) until its revision in 2011.[[774]](#footnote-774) The revised OECD Guidelines now specifically include the supply chain,[[775]](#footnote-775) and, as informed by the UNGPS, provides that companies are expected to apply risk based due diligence over it.[[776]](#footnote-776)

The OECD Guidelines are not legally binding on companies; however, participating governments are required to implement a National Contact Point (NCP) to which a complaint or ‘specific instance’ may be raised by an interested party (broadly defined) in relation to a company’s activities at home or abroad. It is this mechanism that distinguishes the Guidelines from all the other initiatives considered here. It is also clear that the complaint mechanism may be used for alleged corporate misconduct within the supply chain. For example, a number of complaints have been raised by NGOs in relation to state-sponsored forced labour violations in the cotton fields of Uzbekistan.[[777]](#footnote-777)

# However, it should be highlighted that the focus of the NCP compliance mechanism is on ‘mediation and conciliation.’[[778]](#footnote-778) The strongest sanction available to the NCP is the issuance of a final statement. This statement may determine whether a breach has occurred, outline any non-compliance with the NCP mediation process, and offer a possible recommendation on the future implementation of the guidelines. In this sense, it is merely another form of naming and shaming. As the UK NCP case of *Global Witness vs. Afrimex*[[779]](#footnote-779) illustrates, even where a breach has been found, a company has withdrawn from mediation, and a recommendation issued, no further action is mandated.[[780]](#footnote-780) Moreover, as observed by follow up NGO report on the aforementioned Uzbek cotton complaints, any corporate commitment is likely to tail off once the mediation procedures have concluded and media coverage reduced.[[781]](#footnote-781) It comes as no surprise; therefore, that a recent report by OECD Watch on the first fifteen years of the NCP mechanism admitted that “the overwhelming majority of complaints have failed to bring an end to corporate misconduct or provide remedy for past or on-going abuses.”[[782]](#footnote-782)

# 4.8.4 Summary of Non-UN International Instruments

# The initiatives emanating from the international community beyond the UN offer little improvement over the current UN approach. This is particularly true in relation to the ILO and ISO instruments. The former reflects more of a call for action, and whilst the lack of corporate involvement in its development is admirable, the reluctance to even name and shame companies for poor CSP nevertheless reflects a level of deference to corporate interests. The ISO instrument too defers to the company through turning its rejection of a verifiable standard. Although perhaps unsurprising given the proximity of ISO to its commercial customers, it nevertheless, stands in stark contrast to the body’s more typical output in designing certifiable standards for management systems across a variety of complex issues. The complaints mechanism found within the OECD Guidelines provides a step beyond the UN instruments. However, the lack of any real enforcement means that it serves only to provide a soapbox to name and shame. As such, although procedurally the OECD Guidelines may be described as towards the ‘harder’ end of the spectrum of the international voluntary approach to CSP, corporate reputation ultimately forms the basis of any corporate action to internalise social costs.

**4.9 Conclusion**

This chapter has illustrated the voluntary nature of the international approach to corporate human rights violations within the supply chain. Particular attention was given to the approach taken by the UN and its rejection of direct obligations for companies at international law and, seemingly, a binding treaty on states to regulate in this area. In rejecting the first steps towards a binding regulatory approach, the UN has settled on taking a voluntary model of regulation to address the negative human rights impacts of globalised production. The voluntary approach attempts to equate external risk to the risk to a company’s bottom line and thus is centred upon the threat to a company’s reputation, or the business case for CSP. An evaluation of the business case is the focus of chapter 6, in relation to the investor, and chapter 7, as regards the consumer.

As will be considered in the following chapter (chapter 5), informational deficits between companies and those with an interest in their activities have been perceived as constituting a barrier to enhanced self-regulation in the internalisation of social cost. Indeed, the UNGPs provide that companies should “both know and show that they respect human rights in practice.”[[783]](#footnote-783) Whilst *knowing* relates to the implementation of due diligence processes, *showing* “involves communication, [thus] providing a measure of transparency and accountability.”[[784]](#footnote-784) This call for greater transparency, [[785]](#footnote-785) in a voluntary sense, is also encouraged elsewhere, with for example the OECD MNE Guidelines “encourage[ing] disclosure or communication practices” in social, environmental and risk reporting,”[[786]](#footnote-786) and ISO26000 describing transparency in this area as a “valuable aspect” of social responsibility.[[787]](#footnote-787) The following chapter moves beyond this mere encouragement of disclosure, stemming from these international voluntary instruments, to consider a mandatory disclosure-based approach as a means to enhance CSP.

**Chapter 5: A Disclosure-Based Approach**

**5.0 Introduction**

The international voluntary approach, as considered in chapter 4, is founded upon the notion that companies will voluntarily choose to enhance their CSP due to the alignment of external and internal risk. In other words, companies will internalise their social costs due to the business case for doing so. The focus of this chapter is on the use of mandatory disclosure regulation to increase the flow of information as regards a firm’s social performance. This is based on the premise that informed stakeholders will apply pressure on the company to deliver adequate CSP in order to meet their preferences. From an economic perspective, the absence of information about a market leads to an inefficient decision making process whereby market actors make different decisions than they would have done if they had been perfectly informed. From this perspective, relevant information may thus influence a decision to purchase a company’s products, buy its shares, or use one’s resources to engage with the company on matters of CSP. Although not market actors themselves, civil society or trade union stakeholders may indirectly increase the pressure for CSP through organising collective action or lobbying for regulatory change.[[788]](#footnote-788) As such, increased transparency is taken as being a precondition to, and perhaps, also a stimulus of, stakeholder action.

A disclosure-based approach may be separated into two stages: the provision of CSP information and the potential use of that information. The potential for such information to be used to apply pressure on companies is explored elsewhere within this thesis. This chapter considers the extent to which the current disclosure-based regulation affecting UK companies may adequately inform stakeholders about a company’s present social performance. This will involve an examination of the annual reporting requirements of the Strategic Report and, stemming from the EU Non-financial Disclosure Directive (EUNFDD), the Non-Financial Information Statement. It will be highlighted that the focus on the shareholder of the UK’s system of corporate governance is reiterated within the annual reporting regime. Following this, the more stakeholder-focused disclosure-based approach to the issue of forced labour within the supply chain will be examined. This will necessarily involve a consideration of Section 54 of the UK Modern Slavery Act 2015 (MSA). Ultimately, it will be concluded that a number of weaknesses arise in relation to content, comparability, and focus of the disclosure-based regulation in this area. As such, it will be suggested that the current initiatives are unlikely to result in interested stakeholders being adequately informed of a company’s social performance.

**5.1 Corporate Annual Reporting Requirements**

In the UK, a company is required to submit a standardised set of accounts and an annual report on its activities during the preceding financial year. The report is intended to provide information about the company's activities and financial performance. Along with the accounts, the annual report must be filed at Companies House[[789]](#footnote-789) and circulated to all shareholders,[[790]](#footnote-790) with public companies also required to lay them before the general meeting.[[791]](#footnote-791) Inter alia, the report must contain a financial statement that accords to the standardised form and content requirements of the EU Accounting Directive,[[792]](#footnote-792) as implemented within the Companies Act 2006. Of relevance to the present discussion are the requirements for non-financial reporting in the form of the Strategic Report and Non-Financial Information Statement. These will now be considered.

**5.1.1 Strategic Report**

The Company Law Review envisaged the imposition of a non-financial disclosure requirement in order to enable “the public at large to evaluate [the company’s] performance and bring pressure to bear on the company … so as to satisfy relational and wider social interests.”[[793]](#footnote-793) Enhanced transparency would thus “improve the climate of opinion on issues of acceptable and desirable corporate behaviour.”[[794]](#footnote-794) In identifying a link between short term decision-making and irresponsible corporate behaviour, the Company Law Review put forward the idea of the disclosure requirement acting as a counterpart to the duty for directors to have regard to a non-exhaustive list of stakeholder interests in the delivery of shareholder value.[[795]](#footnote-795) The aim of the requirement was to provide some “breathing space”[[796]](#footnote-796) for directors from shareholder pressures to deliver value in the short-term.[[797]](#footnote-797) The aim was thus to increase shareholder patience by permitting directors the opportunity to outline their strategy for long-term growth. Essentially the disclosure would permit directors the opportunity to convince shareholders that greater value may flow to them over an extended time horizon.[[798]](#footnote-798) Whilst the primary goal was thus to inform shareholders, a secondary benefit, in theory, would flow to stakeholders via enhanced social and environmental sustainability.

The means by which shareholders would afford directors the discretion to take a longer term approach was the Operating and Financial Review (OFR). Johnston thus highlighted the significance of the OFR as “fundamental to the goal of ‘enlightening’ shareholder value.”[[799]](#footnote-799) As drafted, the OFR would have required the company to disclose information about the environment, employees, and social and community issues.[[800]](#footnote-800) Significantly, it would have mandated the inclusion of information about the company’s policies in these areas and the extent to which those policies had been successfully implemented.[[801]](#footnote-801) The OFR would also have required the disclosure of supply chain information where such arrangements were “essential to the business of the company.”[[802]](#footnote-802) For example, although potentially subject to considerations of confidentiality and competitiveness,[[803]](#footnote-803) this could have included information on the use and identity of supply chain intermediaries, as discussed in chapter 2. Finally, and importantly, disclosure under the OFR was required to have been prepared in accordance with relevant reporting standards as set by the Accounting Standards Board (ASB). Echoing the use of standardised financial accounts, this had the potential to better allow for social and environmental benchmarking between companies in similar industrial sectors.[[804]](#footnote-804) The company was permitted not to use this standard but was required to explain why this decision had been made.[[805]](#footnote-805)

Although the OFR was enacted in 2005,[[806]](#footnote-806) it never came into force. Political posturing by the New Labour government of the time led to its requirements being deemed overly burdensome upon the business community.[[807]](#footnote-807) As a result, the OFR was replaced at the last minute by the Business Review,[[808]](#footnote-808) now called the ‘Strategic Report.’ [[809]](#footnote-809) Although the OFR aimed to inform stakeholders more broadly, the restrictive aim of the Strategic Report is very much shareholder focused. The purpose of the Strategic Report is thus to inform members of the company and help them assess how the directors have performed their duty under section 172.[[810]](#footnote-810) In order to achieve this aim, this should include a review of the company’s business and a description of its principal risks and uncertainties.[[811]](#footnote-811) The company may provide information about environmental matters (including the impact of the company’s business on the environment), the company’s employees, and social, community and human rights issues. As such, the issue of forced labour within the supply chain could fall within its remit. However, disclosure on such issues is no longer mandatory (as per the OFR) but is restricted to that which is necessary to enable an understanding of the development, performance or position of the company’s business.[[812]](#footnote-812) If the Strategic Report does not contain information in relation to the aforementioned matters, it must state which of those kinds of information it does not contain, yet any omission requires no further explanation.

**5.1.1.1 A Focus on the Shareholder**

Guidance issued by the Financial Reporting Council (FRC) attempts to rephrase the purpose of the Strategic Report beyond allowing an assessment of the directors’ performance of their duty under s172. For example, the guidance “encourages” the provision of non-financial information necessary to understand the future prospects of the entity[[813]](#footnote-813) “irrespective of whether there is an explicit statutory disclosure requirement.”[[814]](#footnote-814) However, although the FRC attempts to encourage the provision of non-financial information beyond the original remit of the statute, it is clear that it does not intend to widen the scope of its intended audience. It is made clear that the key objective of the guidance is “to ensure that Strategic Reports (and annual reports more generally) are focused on the needs of shareholders.”[[815]](#footnote-815)

The FRC guidance provides that “the Strategic Report should focus on those matters that are *material*.”[[816]](#footnote-816) The question of materiality is significant as the definition of material may differ based upon the identity of the stakeholder and the objective of the disclosure. The audience and their respective informational needs thus dictates a determination of materiality. A broad definition of materiality may regard that information which “is really important or has great consequences.”[[817]](#footnote-817) However, in its guidance to financial auditors, the FRC provides a more restrictive interpretation whereby information is only deemed material “if its misstatement or omission individually or in aggregate could influence the economic decisions of users.”[[818]](#footnote-818)

The FRC’s rejection of a broader definition of materiality within its guidance to the Strategic Report is illustrated in relation to the conceptualisation of risk taken therein. For example, a principal risk is defined as a “risk or combination of risks that can seriously affect the performance, future prospects or reputation of the entity.”[[819]](#footnote-819) In other words, the notion of risk is provided to relate to the internal risks of the business. Non-financial matters should thus form part of a broader review as regards the “principal risks to the business as a whole.”[[820]](#footnote-820) Moreover, whilst the guidance acknowledges that “other stakeholders such as customers, employees and members of society more widely” may also wish to use the information, the annual report should only “address issues relevant to these other users where … they are also material to shareholders.” Indeed, the word ‘material’ is emboldened within the guidance text, perhaps reflecting comments made during the consultation period expressing a desire for such clarity on the matter.[[821]](#footnote-821) Further, the guidance actively discourages *immaterial* information by providing that it “should be excluded as it can obscure the key messages and impair understandability.”[[822]](#footnote-822)

**5.1.1.2 Evaluation of Strategic Report**

The Strategic Report reflects the UK’s shareholder-centric system of corporate governance more broadly. Its narrow focus on the financial concerns of the investment community serves to exclude information that may be pertinent to other parties. In other words, whilst a company’s stakeholders may be able to access such information, it may not necessarily correlate to their wider informational needs. This arguably reduces the potential of the Strategic Report to empower non-shareholders to drive improvements in CSP.

It is acknowledged that even within this restricted scope, ‘material’ information may still be of use to other stakeholders. However, the lack of a standardised approach essentially leaves the contents of the report to the discretion of corporate management. Certainly, the disclosure requirements of the Strategic Report (in their previous incarnation as the Business Review) have been observed by Aiyegbayo and Villiers as making little difference to the quality of information provided.[[823]](#footnote-823) Indeed, a more recent study of disclosures made by FTSE 350 companies found a bureaucratic approach being taken to the Strategic Reporting requirements with “pages packed with data and generic, boilerplate statements that comply rather than inform.”[[824]](#footnote-824) More than a decade beforehand, the Company Law Review had warned that “reporting duties without real content” would lead to such compliance,[[825]](#footnote-825) highlighting the significance of the standardised disclosure requirements envisaged under the OFR. In its decision to regulate in this area, it appeared that the EU intended to address the shareholder-centric focus of non-financial reporting and the problems relating to quality of content.

**5.1.2 Non-Financial Information Statement**

The EU acknowledged that the “disclosure of non-financial information is vital for managing change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection.”[[826]](#footnote-826) In order to ensure a level playing field across the EU, the Commission committed to legislate on the transparency of social and environmental information.[[827]](#footnote-827) The EU Non-Financial Disclosure Directive 2014[[828]](#footnote-828) (EUNFDD) represents a key development in this regard and creates a disclosure obligation for large public interest companies (PIEs) within the European Union. The Directive was implemented into the UK Companies Act[[829]](#footnote-829) and came into application on the 1st January 2017. Traded companies[[830]](#footnote-830) with more than 500 employees within a corporate group[[831]](#footnote-831) are now required to create a Non-Financial Information Statement (NFIS) as part of their annual reporting requirements.

The reporting requirements of the NFIS are undoubtedly an improvement over those of the Strategic Report. Applicable companies must “as a minimum”[[832]](#footnote-832) disclose information about the impact of its activities on the following areas: employees, the environment, social matters, human rights, bribery and corruption.[[833]](#footnote-833) Thus, in contrast to the Strategic Report, disclosure in these broad areas is mandatory. Furthermore, in utilising the notion of impact, greater emphasis is placed on the effects of its activities as opposed to mere philanthropic activity, and thus falls in line with the revised expectations of CSP put forward by the UN Guiding Principles on Business and Human Rights (UNGPs), considered in chapter 4. Again reflecting the influence of the UNGPs on regulation in this area, the company must outline its policies relating to the aforementioned social and environmental impacts[[834]](#footnote-834) and describe any due diligence processes implemented by the company in pursuance of these policies.[[835]](#footnote-835) In an attempt to ensure companies consider the effectiveness of its policies, a company is required to disclose a description of the outcome of its policies in this area.[[836]](#footnote-836) Where the company does not pursue policies in relation to one or more of the social and environmental matters listed, a “clear and reasoned explanation” must be provided.[[837]](#footnote-837)

Of particular interest to stakeholders is the provision that an applicable company must describe the “principal risks” relating to its social and environmental impacts arising in connection with its operations. [[838]](#footnote-838) This may involve disclosure relating to its business relationships, products or services that are likely to cause adverse impacts, and how it manages its principal risks. However, disclosure in these latter areas is only required where it is “relevant and proportionate” to do so. This is particularly significant in regards to the use of forced labour use, with business relationships clearly relevant to the means by which a company manages its supply chain. Moreover, the company should also provide a description of the non-financial key performance indicators (KPIs) that are deemed relevant to its business.[[839]](#footnote-839) However, these KPIs may relate to the “performance or position of the company’s business, *or* the impact of the company’s activity.”[[840]](#footnote-840) As such, disclosure in this area may relate to the particular informational needs of the intended recipient. Indeed, the designation of risks as ‘principal’, performance indicators as ‘key’, and the ‘relevance and proportionality’ of disclosing information on the adverse impacts of business relationships, serves to highlight the discretion of corporate management within the disclosure process. Moreover, in permitting such discretion, questions are once again raised as to the intended audience of the non-financial information.

**5.1.2.1 Materiality and the Non-Financial Information Statement**

The text of the EUNFDD appears to outline a need to satisfy the informational requirements of a broad set of stakeholders. Its recitals acknowledge the importance of non-financial information to “shareholders and other stakeholders alike”[[841]](#footnote-841) and reference the European Parliament’s call for such legislation “to meet the needs of investors and other stakeholders as well as the need to provide consumers with easy access to information on the impact of businesses on society.”[[842]](#footnote-842) Furthermore, the Directive does not prescribe a restrictive notion of materiality in relation to any particular stakeholder group. The question of materiality is thus seemingly left to the guidelines prepared by the European Commission as required by Article 2 of the Directive.[[843]](#footnote-843)

Taking the definition of material information from the Accounting Directive[[844]](#footnote-844) as its baseline, the guidelines highlight that the Directive introduces impact as a new element to be taken into account when deciding upon non-financial disclosure.[[845]](#footnote-845) As such, information is to be provided ‘to the extent necessary for an understanding of the ... impact of (a company's) activity’.[[846]](#footnote-846) According to the guidelines, the NFIS “is expected to reflect a company's fair view of the information needed by relevant stakeholders”,[[847]](#footnote-847) thus companies are “expected to consider the information needs of all relevant stakeholders.”[[848]](#footnote-848) The informational needs of stakeholders as a “collective group”[[849]](#footnote-849) should be considered and should not focus on the needs or preferences of any single interest. This group “may include, among others: investors, workers, consumers, suppliers, customers, local communities, public authorities, vulnerable groups, social partners and civil society.”[[850]](#footnote-850) In summary, the guidelines to the Directive highlight the significance of impact within non-financial disclosure. As materiality is seemingly not limited by narrow, shareholder-orientated considerations,[[851]](#footnote-851) information relating to external risks, in terms of adverse impacts, could be disclosed even where the internal risk of financial harm to the company was limited.

However, as the text of the Directive confirms, the guidelines that accompany the Directive are non-binding on EU Member States.[[852]](#footnote-852) As implemented therefore, the UK’s Companies Act contains no requirement for firms to satisfy wider stakeholder needs. Although the wording of the UK statute appears not to preclude it by remaining silent on the purpose of the NFIS, the associated guidance provided by the FRC does not. In contrast to the European Commission’s use of non-binding guidelines to the Directive to encourage broader considerations of stakeholder needs, the FRC’s guidance to the Directive’s implementation into UK law serve to narrow them. Indeed, the FRC Guidance provides that the NFIS comprises a part of the Strategic Report and thus should be interpreted within that wider context.[[853]](#footnote-853) As considered previously, the ‘wider context’ of the Strategic Report is one that is based upon the needs of the shareholder. As such, the guidance encourages a restrictive focus on the informational needs of the rational investor, a perspective likely to be propagated by professional guidance on the matter.[[854]](#footnote-854)

It appears therefore, that the UK’s implementation of the EUNFDD does little to encourage wider forms of disclosure based upon the need to inform a broader group of stakeholders. This may be regarded as a lost opportunity to reformulate, in a relatively unobtrusive way, the responsibilities of a director to a wider group of stakeholders via a somewhat pluralistic disclosure obligation. The decision by the European Commission to permit a restrictive interpretation of the disclosure requirements may be questioned. It is unclear whether the UK is simply missing the point of the Directive. In the alternative, the UK’s choice to interpret the EUNFDD’s requirements restrictively are unsurprising given its previous stance on the OFR as being unnecessarily burdensome on companies.

**5.1.2.2 A Further Lack of Standardisation**

The possibility of a restrictive stance being taken as regards the materiality of information could have been overcome, at least to some extent, via the imposition of reporting standards providing for a more rigid set of disclosure expectations. Indeed, even where materiality is a restriction on the disclosure of information, disclosures may still be of use to other interested parties if they are of sufficient quality and detail. Standardisation of output would arguably help in this regard. Indeed, a key objective of the EUNFDD was to “enhance the consistency and comparability of non-financial information.”[[855]](#footnote-855) If sufficiently specific standardisation could enhance the quality of information disclosed, or at least indicate which firms were being more or less transparent, in theory at least, this should be of interest to a variety of stakeholders.

However, in contrast to the various standards relating to corporate reporting of financial information, no standard form of disclosure is mandated by the EUNFDD. Prior to its implementation, the European Parliament had called for “a sufficient level of comparability” to be matched with a “high flexibility of action” so to reflect the “multidimensional nature of corporate social responsibility” and “the diversity of CSR policies”,[[856]](#footnote-856) yet this call appears unanswered. This paradoxical desire for both flexibility and standardisation echoes the comments of the company law review more than a decade before, with the final result, as per the UK’s Strategic Report, falling on the side of the former.[[857]](#footnote-857) As such, the format and specific details of the disclosure, beyond the relatively broad requirements of the legislation, are for the reporting organisation to decide.

**5.1.3 Enforcement of Procedural Requirements**

Enforcement of the procedural requirements of the Strategic Report (and Non-Financial reporting Statement) is currently undertaken by the FRC.[[858]](#footnote-858) Here, the FRC adopts a (non-compliance) risk-based approach to the selection of reports, supplementing this approach with random sampling,[[859]](#footnote-859) yet also aims to review the reports of a FTSE 350 at least once every five years.[[860]](#footnote-860) By way of illustration, the 2017/2018 financial year saw the FRC review the annual reports of 220 companies.[[861]](#footnote-861) Where compliance is questioned, the Corporate Reporting Review (CRR) director writes to the company’s chairman outlining the issues and requesting an explanation.[[862]](#footnote-862) 2017/18 saw 101 or 46% of the reviewed companies being contacted, though this figure is typically between 30%-40%.[[863]](#footnote-863) Informal correspondence is then used to encourage compliance, and according to the FRC, “in the overwhelming number of cases, matters raised are satisfactorily addressed by the company through this type of engagement without the need for further action.”[[864]](#footnote-864) However, compliance, in a strict procedural sense does not appear to be the problem. Information is provided, often masses of it, and frequently within the broad areas specified by the statute. However, the extent to which this information may be described as useful is another question entirely.

**5.1.4 Effectiveness of** **Annual Reporting Requirements in Enhancing Useful CSP Disclosure**

It is generally evident that disclosure of useful CSP information has been limited. A survey of the Strategic Reports of FTSE 350 companies undertaken by PricewaterhouseCoopers in 2015 is illustrative of the ineffectiveness of the UK’s non-financial annual reporting requirements.[[865]](#footnote-865) For example, little disclosure is typically made in relation to long term corporate strategy with 60% of FTSE 350 companies giving no information that looked beyond their next financial period.[[866]](#footnote-866) This is particularly concerning given that the original basis for non-financial disclosure requirements, at least as far as the UK was concerned, was to allow for the elongation of decision-making timeframes. Moreover, seemingly undermining the link put forward between long term value creation and CSP, only 14% of FTSE 350 companies provided forward looking information on social and environmental issues.[[867]](#footnote-867) Whilst policy information on ethical principles is often provided, echoing corporate codes of conduct, a separate study by the Chartered Institute of Internal Auditors observed that only 20% of FTSE 100 Companies provided information as to how ethical standards were actually applied in practice.[[868]](#footnote-868) It is too early to definitively state that the impact of the Non-Financial Disclosure Directive will be any different.[[869]](#footnote-869) However, preliminary research in this area offers little suggestion of any immediate improvement over disclosures made under the requirements of the Strategic Report.[[870]](#footnote-870) Indeed, given the perceived overlap between the two, it is evidentially difficult to identify disclosures made in response to the NFIS requirements.[[871]](#footnote-871)

Ultimately, the UK’s non-financial reporting regime relies heavily on corporate goodwill to ensure the usefulness of disclosure. Put simply, compliance with a limited set of procedural requirements may not necessarily correspond to a higher quality of disclosure. As such, and in contrast to the requirements for financial disclosure, it may be described as being somewhat closer to self-regulation. The restrictive focus on materiality may serve to emphasise the informational needs of shareholders in the eyes of corporate management, yet even here, quality non-financial disclosure may not necessarily be forthcoming. In theory, shareholders should be interested in such information based on the idea of the existence of a business case for adequate CSP. Taking this view, shareholders may be expected to more actively apply pressure on companies to provide such information. However, the focus on the shareholder taken by the annual reporting requirements is somewhat troublesome, not least because of a reluctance to engage and the preference for exit where short term expectation are not met.

Questions have also been raised concerning the extent to which shareholders are actively concerned with the information provided within a company’s annual reports. Given that the financial information therein is inarguably related to financial performance, questions relating to the financial significance of non-financial information are excluded from debate. Yet such concern may not necessarily be forthcoming. Here, Villiers cites a number of empirical studies undertaken both in the UK and the US whereby shareholders showed considerable disinterest in the contents of annual reports.[[872]](#footnote-872) For example, Brown and De Tore highlight that 40% of shareholders spend less than five minutes on reading the annual reports with a further 37% not even reading it at all.[[873]](#footnote-873) Moreover, there may be perceptions of information overload by shareholders which, as Villiers observes, may serve to “muddy the water rather than providing a clear picture.”[[874]](#footnote-874) This is particularly relevant, and indeed evident, within the disclosure of non-financial information, yet a standardised approach to its disclosure has nonetheless been rejected.

The non-financial disclosure regime applying to companies in the UK fails to ensure the flow of useful CSP information to the shareholder, a further question relates to the extent to which investors are interested in using information to apply pressure on companies to enhance CSP. The interpretation of materiality as financial self-interest, as put forward by the regime, relies upon the business case for a company internalising its social costs. Although it has been highlighted that investors may not necessarily be interested in the contents of annual reports, a further question relates to the extent that they *should* be. It is clear that the investor has been singled out as an agent of change, as indicated within chapter 2, and reinforced by the shareholder-focus taken here.

**5.1.5 Summary of Non-Financial Annual Reporting Requirements**

It has been suggested that the non-financial annual reporting requirements fail to ensure the flow of useful information. The focus on financial materiality reiterates the notion of the shareholder as a means to enhance CSP through the business case for doing so. This is considered further in chapter 6. For present purposes, it is sufficient to highlight that the determination of material information is left to corporate management. Although the EU Non-Financial Disclosure Directive has attempted to reframe the reporting requirements as one of informing stakeholders more broadly, the UK has once again phrased its requirements in terms of the shareholder interest. More fundamentally of course, whether information is deemed to be material or not, the release of such information is essentially discretionary. The requirements of the NFIS mandate disclosure in a number of areas, yet even if information is provided as regards, for example “social matters”, the broad nature of such topics permits the use of boilerplate disclosing. The lack of any further standardisation is detrimental to its potential effectiveness.

**5.2 Modern Slavery Act 2015**

A disclosure-based model of regulation has also been used by the UK in an attempt to address the specific issue of forced labour use within the supply chain. As the first national legislation on this issue, Section 54 of the UK’s Modern Slavery Act 2015 (MSA) has been described as a “ground-breaking” development in the regulation of CSP.[[875]](#footnote-875) The Act creates a procedural requirement for firms to disclose their efforts to eradicate modern slavery within a modern slavery statement.

**5.2.1 Policy Background**

The UK’s Modern Slavery Act 2015 (MSA) was enacted on 26 March 2015, less than a year after it was first laid before Parliament.[[876]](#footnote-876) The impetus for the Act was to rectify a breach of Article 4[[877]](#footnote-877) of the European Convention of Human Rights as identified by the Strasbourg court in C.N. v U.K in relation to the UK’s duty to prevent forced labour in the domestic sphere through the criminal law.[[878]](#footnote-878) Yet in addition to the criminal offences contained within the Act in relation to the direct use of modern slavery within the UK, the remit was extended to tackle its use within the global supply chains of large companies selling goods and services in the UK. It is the inclusion of a transparency in supply chains provision that is of interest within the context of this thesis.

The decision for the UK to legislate in this area came as a result of pressure from a number of CSOs such as Anti-Slavery International and the Walk Free Foundation.[[879]](#footnote-879) Yet arguably their work was made easier given that many companies faced similar transparency requirements as a requisite of doing business in California.[[880]](#footnote-880) In their analysis of interactions between business actors, civil society organisations, and policymakers, LeBaron and Rühmkorf [[881]](#footnote-881) suggest the strategic use of an industry-led ‘transparency coalition’ to shape the UK’s law in this area. In contrast to the annual non-financial reporting requirements discussed above, the regulation of modern slavery within the supply chain did not necessarily have to follow a disclosure-based model. Here, LeBaron and Rühmkorf [[882]](#footnote-882) suggest that a number of large multinational companies aimed to deflect calls for a ‘hard’ legal approach as per the duty-based formulation of the UK Bribery Act 2010, through their support of a separate disclosure-based instrument.[[883]](#footnote-883) As the writers point out, many multinational enterprises had little to lose from such an initiative in light of their existing disclosure obligations under the CTSCA.[[884]](#footnote-884) As part of this coalition, a number of prominent Civil Society Organisations (CSOs) were ‘on boarded’ in support of the regulatory format of what would finally become the MSA. As the authors unearth, CSOs are under pressure to demonstrate returns too. [[885]](#footnote-885)

**5.2.2 A Focus beyond the Shareholder**

The MSA is based on the California Transparency in Supply Chains Act 2010 (CTSCA),[[886]](#footnote-886) although as will be considered shortly, is not an exact replica. Nevertheless, it is evident that both pieces of legislation stand in contrast to the annual reporting requirements discussed previously in aiming beyond self-interested investors as their target audience. Firstly, the focus on this wider group of stakeholders is evident in the medium by which the information is communicated. In contrast to a company’s annual reports which must be circulated to shareholders, the MSA requires that the modern slavery statement be published on the company’s website[[887]](#footnote-887) with a link to the statement provided in a prominent place on the website homepage.[[888]](#footnote-888) Secondly, in contrast to the Strategic Reporting requirements, there are no restrictions based upon the ‘materiality’ of content within the guidance to either the UK or the Californian instrument.[[889]](#footnote-889)

Whilst the CTSCA very much focuses on enlisting consumers as a means to address the issue of forced labour within the supply chain,[[890]](#footnote-890) the MSA provides that the information disclosed within a modern slavery statement is intended for “the public, consumers, employees and investors.”[[891]](#footnote-891) As such it is made clear within the statutory guidance to the MSA that: “it will be for consumers, investors and Non-Governmental Organisations to engage and/or apply pressure where they believe a business has not taken sufficient steps [to eradicate modern slavery].”[[892]](#footnote-892) Civil society pressure is likely to involve attempts to influence the actions of market-based actors. Indeed, there appears to be considerable focus upon the consumer as an agent for change with a recent review of the Act, (discussed shortly) highlighting that the “power of consumers is a critical tool in influencing business behaviour in relation to modern slavery.”[[893]](#footnote-893)

**5.2.3 Overview of the Modern Slavery Act 2015**

Section 54 of the MSA provides that a commercial organisation[[894]](#footnote-894) is required to prepare a modern slavery statement for each financial year.[[895]](#footnote-895) The statement must be published on its website, and must have been approved by the board and signed by a director.[[896]](#footnote-896) The statement should outline the steps the company has taken to ensure that slavery and human trafficking is not taking place within its business or in any of its supply chains.[[897]](#footnote-897) Where the company has not undertaken any action in this regard, the statement should provide that the organisation has taken no such steps.[[898]](#footnote-898) The disclosure requirement applies to organisations that supply goods or services,[[899]](#footnote-899) in any part of the United Kingdom,[[900]](#footnote-900) and records a turnover, including that of its subsidiaries,[[901]](#footnote-901) of £36 million or above.[[902]](#footnote-902) In 2015, it was estimated that the provision applied to approximately 17,000 UK businesses[[903]](#footnote-903) and countless foreign companies that do business in the UK. As with the CTSCA, the MSA provides that the compliance may be enforced by way of an injunction.[[904]](#footnote-904)

The MSA was intended to set a ‘common framework’[[905]](#footnote-905) for modern slavery reporting with the aim of “allow[ing] investors, consumers and the general public to decide who they should and should not do business with.”[[906]](#footnote-906) The ease of comparability between statements would thus seem to be a significant factor in standardising reporting in this area. However, the Act was also ‘specifically designed to minimise the burdens on business.’[[907]](#footnote-907) This familiar contradiction between desiring standardisation and flexibility led to the rejection of any mandatory areas of disclosure being prescribed by the statement. As such, the MSA provides that a company’s statement *may* include information in a number of potentially pertinent areas.[[908]](#footnote-908) The suggested factors in section 54(5) provide that information may be disclosed about the nature of the business, its structure and supply chain operations, its policies in relation to slavery and human trafficking, details of its relevant due diligence processes including the identification of areas risk and steps taken to assess and manage such risks, including the relevant training made available to staff. Finally, the Act suggests that the statement consider the company’s effectiveness in preventing slavery and human trafficking within its business or supply chains “measured against such performance indicators as it considers appropriate.”[[909]](#footnote-909)

An initial criticism of the MSA related to corporate groups. Here, a company would not need to report on the supply chain activities of its subsidiaries providing that those subsidiaries do not do business in the UK. According to barrister Parosha Chandran, this provides the “perfect cover” for those companies with forced labour within their supply chains which are producing goods and services overseas that are not destined for UK/Californian market.[[910]](#footnote-910) Essentially, the requirement is limited to those supply chains which flow into the UK, and not all of those supply chains from which the company may derive benefit from. Thus, although the UK government “expect organisations carrying out any part of their business in the UK to disclose what they are doing in their business or supply chains to ensure such slavery does not occur anywhere in the *entirety* of their operations”,[[911]](#footnote-911) such an expectation is not reflected within the statute.

Whilst the above criticism relates to the limitations of using a particular consumer market as a means to delineate applicability, other criticism is more specific to the UK’s particular implementation of the disclosure-based instrument.

**5.2.4 Comparison with the Californian Act**

The scope of MSA is broader than the CTSCA that it is modelled upon, yet also less specific in a number of significant areas. Focusing on improvements over the Californian Act, the minimum threshold of £36 million in annual revenue is lower than the $100million revenue stipulated by the CTSCA. Moreover, the MSA applies to all industrial sectors and is not restricted to retail and manufacturing. This is significant given that companies in the construction and agricultural industries are included and these sectors have also been deemed as higher risk industries.[[912]](#footnote-912) Finally, whilst the CTSCA only asks the extent to which the lead firm requires *direct* suppliers to certify their products are slavery free, the MSA does not appear to restrict itself to the first tier of the supply chain. As outlined in chapter 3, the lower tiers of the supply chain appear to be of greater risk of forced labour. On this point, the statutory guidance to the MSA outlined that organisations should “engage their lower tier suppliers where possible.”[[913]](#footnote-913) However, as suggested by the study of modern slavery statements in chapter 8, it appears that at present many companies are offloading their responsibilities (or delimiting their risk) at the first tier.

The MSA is less prescriptive as to the contents of the statements. In contrast to the suggested disclosure areas of the MSA, the CTSCA provides that disclosure in the five areas outlined by the Californian Act[[914]](#footnote-914) is mandatory. Moreover, although there is significant overlap between these areas, there is a significant difference. The statutory provisions of the CTSCA is more specific as regards the practical application of due diligence. Most pertinently, given the central role of the social audit, discussed in chapter 4, the company must report upon the extent to which it conducts supplier audits and must explicitly disclose whether these audits are a) independent and b) unannounced. Furthermore, in attempting to address the issue of lower tier performance, companies must disclose the extent to which suppliers are required to certify that products comply with host country laws regarding slavery and human trafficking. The one area where the MSA improves upon the categories of disclosure of the CTSCA, is in its suggestion that the effectiveness of any measures be considered and disclosed upon, using relevant performance indicators where appropriate. However, as observed within the large-scale study of modern slavery statements undertaken in chapter 8, the vast majority of companies have not provided any information in this area.

Indeed, whilst the Government “expects” many businesses would choose to disclose within those areas suggested,[[915]](#footnote-915) as observed by the study in chapter 8, this does not appear to be the case. This observation is reiterated within a recent Joint Parliamentary Human Rights Committee report providing that “many statements do not reveal much, if anything, about the practical steps being taken to tackle modern slavery.”[[916]](#footnote-916) It was suggested that the lack of quality disclosure found in many statements may have been a result of the weak disclosure requirements of the Act, along with the weak guidance provided by the government in serving to prescribe what would be expected.[[917]](#footnote-917) Partly in response to this criticism, the UK government updated the statutory guidance accompanying the Act in 2017. The updated guidance removed the passage previously existing in the 2015 guidance which emphasised that the categories of disclosure were "not compulsory" and that they merely "provide guidance and examples as to the type of information to include." The guidance was also amended to state that companies "should aim to include information about" the suggested areas, rather than that they "may" include such information, as per the previous incarnation.[[918]](#footnote-918) However, no legislative changes were made to the Act itself. This leaves it somewhat out of step with both the Californian law it is based on, and the Australian law[[919]](#footnote-919) that it has spurned.[[920]](#footnote-920)

It is evident that there has been greater procedural compliance in disclosing within the *mandatory* categories of the CTSCA than in response to the *suggested* categories of the MSA.[[921]](#footnote-921) A study of CTSCA statements found that 53% supplied information in the five mandatory categories stipulated within the legislation.[[922]](#footnote-922) Yet, as will be observed in chapter 8, disclosure under the suggested categories of the MSA is far lower. It is also pertinent to note that the Californian figure was taken prior to the rather late issuance of statutory guidance by the Californian Department of Justice.[[923]](#footnote-923)

It must also be highlighted that many companies have simply not complied with the MSA at all. A study undertaken in October 2018 found that an estimated 40% of applicable companies doing business in the UK had not published a modern slavery statement.[[924]](#footnote-924) Although the MSA provides for the use of an injunction to force the publication, as with the CTSCA, this power has never actually been used.[[925]](#footnote-925) Moreover, any potential for non-legal enforcement by market actors based upon reputation is restricted by issues of comparability which add to the vagueness of the reporting requirements of the MSA. Firstly, there is a lack of information available as to which companies the Act applies, with no list made available. Despite calls within the consultation period for such a list to “act as a comparison site to consumers as well as a league table of compliant companies”[[926]](#footnote-926), this obligation was ultimately omitted. [[927]](#footnote-927) As Anti-Slavery International explain: “At present, it is not clear which businesses … are covered by the provision. Without clarity on who is required to report, the public, investors, parliamentarians and the Government itself cannot effectively monitor compliance with the Modern Slavery Act requirements.”[[928]](#footnote-928) Secondly, in contrast to the company’s annual report, which must be filed at Companies House,[[929]](#footnote-929) and the recent Australian Modern Slavery Act 2018,[[930]](#footnote-930) firms are not required to submit statements to a centralised repository, restricting both ease of access and comparability. Essentially, therefore, the monitoring of compliance has been left to civil society. Indeed, two central repositories have been set up by different non-governmental bodies, and whilst this is welcome in the absence of a better option, this situation has been criticised as being potentially confusing for stakeholders.[[931]](#footnote-931)

**5.2.5 Proposals for Reform**

Criticism of the MSA has found its way to the UK Parliament via a Private Members’ Bill, sponsored by Baroness Young of Hornsey.[[932]](#footnote-932) Seemingly dropped the previous year, the impetus for such a Bill appeared to be revitalised following a show of support by the Joint Committee on Human Rights.[[933]](#footnote-933) Aside from extending the scope of the MSA to cover public bodies, the Bill seeks to amend the Act to stipulate that a modern slavery statement “must include information” as regards the current suggested areas of disclosure and, so not to limit its scope, “may [also] include information about other matters.”[[934]](#footnote-934) Moreover, the Bill seeks to mandate companies to provide a rationale where no steps have been taken by a company to prevent modern slavery within their supply chains,[[935]](#footnote-935) and so reflecting a ’comply or explain’ approach. As it stands, the MSA permits companies to state that no steps are being taken, yet as observed in chapter 8, very few are prepared to say so. The Private Members’ Bill also seeks to mandate the government to publish a complete list of those organisations required to publish a statement under the Act. Although a minority of Private Members' Bills become law,[[936]](#footnote-936) legislation may be affected indirectly through the creation of publicity around an issue.[[937]](#footnote-937) Indeed, in heeding such criticism, an independent review into the MSA was launched at the bequest of Prime Minister Teresa May in July 2018.

The final report of the review was released in May 2019.[[938]](#footnote-938) As with the Private Members’ Bill, the review calls for mandatory disclosure within the six areas but also calls for the removal of the option for companies to provide that no steps have been taken.[[939]](#footnote-939) Whilst disclosure in the suggested areas would be mandatory, the review suggests that if a company determines that one of the headings is not applicable to their business, they should provide an explanation of why not.[[940]](#footnote-940) Particularly pertinent to questions of standardisations and comparability, the Review calls for a template to be provided within the statutory guidance that would outline the information that should be provided within each category.[[941]](#footnote-941) The report also calls for specific clarification within the MSA that firms are expected to consider of the whole supply chain (and not merely the first tier).[[942]](#footnote-942) Again, if they do not do so, they should provide an explanation why not, and also what steps they are going to take in the future. According to the review, this “would address the issue of companies offloading their responsibilities at the first tier of the supply chain”.[[943]](#footnote-943)

The review proposes that a central repository for the modern slavery statements should be set up, and notes the government-run repository under the Australian Modern Slavery Act.[[944]](#footnote-944) The review also called for a central list of applicable companies. However, preference was given to an internal list as opposed to one that would be publically available.[[945]](#footnote-945) This proposal appears to respect the terms of a recent warning shot by the government in threatening to ‘name and shame’ companies in the future should performance not improve.[[946]](#footnote-946) Moreover, it emphasises a desire for the state to play a greater role in securing compliance. Indeed, although the MSA set up the office of an Anti-Slavery Commissioner, monitoring and enforcement of the slavery and human trafficking statement was not included within its limited remit.[[947]](#footnote-947) The report calls for this to be changed to require the Anti-Slavery Commissioner to monitor compliance with the Act and report upon this annually.[[948]](#footnote-948)

A lack of compliance with the MSA is clearly a significant issue. As observed previously, many applicable companies have not even published a modern slavery statement. The independent review provided calls for a more robust and systematic approach to be taken to non-compliance. According to the report this would require the government to make legislative provision to permit a gradual approach to be taken to non-compliance, allowing for an initial warning to fines (as a percentage of turnover), to courts summons and directors disqualification.[[949]](#footnote-949) The report then calls for an enforcement body to be established or assigned to impose these sanctions which could be funded through the fines levied for non-compliance.[[950]](#footnote-950)

It is arguable that the MSA review was limited by its remit. In considering “what more can be done to strengthen” the legislative elements applying to the corporate supply chain,[[951]](#footnote-951) the government provided that any recommendations made “should only relate to the legal framework provided by the act and its implementation.”[[952]](#footnote-952) With a more intensive review of the regulatory model used by the MSA seemingly off the table, the panel nevertheless managed to include one very brief proposal within the review that seemingly does go beyond mere disclosure. Here, a suggestion was made that companies should have a designated board member who is personally responsible for ensuring that the modern slavery statement has been published and accords to the legislative requirements.[[953]](#footnote-953) Of greater interest however, is the idea put forward that this board member could be found liable where no actions are taken in response to a finding of modern slavery within the supply chain. This notion of a designated modern slavery director is considered in more detail in chapter 10.

**5.2.6 Evaluation of Proposals for Reform**

The proposals for a single central public repository and the amendment of the statute to mandate disclosure within the listed areas are welcome. However, on their own they may achieve little as significant discretion remains as to what may be disclosed within the broad categories. The reliance on comply or explain provision may do little to further disclosure here as a firm may seek to simply comply by providing a vague, boiler plate statement as opposed to explaining why it has selected not to disclose within a specific area. Moreover, the removal of the ‘taken no steps’ option would have very limited effect given that, as chapter 8 observes, companies are extremely reluctant to admit this. Perhaps of greater significance to the goals of standardisation and comparability is the idea that a template should be introduced to guide the content of disclosure. Providing the design of the template is specific enough, this proposal could aid the standardisation, and thus comparability, of modern slavery disclosures. The use of such a template is considered further in chapter 10.

The proposal for a central public repository in conjunction with an internal list of applicable companies highlights a desire for a greater role to be taken by the state. This is more specifically reflected in the call for greater responsibility for the Office of the Anti-Slavery Commissioner. Nevertheless, proposals for the Anti-Slavery Commissioner to monitor and report annually on compliance,[[954]](#footnote-954) along with calls elsewhere in the review for a greater role in overseeing guidance[[955]](#footnote-955) and commissioning research,[[956]](#footnote-956) are reliant on adequate resources being made available.[[957]](#footnote-957) It is clear that this is not currently the case,[[958]](#footnote-958) and similarly, as considered in chapter 9, may not necessarily be forthcoming. It is possible that this resource gap could be filled through beefing up the financial consequences of non-compliance as envisaged by the review. However, whilst the stricter enforcement measures proposed are welcomed, given the lack of enforcement under the current legislation, it is clear that such powers must be accompanied by a willingness to use them.

A further question, of course, relates to the effectiveness of this disclosure-based model as a means to enhance anti-slavery CSP. The review acknowledges that: “Consumers are viewed as playing an essential role in eradicating modern slavery in the UK, yet research reviewed on consumer attitudes to modern slavery revealed that consumers are often unaware of the critical role they play.”[[959]](#footnote-959) The cognitive, psychological and situational factors that may act as barriers to the consumer undertaking this role is considered in chapter 7. Perhaps acknowledging the presence of such barriers, the final substantive proposal within the MSA review was a call for further research on how consumers can be more effectively enlisted in the fight against forced labour within the supply chain.[[960]](#footnote-960) It will be suggested in chapter 10, that such awareness may be enhanced by more actively involving the consumer in the regulatory process.

**5.2.7 Summary of MSA**

The disclosure of corporate anti-slavery efforts is thus supposed to inform stakeholders, and in particularly consumers, to apply pressure on the companies to enhance their CSP. However, although unrestricted by notions of financial materiality, the MSA once again affords considerable discretion to corporate management in relation to the information disclosed. Put simply, the MSA represents an example of procedural regulation, yet it is arguably closer to self-regulation. The vagueness of the statute “means that there is nothing specific that companies need to report on”.[[961]](#footnote-961) Moreover, legal compliance does not turn on how well the statement is written or presented, but merely its existence on a company’s website. Compliance in a strict sense involves simply a company publishing a modern slavery statement that has been signed off by a director, yet many applicable companies have not even done this. This is perhaps unsurprising given the difficulty in monitoring the corporate responses, arising from the absence of a central repository and list of firms to which the statute applies, not to mention a lack of willingness to enforce.

**5.3 Conclusion**

This chapter has considered the developments in corporate disclosure-based regulation relating to CSP. It has been shown that the non-financial transparency requirements as implemented are principally aimed at the rational investor, and from this perspective may serve to exclude information that may be relevant to other stakeholder groups. Yet even with such restrictions, the usefulness of the information to investors may be limited given the broad discretion available to corporate management. The requirements for the Non-Financial Information Statement go further than the original Strategic Report in mandating disclosure in certain areas and emphasising the impact of corporate operations. Yet once again, a lack of standardisation means that ultimately a company may choose to disclose whatever it likes within the broad categories of ‘employees’ or ‘social matters’ and so provide little useful information to investors or stakeholders alike.

Similarly, although unrestricted by questions of financial materiality, the UK’s disclosure-based attempt to address forced labour within the supply chain fails to prove a framework capable of ensuring the flow of useful information to interested stakeholders. In attempting to “encourage businesses to do the right thing, by harnessing consumer and wider stakeholder pressure,”[[962]](#footnote-962) the Act has been designed in deference to corporate interests with almost complete discretion given to the content of disclosure. The poor quality of information provided within modern slavery statements is observed in chapter 8. The final report of the independent review of the MSA has put forward a number of relatively welcome recommendations. However, the reception to and impact of this report remains to be seen.

This chapter has cast doubt on the ability of the current disclosure-based regulation to adequately inform interested stakeholders on CSP issues. However, further questions must be raised as to the foundations of the disclosure-based approach. Underlying this approach is the belief that informed stakeholders may better enforce the social boundaries of the productive process. It must be asked whether improving transparency is enough. Put simply, even if corporate non-financial disclosures were improved, can this model of regulation substantively enhance the internalisation of social cost? The potential for informed investors and consumers to reliably do so within the current regulatory sphere is the focus of chapters 6 and 7.

**Chapter 6: The Investor as a Potential Agent of Change**

**6.0 Introduction**

Chapter 5 considered the implementation of Section 54 of the Modern Slavery Act in its aim to inform investors and consumers[[963]](#footnote-963) of corporate efforts to eradicate forced labour from the supply chain. This chapter focuses on the first of these actors, the investor. As was considered in chapter 2, the UK’s system of corporate governance has permitted short term shareholder value to be the primary corporate objective. It was also highlighted that investors have increasingly been targeted as a means of elongating the timeframe of business decisions. A key element of achieving a more sustainable company is the notion that stakeholder interests should more readily be incorporated into the company’s decision-making process. Indeed, the MSA and non-financial disclosure requirements discussed in chapter 5, have attempted to reduce informational asymmetry between the company and investor on CSP related matters. Although it has been suggested that the requirements for non-financial disclosure are flawed, the greater question regards the basis upon which they are founded. Underlying the disclosure requirements, and indeed the voluntary approach taken by the international community considered in chapter 4, is the notion that market actors will seek to apply pressure on the company to enhance its CSP. As will be considered in chapter 7, for consumers the focus has been on the ethical arguments for consumer action. In contrast, for investors there has been a greater emphasis on financial self-interest and the ‘business case’ for CSP. This relies on the notion that a company with poor social or environmental performance may be perceived by investors as possessing a greater risk of future losses,[[964]](#footnote-964) whilst those with better CSP are likely to do better through their appeal to consumer preferences.

The effectiveness of the investor in the role of change agent is based on the premise that CSP is pertinent firstly, to the investment decision and secondly, to any decision to expend resources to engage with a company to enhance its behaviour. As will be illustrated, considerable regulatory emphasis has been placed on harnessing investor ‘voice’ as opposed to ‘exit’ as a means to incentivise CSP. Underlying this position is the presumption that investors have the capacity and incentive for engagement on sustainability issues. Regulatory intervention in this area has identified larger institutional investors as more likely to engage with companies. However, it appears that a number of significant barriers exist and are likely to undermine the effectiveness of the regulation.

This chapter is structured as follows. First, the notion of responsible investment will be considered. It will be highlighted that the discourse in this area has shifted over time from a primarily ethical basis, to one of financial materiality serving to highlight the faith placed in the business case as an incentive for investor action. Second, the validity of the business case for CSP will be considered both in relation to the perceived financial gains of CSP and in relation to the financial impact of negative CSP events. Third, the potential of the investor to enhance CSP through engagement with those companies in which it invests will be considered. Particular focus will be placed on the potential of certain institutional investors, primarily pension funds, to engage. Unfortunately, a number of significant barriers to this engagement will be identified. Finally, as somewhat of an addendum, the conflation of long-term sustainability in an economic sense, to matters of social and environmental sustainability is briefly explored. It will be illustrated that sustainable financial growth may not necessarily equate to enhanced CSP thus highlighting a further weakness of the ‘business case’ argument for investment in a genuinely socially responsible sense.

**6.1 ‘Responsible’ Investment**

Ethical or Socially Responsible Investment (SRI) has its foundations in the religious movements of the 18th Century. Perhaps most famously, John Wesley, founder of the Methodist Church, preached: “Gain all you can, without hurting either yourself or your neighbour, in soul or body, by applying hereto with unintermitted diligence, and with all the understanding which God has given you.”[[965]](#footnote-965) In adhering to a morally-bound use of money, ethical investors initially avoided investment in goods such as alcohol, gambling, or tobacco on religious grounds. The 1970s saw such investors avoid companies involved in weapons production for the Vietnam War[[966]](#footnote-966) with the 1980s in divesting from companies linked to the apartheid regime in South Africa.[[967]](#footnote-967) As such, ethical investment was initially based on the negative screening of so-called ‘sin-stocks’, linked to socially undesirable consequences. The underlying premise of thus harked back to John Wesley’s idea of financial gain without causing harm to stakeholder interest. Later, positive screening became more prevalent as ethical investors, or the funds that serviced their demands, actively sought socially responsible targets for investment. The idea was thus instead of punishing those firms that created social and environmental externalities, ethical investors could reward those acting more socially responsible. Socially active investors also arose, acquiring shares in a company as a strategy to leverage change in corporate behaviour from the inside. The approach to SRI, based upon the divestment/investment decision and shareholder engagement, was thus forged.

As Hawley observes, socially responsible or ethical investment has increasingly been rebranded with the more neutral terminology of ‘sustainable’ or ‘responsible’ investment.[[968]](#footnote-968) This is best exemplified by the high profile Principles for Responsible Investment (PRI), as supported by the United Nations. According to the PRI, “Responsible investment is an approach to investing that aims to incorporate environmental, social and governance (ESG) factors into investment decisions, to better manage risk and generate sustainable, long-term returns.”[[969]](#footnote-969) This is driven by a recognition that “ESG factors play a material role in determining risk and return.”[[970]](#footnote-970) Underlying this revised notion of responsible investment therefore, is the idea that non-financial information is relevant to the investment decision[[971]](#footnote-971) due to its materiality to investment returns.[[972]](#footnote-972) Indeed, the PRI provides that “Responsible investment does not require ruling out investment in any sector or company. It simply involves including ESG information in investment decision-making, to ensure that all relevant factors are accounted for when assessing risk and return.”[[973]](#footnote-973)

Efforts to mainstream responsible investment practices were accelerated in the aftermath of the global financial crisis with long term investment seen as a driver of economic stability.[[974]](#footnote-974) Haldane observes the correlation between macro-economic stability and investment practice is nothing new.[[975]](#footnote-975) As Keynes commented in 1938, “It is from time to time the duty of a serious investor to accept the depreciation of his holdings with equanimity without reproaching himself. Any other policy is anti-social, destructive of confidence and incompatible with the working of the economic system.”[[976]](#footnote-976) Yet, the FTSE index has seen the average holding period drop from nearly eight years in the mid-1960s to just over seven months in 2007.[[977]](#footnote-977) Similar figures can be given for the US whereby the average duration fell from seven years between 1940 and 1965 to seven months in 2007.[[978]](#footnote-978) Indeed, during this period the average holding period dropped significantly across the majority of the world’s major stock exchanges.[[979]](#footnote-979) The readiness of shareholders to ‘exit’ where value is not delivered and the perceived link between sustainable returns and non-financial issues led to calls for greater engagement on ESG issues by investors with the companies in which they invest.

The mainstreaming of responsible investment has refocused the movement away from its ethical foundations to its promotion as “a profitable alternative to conventional investment”[[980]](#footnote-980) based upon a “broadening definition”[[981]](#footnote-981) of social responsibility. As the United Nations Environment Program Financial Initiative (UNEPFI), from which the PRI grew, provide “The first – and arguably for investors the most important – reason to integrate environmental, social, and governance issues is, simply, to make more money.”[[982]](#footnote-982) Therefore, whereas such investment was once associated with ethical notions of complicity and engagement based upon the leverage to ‘do good’,[[983]](#footnote-983) it is now framed in terms of ‘ESG Integration’[[984]](#footnote-984) for financial gain. Within both the regulatory sphere and in current practice,[[985]](#footnote-985) the onboarding of the investment community has purged the “more radical ethical agenda”[[986]](#footnote-986) leaving in its place a mode of “values-neutral risk management.”[[987]](#footnote-987)

Attempts to garner widespread support for the incorporation of such information into investment practices have come at the expense of the ethical foundations for investing responsibly. Indeed, the vast majority of the recent literature in the area fails to focus on the societal or environmental impacts of responsible investment and instead concentrates on its financial risk to the investor. In practice, the mainstreaming of responsible investment practice has expanded the concept beyond its social and environmental origins to Environmental, Social, and Corporate Governance (ESG) matters, yet in the same breath restricted the consideration of such information to where it is financially ‘material’. This raises questions as to the extent to which such information is financially material to the investor.

**6.2 The Business Case for Responsible Investment**

A focus on financial materiality, as put forward by the PRI, has put the business case for CSP as the central incentive for investor action. The following sections will review the empirical research in this area in order to consider the validity of the business case. Firstly, the perceived correlation between positive CSP and financial performance will be examined. Secondly, the perceived correlation between negative CSP events and financial performance will be considered.

**6.2.1 The Impact of CSP on Long Term Shareholder Value**

The wider research in this area has focused on the causal relationship between corporate social performance (CSP) and corporate financial performance (CFP). Over two hundred empirical studies, and countless more from a theoretical perspective, have been conducted to consider the link between these two variables. These studies pertain to consider the financial performance of socially responsible firms, portfolios, funds or stock market indices relative to their conventional peers. Numerous individual studies have found the relationship to be positive,[[988]](#footnote-988) neutral,[[989]](#footnote-989) or negative[[990]](#footnote-990) and as such are widely inconsistent. It is suggested that an overall picture of the research in this area may be best garnered through a consideration of the substantial reviews written to survey the empirical literature on the subject.[[991]](#footnote-991)

An early review by Cochran and Wood find a “spurious correlation” between CSP and CFP[[992]](#footnote-992) with Ullmann observing that: “no clear tendency can be detected.”[[993]](#footnote-993) Aupperle, Carroll and Hatfield found a mixed relationship within the studies surveyed[[994]](#footnote-994) with Wood and Jones, in their consideration of the issues from the perspective of various stakeholders, also concurring that the relationship remains “ambiguous.”[[995]](#footnote-995) Pava and Krausz in their small review of 21 studies found that socially responsible firms “outperformed or performed as well as” those deemed not to be so;[[996]](#footnote-996) a finding later confirmed by van Beurden and Tobias Gössling.[[997]](#footnote-997) Margolis and Walsh also found a slightly positive relationship within 53% of the studies reviewed[[998]](#footnote-998), with Orlitzky, Schmidt and Rynes’ review concluding that CSP is “is likely to pay off.” [[999]](#footnote-999) A large study of over two hundred studies by Margolis, Elfenbein and Walsh undertaken in 2007 found that “the overall effect is positive but small” with more recent results (almost half of the studies considered) found to be even smaller.[[1000]](#footnote-1000) On this point, it is worth mentioning that many of the positive findings relating to bull market of the 1990s have been criticised as regards the effect of the technology boom. This may well have disproportionately affected the performance of socially responsible stocks in a positive manner.[[1001]](#footnote-1001) This observation appears to accord with the findings of a more recent study of empirical research undertaken between 2002 and 2011 in which a positive relationship between CSP and CFP was found in less than half of the studies considered.[[1002]](#footnote-1002) The situation is perhaps best summed up by Kiymaz’s review of the empirical research into SRI fund and index performance.[[1003]](#footnote-1003) Although Kiymaz did not attempt to quantify the extent of empirical disagreement, the studies surveyed suggested SRI to be a valuable source of risk reduction, a statistically significant cost, or showing little difference to conventional funds in terms of risk-adjusted returns.

In terms of the duration of studies, the consideration of the relationship between ethical and financial performance in specific companies over the longer term is more limited. This perhaps reflects the inherent difficulties of conducting such studies over an extended period of time, and because of the relatively short existence of many SRI funds and indices.[[1004]](#footnote-1004) On the specific and sufficiently exact issue of corporate divestment in South Africa, empirical research has once again offered mixed results with studies reporting a positive relationship,[[1005]](#footnote-1005) a negative relationship,[[1006]](#footnote-1006) and an absence of any significant relationship.[[1007]](#footnote-1007) More broadly, a study of CSP by Kim found no link between ethical and financial performance over the long term within the eight companies studied;[[1008]](#footnote-1008) however other researchers suggest that longer term, as opposed to short term, CSP is more likely to yield economic benefit.[[1009]](#footnote-1009) In summary, the results of the research are somewhat mixed.

The value of the above findings is further diminished by a noticeable lack of theoretical and empirical consistency.[[1010]](#footnote-1010) Although typical control measures relating to company size, industry, risk, research and development, and advertising expenditure are incorporated within much of the research,[[1011]](#footnote-1011) elsewhere, however, inconsistencies abound making the overall picture, “wishy-washy at best.”[[1012]](#footnote-1012) Indeed, the techniques used to measure financial performance vary considerably across the research. For instance, Margolis and Walsh identified the use of 70 different methods to measure the financial performance across the 95 studies reviewed in their work. [[1013]](#footnote-1013) They found that the majority of these studies incorporated different accounting measures of financial performance relating to either risk or return on equity, assets, or sales. Other studies utilised various market based measurements, or a combination of both market and accountancy measures.

Moreover, the definition of what constitutes CSP also differs within the research. Empirical studies attempting to relate CSP to CFP may utilise third party social audits, corporate disclosures, or increasingly,[[1014]](#footnote-1014) the particular researcher’s own system of benchmarking to in the definition of CSP. Most commonly, however, the benchmarking system enlisted by a social rating agency[[1015]](#footnote-1015) is used for this purpose.[[1016]](#footnote-1016) However, even amongst social rating agencies, disagreement exists with an obvious example surrounding the negative screening practices of a particular social rating agency as compared to another. For example, the criteria governing inclusion within the KLD 400 social index disallows the listing of firms whose business is nuclear power or online gambling, yet the criteria for the FTSE4GOOD index allows for companies with a primary business[[1017]](#footnote-1017) in these sectors.

In spite of this, it is clear that amongst the different benchmarks used within the research, there has been some divergence to the KLD social rating criteria[[1018]](#footnote-1018) as introduced by investment firm Kinder, Lydenberg, Domini and Company, Inc.[[1019]](#footnote-1019) in 1988. The rating system initially used negative screening to select 400 companies, uninvolved in certain ‘sin’ industries and with no business links to South Africa, to comprise the Domini Social Index Fund, a mutual fund that was then offered to socially conscious investors.[[1020]](#footnote-1020) However, over time, KLD added positive screening to their ratings database, which is now constructed in terms of ‘strengths’ and ‘concerns’.

An interesting meta-analysis by Mattingly, surveyed 100 studies undertaken between 1994 and 2011 which utilised the KLD criteria as the CSP benchmark.[[1021]](#footnote-1021) Although it accepted that the KLD criteria have evolved over time, to some extent the research is methodologically consistent. This is in contrast to the cocktail of CSP benchmarks, differing significantly in both scope and extent,[[1022]](#footnote-1022) found within a number of the reviews considered above.[[1023]](#footnote-1023) Mattingly’s review observed that financial performance was positively related to social performance but, significantly, only when accounting measures of profitability were used. When stock returns were used to measure CFP, financial performance was not often linked to social performance, a conclusion supported by the earlier work of Orlitzky, Schmidt and Rynes.[[1024]](#footnote-1024) If it is the case that social performance is more highly correlated with accounting-based measures of CFP than market-based indicators, such a finding is thus likely to offer a less direct incentive for potential investors, especially in light of the practice of short termism prevalent amongst many shareholders. Responsible investors, on the other hand, would be expected to accept longer timeframes as presumably accounting profits could be deployed to grow the business.

However, even within studies utilising the KLD method of rating CSP, problems remain. Perhaps most obviously the KLD benchmark has changed over time, and, thus has been a ‘moving yardstick’ for research undertaken in different periods. For example, it did not initially include issues of forced or child labour,[[1025]](#footnote-1025) let alone supply chain considerations which were only introduced in 2010.[[1026]](#footnote-1026) Moreover, a 2009 study by Chatterji, Levine and Toffel raises serious questions as regards the ability of such social ratings agencies to reflect what is actually going on.[[1027]](#footnote-1027) The study considers the environmental performance of 588 US companies regulated by the Environmental Protection Agency (EPA) that had been rated during the period 1991-2003 by KLD. Although the study observed the suboptimal use of publicly available information by the KLD ratings system, it nevertheless found the KLD ratings to be “fairly good summaries”[[1028]](#footnote-1028) of past environmental performance. However, it is clear that environmental performance, at least on a domestic level and within a developed nation, can be more readily verified than that of many aspects of social performance, courtesy of the stricter regulatory oversight in this area. Additionally, and perhaps of greater concern, was the finding that the KLD rating was inadequate at predicting future pollution levels or environmental compliance violations. Therefore as the authors of the study state: “if social ratings are not providing adequate transparency, stakeholders may be responding more to measurement error than actual corporate social responsibility.”[[1029]](#footnote-1029)

A further criticism of social rating systems is the tendency for such benchmarks to cover an overly expansive set of behaviours which, although in some senses are welcome, in others may serve to dilute the strength of the findings relating to any one activity. The effect of this is that the specificity of earlier research has frequently given way to a broader concept of what constitutes CSP. Thus whilst early studies used pollution control,[[1030]](#footnote-1030) philanthropic work,[[1031]](#footnote-1031) South African divestment,[[1032]](#footnote-1032) or the integration of women and minority groups[[1033]](#footnote-1033) as the basis for satisfying the requirement of CSP, more recent benchmarking includes a far wider range of activities. Social rating agency benchmarks in this area may contain, for example, corruption[[1034]](#footnote-1034) or tax transparency,[[1035]](#footnote-1035) or make reference to a range of corporate governance matters such as the independence the board, shareholder voting rights or the existence of a remuneration committee.[[1036]](#footnote-1036) Indeed, this is a further justification for the narrow definition of CSP taken within this thesis as outlined in chapter 1.

Corporate governance matters are given by far the most attention in both investment policy statements and within company reports.[[1037]](#footnote-1037) This may well be because corporate governance is deemed the most material. For instance, a 2011 Eurosif study observed that factors relating to governance were perceived as the most significant ESG consideration amongst European pension funds.[[1038]](#footnote-1038) It appears that such perceptions are well grounded with analysts at Barclays finding that “**Governance is the largest performance driver** of the three of E, S and G”,[[1039]](#footnote-1039) a point reiterated by researchers in the academic sphere.[[1040]](#footnote-1040)

As such, those corporate governance factors currently permitting a focus on short term shareholder value could be included alongside those aspects that are intended to reflect the corporate impact on other stakeholders. Moreover, adherence to ineffective corporate governance regulation may have led to increased ratings with no discernible effect on corporate conduct. Indeed, the mere act of shareholder engagement with a firm, regardless of purpose, may serve to enhance its ESG rating. [[1041]](#footnote-1041)

Factors such as customer relations and product quality may also be incorporated in the determination.[[1042]](#footnote-1042) Clearly, the inclusion of such factors, along with those related to governance as considered above, may serve to skew the results of a company’s social rating. Any ‘alpha’[[1043]](#footnote-1043) generated may be unrelated to more progressive notions of socially or environmentally responsible conduct.

This criticism may also be levelled at the exclusionary criteria utilised by social rating agencies. Fossil fuel companies are included within the FTSE4GOOD index and Dow Jones Sustainability Index (DJSI).[[1044]](#footnote-1044) As mentioned previously, the FTSE4GOOD allows for companies whose business is in nuclear power and gambling, as does the Dow Jones Sustainability Index within its broader market indices. Indeed the FTSE4GOOD screening criteria excludes companies which manufacture tobacco or weapons systems yet appears to allow the manufacture of components to be used in non-controversial weapons.[[1045]](#footnote-1045) Even the somewhat stricter KLD database allows for large producers of unhealthy food and beverages, such as Pepsico, to be included within the KLD 400.[[1046]](#footnote-1046) Furthermore, the KLD screening criteria permits companies to generate the smaller of 5% or $500 million of its revenue through alcohol production or gambling, 15% of its revenue through the distribution, retail or supply of tobacco, or 5% or $20 million from the retail of civilian firearms and 5% or $500 million through the manufacture of conventional weapons.[[1047]](#footnote-1047)

This problem of over-inclusivity as regards positive factors, or under-exclusivity as regards negative factors, is compounded by a tendency evident within a number of studies[[1048]](#footnote-1048) to report corporate social performance as an aggregate measure of ‘CSR’ or ‘ESG’ rather than an illustration of the impact of the individual elements that comprise such a benchmark, on financial performance.[[1049]](#footnote-1049) Indeed, Mattingly and Berman observe that this “overall score”[[1050]](#footnote-1050) of CSP is frequently calculated by researchers using the KLD database as the net difference between KLD ‘strengths’ and ‘weaknesses.’[[1051]](#footnote-1051) This formulation thus assumes that each type of strength or weakness holds the same level of importance and cost.[[1052]](#footnote-1052) Moreover, the risk here of course is that positive performance in one area may hide negative performance in another. By way of a practical illustration, though with reference to the criteria of the Dow Jones Sustainability Index (DJSI), Nestlé recently scored highly in the ‘Environmental Dimension’ following its innovations in reducing water consumption and the conversion of waste into renewable energy, and achieved an overall sustainability score of 89 out of 100 in the DJSI ranking.[[1053]](#footnote-1053) This is despite the publishing of an audit report by the Fair Labor Association (FLA), as commissioned by Nestlé, which disclosed multiple cases of forced and child labour within the cocoa supply chain in the Ivory Coast. [[1054]](#footnote-1054) Indeed, the ‘black boxing’ of CSP into an overall score must surely operate in contrast to corporate practice in which it is submitted that the highly developed risk management departments present in the large modern day corporation consider ‘CSR’ as a single holistic risk to corporate reputation as opposed to a spectrum of risks based upon a range of factors, not least the category reflecting which ‘socially responsible’ activity.[[1055]](#footnote-1055)

Within the investment marketplace, the absence of a standard definition for such investment has allowed the proliferation of somewhat conventional funds arguably mislabelled as being socially responsible.[[1056]](#footnote-1056) Despite the Investment Association reporting that, of September 2015, £9.8 billion of assets were under management for responsible investment funds, the social performance of such funds is questionable.[[1057]](#footnote-1057) Indeed, it has been illustrated that within even those negative screens which may be thought as equating to basic socially responsible investment are frequently disregarded.[[1058]](#footnote-1058) By way of example, the Virgin Climate Change Fund features Shell in its top ten holdings with a 4% shareholding.[[1059]](#footnote-1059) In such circumstances, any argument for an investment policy of corporate change via engagement would be futile with Shell unlikely to change its core business any time soon. More pertinently, the fund itself does not advertise the fact that such investments are made, thus the financial performance of the ‘product’ is artificially enhanced by non-ethical holdings. Indeed, in a survey of SRI fund providers, Jayne and Skerratt found financial track record, performance within a market sector and the performance of market sector to be perceived as the highest rated considerations with company size, turnover, and market forecasts all appearing above ethical considerations.[[1060]](#footnote-1060) This suggests an approach to investment options very much in line with what could be considered ‘conventional’. Of course, some funds are ethically managed and adhere to relatively strict criteria as regards their investments but inconsistency as regards these ethical credentials remains widespread. In spite of the Kay Review outlining that ‘caveat emptor’ is incompatible with an equity investment chain based on trust and stewardship,[[1061]](#footnote-1061) it is clear that that the notion very much applies.[[1062]](#footnote-1062) It is, of course notable, that many of these responsible investment funds are offered by mainstream investment companies designed to address a niche market segment, much the same way that companies with poor social performance may include niche ‘ethical’ products within their product line.

**6.2.2 The Impact of Negative CSP Events on Shareholder Value**

A further question focuses not on the perceived financial performance related to ‘good’ companies but on the risk of adverse financial performance arising from a company found to be ‘bad’. This regards the reputational impact of a finding of an adverse impact on society, or negative CSP. According to the PRI, incorporating ESG factors into the investment decision protects the investor from “Value-destroying reputational risk” relating to social and environmental externalities.[[1063]](#footnote-1063) The aim of this section is to consider the validity of this claim.

Various methods of event study[[1064]](#footnote-1064) have been utilised by researchers to overcome the difficulties in evaluating a short term share price fluctuation or level of abnormal return[[1065]](#footnote-1065) as a result of the announcement of potentially relevant social or environmental corporate information. Much of the research in this area has focused on the impact of environmental announcements on company share price following the publication of adverse information due to an industrial accident or, for example, as part of the US Toxic Release Inventory Program.[[1066]](#footnote-1066) Although, not wholly in consensus,[[1067]](#footnote-1067) a significant amount of the literature in this area suggests that the release of negative environmental information does have a corresponding effect on share price.[[1068]](#footnote-1068)

The market penalty appears particularly significant in the case of large scale catastrophes such as the Bhopal chemical explosion,[[1069]](#footnote-1069) Exxon Valdez oil spill,[[1070]](#footnote-1070) and especially so in the BP Deepwater Horizon explosion and consequent oil leak.[[1071]](#footnote-1071) For such industrial accidents, the negative affect on share price may be significantly related to adverse media coverage.[[1072]](#footnote-1072) However, these three cases resulted in long lasting law suits, and certainly as regards Bhopal and the Exxon Valdez, market value losses may well have related more to the risk of legal penalty as opposed to any damage to reputation.[[1073]](#footnote-1073) Indeed, where higher litigation risks exist for a firm, the primary value of positive CSP is *“*an insurance mechanism”[[1074]](#footnote-1074) against such litigation. Where no such risk of litigation exists, there is no guarantee that the market will react accordingly.[[1075]](#footnote-1075)

Far less research has been conducted as regards the communication of adverse information concerning the corporate violation of human and labour rights.[[1076]](#footnote-1076) Dag, Eije, and Pennink examine the effects of press releases by Amnesty International on multinational firms operating within Indonesia in 1996 with a sample of 48 cases finding no significant influence on stock returns. [[1077]](#footnote-1077) However, the study only considered an ‘involvement’ with the Indonesian government and even here, did not discern the character or extent of this involvement.

A 2009 study by Kappel, Schmidt and Ziegler also offers some support to the idea that negative human rights disclosure events have a corresponding effect on share price. The study considered the impact of 153 media announcements made between 1983 and 2008 and relating to corporate human rights abuse,[[1078]](#footnote-1078) on the share prices of 92 firms within the United States, the United Kingdom, Germany, and Switzerland within five days of the disclosure.[[1079]](#footnote-1079) The study found no significant impact on the share price of Swiss or German firms but a significant impact was found in those companies based in the US and UK.[[1080]](#footnote-1080) However, the search terms used within the study when identifying news stories appear to give a lot of credence to the issue of racial, sexual, and religious discrimination. Domestic discrimination in such instances is widely reported to negatively affect share price[[1081]](#footnote-1081) as per the Texaco scandal of 1994.[[1082]](#footnote-1082) It is therefore possible that discriminatory behaviour in a domestic sense, and the consequent risk of litigation, may have had a disproportionately negative effect on the findings suggested by the study.

Perhaps a more pertinent study by Rock in 2001 found that in 33 of 45 instances of adverse information related to the working conditions in overseas suppliers being released, the share price of the related US brands fell by a statistically significant amount on the day of the announcement.[[1083]](#footnote-1083) However, the time of the study related to a period of extensive media coverage relating to the issues of sweatshop labour. It is possible that following this initial outrage, interested parties may have adjusted to the realities of the prevalent model globalised production. By way of illustration, a recent study by Boudreau, Makioka, and Tanaka considered the abnormal returns of companies whose clothing products were being produced in the Rana Plaza factory complex prior to its collapse. This study found large fluctuations in share price from the day of the collapse to a few days prior to the formation of the Bangladesh Accord on Fire and Building Safety but that these returns were neither systematically positive nor systematically negative.[[1084]](#footnote-1084) This may have been because the market was unsure, in the interim period, as to the possibility of regulatory intervention of a type that would significantly increase costs and reduce profits. A second study of the impact of the Rana Plaza on thirty-nine retailers, was even less encouraging, with a negative stock market reaction on the day of the disaster, yet both magnitude and significance of this impact dissipated the following day.[[1085]](#footnote-1085)

The ability of the market to dictate corporate social behaviour in any consistent fashion, is further questioned in cases where seemingly positive information leads to a negative effect on stock price. Boyle, Higgins, and Rhee, provide an example whereby a number of defence contractors signed up to ethical initiative yet their share prices declined relative to those of their competitors. This was thought to be due to shareholders viewing the move as a sign of impending regulation or as a “penalty for social irresponsibility.”[[1086]](#footnote-1086)

If financial utility is prioritised over any ethical concern, the reason that investors sell shares in the face of negative media attention is not predominantly because of social concerns, it is because of financial uncertainty, as per the aftermath of the Rana Plaza disaster considered above. This is further illustrated by two pieces of research that considered the ejection of firms from SRI indices. The first study considered ejections from the KLD 400 Social Index[[1087]](#footnote-1087) from 1990-2004[[1088]](#footnote-1088) and the second from the Dow Jones Sustainability World Index from 2002-2008.[[1089]](#footnote-1089) Although both studies indicate that the ejection led to a negative shock on a company’s share price, in both studies this ‘shock’ was found to be very temporary with no significant impact on quarterly stock return. Moreover, as acknowledged by one set of researchers, the temporary effect may well have been due to the reaction of ethically screened funds removing such stock rather than any reduction in shareholder value.[[1090]](#footnote-1090) Further examples of the positive financial value of the resolution of uncertainty abound.For instance, following a settlement mediated by the Indian Supreme Court sometime after the Bhopal chemical disaster, shares in the Union Carbide Corporation rose approximately 7%.More recently, BP was the recipient of the largest environmental fine in US history following the Deepwater Horizon oil spill, and yet BP shares rose following the news.*[[1091]](#footnote-1091)* Clearly financial uncertainty and social concern are not one and the same.

Where the very real risk of large fines or legal action exists, the effects on share price may be significant, as with the recent Volkswagen emissions scandal*[[1092]](#footnote-1092)* or the aforementioned BP’s Deepwater Horizon disaster.*[[1093]](#footnote-1093)* Yet these cases are illustrative of the impact of environmental and consumer laws and in cases where the effects of the harm are felt within a jurisdiction with developed and competent systems of enforcement. Moreover, where the future of one stock is uncertain because of adverse media and civil society attention, investors may simply move an investment to a close substitutethat likely encounters similar issues*[[1094]](#footnote-1094)* but remains outside of the media spotlight*[[1095]](#footnote-1095)* and thus poses less immediate financial risk. Although the potential for such an impact on share price exists as regards adverse CSP impacts, as per Nike in the 1990s, the ability of consumers to effect change is restricted by a number of cognitive, psychological and situational factors discussed in the following chapter (chapter 7).

**6.3 The Capacity of the Investor to Effect Change**

The above discussion has highlighted the inconclusiveness of the business case as an incentive for investor action to enhance CSP. The focus on this section is on the capacity of the investor to effect change through engagement as opposed to exit. Following a brief consideration of individual investors, the emphasis will shift in line with the focus of regulatory developments in this area, to traditional institutional investors, most particularly, pension funds.

**6.3.1 Individual Investors**

The private individual investor who purchases stock for his or her own personal account may choose to buy shares in whichever company he or she chooses. A recent study by Morgan Stanley found that more than half of individual investors believed that a trade-off existed between financial returns and investing in socially and/or environmentally responsible manner.[[1096]](#footnote-1096) The study also found that only 9% would choose to invest in a company with high quality environmental, social, and governance practices and that only 7% would choose to exit an investment due to ‘objectionable activity.’ [[1097]](#footnote-1097) Although, according to a YouGov survey for Good Money Week, 54% of investors want their investments to have a positive impact, the issues most pertinent to respondents were found to be ‘bribery and corruption’ (40%), **‘**tax avoidance’ (37%) and **‘**data protection’ (31%).[[1098]](#footnote-1098) These findings appear to reflect those more established concerns relating to Friedman’s ‘rules of the game’ in decrying ‘deception or fraud’[[1099]](#footnote-1099), as opposed to those relating to a more developed sense of social responsibility.

Even where the will exists, the capacity for individual private investors to affect corporate behaviour is limited. This is, in part, due to the restrictive nature of the law relating to shareholder engagement in this area, discussed in chapter 2 in relation to s172 of the Companies Act in the context of the business judgment rule. However, perhaps more significantly, the opportunity for such a person to engage in either formal or informal activism may be somewhat confined as a consequence of the dispersed nature of shareholding in the UK. Moreover, individual shareholding is no longer the norm within the UK’s equity market. Where individual investors once held the majority of shares, this figure massively declined over the second half of the twentieth century. Indeed, representing a massive decline from UK individuals owned an estimated 12% of quoted UK shares (by value) at the end of 2014.[[1100]](#footnote-1100) Instead, individual shareholders as a group have moved to enlisting professionally managed investment funds for their investment purposes.[[1101]](#footnote-1101) These institutional investors and their potential to engage with those companies they invest in will now be considered.

**6.3.2 Institutional Investors**

Institutional investors are large financial investment vehicles that act on behalf of a client in the provision of managed investment services. Investment objectives, strategies, and timeframes vary widely between these investors. [[1102]](#footnote-1102) What may be termed ‘traditional’ institutional investors[[1103]](#footnote-1103) comprise of public and private pension funds, insurance companies,[[1104]](#footnote-1104) and pooled investment vehicles such as unit trusts, along with certain charities and educational institutions. ‘Alternative’ institutional investors are the more recent additions to the financial system, arising as an alternative or complement to those institutions in the traditional mould.[[1105]](#footnote-1105) This category is mostly made up of hedge funds, private equity funds, sovereign wealth funds and exchange traded funds. It is the former category that is considered here.

According to Hawley and Williams, certain institutional investors (primarily pension funds and insurance companies) have become “universal owners”[[1106]](#footnote-1106) based on the broad nature of their investment portfolio. Theoretically at least, rather than seeking returns on the basis of short term movements in the market, long term investors should attempt to positively affect the value of a broader spectrum of assets. Because such institutions own “a representative cross section of the investable universe”,[[1107]](#footnote-1107) they are said to have a quasi-public policy interest in the long term health of society as a whole. Indeed, where block-holding is large, exit may not be possible without driving down the share price and suffering financial loss, so engagement may be preferred.[[1108]](#footnote-1108)

As “guardians of the investing public”[[1109]](#footnote-1109) these institutional investors have the potential to encourage investee companies to be more responsive to the societal needs of their beneficiaries.[[1110]](#footnote-1110) As many of their beneficiaries are investing for the long term, in theory, many institutional investors are directly linked to long term thinking by the long term nature of their liabilities and thus possess a reduced need for liquidity. Whilst unit trusts generally allow for short term exit and thus require a relatively liquid portfolio, pension funds, life insurance funds, and to some extent sovereign wealth funds, enjoy extended time horizons.[[1111]](#footnote-1111) Amongst these, pension funds[[1112]](#footnote-1112) are singled out by Hawley and Williams as potential drivers of long term economic, environmental and social stability.

**6.3.3 The Potential for Engagement**

Shareholder engagement refers to the use of a person’s informal influence or formal rights, as a shareholder, to attempt to bring about a change in corporate activities or direction. The use of shareholder ‘voice’ to engage with the investee company to influence corporate conduct and direction is thus an alternative to the ‘exit’ strategy of simply selling one’s shares. The primary rationale to further shareholder interests, whatever these may be, through influencing the decision-making function of the board (and perhaps the composition of the board itself).

In its most formal embodiment, shareholder engagement regards the use of voting rights in regards to a company resolution. However, taking a step back, the mere proposal of a shareholder resolution is also an avenue for the activist shareholder and of particular use. Indeed a common feature of shareholder proposals is their withdrawal once a board agrees to consider or acts upon an issue prior to a vote taking place.[[1113]](#footnote-1113) On the informal side, shareholder engagement refers to informal meetings and communications between shareholders and the board. As such, it is less confrontational and may uphold the cordiality of a particular shareholder-board relationship, though clearly this is related to what is deemed acceptable within a particular relational environment. In contrast to the ‘loud voices’ of shareholder proposals favoured within US corporate culture, informal engagement is the preferred method of engagement within the UK,[[1114]](#footnote-1114) partly because of the relational culture but also because of differences in the law.

The 2012 Kay review of UK Equity Markets and Long-Term Decision Making observed that “shareholder engagement is neither good nor bad in itself: it is the character and quality of that engagement that matters.”[[1115]](#footnote-1115) Indeed, although shareholder activism has been put forward by some as the path to long term investment,[[1116]](#footnote-1116) others believe that such practice has exacerbated the tendency of the market to focus on the short term. [[1117]](#footnote-1117) The most common reason for engagement is thus the enhancement of shareholder value whether in the short term, most obviously exemplified by the pressure exerted on boards to undertake a hostile takeover or leveraged buyout,[[1118]](#footnote-1118)or in regards to longer term dissatisfaction with the management of the organisation.[[1119]](#footnote-1119)

Although shareholder engagement has predominantly focused on conventional corporate governance as a way to enhance shareholder value,[[1120]](#footnote-1120) it has also been used by CSOs and ethically concerned shareholders to further social and environmental goals. Initial examples of social shareholder activism include the use of shareholder proposals to protest against involvement in the Vietnam War and later to increase divestment in apartheid South Africa.[[1121]](#footnote-1121) The aim with using such a resolution in this way is not generally to win the vote (it is highly unlikely that the necessary proportion of votes will be secured to pass a binding resolution[[1122]](#footnote-1122)) but to force the issue upon the corporate agenda, raise awareness and generate support both amongst shareholders and, via the associated media coverage, the general public. Dhir provides a detailed examination of a shareholder proposal raised to force Canada-based Goldcorp, one of the world’s largest gold mining companies, to undertake a Human Rights Impact Assessment (HRIA) in its Guatemalan mines.[[1123]](#footnote-1123) In 2009, a shareholder proposal at Nucor, the largest US steel producer, received 27% of the vote as regards Nucor’s inaction to accusations of slave labour within their supply chain. As a result, Nucor entered a written agreement to require its tier 1 suppliers to take certain steps allowing for third party monitoring of their production.[[1124]](#footnote-1124)

Under UK Company Law, shareholders in a public limited company have the power to propose a resolution to be considered at an annual general meeting. Upon receipt of a written request[[1125]](#footnote-1125) the company is required to give notice of such a proposal to all eligible shareholders[[1126]](#footnote-1126) in the same manner and time as it gives notice of the meeting. [[1127]](#footnote-1127) Moreover, Shareholders also have the power to require the company to circulate a supporting statement to all eligible shareholders giving further information about the resolution.[[1128]](#footnote-1128) This is significant as it allows raising awareness of the issue contained within the proposal, increasing attendance at the meeting and ultimately ‘campaigning’ for votes. The statement must not exceed 1,000 words[[1129]](#footnote-1129) which has the potential to be quite restrictive, especially where some complexity is involved. In spite of this limitation, the real benefit of this provision to the proposing shareholders is that the cost of circulation (to potentially a huge number of shareholders) is paid for by the company as opposed to themselves.[[1130]](#footnote-1130)

In its need to balance the capacity for potentially activist shareholders to have a voice against the possibility that such a proposal may be misused by minority shareholders with ‘an axe to grind’, a proposed shareholder resolution may be legitimately rejected by the board if it is deemed to be defamatory,[[1131]](#footnote-1131) frivolous or vexatious,[[1132]](#footnote-1132) or it would, if passed, be ineffective (whether by reason of inconsistency with any enactment or the company's constitution or otherwise).[[1133]](#footnote-1133) It is clear that a proposal should have the potential to allow debate amongst the shareholders as to the appropriate direction of the company despite the possibility of the freerider problem.[[1134]](#footnote-1134) What is less clear, however, is the limit by which extraneous concerns may be rejected as frivolous, vexatious or ineffective. However, the fact that such resolutions have, in the past, been used to raise social and environmental issues appears promising in this regard.[[1135]](#footnote-1135)

Whereas US law merely requires a stock holding of US$2000 in market value held for a period of at least one year prior to the company’s annual submission deadline for the proposal of a shareholder resolution,[[1136]](#footnote-1136) the law in the UK is far more restrictive. In the UK the power to propose a resolution is subject to the activist shareholders representing at least 5% of the total eligible voting rights,[[1137]](#footnote-1137) or at least 100 members[[1138]](#footnote-1138) who have a relevant right to vote and hold shares in the company on which there has been paid up an average sum, per member, of at least £100.[[1139]](#footnote-1139) In considering the Bill, the House of Lords observed that within large companies the “threshold for proposing a resolution of members holding 5%of voting rights would … usually be too high a threshold for small shareholders to reach.”[[1140]](#footnote-1140) Yet, it was also put forward that an average figure of £100 per member in paid up capital[[1141]](#footnote-1141) may be “unduly onerous” to shareholders wishing to raise a resolution.[[1142]](#footnote-1142) By way of illustration, the nominal value of a single share in Next plc is £0.10 whereas the market value per share as determined by the FTSE100 is around £57.00.[[1143]](#footnote-1143) In order to raise the required collective shareholding by nominal value of £10,000, a collective shareholding of almost six million pounds by market value would be necessary. Therefore to fulfil the average shareholding requirement, it is perhaps likely that at least one large institutional investor will be required to be ‘on board’.

However, despite Hawley and Williams suggesting that traditional institutional investors should be incentivised to engage with companies (based on the premise of universal ownership), they have remained largely passive.[[1144]](#footnote-1144) When the 2004 Myners Review called for more shareholder activism by pension funds to better represent the long term considerations of their beneficiaries,[[1145]](#footnote-1145) a subsequent review provided that such engagement had not been particularly forthcoming.[[1146]](#footnote-1146) A renewed impetus on the use of these investors in a gatekeeping role came in the aftermath of the 2008 financial crisis, in which these institutions faced heavy criticism for their lack of monitoring and engagement.[[1147]](#footnote-1147) Clearly, the financial consequences of institutional investor inaction proved to be extremely damaging to the beneficiaries of the funds themselves.[[1148]](#footnote-1148) The 2009 Walker Report on governance at UK financial institutions[[1149]](#footnote-1149) proposed that a set of principles for fund managers be introduced based around the notion of stewardship. The report recommended that the code be overseen by the Financial Reporting Council (FRC) in much the same way as the Corporate Governance Code as outlined in chapter 2. The Stewardship Code was subsequently implemented in the UK in 2010.[[1150]](#footnote-1150)

**6.3.4 Stewardship Code**

The UK Stewardship Code (‘The Code’) aims to “promote the long term success of companies in such a way that the ultimate providers of capital also prosper.”[[1151]](#footnote-1151) The Code identifies traditional institutional investors, such as pension and insurance funds, as suitable actors in the promotion of long term active relationships between such institutions and those companies in which shares are held. Ultimately, the role of these institutional investors is “to protect and enhance the value that accrues to the ultimate beneficiary.”[[1152]](#footnote-1152) The Code applies to both the investment funds and the asset managers with equity holdings in UK listed companies.[[1153]](#footnote-1153) Whilst becoming a signatory to the code is voluntary for some institutional investors, all UK-authorised asset managers are required to produce a statement of commitment to the code, or explain why they have not done so under the UK Financial Conduct Authority’s (FCA) Conduct of Business Rules. As such, the regulatory objective of the Stewardship Code is fashioned around a ‘comply or explain’ obligation in the same vein as the UK Corporate Governance Code. It does not obligate the following of the principles found therein but merely an explanation for not doing so.

The Code sets out a number of best practices on engagement within its principles. In part, these reflect the needs to disclose their practices to their beneficiaries. For example, the Code provides that institutional investors should publicly disclose their policy on how they will discharge their stewardship responsibilities and how conflicts of interest will be managed. Moreover, the Institutional investor should have a clear voting policy and report periodically on its stewardship and voting. The Code provides that institutional investors should monitor their investee companies and establish clear guidelines as to how and when they will escalate their stewardship activities. In monitoring investee companies, the Code outlines that the institutional investor should engage with the company, and if appropriate, collectively with other investors.[[1154]](#footnote-1154) Here the company should, for example, monitor the performance of the company,[[1155]](#footnote-1155) seek to vote all shares held,[[1156]](#footnote-1156) and not automatically vote in line with the recommendations of the board.[[1157]](#footnote-1157)

Where concerns exist “about the company’s strategy, performance, governance, remuneration or approach to risks”, the Code provides that further, typically more intensive, engagement may be necessary.[[1158]](#footnote-1158) The Code outlines that the investee company’s approach to risks include ‘those that may arise from social or environmental matters’.[[1159]](#footnote-1159) As the principles of the code are “to protect and enhance the value that accrues to the ultimate beneficiary”[[1160]](#footnote-1160) they seemingly refer to those social or environmental risks that may cause financial detriment to the investor. A proposed update to Stewardship Code in 2019 more specifically attempts to encourage consideration of ESG factors amongst asset managers[[1161]](#footnote-1161) and more specifically limit their consideration to those that are financially ‘material’.[[1162]](#footnote-1162) This also represents an attempt to clarify the nature of the fiduciary relationship in regards to ESG information, discussed shortly at 6.4.2.

The Code also attempts to position the institutional investor as a gatekeeper to the disclosure requirements of the Strategic Report Regulations and Non-Financial Disclosure Directive. In highlighting the proposed relationship between the two, the Code provides that in monitoring its investee companies, an institutional investor should consider the quality of the corporate reporting. More broadly, institutional investors should “satisfy themselves that the company’s board and committees adhere to the spirit of the UK Corporate Governance Code.”

Underlying the Stewardship Code is the presumption that engagement is ultimately desirable for the institutional investor. However, pension funds may prefer not to be ‘locked in’ via a policy of engagement which may diminish their ability to exit underperforming stock when appropriate.[[1163]](#footnote-1163) The cost and inconvenience of engagement provide a more general deterrent.[[1164]](#footnote-1164) Moreover, the use of exit instead of voice may be more readily selected where the satisfaction of its liabilities to its beneficiaries do not require long term investment. For example, in light of a maturing workforce[[1165]](#footnote-1165) and the recent changes to defined contribution pension schemes allowing for substantial lump sums to be withdrawn from the age of 55,[[1166]](#footnote-1166) such schemes may have to increase liquidity and adjust their investments accordingly. It follows therefore that institutional investors may have an interest to apply short term pressures to ensure steady growth streams to meet annual levels of return to their beneficiaries’ investment plans.[[1167]](#footnote-1167) Furthermore, the dispersed ownership of shares amongst institutional investors may also mean that, in practice, they may be individually unable to apply significant pressure on corporate management.[[1168]](#footnote-1168) Indeed, dispersion as opposed to monitoring is not merely a conscious risk reduction strategy, but also reduces the administrative costs related to engagement. Although the Code attempts to encourage collective engagement by institutional investors, to do so may also involve such costs and thus be rejected on this basis. Finally, in relation to the broader aims of the code, the current practices of pension funds along the realities of the UK’s equity market as regards the holdings of UK institutional investors act as a barrier to these investors in furthering long termism.[[1169]](#footnote-1169) These barriers are exacerbated by materiality-related restrictions placed on investment fund management and the unlikelihood of beneficiaries to override them.

**6.4 Potential Barriers to Effective Stewardship**

This section focuses on the barriers to the effectiveness of pension funds as effective stewards of corporate behaviour. First, the current practices of the investment industry are identified as problematic. Second, the fiduciary relationship between investment fund and beneficiary has been perceived as a barrier to incorporating non-financial information into the investment decision. It will be highlighted that the law appears to allow for the incorporation of non-financial information into investment decisions made on behalf of others, so long as this information is material. However, commonly held views appear to remain otherwise. This highlights the awareness problem that initiatives such as the UN PRI have attempted to address. Third, it appears that non-materiality as a barrier to socially responsible investment may be overcome with the blessing of the pension fund beneficiary. As such, the likelihood of these actors to enable materiality to be overridden in the management of pension funds will be considered. Finally, and perhaps most damningly as regards the ability of the traditional institutional investor to affect change in this area, the declining significance of these actors within the UK equity market will be illustrated.

**6.4.1 Current Practice**

Standard industry practice appears to contradict the theoretical assumptions underpinning the role of institutional investors to act as stewards of responsible corporate practice. Firstly, and most basically, the institution may not be convinced of the superior returns of long-term investment strategies.[[1170]](#footnote-1170) Secondly, and relatedly, there are inherent difficulties in predicting long term value as opposed to the relative ease of measuring short term performance.[[1171]](#footnote-1171) This may impede an institution’s ability to lengthen its investment horizons. Thirdly, the institution’s liability profile may require short term returns to meet more immediate payments to beneficiaries.[[1172]](#footnote-1172) Fourthly, due to the complexity of the investment marketplace[[1173]](#footnote-1173) many insurers and pension funds have outsourced their equity investment[[1174]](#footnote-1174) to specialist fund managers.[[1175]](#footnote-1175) However, the use of these fund managers can also act as a barrier to longer term considerations.[[1176]](#footnote-1176) Indeed, a 2014 study of US equity fund managers found an average holding period of just 1.45 years.[[1177]](#footnote-1177)

Stock or portfolio performance may be evaluated in absolute or relative terms. In other words, has the investment increased in total value or has a selected portfolio appreciated more or depreciated less than those of a peer group or on the average returns of a particular stock market index. This latter method of *relative* benchmarking is commonplace within the industry.[[1178]](#footnote-1178) This means that, for example, a decline in value of 8% relative to a 10% fall in an index or peer benchmark is thus rewarded. This perverse situation has resulted in the short term holding of stocks by many fund managers. Although investment consultants are frequently used to provide advice on fund manager selection and monitoring,[[1179]](#footnote-1179) the vast majority “lack any understanding of responsible investment and don’t see it as their role to show any leadership in this area.”[[1180]](#footnote-1180) As it stands, the evaluation of the performance of fund managers, who are widely used by institutional investors, is based upon quarterly figures. As such, fund managers are more concerned with quarterly peer review than any market-wide change of perspective.[[1181]](#footnote-1181) Gifford also highlights the significance of mixed signals sent by the asset holder whose policy may outline sustainability, but the first question a fund manager is asked relates to quarterly performance.[[1182]](#footnote-1182)

The preference for short term investments is also framed by a number of behavioural biases. The concept of heuristics within behavioural economics observes that humans use of mental short cuts in order to make fast judgments based on limited information.[[1183]](#footnote-1183) Whilst these shortcuts may be sensible within the context of physical human evolution, they are less so in regards to investment decisions. This is particularly true in relation to the long-term investor. An obvious example of such a behavioural bias is the problem of herding, whereby an investor assumes others have superior information and thus instinctively follows the majority.[[1184]](#footnote-1184) Another bias is the psychological tendency to overvalue short-term information within the decision-making process.[[1185]](#footnote-1185) This issue is exacerbated by melodramatic and increasingly frequent dissemination of information within the financial press.[[1186]](#footnote-1186)

A further issue relates to the nature of the relationship between pension-based institutional investors and those who invest their money with them. Uncertainty surrounding this relationship has been identified as a potential barrier to the incorporation of non-financial information into investment decisions. Indeed, the Kay Review of UK Equity Markets and Long-Term Decision Making found that significant uncertainty existed within the investment community in relation to the scope of fiduciary duties.[[1187]](#footnote-1187) It was found that this duty was interpreted by some investment intermediaries as the duty to maximise short-term financial returns and thus restricting the consideration of factors that could impact corporate performance in the longer term.[[1188]](#footnote-1188) Clearly, as previously observed by a number of academic commentators, such a view precludes the inclusion of longer term social and environmental considerations into investment decisions.[[1189]](#footnote-1189)

**6.4.2 The Fiduciary Relationship between Investment Actors**

The standard legal model for an investment fund within the UK is that of the trust,[[1190]](#footnote-1190) in which a fiduciary relationship exists between the pension fund as trustee and the ultimate investor as beneficiary. A fiduciary may be defined as “someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.”[[1191]](#footnote-1191) Therefore the fiduciary concept “encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal.”[[1192]](#footnote-1192)

The Pensions Act 1995 provides the trustees of occupational, or workplace, pensions with a wide investment power.[[1193]](#footnote-1193) However, this power is subject to any provisions within the trust deed, a number of statutory provisions and the relevant case law. Primarily, the Occupational Pension Schemes (Investment) Regulations 2005[[1194]](#footnote-1194) require that investment of the scheme assets is to be undertaken “in the best interests*”* of members and beneficiaries[[1195]](#footnote-1195) and in the case of a potential conflict of interest, in the sole interest of members and beneficiaries.[[1196]](#footnote-1196) These provisions reflect the distinguishing duty of any fiduciary relationship, the duty of loyalty.[[1197]](#footnote-1197) As such, fiduciaries may not, unless properly authorised, put themselves into a position where their interests and duty conflict.[[1198]](#footnote-1198) Professional asset managers must also exercise their discretion in accordance with the Investment Regulations[[1199]](#footnote-1199) and so are also required to act in the best interests of the beneficiaries.

The key question then, as regards the consideration of social and environmental issues within investment decisions, surrounds the definition of what exactly constitutes ‘the best interests’ of the beneficiary. Indeed, as the Law Commission would later confirm, the fact that trustees are required to state their policy on the extent to which social, environmental or ethical considerations are taken into account when investing does not necessarily mean it is permissible for them to do so.[[1200]](#footnote-1200)

Much of the caution expressed by pension funds in discharging their fiduciary duties must to some extent emanate from the limited judicial consideration of ‘best interests’, along with its seemingly narrow interpretation of this term in the case of *Cowan v Scargill.*[[1201]](#footnote-1201) In this case, the union appointed trustees of a coal miner’s pension fund, wished to cease investments made overseas along with those made in those energy sectors which compete with coal, an action which the remaining trustees, appointed by the National Coal Board, successfully argued would be a breach of their fiduciary duty. Sir Robert Megarry V.C.’s assertion that “When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests”[[1202]](#footnote-1202) and the rarity of cases where the situation would be otherwise[[1203]](#footnote-1203) has been construed by many to provide support to the view that investment decisions should be driven by financial return.[[1204]](#footnote-1204) Indeed, in citing *Buttle v Saunders*,[[1205]](#footnote-1205) Megarry suggested that so long as their actions are legal, trustees may have to act dishonourably in order to act in the beneficiaries’ best interests.[[1206]](#footnote-1206)

Megarry’s conservative view on the subject may have been somewhat misrepresented with his comments on reflection, albeit in an academic article, suggesting that if the applicant trustees in *Cowan v Scargill* had spoken of ‘preference’ as opposed to ‘prohibition’ the case may have well been decided differently.[[1207]](#footnote-1207) Indeed, a 2005 Freshfields Bruckhaus Deringer report, as commissioned by the United Nations Environment Programme Finance Initiative (UNEP FI),[[1208]](#footnote-1208) cast doubt on the reliability of the case as a legal authority based upon a lack of proper legal argument due to the applicant’s self-representation.[[1209]](#footnote-1209) It appears, a conservative view of ‘best interest’ has effectively been entrenched in common practice, in part because of interpretations surrounding the standard of care required by trustees in the investment of pension fund assets in relation to their duty of prudence.

The trustee must take “all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own.”[[1210]](#footnote-1210) In contrast to other types of trust,[[1211]](#footnote-1211) this duty of prudence may not be restricted in the case of occupational pension funds. [[1212]](#footnote-1212) Indeed, it is clear from *Harries v Church Commissioners[[1213]](#footnote-1213)* that the narrowing of investment options via negative screening criteria may serve to impede the duty of prudence[[1214]](#footnote-1214) and thus breach the duty of care.[[1215]](#footnote-1215)

The duty of prudence also includes the need to diversify investments[[1216]](#footnote-1216) through the use of an investment portfolio.[[1217]](#footnote-1217) The power of investment exercised in a manner “calculated to ensure the security, quality, liquidity and profitability of the portfolio as a whole.”[[1218]](#footnote-1218) For example, occupational pension fund trustees are "to be judged by the standard of current portfolio theory … rather than the risk attaching to each investment taken in isolation."[[1219]](#footnote-1219) The overall-risk profile of a pool of assets is thus considered rather than each specific investment in isolation. In practice, therefore, the standard of care has been interpreted by courts, commentators and trustees themselves as equating to ‘what the majority of investors do.’[[1220]](#footnote-1220) In other words, pension funds are encouraged to follow those practices unitised by similar institutional investors.[[1221]](#footnote-1221) Aside from leading to the problem of ‘herding’ mentioned previously, this could arguably impede upon specific investment decisions in companies or industries.

As commented upon above, the use of negative screening criteria may breach the pension trustee’s duty of care. However, in *Harries v Church Commissioners*, it was suggested by Sir Nicholls VC that so long as professional advice was sought, the choice between two equally suitable investments in a conventional sense could be decided by reference to ethical factors.[[1222]](#footnote-1222) This point was reiterated by the Law Commission in its final report “Fiduciary Duties of Investment Intermediaries” whereby it was stated more broadly that non-financial concerns may be taken into account by pension funds providing that the trustee anticipates no risk of financial detriment.[[1223]](#footnote-1223) However, as Richardson notes, this ‘tie-breaker principle’ may be difficult to apply in practice given that investments are typically managed on a portfolio basis,[[1224]](#footnote-1224) as observed above. In summary, the nature of the fiduciary duty does not preclude the incorporation of ESG factors in investment decisions, providing that they are not selected in the knowledge that they will cause financial detriment to the beneficiary.

It follows, therefore, as observed within a 2017 Law Commission report, that the barriers to responsible investment by pension funds are, in most cases, structural and behavioural rather than legal or regulatory.[[1225]](#footnote-1225) As such, efforts have been made to reverse this situation through emphasising that the duty of prudence requires that non-financial information should be taken into account where it is material to do so. For example, the Law Commission made reference to the Kay Review[[1226]](#footnote-1226) in identifying the need to consider environmental, social or governance risks where they are financially material to the performance of an investment, including that of the long term.[[1227]](#footnote-1227) The need to consider ESG factors in discharging the duty of prudence is also reiterated within the UN Principles for Responsible Investment and, following a call therein,[[1228]](#footnote-1228) in the updated 2019 Stewardship Code (as proposed).[[1229]](#footnote-1229)

Of course, all these efforts simply serve to emphasise the notion of materiality, or the business case for CSP. As considered above, and as confirmed by the law commission,[[1230]](#footnote-1230) and approved of by the UK government,[[1231]](#footnote-1231) financial considerations are to take precedence in the administration of pension schemes.[[1232]](#footnote-1232) Put simply, only those factors that are material should be taken into consideration. However, in practice, are there any circumstances in which a fund could make investment decisions that relied on ‘non-material’ considerations?

**6.4.3 The Question of Non-Materiality and Beneficiary Consent**

Lord Murray observes in *Martin v City of Edinburgh District Council*, albeit in obiter, that a trustee may be unable to “divest himself of all personal preferences, of all political beliefs, and of all moral, religious or other conscientiously held principles.”[[1233]](#footnote-1233) Although the duty to act in the beneficiaries best interests is similar to the duty that the directors of a company must prioritise shareholder interests, as considered in chapter 2, no business judgment rule exists in the investment context preventing judgment by the courts. To some extent, the uncertainty of the stock market may act “as a shield to liability”[[1234]](#footnote-1234) for pension trustees. Thus, if the strict letter of the law is ignored, pension fund trustees may be able to invest ethically, at lower financial reward, due to the inherent difficulty in proving liability for improper investment.[[1235]](#footnote-1235) However, for occupational pension funds, it is necessary that the pension fund’s investment “consist predominantly of investments admitted to trading on regulated markets”[[1236]](#footnote-1236) with other investments “kept to a prudent level”.[[1237]](#footnote-1237) This restriction may serve to restrict pension fund investment in specific ‘impact investments’[[1238]](#footnote-1238) that offer clear social or environmental benefits. [[1239]](#footnote-1239)

As guided by obiter within *Harries v Church Commissioners*[[1240]](#footnote-1240) along with that, in a persuasive sense, of the Scottish case of *Martin v City of Edinburgh District Council*,[[1241]](#footnote-1241) the Law Commission stated that a pension fund set up by a religious group, charity or political organisation need not invest in conflict with the objectives of the organisation.[[1242]](#footnote-1242) This would also be true within a direct contribution scheme where an ethical option is made available to the beneficiary.[[1243]](#footnote-1243) More broadly, therefore, a fiduciary is provided with greater latitude to incorporate non-financial information into the investment decision upon the beneficiary’s consent. This is acknowledged in the aforementioned Freshfields Report which provides that “a decision-maker may integrate ESG considerations into an investment decision to give effect to the views of the beneficiaries in relation to matters beyond financial return.”[[1244]](#footnote-1244)

However, for consent to be given over the management of a particular fund there must be consensus as to the extent of this latitude provided to the pension fund in relation to any consent to non-materiality. A trustee has a duty to treat all the beneficiaries even-handedly.[[1245]](#footnote-1245) Yet as considered in relation to the consumer in chapter 7, ethical considerations of what is or is not important may differ amongst individuals. As such, the potential for consensus within a large investment institution may be remote.[[1246]](#footnote-1246) It is arguable that this would not be an issue where, for instance, reference is made to internationally recognised human rights standards. However, a greater problem is the typically passive nature of the investor beneficiary in this area.[[1247]](#footnote-1247)

The vast majority of pension scheme members remain broadly unaware of where their money is invested.[[1248]](#footnote-1248) For policy-makers this is once again framed as part of a market failure resulting from the insufficient supply of information to the market. The beneficiary is expected to be able to monitor the performance of the pension fund in ensuring such matters are considered within the ultimate investment decision. As considered in chapter 5, requirements have been put in place for companies to disclose non-financial information within their annual reports. Institutional investors have been encouraged to seek ESG information, albeit *material* ESG information, from the companies in which they, or more precisely the fund managers, invest. Here the issue is the flow of information to the investing beneficiary.

However, disclosure regulation has been in place for some time in the area. Since the turn of the millennium there has been a requirement for all UK occupational pension funds to disclose the extent (if at all) to which social, environmental or ethical considerations are taken into account in investment decisions.[[1249]](#footnote-1249) This change was influential in inspiring similar reforms within Australia, New Zealand and a number of EU states.[[1250]](#footnote-1250) However, the extent to which investment policy was communicated appeared to be less than satisfactory,[[1251]](#footnote-1251) and frequently only upon request.[[1252]](#footnote-1252) Moreover, the introduction of the Stewardship Code in 2010 has too seemingly had little impact. The Code provides that fund managers should provide regular accounts to the institutional investor[[1253]](#footnote-1253) who should then report at least annually to the beneficiaries.[[1254]](#footnote-1254) However, the recent Kingman Review of the Financial Reporting Council found that the Code “remains simply a driver of boilerplate reporting” and, unless improved, “serious consideration should be given to its abolition.”[[1255]](#footnote-1255)

The revised EU Shareholders Rights Directive (‘Shareholders Rights Directive II’)[[1256]](#footnote-1256) also attempts to address the inadequacy of engagement through enhancing transparency along the investment chain. As with the UK Stewardship Code, the institutional investor should publicly disclose information about the implementation of their engagement policy and how they have exercised their voting rights.[[1257]](#footnote-1257) However, under the Directive, asset holders will also be required to disclose how their equity investment strategy is consistent with the investment profile and how it contributes to the medium to long-term performance of their assets.[[1258]](#footnote-1258) This should include information in relation to any attempts made to incentivise asset managers to make investment decisions based on medium to long-term company performance.[[1259]](#footnote-1259) The Financial Conduct Authority (FCA) has drawn up plans for its implementation into UK law in June 2019 but this is dependent on the final terms of the UK’s withdrawal agreement from the EU.[[1260]](#footnote-1260)

Although the greater level of specificity is welcomed in determining the content of disclosure, it is unlikely to have a great impact upon beneficiaries. Investing beneficiaries are simply not sufficiently active within the investment relationship beyond their initial selection. The selection of investments within a modern portfolio is a specialist activity in which the lay beneficiary is likely to lack competence.[[1261]](#footnote-1261) Indeed, the lack of competence is typically the reason for choosing to invest in a fund as opposed to investing directly in companies themselves. As such, these beneficiaries are unlikely to engage with their chosen investment fund on such matters. Moreover, exit of a fund is unlikely, given that an individual is unlikely to regularly review and change their choice of fund. This is even less likely within an occupational scheme whereby the employer contributes a certain percentage to the fund.[[1262]](#footnote-1262) Relatedly, the UK government rowed back on its proposal for occupational pension schemes to disclose the extent to which members’ views on non-financial matters are taken into account in the fund’s investment strategy.[[1263]](#footnote-1263) It is clear, therefore, that the initial selection of a pension fund is highly significant.

Some occupational pensions, especially those relating to Defined Contributions (DC) type, now allow for an ethical pension scheme option to be selected. However, in the private sector this is far from the norm, even amongst those companies listed on SRI indices.[[1264]](#footnote-1264) A recent study by the Triodos Bank, a specialist in ethical finance, found that 74% of its ethically minded respondents would not invest in a company, fund, or pension scheme in which activities relating to modern slavery were reported.[[1265]](#footnote-1265) Such concerns were reiterated as ‘essential’ or ‘very important’ by respondents to an Ipsos MORI survey commissioned by the Ethical Investment Research and Information Service (EIRIS). [[1266]](#footnote-1266) However, once again, the attitude-behaviour gap, as is considered in chapter 7, the context of the ethical consumer, is likely to be relevant here, as is the likelihood of respondents tailoring their responses to what are perceived to be societal expectations. Perhaps more insightfully, a study by the National Association of Pension Funds (NAPF) illustrates the considerable drop in support for ethical investment where it is associated with financial cost.[[1267]](#footnote-1267) Indeed, it should be borne in mind that even accepting that many responsible investment funds have questionable social performance, in 2015, of the total funds under management (£830 billion), only 1.2% (£9.8 billion)[[1268]](#footnote-1268) were held in responsible investment funds, representing the same proportion of total investment as the year before.

**6.4.4 The Declining Significance of Domestic Institutional Investors on the UK Stock Market**

For other reasons too, the emphasis placed on UK institutional investors as drivers of change is largely misplaced. Although the rise of institutional investors since the Second World War[[1269]](#footnote-1269) may have once made them suitable targets for such responsibility,[[1270]](#footnote-1270) the realities of UK domestic institutional asset ownership now suggest otherwise. In short, where investment was once biased towards the domestic equity market [[1271]](#footnote-1271) this is no longer necessarily the case. Firstly, as the Kay Review observes, pension (and life insurance) funds have reduced their exposure to equity markets as a result of regulation and the longer term maturity of the funds themselves.[[1272]](#footnote-1272)A particular consequence of this has been an increased investment in bonds by pension funds,[[1273]](#footnote-1273) a practice evidently not restricted to the UK.[[1274]](#footnote-1274) However, this is only part of the story. An inevitable result of the abolition of UK exchange controls and the liberalisation of outward investment in the late 1970s[[1275]](#footnote-1275) has seen increased investment by Pension funds, insurance companies, and trusts in overseas equity[[1276]](#footnote-1276) in search of greater returns and the reduction of risk through enhanced diversification. The UK Stewardship Code does not impose a ‘comply or explain’ requirement for engagement in such circumstances, it merely calls for “best efforts” in the application of its principles.[[1277]](#footnote-1277) Moreover, continued institutional disinvestment in UK equity saw a net disinvestment in UK equity of £15 billion in 2014 alone.[[1278]](#footnote-1278) As a result, in 2014, pension funds held only an estimated 3% of UK equity with insurance funds holding a further 6%.[[1279]](#footnote-1279)

The largest single category of investors in UK equity was that of overseas investors with an estimated 54% of value at the end of 2014, a figure than has progressively risen from 31% in 1998.[[1280]](#footnote-1280) Of the total overseas investment in the UK, 46%, or approximately £929 billion, emanated from North America. Approximately half of North American investments in UK equity comprise of unit trusts[[1281]](#footnote-1281) but around 20% comes from US pension funds.[[1282]](#footnote-1282) Many overseas investors are likely to have a widely diversified portfolio in a variety of international markets,[[1283]](#footnote-1283) and for reasons of expense and distance are less likely to engage with UK companies.[[1284]](#footnote-1284) Furthermore, overseas pension funds are not subject to the meagre requirements of the UK Stewardship Code.[[1285]](#footnote-1285) In contrast to UK law, US occupational pension funds have a fiduciary duty to vote “on issues that may affect the value of the plan’s investment.”[[1286]](#footnote-1286) This responsibility is not imposed upon US state public pensions but is commonly accepted by many.[[1287]](#footnote-1287) However, significantly, this obligation does not appear to apply to those investments made overseas. In such circumstances, occupational pension funds are allowed to consider the cost implications associated with such practices prior to taking any decision to vote,[[1288]](#footnote-1288) with public pension funds likely following suit. Moreover, similar fiduciary duties apply to US pension funds as those discussed in relation to their UK counterparts.[[1289]](#footnote-1289) As such, the objective of such funds is again primarily financial, a goal likely strengthened within many US public pension funds due to reports of negative cash flows.[[1290]](#footnote-1290) Thus, even if such funds have the capacity in terms of domestic shareholding to push long term objectives, any non-financial benefit is likely collateral and thus must fit within the confines of materiality.

**6.5 ESG and the Equation of Long-Termism to Sustainability**

According to the PRI the integration of ESG factors into the decision-making process is driven by the notion that “ESG factors play a material role in determining risk and return.”[[1291]](#footnote-1291) Thus, as noted previously, the revised Stewardship Code, as proposed, more specifically outlines the need to consider ESG factors. This requirement is reiterated within recent regulation applying to occupational pension schemes.[[1292]](#footnote-1292) More broadly, the UK’s FRC has sought to engage with the investment community on matters of responsible investment through the establishment of an Investor Advisory Group in June 2018 that consists largely of ESG specialists.[[1293]](#footnote-1293)

ESG integration is supposedly about understanding the long term sustainability of a company and the risks to value thereof. According to the PRI, “the generation of long-term sustainable returns [being] dependent on stable, well-functioning and well-governed social, environmental and economic systems.”[[1294]](#footnote-1294) Yet if long term non-financial considerations are likely only to be incorporated if they are financially material, or at least to no financial detriment, the potential for long termism overlapping with social and environmental sustainability rests on the extent to which the business case exists, or at least the extent to which investors believe it exists.

Of course, in some time periods one can certainly ‘do well by doing good.’ The current decline in fossil fuel prices has created a climate for which investment in renewables may be relatively lucrative.[[1295]](#footnote-1295) Yet this set of circumstances may be short lived and such market-based inconsistency is no basis for the fulfilment of regulatory objectives. Improved performance in socially desirable areas may in some circumstances, correlate positively with financial performance but on other occasions, it may not. Furthermore, within the ‘three pillars’ of sustainability,[[1296]](#footnote-1296) the potential for a win-win scenario seems skewed far more towards an overlap between the economic and environmental pillars, as opposed to that of society.

According to the widely cited ‘Brundtland Report’ of the World Commission on Environment and Development, sustainable development may be defined as that which “meets the needs of the present without compromising the ability of future generations to meet their own needs”[[1297]](#footnote-1297) or in economic terms, the requirement for intertemporal distribution.[[1298]](#footnote-1298) In a purely economic sense, the sustainability argument relates to the increased costs associated with the diminishment of finite global resources.[[1299]](#footnote-1299) This therefore, should appeal to both macro-economic and micro-economic sensibilities in the longer term. Indeed, at a micro-level where a product is price elastic and consumer demand responds more than proportionately to a change in price, revenue will fall. The alternative is that the firm shoulders the cost increases, again negatively impacting upon profit margins.

When applied to environmental factors this argument, in theory at least, appears to make sense.[[1300]](#footnote-1300) Indeed, even within the short term, positive corporate environmental action may lead to significant cost savings through the more efficient use of natural resources.[[1301]](#footnote-1301) However, as Becker-Blease observes in relation to the environmental business case, ‘a common theme … is waste reduction.’[[1302]](#footnote-1302) Yet a rather significant problem arises when the concept is extended beyond its roots as a fruitful marriage of ecology and economics. [[1303]](#footnote-1303) For instance, although the Brundtland Report identified the necessity to meet human needs in ecological terms[[1304]](#footnote-1304), the UN now links the concept of sustainability with standard of living more generally and considers fairness, social justice and greater access to a better quality of life[[1305]](#footnote-1305) amongst its components. The recent UN Sustainability Goals arguably goes even further to broaden the concept.[[1306]](#footnote-1306) The business case argument for social, as opposed to environmental sustainability, relates to the need for societal stability to maintain a business climate conducive to growth, yet it is difficult to see this as persuasive to business interests.

The issue with such an argument is that it ignores the exploitation of labour that has remained at the heart of capitalist production since its conception.[[1307]](#footnote-1307) More specifically, it ignores the deliberate construction of a dominant international business model that has been created to do just this. Indeed, as was discussed in chapter 2, the continued exploitation of overseas workers appears necessary to satisfy shareholder expectations within a strategy based on value capture through global outsourcing. Finally, as a resource, globalisation and an increasing global population[[1308]](#footnote-1308) has meant a “glut of labour”[[1309]](#footnote-1309) being available, thus the scarcity argument does not satisfactorily apply. The point being made is that in an environmental sense, there appears to be *some* business case argument for sustainability, and collaterally this may benefit the living conditions of the world’s population. However, the inclusion of such social considerations into the corporate objective appears far less linked to any plausible notion of win-win, and indeed, may actually be antithetical to the ‘sustainability’ of the current business model utilised by many multinational corporations. Where a business may benefit from the exploitation of systemic weaknesses where regulatory or social sanctions are lacking, the capital markets, in their desire for financial performance, may amplify the incentives for companies to do so.[[1310]](#footnote-1310) As such, the long term economic health of one society may well be to the detriment of the rights and working conditions of those within another.

Moreover, a core element of the business case argument for sustainability is the notion of social and environmental upheaval affecting the economic stability of the financial markets.*[[1311]](#footnote-1311)* Yet sustainability and long termism should not necessarily be conflated. The former regards facilitating the continual use of the earth’s resources whilst the latter merely incorporates sustainability issues as one of a number of considerations within the broader concept of long term, or ‘enlightened’, shareholder value.*[[1312]](#footnote-1312)* By way of a practical example, as recognised by the leading fund managers, investment in tobacco stocks have returned and are predicted to continue to return significant financial benefits over a sustained period.[[1313]](#footnote-1313) However, both the product and activities of tobacco companies may be highly criticised from a social and environmental perspective.*[[1314]](#footnote-1314)* Famed long term investor Warren Buffet’s favourite cash cow, Coca-Cola, provides a further example with the company continuing to pay steady dividends and doubling in value over the past decade despite the negative effects of its products on health*[[1315]](#footnote-1315)* and local water supplies.*[[1316]](#footnote-1316)* In short, stable long term stockholding does not always fit with the broader societal objectives of the sustainability agenda. As acknowledged by the UK Department for Work and Pensions (DWP) more broadly, “ESG factors are not *always* themselves financially material”[[1317]](#footnote-1317)

**6.6 Conclusion**

This chapter has highlighted the significance of materiality to the notion of responsible investment. In doing so, the discourse has shifted away from one centred on ethics to one based upon financially material benefit. Criticised as an attempt by the financial industry to stave off regulation whilst continuing to do business as usual,[[1318]](#footnote-1318) the notion of responsible investment has become almost entirely reliant on the business case for CSP as a means to incentivise investor action. Unfortunately, as has been argued, the business case appears somewhat inconsistent in its application. Firstly, the unreliability of CSP-CFP relationship as an incentive for determining the investment decision has been highlighted. Secondly, it appears that the ability of investors to engage with companies to encourage sustainability and long term decision making has been overstated. Centring on that type of institutional investor that appears most suited to this role, the pension fund, it has been shown that a variety of barriers exist to the capacity of these entities to affect change. Ultimately, it is not suggested that companies may not do well by doing good, nor that long termism and sustainability may not equate. What has been suggested is that given the uncertainty and inconsistency in this area, both empirically and conceptually, the investor appears unsuitable as a mechanism to enhance CSP.

**Chapter 7: The Consumer as a Potential Agent of Change**

**7.0 Introduction**

The disclosure-based approach taken by the UK’s MSA[[1319]](#footnote-1319) and similar laws in California[[1320]](#footnote-1320) and Australia[[1321]](#footnote-1321) positions the consumer as an essential means to enhance anti-slavery CSP. A key aim of this regulation is to address market imperfections relating to information asymmetry between producer and consumer. In contrast to the rationally-minded investor, the consumer is framed as an ethical actor that will incorporate corporate social performance information into the purchase decision. Put simply, ‘good companies’ will be rewarded and ‘bad companies’ punished through choices made at the check-out. This view is seemingly bolstered in consumer surveys highlighting a desire for more increased transparency to allow for greater ethical consumption. Indeed, the CTSCA, as the regulatory model for the MSA, references such a study in the justification for legislative action on the first page of its statutory guidance.[[1322]](#footnote-1322) From this transparency-based perspective, so long as the consumer is informed, they may be expected to make ethical purchase decisions. Unfortunately, this position overstates the ability of consumers to drive CSP.

This chapter is structured as follows. First, the notion of the consumer as a market actor will be considered. Second, a number of social, cognitive and psychological barriers are identified that may serve to limit the effectiveness of the consumer as a means to apply pressure on firms to internalise their social costs. Third, it will be acknowledged that there is historical evidence of the ability of consumers to drive CSP in rare instances where issues of collective action are overcome. In such cases, access to reliable CSP information and the ability to disprove corporate-led communications may assist the instigation of coordinated consumer action. Finally, in acknowledging the potential for collective consumer action in this manner, barriers appear to exist within the consumer law in terms of challenging and ensuring the accuracy of corporate disclosures relating to CSP.

**7.1 The Consumer as Market Actor**

According to Adam Smith “Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer.”[[1323]](#footnote-1323) In seeking to understand the role of the individual in guiding the productive process, the notion of the consumer is tightly moored to the neoclassical economic context. The individual is perceived as a rational utility maximiser that implies he or she will select the good or service that provides the highest level of *utility* per unit of cost.

For Bentham the principle of utility may be equated to the “tendency [an action] appears to have to augment or diminish the happiness of the party whose interest is in question.”[[1324]](#footnote-1324) Utility thus corresponds to the satisfaction or dissatisfaction attained through the fulfilment of an individual’s wants or needs, or lack thereof. In the context of the purchase decision, utility is the customer satisfaction gleaned from a purchase of a good or service. For some this measure of satisfaction can be quantified by the price an individual is willing to pay for a product less the price actually paid,[[1325]](#footnote-1325) for others, it can merely be ranked in order of preference.[[1326]](#footnote-1326) As a quantum of ‘satisfaction’, utility is both relative and subjective. As such, one individual’s perception of utility may differ from that of another and indeed, may differ over time.[[1327]](#footnote-1327) A key point is that utility maximising behaviour is seen as both natural and desirable[[1328]](#footnote-1328) because it leads to the greatest amount of satisfaction[[1329]](#footnote-1329) within society.[[1330]](#footnote-1330)

Consumer sovereignty[[1331]](#footnote-1331) may be defined as "the right to choose among a sufficient range of products sothat the particular demand specifications of a particularconsumer can be reasonably matched."[[1332]](#footnote-1332) The broader implication is that “consumer demand determines what a society produces.”[[1333]](#footnote-1333) Put simply, companies produce what consumers want, and thus maximize consumer utility in order to generate their profits.[[1334]](#footnote-1334) As Veblen’s[[1335]](#footnote-1335) concept of ‘conspicuous consumption’[[1336]](#footnote-1336) illustrates, utility may not merely be determined through a product’s features and quality, but also through its social value to the individual. Although for Veblen, this related to the social signalling value of consumption, it highlights that satisfaction may be attained independent of considerations of product functionality and price. It follows therefore, that *how* something is produced may be a desirable attribute to the individual for the attainment of psychological satisfaction. Put simply, consumer preferences may be shaped by ethical factors alongside basic needs and existing desires. This is the basis of what has become known as ethical consumerism. Ethical consumerism may be defined as “the practice of purchasing products and services produced in a way that minimises social and/or environmental damage, while avoiding products and services deemed to have a negative impact on society or the environment.”[[1337]](#footnote-1337) Thus the ethical consumer may seek to purchase a ‘good’ product or boycott one that is deemed ‘bad’.

This view is problematic for two reasons. Firstly, it ignores the powerful realities of the modern enterprise. Consumer wants are instigated and shaped by the marketing campaigns of the very organisations that aim to satisfy[[1338]](#footnote-1338) or, to some extent, as Galbraith posits, ‘wants thus come to depend on output.’[[1339]](#footnote-1339) In other words, demand may be shaped by companies. [[1340]](#footnote-1340) Secondly, as will be discussed in detail, underlying this view is the belief that consumers want to make ethical choices based on corporate social conduct, and are able to do so.

**7.2 The Attitude-Behaviour Gap**

Attempts to improve corporate social performance through increased disclosure rely on the notion that the availability of this information will influence purchasing behaviour. According to a poll across 58 countries undertaken by Nielsen in 2012, over 50% of those consumers surveyed would be prepared to pay more for products that are sold by socially responsible companies.[[1341]](#footnote-1341) The UK, a perceived leader in ethical consumption,[[1342]](#footnote-1342) saw a 2010 survey undertaken by YouGov report that 81% of UK consumers dislike buying products from companies of which they disapproved.[[1343]](#footnote-1343) Indeed, an ICM survey conducted in the same year found that 73% of those UK consumers polled were to some extent influenced by ethical considerations in their purchase decisions. It is also notable that 31% stated they were more likely to consider such issues than two years previously (the height of the financial crisis),[[1344]](#footnote-1344) perhaps reflecting an increased propensity to care about such issues outside of periods of widespread financial uncertainty.

According to the Ethical Consumer Markets Report, the total market value of the UK ethical consumption sector (including the positive value of consumer boycotts) in 2013 was £32.2 billion, up from £8.5 billion at the turn of the millennium.[[1345]](#footnote-1345) However, as of 2014, total UK consumer spending equalled approximately £378 billion.[[1346]](#footnote-1346) Ethical consumption, therefore, even broadly defined to include those items that enhance product functionality such as energy efficient boilers and rechargeable batteries,[[1347]](#footnote-1347) as contained within the aforementioned Ethical Consumer Markets Report, remains a small percentage of the UK’s total consumer expenditure. However, over and over again, consumer surveys paint a different picture. For example, research shows that consumers claim they are willing to pay a premium for products produced under fair trade conditions.[[1348]](#footnote-1348) More specifically, 87% and 84% of UK and US consumers respectively stated they would be willing to pay an increased amount for tea and coffee that has been certified as being free from modern slavery,[[1349]](#footnote-1349) a key claim of the Fairtrade certification scheme.[[1350]](#footnote-1350) Yet demand for Fairtrade Coffee within the global north appears to have plateaued, unable to achieve more than 3 or 4 percent of total consumption.[[1351]](#footnote-1351)

The disconnect between that which consumers claim they will do and what they actually do has been termed the ‘attitude-behaviour’[[1352]](#footnote-1352) or ‘ethical-purchase’[[1353]](#footnote-1353) gap. Although the research in this area varies widely in terms of product, specific ethical concern, sample, and duration between saying and doing, it is clear the majority of studies[[1354]](#footnote-1354) confirm the existence of such a ‘say-do’ gap.[[1355]](#footnote-1355) Whilst quantification of the gap varies, and calls for more precise measurement exist,[[1356]](#footnote-1356) it is clear that the level of disconnect between a consumer’s words and deeds is significant. By way of illustration, a study by Futerra on behalf of the UK Government’s Department for Environment, Food and Rural affairs, found that of the 30% of consumers that stated they would make ethical purchases, only 3% actually did.[[1357]](#footnote-1357) This is in spite of a selective bias within much of the research whereby locales or situations likely to contain ethically minded individuals are actively selected by a study[[1358]](#footnote-1358) or alternatively, within a random selection, are more likely to participate.[[1359]](#footnote-1359)

The short explanation for the existence of the attitude-behaviour gap is a lack of commitment[[1360]](#footnote-1360) on behalf of the consumer. Social pressures leads the individual to signal their virtue by providing socially acceptable responses to surveys that do not necessarily reflect their true beliefs. As Adam Smith wrote in the Theory of Moral Sentiments, "Man naturally desires, not only to be loved, but to be lovely."[[1361]](#footnote-1361) However, the issue cannot be put down to social desirability bias[[1362]](#footnote-1362) alone. In order to understand the nature of this disconnect and the barriers to ethical consumption more precisely, a more detailed analysis of the purchase decision is required.

**7.2.1 The Heterogeneity of the Consumer**

It is clear that there is no such thing as a ‘typical’ ethical consumer.[[1363]](#footnote-1363) Most obviously, consumers may differ on what they consider to be ethical consumption.[[1364]](#footnote-1364) This reflects the subjective nature of their utility function. What one person deems to be of high ethical importance may differ to that of another. Indeed, the consumer may not care about ethical consumption at all. This lack of consensus is reflected within the empirical research in this area. Some studies show consumer perceptions of human rights and labour conditions to be the most important *ethical* consideration when making a purchase,[[1365]](#footnote-1365) whilst others cite other factors such as animal welfare[[1366]](#footnote-1366) to be the highest ethical concern. Inconsistent findings within the research shed little light upon this from a demographic perspective. Although some studies highlight the significance of gender,[[1367]](#footnote-1367) age,[[1368]](#footnote-1368) affluence,[[1369]](#footnote-1369) and educational level[[1370]](#footnote-1370), others report the relative unimportance of such factors in determining ethical concern.[[1371]](#footnote-1371)

Linked to this observation are the cognitive processes that shape consumer demand. According to Hunt and Vittel’s widely accepted[[1372]](#footnote-1372) and empirically tested[[1373]](#footnote-1373) General Theory of Marketing Ethics,[[1374]](#footnote-1374) as applied to the study of the ethical consumer, the individual may make an ethical judgment which advises his or her intention and then, to a certain extent, his or her behaviour. This ethical judgment is based upon a cognitive assessment of the innate moral correctness of one’s behaviour (deontological evaluation) along with a calculation of the potential consequences of this behaviour (teleological evaluation).

Deontological evaluations are dictated by the individual’s ‘core social values’[[1375]](#footnote-1375) and are thus based on cultural norms and personal characteristics and experiences. As such they tend to remain relatively static[[1376]](#footnote-1376) and while they have the potential to evolve over time, equally they may not.[[1377]](#footnote-1377) Linked to this is the notion of the consumer as a citizen and the argument that societal-based obligations may exist for the consumer to act ethically.[[1378]](#footnote-1378) A person’s choices may not merely be determined by their own self-interest[[1379]](#footnote-1379) but that of society. However, this clearly depends on the particular society the consumer has been shaped by.[[1380]](#footnote-1380) This is of particular concern in regards to the increased purchasing power within developing markets, where, despite a far lower incident of empirical research,[[1381]](#footnote-1381) a reduced consumer concern for ethically sourced products appears evident.[[1382]](#footnote-1382) This may be linked to lower incomes levels within a less advanced consumer economy. As Pickles and Zhu comment, it is difficult to imagine a model of regulation that ultimately relies on the market for its enforcement operating effectively in societies in which consumer awareness is still developing.[[1383]](#footnote-1383) As will be illustrated, this observation is even more damning when applied to consumers in developed countries whereby few people shop ethically despite knowing it is the right thing to do.

Teleological evaluations, however, are likely to vary between individual purchases made by a particular consumer based upon the extent to which consequences are identified and appreciated.[[1384]](#footnote-1384) This element of ethical judgment can be linked to the moral intensity assigned by the individual to the ethical issue in question.[[1385]](#footnote-1385) A range of consumer studies[[1386]](#footnote-1386) use Jones’ model of moral intensity[[1387]](#footnote-1387) in outlining six factors that inform such calculations.[[1388]](#footnote-1388) These factors may be summarised as the magnitude, likelihood and immediacy of adverse consequences, along with the extent to which the adverse effect is concentrated on a small number of ‘victims’, the proximity of any effect to the decision maker, and finally, the level of social consensus in determining an activity to be ethically wrong. An overarching issue in this area is a commonly held belief in a collective action problem. Put simply, a belief that one individual cannot make a difference[[1389]](#footnote-1389) to the negative consequences of big business due to the “sheer scale of global bads.”[[1390]](#footnote-1390) Such a belief significantly undermines the prospects of responsible consumerism, and highlights the importance of coordinative action, discussed at 7.3.

**7.2.2 The Significance of Competing Demands**

The disclosure-based approach as taken by the MSA aims to enhance the flow of information to the consumer. Underlying this approach is the idea that ability of ethical consumers to ‘vote’ for more ethical production has been tempered by a lack of consumer knowledge. Unfortunately, this does not appear to be based on the reality of the purchase decision and the competing demands placed upon the consumer in making it.

An individual possesses a limited amount of cognitive processing power[[1391]](#footnote-1391), a fact that highlights the significance of planning[[1392]](#footnote-1392) and information recall[[1393]](#footnote-1393) to any final purchase decision. Yet much consumption is an everyday affair[[1394]](#footnote-1394) involving little planning other than perhaps a vague and provisional shopping list and the choosing of one product at a time. Furthermore, the ability to recall the social attributes of a product has been shown to be lower than those relating to brand, price and functionality.[[1395]](#footnote-1395) Branding, therefore, appears to be crowding out salient ethical features of products. As has been observed, the majority of research in this area does not give sufficient credence to the context of any purchasing decision and in particular fails to consider the significance of ‘trade-offs’[[1396]](#footnote-1396) or ‘competing demands’[[1397]](#footnote-1397) made at the point of consumption between competing pressures. In making this observation Devinney, Auger, and Eckhardt cite the 1971 Darley-Batson experiment, a modern re-examination of the parable of the Good Samaritan conducted at Princeton University.

The Darley-Batson experiment involved recruitment of a number of seminary students to give a lecture on either their motives for choosing to study theology or about the biblical story of the Good Samaritan. The notice given to the students upon arrival was varied with some students told they were running late and others told that they were early. The lectures were to be given in a different building that involved a short walk to access. On the way, each student would encounter an actor enlisted by the experiment to lie slumped in an alley coughing and groaning. It was found that contrary to expectations, the content of the speech made no difference to the likelihood of the students stopping to help. What mattered significantly was whether the student was under a time pressure with 60% of those running early stopping to help, but only 10% of those students running late coming to man’s aid.[[1398]](#footnote-1398)

Situational factors are thus arguably extremely important to the final purchase decision and these factors often require some element of trade off. In the experiment above, time was the key factor, as it may be to a shopper who has just popped into the local convenience store to make a purchase. Consumers focus on the positives of a chosen option, most likely that brand which they buy regularly, and distort information regarding alternatives both before and after a purchase. [[1399]](#footnote-1399) Yet any purchase decision, even the decision not to purchase, may involve perceptions of trade off. As the decision not to purchase anything is a more committed decision than the purchase of an ethical alternative,[[1400]](#footnote-1400) a consumer is more likely to opt for substitution. However, it has been shown that consumers are in general reluctant to sacrifice quality or functionality for ethical considerations.[[1401]](#footnote-1401) Perceptions of quality are heightened by the use of corporate branding. Against the marketing resources of these well-established brands, ethical alternatives may be perceived as inferior in a variety of performance dimensions.[[1402]](#footnote-1402) Branding could, in essence, trump ethical credentials. A further barrier is the typically habitual nature of human behaviour,[[1403]](#footnote-1403) which means that once a regular consumer of a particular brand, in many cases a consumer will stick with it.

**7.2.3 The Significance of Price**

It seems intuitive that ethical production will entail higher costs. It follows that ethical production may be reflected in a higher price at the checkout. Yet it is also specifically incorporated in the majority of surveys on the intents of ethical consumers with the typical question being “would you pay more for an ethical product?” However, despite frequent denials in these surveys, perhaps the greatest issue for the majority of consumers regards the cost difference between a standard product and its ethical alternative.[[1404]](#footnote-1404) This appears to be particularly true for frequently purchased items.[[1405]](#footnote-1405) Yet the line between frequent and infrequent purchases is blurring with fast fashion and regular product updates increasing the regularity of consumption. American Apparel’s bankruptcy in 2015 is illustrative of the difficulty faced by ethical producers with the company’s target market of ‘young shoppers less keen’ to pay the higher prices associated with ethically produced clothing.[[1406]](#footnote-1406)

Affluent societies possess a greater scope for ethical consumption because individuals have to worry less about meeting their basic needs[[1407]](#footnote-1407) yet the trade-off between buying ethically and saving money for something else is a prevalent factor for consumers regardless of where they reside. Miller offers a more honourable rationale for rejecting an ethical purchase in order to act morally for the benefit of one’s family[[1408]](#footnote-1408) yet it would be rather naive to suggest that this is always the case. For instance, a study by Davies, Lee and Ahonkai found that ethical concerns relating to the purchase of luxury goods were significantly lower than for commoditized purchases.[[1409]](#footnote-1409) This undermines the rationale of necessity as a justification for a lack of ethical concern.

**7.2.4 The Use of Available Information by Consumers**

A 2011 survey conducted by Marketing Magazine, found that 74% of UK consumers wanted to know more about the behaviour of a company prior to making a purchase.[[1410]](#footnote-1410) However, many consumers do not actively seek information about a product or brand even where it is available.[[1411]](#footnote-1411) A study by Boustridge and Carrigan found that where awareness of unethical corporate activity was low, not one participant reported that an increased level of information would alter their own, non-ethical purchasing behaviour.[[1412]](#footnote-1412) Indeed, even where such information is communicated to the consumer in a way that requires little cognitive process, such as via point of sale signs or labelling schemes, such individuals do not necessarily act upon it. For example, a recent field experiment in Germany illustrated that when the price of Fairtrade coffee was reduced for a three-week period, demand increased[[1413]](#footnote-1413) but neither the increased provision of Fairtrade information via enhanced Fairtrade labelling nor the use of visual appeals through the use of display signs [[1414]](#footnote-1414) led to any change in demand. Furthermore, and perhaps most damningly, consumers may already be reasonably well informed and able to discuss social issues alongside those related to features and functionality, yet still not purchase ethically. [[1415]](#footnote-1415) Indeed the possibility for information overload and bombardment has been identified by a number of writers[[1416]](#footnote-1416) an issue exacerbated by the proliferation of alternative corporate standards.[[1417]](#footnote-1417)

Even where cost is excluded from the equation and information is provided the consumer may still not be relied on, perhaps due to perceptions of reduced quality as outlined previously. A study by Kimeldorf et al investigated the purchase behaviour in relation to athletics socks in Detroit.[[1418]](#footnote-1418) The socks were stacked in two racks adjacent to each other. One rack had a sign that stated: “Buy GWC . . . Good Working Conditions” and contained an explanation that the socks in that rack were not produced using child labour or in sweatshop conditions. Each pack of socks in this rack was labelled with a “GWC.” The other rack contained socks that were identical in every way but were not labelled or signposted. Even though there was no difference in price between the two options, only 49% of consumers took the ethical option.

Finally, amongst the ethical consumer community, the lines appear blurred. A recent survey amongst readers of Ethical Consumer magazine found that 67% of respondents thought that the ethics of the company are more important than whether the garment is 100% ethically produced.[[1419]](#footnote-1419) Such a perspective arguably reinforces the incentive for companies to present themselves as being ethical in order to safeguard against a risk of a drop in consumer demand. In other words, CSR, as a means to influence perceptions or ‘position’[[1420]](#footnote-1420) the company as a positive force can act as barrier to ethical purchase decisions. Indeed, it is no coincidence that many of the early champions of CSR operated the more controversial of business sectors.[[1421]](#footnote-1421)

In summary, for the majority of consumers, the attitude-behaviour gap illustrates that even if they do honestly care about corporate ethics, they may not care enough about it as much as they care about functionality and price. The combination of a supply side business model that continuously aims to minimise costs and a demand side, consumer base that prioritises low prices leaves little room for consumer driven ethical corporate conduct outside of niche market segments. However appealing the concept of the consumer as a ‘voter’ to determine society’s acceptance of productive practices may be, is ultimately based on an idealised perspective of the individual that overlooks the many psychological, social and economic barriers to ethical consumption.

**7.3 The Potential for Coordinated Ethical Consumer Activism**

It is accepted that *some* ethical consumers do exist. In a minority of situations, consumers who feel particularly strongly about a certain issue[[1422]](#footnote-1422) may make the effort to overcome some of the hurdles discussed previously. For example, although they may acknowledge that their choice to buy or not may have little impact, they may choose to do so regardless. For consumers in these situations, the often vague and inaccessible language frequently used within corporate disclosures in this area may be a barrier to direct engagement.[[1423]](#footnote-1423) This highlights the significance of the role of civil society, and more specifically, ethical consumer pressure groups, acting within an interpretative role. The dissemination of accessible and targeted CSP information forms a key role undertaken by such groups. Indeed, it arguably forms the basis of their overarching purpose to address the collective action problem faced by individual ethical consumers.

In a minority of instances, active ethical consumers can make their feelings felt, as exemplified by the market for niche products outlined previously. However, in terms of maximising the potential impact of purchasing power on CSP, the most significant weapon in the consumer’s arsenal is the boycott.[[1424]](#footnote-1424) A consumer boycott may be defined as "an attempt by one or more parties to achieve certain objectives by urging individual consumers to refrain from making selected purchases in the marketplace."[[1425]](#footnote-1425) As effective boycotts require widespread participation,[[1426]](#footnote-1426) the most successful are typically those resulting from a coordinated approach undertaken, in most cases, by civil society. Concerted campaigns against, for example, Barclays Bank in failing to withdraw from apartheid South Africa,[[1427]](#footnote-1427) or Shell for its plan to sink the Brent Spar oil platform at sea,[[1428]](#footnote-1428) have had a significant impact on the target firm. Perhaps the ‘poster boy’ for consumer action, however, was the international boycott of Nike in the 1990s.

Following an exposé of working conditions in Nike supplier factories in 1991, Nike was one of the first companies to introduce a corporate code of conduct yet did nothing to monitor the expectations therein. Following a series of public scandals, including the use of child labour in Pakistan and factory workers being exposed to toxic fumes in Vietnam,[[1429]](#footnote-1429) the issue received growing attention by consumers across the world. The boycott was carefully designed to impact on the company’s brand, serving to expand consumer activism,[[1430]](#footnote-1430) notably amongst the key market of US college students. The short term impact of the boycott was a fall in Nike’s sales of almost 8%, together with a 15% reduction in the company’s share price. The real success, however, was the subsequent acknowledgement by the firm of its role in facilitating the exploitation of workers in its supply chain and the attempt to monitor supplier compliance with its code of conduct through widespread use of company audits.[[1431]](#footnote-1431) Although the audit approach taken by many companies is critiqued in chapter 4, it is important to understand that Nike was a front-runner in doing anything about its supply chain. As such, the long term impact of the boycott was the company’s transition, over the years, to what might be termed a market leader.[[1432]](#footnote-1432)

Nike was targeted because it was one of the best-selling brands in the world and had repeatedly denied any responsibility for malpractice within its supply chain[[1433]](#footnote-1433) yet part of the consumer outrage was arguably linked to the misleading picture the company had painted of its social performance. For example, in 1997, the company published a review which painted Nike in a highly favourable light, yet the review was subsequently found to contain key omissions and reflected a very soft investigative approach.[[1434]](#footnote-1434) In the same year, Nike’s CEO, Phil Knight, publically committed to a number of projects to improve conditions within the supply chain. Yet a report on their impact concluded that the projects had been of “little benefit to Nike workers”, “helped only a tiny minority or else have no relevance to Nike [supplier] factories at all.”[[1435]](#footnote-1435) According to Leila Salazar, corporate accountability director for Global Exchange, Nike had “continued to treat the sweatshop issue as a public relations inconvenience rather than as a serious human rights matter.”[[1436]](#footnote-1436) Indeed, legal action was attempted by disgruntled consumers in California[[1437]](#footnote-1437) based on the company’s misleading CSR communications more broadly. Certainly, consumers have been found to constantly question the legitimacy of claims made by companies as regards their supply chain practices.[[1438]](#footnote-1438) As such, the ability to disprove inaccurate corporate communications may serve as a powerful mechanism to stimulate consumer action. Moreover, it would provide a more active role for the consumer within the CSP regulatory process beyond the purchase decision, which it will be argued in chapter 10, could serve to raise awareness of their significance in enhancing CSP.

**7.4 The Potential for UK Consumers to Ensure the Accuracy of Disclosure**

The active ethical consumer may be incentivised to purchase a particular product or not dissuaded from doing so, based upon the information made available. In other words, the range of situations in which consumers may act on ethical principles may be expanded as a result of CSP information. For those consumers who utilise CSP disclosures to inform a purchase decision, a key issue relates to the accuracy of the information presented to them. This is particularly pertinent as regards to access and use of such information by civil society as the coordinators and stimulators of consumer action. However, the MSA contains no mechanisms in order to verify the information provided within a modern slavery statement. The possibility exists therefore for inaccurate CSP information to mislead the active ethical consumer, both within the MSA and within disclosures more generally, most obviously within corporate codes of conduct. In both cases, the potential exists for media or civil society investigation to question the veracity of what has been stated or committed to. As such, this section considers the potential for the consumer to utilise their legal rights to ensure the accuracy of such information ex post the purchase decision.

As with the MSA and CTSCA, much consumer law has sought to address informational asymmetries between producer and consumer.[[1439]](#footnote-1439) The EU Unfair Commercial Practices Directive 2005 (UCPD)[[1440]](#footnote-1440) aims to prevent business practices that distort the economic behaviour of consumers through impairing their ability to make an informed decision, resulting in a purchasing decision that they otherwise would not have made.[[1441]](#footnote-1441). The Directive has been implemented in the UK by the Consumer Protection from Unfair Trading Regulations 2008 (UTRs) as amended by the Consumer Protection (Amendment) Regulations 2014. [[1442]](#footnote-1442) A commercial practice is held to be misleading “if it contains false information or if it is likely to mislead the average consumer[[1443]](#footnote-1443) in its overall presentation.”[[1444]](#footnote-1444) As such, the law here provide for two types of misleading actions that are potentially relevant to this discussion. The first of these is the failure by a trader to comply with a commitment contained in a code of conduct,[[1445]](#footnote-1445) and the second to ‘misleading information generally.’[[1446]](#footnote-1446) These will be considered in turn, with the latter considered in the context of misleading information within a modern slavery statement. By placing the MSA within the context of consumer law, a greater emphasis is arguably attached to the accuracy of the information provided therein.

**7.4.1 The Applicability of Consumer Law to Misleading CSP Disclosures within a Code of Conduct**

A code of conduct is defined within the Regulations, as “an agreement or set of rules (which is not imposed by legal or administrative requirements), which defines the behaviour of traders who undertake to be bound by it in relation to one or more commercial practices or business sectors.”[[1447]](#footnote-1447) According to the guidance “the average consumer would expect code members tosell products which comply with their code [of conduct], and is likely todecide to buy them on this basis.”[[1448]](#footnote-1448) This is inarguably a good start. However, the Regulations go on to provide that misleading conduct requires a failure to honour a commitment that is “firm and capable of being verified and is not aspirational which is made in a code of conduct where the trader has undertaken to be bound and indicates that he is bound by it in commercial practice.”[[1449]](#footnote-1449) As Chiari observes, the imposition of such conditions reflect a highly restrictive approach by the EU to the applicability of codes of conduct to the issue of misleading corporate social practice.[[1450]](#footnote-1450)

Firstly, although attempts have been made to mandate firm and verifiable commitments in commercial speech,[[1451]](#footnote-1451) they remain far from the norm. As is the case within the MSA statements examined in chapter 8, the use of vague or aspirational commitments, particularly as regards the supply chain, are common within many codes of conduct.[[1452]](#footnote-1452) Secondly, the need for a firm to indicate that it is bound to those commitments undertaken in a code of conduct may prove difficult in practice. This is particularly so given the guidance exemplifies such an indication through citing the use of certification logos and labels within a company’s advertising material.[[1453]](#footnote-1453) This view appears to differentiate a code of conduct from a firm’s marketing practices, yet arguably both can play a part in enhancing corporate image. In his detailed study, Ruhmkorf contends that the utilisation of a website for the purpose of outlining a firm’s CSR commitments via its code of conduct and the facilitation of online shopping *may* qualify as an indication to be bound within commercial practice.[[1454]](#footnote-1454) However, it must be questioned why such a prevalent and obvious example was not utilised within the guidance.

Article 11 of the Unfair Commercial Practices Directive requires that the Member States introduce “effective and adequate” means to combat unfair commercial practices.[[1455]](#footnote-1455) Discretion is thus given to each state in setting the penalties for non-compliance, though the penalties must be effective, proportionate and dissuasive.[[1456]](#footnote-1456) Although the UK law has been strengthened by the availability of a private right to redress, as discussed in the following section, this does not appear to have been extended to cover misleading information within a code of conduct. Here, as no mention of the remedy is made in the amendments, the remedy is seemingly restricted by the original 2008 Regulations to injunctive civil action.[[1457]](#footnote-1457) This would allow a consumer to apply to the court to order the removal or amendment of misleading CSP information. However, an injunction may not prevent further corporate misinformation by the firm. Moreover, the risk of costs in seeking one may dissuade consumers from even trying.

**7.4.2 Modern Slavery Statements and ‘Misleading Information Generally’**

As examined in chapter 8, the language of commitment found within a small number of ‘market leader’ MSA statements are arguably firm and verifiable. This is particularly the case where reference is made to a specific social certification standard. It is unlikely that the provisions on codes of conduct could be extended to apply beyond a code of conduct given the specificity of the terminology used.[[1458]](#footnote-1458) However, the possibility remains that redress for inaccurate content within an MSA statement could fall under the provisions related to ‘misleading information generally.’[[1459]](#footnote-1459)

According to the guidance, actions are misleading if they contain “false information” or are “deceiving, or are likely to deceive the average consumer” and “the average consumer takes, or is likely to take, a different decision as a result.”[[1460]](#footnote-1460) Given the perspective taken by the law as regards the definition of the average consumer in respect to misleading codes of conduct, it is conceivable that these two factors could be satisfied. However the false or deceiving information is restricted to a list of “matters” provided.[[1461]](#footnote-1461) The most relevant of these matters appears to be protection against misleading information as to “the extent of the trader’s commitments”.[[1462]](#footnote-1462) Unfortunately, neither the regulations nor the guidance provide any further information on the interpretation of this matter, and no cases have been brought to test the law.

A private right of action for damages is available where a consumer can show that the misleading practice generally was a significant factor[[1463]](#footnote-1463) in a purchase decision.[[1464]](#footnote-1464) Again, the question of whether a consumer with strong ethical convictions may be able to satisfy this requirement is yet to be tested. Damages may only be claimed where the loss was reasonably foreseeable[[1465]](#footnote-1465) at the time of the misleading practice. Moreover, damages are likely to be modest[[1466]](#footnote-1466) and only payable upon proof of actual loss, alarm or distress. This may be difficult for a claimant to establish. Indeed, the guidance to the Amendments goes on to state that: “Damages for distress are most likely to be appropriate in respect of aggressive practices”[[1467]](#footnote-1467) which may serve to restrict their availability to misleading information. A consumer does not have the right to a claim in damages if the trader can prove that the misleading practice was due to a reliance on information supplied to the trader by another person, or was due to the act or default of a person other than the trader.[[1468]](#footnote-1468) This would appear to apply to actors within a company’s supply chain. This defence would only apply where the trader took all reasonable precautions and exercised all due diligence to avoid the misleading action.[[1469]](#footnote-1469) A greater understanding of what would be deemed reasonable would require consideration by the courts. However, no cases have been brought in the UK in relation to a misleading CSP disclosure or even in relation to a code of conduct violation. A key reason for this is the expense of litigation in the UK and relatedly, the procedural rules of the UK civil law.

**7.4.3 The Untested Boundaries of Consumer Law**

The EU Unfair Commercial Practices Directive acknowledges the significance of “organisations … having a legitimate interest in combating unfair commercial practices”,[[1470]](#footnote-1470) yet the procedural rules of court are left to the member state. As such, although consumer rights groups have a long history within the UK,[[1471]](#footnote-1471) the legal rights afforded to them are extremely limited. A small number of independent consumer bodies were given additional powers under the Enterprise Act 2002[[1472]](#footnote-1472) but these essentially amounted to a fast tracked complaint to the Competition and Markets Authority (CMA).[[1473]](#footnote-1473) These representative groups have no standing within the UK’s system of civil law and thus no ability to utilise strategic litigation to test the boundaries of the law. As such, the dream of Michael Young, founder of the Consumers’ Association, of organised consumers acting alongside organised labour and organised capital as a third force for the UK’s citizenry,[[1474]](#footnote-1474) appears to be a long way from being realised.

Given the UK’s lack of locus standi for consumer rights organisations, it is unsurprising that the closest the Directive has come to being tested in terms of CSR related corporate disclosures has been within two other European jurisdictions that have more favourable rules in this regard. Even here, however, the extent to which consumer law may be used to regulate corporate conduct is very limited.

In Germany, the Hamburg Consumer Protection Agency (HCPA), as supported by the European Centre for Constitutional and Human Rights (ECCHR) and the Clean Clothes Campaign (CCC), brought an action against Lidl before the courts in 2010.[[1475]](#footnote-1475) Following an advertising campaign by the supermarket retailer, it was claimed that the company advocated for fair working conditions, only used selected suppliers for its non-food orders, and opposed human and labour rights violations in its supply chain. However, with reference to an undercover research generated by the ECCHR and CCC suggesting the violation of labour rights within Lidl’s supply chain,[[1476]](#footnote-1476) the HCPA alleged that such claims were ultimately misleading. Unfortunately, in terms of bringing clarity to the law, the case was settled out of court whereby Lidl agreed to withdraw the relevant public claims and advertisements, and thus, as with any consent decree,[[1477]](#footnote-1477) no admission of guilt was made.

A more recent case brought in France by two civil society organizations, Sherpa and ActionAid France, against Samsung Global (and its French subsidiary, Samsung Electronics France) has the potential to add to the level of understanding surrounding this area of law. In this case, statements made by Samsung in relation to the ethical nature of its productive practices are alleged to constitute misleading advertising and thus a deceptive trade practice. As with the Lidl case, evidence was submitted that suggested the firm’s claims did not correspond to the labour and health and safety abuses uncovered at factories in China and South Korea.[[1478]](#footnote-1478) Although the Public Prosecutor decided to close the preliminary investigation on two occasions, in one case following a hearing reportedly limited to Samsung France’s senior management team and the other without any investigation at all,[[1479]](#footnote-1479) certain evidential developments led to the two CSOs opting to attempt to bring the action once again to the courts in June 2018. The outcome of this third attempt has not yet been decided. However, in November 2018, following a mediation procedure, Samsung recognized that it has exposed its South Korean factory workers to toxic chemicals and agreed to pay compensation to those employees suffering from related diseases.[[1480]](#footnote-1480) It is possible that this acknowledgement may influence the opinions of French courts, though also paves the way for a potential settlement, again limiting an understanding of the scope of the law.

**7.5 Conclusion**

This chapter has considered the potential for the consumer as a mechanism by which to enforce adequate CSP. The disclosure based regulatory approach relies on the ethical demands of the consumer to enforce compliance. Based on the notion of consumer sovereignty, responsibility for the productive process is shifted to the consumer in the hope that the capitalist model of production may be made ethical.[[1481]](#footnote-1481) Unfortunately, as this chapter has considered, a number of social, cognitive, and psychological barriers serve to prevent the consumer dictating the terms of corporate behaviour in line with regulatory expectations. The broader aim of this chapter was not to deny the existence of ethical consumers but to cast doubt on the reliability of positioning them to play a central role within a regulatory framework.

Yet, in acknowledging the *potential* for organised consumers in a minority of instances to affect corporate behaviour, this chapter has observed a further barrier. The restrictive scope of consumer law and its remedies limit the legal rights for consumers to ensure corporate adherence to ethical commitments made in relation to the supply chain. As the Nike example illustrates, corporate disclosure on CSP may not always be accurate and is largely unverified. This is particularly problematic in relation to the disclosure-based approach taken by the MSA as it aims to force companies to inform the consumer market. The difficulty in testing the scope of the law is exacerbated due to the cost and restrictive nature of locus standi within the UK. There is no suggestion that consumer enforcement of CSP is of concern to the present government.[[1482]](#footnote-1482)

**Chapter 8: An Empirical Analysis of Modern Slavery Statements**

1. **Introduction**

The voluntary and disclosure-based regulatory approaches to CSP encapsulating the issue of forced labour in the supply chains were outlined in chapters 4 and 5. Chapters 6 and 7 have questioned the ability of these market-driven approaches to rely upon investor and consumer pressure to drive companies to internalise their social costs. This chapter aims to illustrate the weakness of a ‘soft’ approach to the problem through a large scale study of modern slavery statements generated in response to s54 of the UK’s Modern Slavery Act 2015 (MSA). As the largest study undertaken to date into what I have termed ‘suggested compliance’ with the MSA, it is hoped that this study of the first set of statements created following the implementation of the Act will also provide a benchmark for future researchers in this field.

**8.1 Aims of Empirical Study**

The voluntary nature of the vast majority of regulation in this area creates difficulty for the researcher in investigating the corporate response to the issue of forced labour within the supply chain. It is contended that the UK Modern Slavery Act’s (MSA) requirement for a mandatory statement of disclosure provides an opportunity to examine corporate efforts in this area. Although it is acknowledged that the focus of this study is limited to corporate disclosure, it is submitted that the practicalities in accessing a large dataset pertaining to *actual* action is beyond this, and perhaps any other, researcher. The aim is thus to provide an insight into the level of effort as *suggested* by the corporate response to the MSA.

It is important to contextualise the findings of the research within the broader context of this thesis. In chapter 2, it was argued that the sourcing decisions of companies have led to an environment conducive to the use of forced labour within the supply chain. Moreover, as noted above, it has been suggested that the market alone is an inconsistent and unreliable mechanism to enforce CSP. This study thus considers corporate responses to the MSA in the light of a causal relationship existing between a company’s procurement and the use of forced labour within the supply chain.

In order to do this, the study specifically aimed to provide insights into how organisations have complied with the procedural requirements and the substantive aims of s54 of the MSA. Procedurally, as considered in chapter 5, a disclosing company is in compliance with the MSA so long as it produces a statement, which has been signed by a director (or partner) and is accessible from the company’s website. However, as also outlined in chapter 5, the Act also provides that a modern slavery statement *may* provide details of its efforts in relation to a number of specific areas of potential relevance to the prevention of modern slavery in the supply chain. These suggested areas of disclosure relate to whether information about the supply chain, due diligence processes, identified risks and the management of these risks, staff training, and an assessment of its effectiveness (which may be based on such performance indicators as it considers appropriate) has been disclosed. Substantively, and thus more significantly,[[1483]](#footnote-1483) the content of these suggested areas of disclosure must be considered beyond their relevance to simple procedural compliance. As the Act is ultimately intended to address the social problem of forced labour within the supply chain via enhancing anti-slavery CSP, it must also be considered to what extent the statements suggest that firms have adequately responded with this broader substantive objective. The level of disclosure provided and the content therein thus allows for insights to be gleaned into a company’s willingness to disclose the actions being taken to address the issue. These individual factors may be grouped under the header of what I term ‘suggested compliance’. Suggested compliance may therefore be defined as the extent to which those policies and procedures disclosed by an organisation suggest compliance with the aims of a particular set of requirements, rules, or legislation.

**8.1.1 Restatement of Research Question**

The aim of the empirical research undertaken is to address the following research question:

*To what extent do the modern slavery statements, published in response to s54 of the UK’s Modern Slavery Act 2015, suggest that organisations have complied with the procedural requirements of the Act and its broader substantive aim to enhance anti-slavery CSP?*

**8.1.2 Ontological and Epistemological Position**

This empirical enquiry is broadly informed by the ontology of social constructionism and epistemology of interpretivism. Social constructionism may be described as “the view that all knowledge, and therefore all meaningful reality as such, is contingent upon human practices, being constructed in and out of interaction between human beings and their world, and developed and transmitted within an essentially social context.”[[1484]](#footnote-1484) Shared versions of knowledge[[1485]](#footnote-1485) are shaped over time by a constant process of revision[[1486]](#footnote-1486) in which a community of knowers[[1487]](#footnote-1487) are continuously negotiating meaning[[1488]](#footnote-1488) reflecting a collaborative notion of reality that is both a social product and a product of a specifically-situated society.[[1489]](#footnote-1489) Such an ontological position corresponds to an interpretivist epistemology which challenges the notion that reality is distinct from a person’s knowledge of it[[1490]](#footnote-1490) and highlights the significance of social interactions within their natural settings[[1491]](#footnote-1491) and the meanings ascribed to them.[[1492]](#footnote-1492) This position accords well to the corporate manipulation of public perceptions by CSP (or the impression of CSP) in an attempt to position themselves as positive actors within society, or at a minimum to attempt to deflect perceptions as regards the evils of big business. It follows therefore, that corporate disclosures, whether found within a firm’s CSR strategy or guided by legislation such as the MSA, may be perceived as interactions that serve to shape the nature of the social world.

**8.2 Document-Related Methods of Analysis**

The use of corporate documentation as a data source is a source of concern for the researcher. Indeed, as Forster warns, the interpretation of company documentation is invariably subjective and thus must be used with caution.[[1493]](#footnote-1493) However, corporate communication is not alone in its subjectivity. For individuals too, the motivations behind self-presentation are activated by the evaluative presence of other people[[1494]](#footnote-1494) and thus the researcher runs the risk of informants telling him or her what they want to hear.[[1495]](#footnote-1495) Indeed, according to Goffman, all human interaction is both meaning-laden and negotiated and thus must necessarily be understood as involving factors such as secrecy, ‘front’, and political gamesmanship.[[1496]](#footnote-1496) Taking this as a starting point, it follows that communication may be understood as shaping identity. From the perspective of society as a social construction, positioning theory has, in particular, been used to investigate the implicit and explicit patterns of reasoning that belies intercommunication,[[1497]](#footnote-1497) in the positioning of oneself and others within a socially-constructed reality. Clearly, a position may have direct moral implications with a person or group capable of “being located”, for example, as trustworthy or untrustworthy or ‘with us’ or ‘against us’.[[1498]](#footnote-1498) Yet the “stories people tell about themselves will differ according to how they want to ‘present’ themselves”[[1499]](#footnote-1499) thus it is clear that the positioning of oneself may therefore incorporate a process of deliberate ‘strategic positioning’ whereby the position sought may correspond to the achievement of a specific goal.[[1500]](#footnote-1500) As the scalability of positioning theory illustrates, such observations may be equally witnessed within the communicative interaction of individuals,[[1501]](#footnote-1501) organisations,[[1502]](#footnote-1502) or even states.[[1503]](#footnote-1503) In summary, it is accepted that the MSA disclosure statements may be used for the positive shaping of the corporate image, yet it is contended that this risk of subjectivity likely applies whatever the subject.

**8.2.1 Data Sources**

Although the UK government estimated that between 9,000-11,000 companies were required to report under the Act,[[1504]](#footnote-1504) no official list of the companies falling within the scope of the law and no public repository of modern slavery statements exist.[[1505]](#footnote-1505) As such, the data was collected from an unofficial independent registry managed by the Business & Human Rights Resource Centre, an independent civil society organisation based in the UK and US.[[1506]](#footnote-1506) Although no information is available as to the process by which the statements were gathered, the registry is highly respected.[[1507]](#footnote-1507) It is supported by a governance committee of a number of civil society organisations,[[1508]](#footnote-1508) and is recommended as the central repository of such statements by the Law Society, the ICCR (Interfaith Centre on Corporate Responsibility) and the BSCI (Business Social Compliance Initiative).

The analysis took as its dataset all the modern slavery statements available from this registry as of 12th of November, 2016.[[1509]](#footnote-1509) The registry spreadsheet contained 952 accessible statements. However, in 17 cases statements were merely duplicated in regards to different members of a corporate group and thus were discounted. In total therefore, the dataset comprised 935 modern slavery statements.

**8.2.2 Sample**

The vast majority of disclosing organisations in the sample were private sector commercial (‘for profit’) organisations. However, it is acknowledged that the dataset does contain a small number of public sector and not-for profit organisations namely NHS heath trusts, councils, universities, Universities purchasing consortia, Civil Society Organisations and Arms-Length Management Organisations (ALMOs) relating to the provision of social housing. 802 of the disclosing organisations cited their headquarters as being in the UK with 133 headquartered abroad.

The organisations were described within the registry as operating in the industrial sectors set out in Table 1 provided on the next page. Each sector has been designated with a letter ranging from A-Y in order to provide anonymised sectoral information where reference is made to the content of a particular modern slavery statement. Thus for example, there were 78 statements listed as being within the Agriculture/Food/Beverage sector which has been designated with the letter ‘A’. As such, each of the 78 individual statements found within the Agriculture/Food/Beverage sector were designated as A1 to A78.

*Table 1: Sectoral information of sample and designation key*

|  |  |  |
| --- | --- | --- |
| **Industrial sector** | **Number of statements** | **Designation** |
| Agriculture/Food/Beverage | 78 | A1 – A78 |
| Apparel & textile | 14 | B1 – B14 |
| Chemical | 19 | C1 – C19 |
| Conglomerates | 3 | D1 – D3 |
| Construction & Building Materials | 61 | E1 – E61 |
| Consumer Products / Retail | 63 | F1 - F63 |
| Finance | 40 | G1 – G40 |
| Furnishings | 8 | H1 – H8 |
| Garden/Landscaping | 1 | I1 |
| Health | 51 | J1 – J51 |
| Leisure | 6 | K1 – J6 |
| Manufacturing | 29 | L1 – L29 |
| Media/Publishing | 10 | M1 – M10 |
| Metals/Plastics/Base Metals | 7 | N1 – N7 |
| Natural Resources | 11 | O1 – O11 |
| Professional Services | 128 | P1 – P128 |
| Real Estate | 61 | Q1 – Q61 |
| Services | 154 | R1 – R154 |
| Shipping & Handling | 7 | S1 – S7 |
| Sports | 1 | T1 |
| Technology | 89 | U1 – U89 |
| Transport | 42 | V1 – V42 |
| Travel | 13 | W1 – W13 |
| Utilities | 38 | X1 – X38 |
| Ventilation Suppliers | 1 | Y1 |

**8.3 The Coding Process**

A key element of the coding process was the construction of a coding schedule which provides a transparent list of codes to be applied to each data item. The coding schedule thus illustrates how qualitative data has been converted into numeric data for the purposes of systematic content analysis. The creation of a coding schedule involved a series of revisions during the actual coding whereby relevant ‘questions’ of the data were added, removed, and amended as the process went on, necessitating the revisiting of data items to code against newly devised or revised criteria. The use of coding software (considered below) ensured that the coding schedule could be easily revised, and in making the large dataset more manageable, greatly aided its systematic application. The coding schedule was deemed adequate after approximately a third of the total dataset was analysed with the reliability of the coding enhanced through the researcher focusing exclusively and intensively on the coding process as the only task in progress. Although a need for some level of restraint in the creation of codes was acknowledged,[[1510]](#footnote-1510) a large number of codes were employed with the coding schedule and proved not to be problematic in its application. The list of codes and their respective frequencies is available to view within the coding schedule provided in Appendix A.

Following this initial phase of open coding culminating in the creation of the coding schedule, a systematic sorting phase was utilised in order to generate information relating to frequency. Checks were undertaken within this phase to ensure that data items had been coded accurately. It is here within the sorting and checking phases that the decision to use a computer-assisted approach to the coding is most obviously justified.

**8.3.1 The Use of Computer Assisted Qualitative Data Analysis Software**

A traditional paper-based approach was deemed inadequate given the large volume of the data set yet the decision to use Computer-Assisted Qualitative Data Analysis Software (CAQDAS) must be justified beyond mere practicality. The use of CAQDAS has been suggested to enhance the transparency and trustworthiness of the research process.[[1511]](#footnote-1511) Although Neumann and Coe[[1512]](#footnote-1512) highlight the risk of such software potentially obscuring significant nuances within the text analysed, with this in mind, a high degree of care was taken during the coding process in order to avoid simply ‘going through the motions’. Another issue is raised by Robins and Eisen[[1513]](#footnote-1513) in cautioning against allowing the software to drive the design of the research.[[1514]](#footnote-1514) In other words, the research should be designed to address the aims of the research and not by the capacities of the software available. It is submitted that any such deviation was avoided through determining the analytic objective prior to the coding process, and ensuring that the analytical process did not deviate from this overarching goal as set out by the research question. Indeed, prior to the coding process this researcher had no experience with CAQDAS so consideration of its functionality did not affect the research aims.

**8.4 Content Analysis**

The nature of a socially constructed reality founded on an interpretivist epistemological position necessitates a method tailored to understanding. However, such a method must provide sufficient evidence to both gain the reader’s confidence in the researcher and permit the reader to make an independent conclusion about its wider validity.[[1515]](#footnote-1515) The requirement for a structured form of enquiry led to the decision to apply content analysis to the dataset. Bryman highlights a number of advantages of content analysis as a research technique.[[1516]](#footnote-1516) From a practical perspective it is highly flexible and thus may be applied to a wide variety of unstructured, text-based information. Moreover, it enables the demonstration of transparency within the research and allows for ease of replication and the potential for follow up studies. Perhaps most significantly, the method permits information to be generated about groups within society to which access is to some extent restricted.

Content analysis typically involves a numerical representation of prevalence within the data. Where a category of meaning, or theme, within the data is identified based upon prevalence, the numerical representation of textual elements provides a means by which data may be identified, organised, indexed, and retrieved.[[1517]](#footnote-1517) The “actual number of times such units of relevant meaning occur … will indicate the significance of how important particular issues are perceived to be” with the context of the data.[[1518]](#footnote-1518) Content analysis has previously been described as a “research technique for the objective, systematic and quantitative description of the manifest content of communication”,[[1519]](#footnote-1519) yet it should not be dismissed, as it has been,[[1520]](#footnote-1520) as being merely quantitative. Indeed, the flexibility of a technique which may be “fruitfully employed to examine virtually any type of communication”[[1521]](#footnote-1521) permits the researcher to focus on either the quantitative or qualitative features of the communication under examination.[[1522]](#footnote-1522) Although the method of analysis generates a numerical output, this output should not be viewed as disjointed from the data itself, and instead should be understood as being representative of significance. These numerical representations of significance are thus typically exemplified and highlighted with reference to specific units of meaning extracted within the coding process in order to emphasise their link to the data through exemplification or a deeper consideration of meaning with respect to a particular data extract.

The process of content analysis allows for a hierarchical system of categorisation to be used.[[1523]](#footnote-1523) A category may incorporate a single code or include a number of sub-categories incorporating a grouping of codes and sub-codes. The categories thus allow for the grouping of codes into themes of meaning. A*nalytic categories*[[1524]](#footnote-1524) are defined prior to the coding process and thus may be identified deductively from the literature or from the research question itself. In contrast, *grounded categories* arise as a result of the coding process and are identified within the open phase of coding process which, strictly speaking,[[1525]](#footnote-1525) occurs prior to the sorting[[1526]](#footnote-1526) or axial[[1527]](#footnote-1527) phase of sorting codes to their corresponding categories.

Both analytical and grounded categories were used within the analysis with the codes therein also identified both deductively and inductively. In considering the issue of what I have termed ‘suggested compliance’ at the heart of the research objective, the issues of compliance with the procedural requirements of the Act (procedural compliance) and, so far as is suggested, compliance with the substantive aims of the Act (substantive compliance) were required to be addressed. The procedural requirements of the Act lent themselves to the deductive specification of categories prior to the coding process and so were categorised prior to the coding being undertaken. In contrast, in the analysis of substantive compliance, it was deemed more appropriate to allow for the identification of codes and categories inductively through the coding process. It was felt that predetermination of corporate action to this effect would be unduly restrictive on the investigative process. Indeed, allowing for the categorisation of meaning to emanate from the data itself permitted the identification of relevant yet unanticipated[[1528]](#footnote-1528) “dimensions or themes that seem meaningful”[[1529]](#footnote-1529) within the data without the straightjacket of a strictly predetermined set of codes and categories. It was acknowledged that ‘meaningfulness’ is governed by the overarching purpose of the research and thus a process of reflection was utilised to reflect on the possible ways the codes might later be used in the interpretation of data in order to answer the research question at hand.[[1530]](#footnote-1530) It may be stated that these inductive codes were thus ‘grounded’ both conceptually to the context of the study, and empirically, to the material itself.[[1531]](#footnote-1531)

**8.5 Findings and Discussion**

The following discussion considers the findings of the study in order to answer the overarching research question: To what extent do MSA statements suggest that organisations have complied with the procedural requirements and substantive aims of the UK’s Modern Slavery Act 2015?

The discussion will be structured as follows. First, a number of initial observations will be outlined that do not fall neatly within the structure of discussion as informed by the mandatory and suggested categories of the MSA yet are arguably relevant to the broader research question. Following this, an overview of procedural compliance will be provided as regards the mandatory and suggested requirements of the Act. The majority of the discussion, however, will focus on the findings of this study as regards the substance of the disclosures made within the suggested categories outlined in s54(5) of the MSA.[[1532]](#footnote-1532) There is therefore a focused consideration of the policy specifics provided within the statements, the disclosure of supply chain information and the identification of risk, along with its management through due diligence and staff training, and whether and how companies measured the effectiveness of the measures taken. Finally, a theme that emerged within the study will be considered: the apparent presence of market leaders in terms of apparent substantive compliance.

As part of the discussion reference will be made to the *statutory guidance* issued under s54(9) of the Modern Slavery Act 2015[[1533]](#footnote-1533) which “sets out the basic requirements of the legislation, as well as advice on what can be included in a statement to give assurance to those scrutinising the statements.” As part of the advisory content within the guidance document, disclosing organisations are referred to a number of external information sources which may be utilised by firms in their efforts to prevent modern slavery within the supply chain with links provided to the relevant online resource. Whilst some of these resources are merely listed at the end of the guidance notes,[[1534]](#footnote-1534) others appear more prominently within the text. For example, it is stated that “For detailed guidance on good practice with regards to due diligence organisations should refer directly to the UNGPs”[[1535]](#footnote-1535) with the OECD Guidelines[[1536]](#footnote-1536) referenced for ‘responsible business conduct’ more generally, and “other useful guides” emanating from the ETI,[[1537]](#footnote-1537) Verité[[1538]](#footnote-1538) and the Walk Free Foundation[[1539]](#footnote-1539) signposted repeatedly with the statutory guidance.[[1540]](#footnote-1540) It is contended that the availability and signposting of such resources to disclosing organisations rendered them relevant to the consideration of corporate efforts relative to what has been deemed standards of good practice. These prominently positioned sources of information are termed *associated guidance*. The purpose of their inclusion within the following discussion is therefore to provide greater insight into the extent of compliance as regards these standards along with the provision of context and an understanding of the technical impacts of corporate decision in this area.

**8.5.1 Initial Observations**

The majority of disclosing organisations within the dataset professed a strong commitment to the aims of the Act. Unfortunately, this level of commitment was not necessarily reflected in the effort and care taken in drafting the statements. Although the guidance to the MSA suggested that the statement should be “succinct” and noted that “it is not necessary for businesses to replicate the wording of an organisation’s policies on every issue directly in the statement”, it should “cover all the relevant points” and may “support the narrative in the statement by providing relevant links to a particular document or policy that is publicly available and already published on the organisation’s website.”[[1541]](#footnote-1541) Whilst some companies provided long and detailed statements (the most verbose contained 21781 words), the shortest statement contained a mere 83 words. The average number of words within a statement was arguably on the short side with a mean of 723 and a median of 588 words. It is also pertinent to note that “relevant links” to separate policy documents were very rarely used throughout the dataset. Moreover, the prevalence of statements incorporating spelling, punctuation, and grammatical mistakes, or unnatural repetition was surprisingly high (approximately 5%) especially given the large nature of the companies surveyed and the requirement for sign off at board level. Perhaps of even greater concern was the widespread use of duplicate text strings across the dataset which, in a small number of instances, comprised the vast majority of the statement. It is suggested that the use of such text strings could, at best, reflect the use of common legal advice but, at worst, could indicate a drafter simply duplicating elements of another organisation’s disclosure.

A second area that may be commented upon which may not be neatly categorised as strictly falling within an aspect of compliance as informed by the Act relates to observations made as regards the language used within the statements. In order to maintain objectivity throughout the coding process, the advice of Strauss was heeded. As such, the researcher submitted to “believe everything and believe nothing”.[[1542]](#footnote-1542) It follows that a conscious effort was made to resist the making of any judgment as to the plausibility of what was being claimed. This was reflected in a semantic approach to the data analysis being taken throughout the coding process whereby the explicit or surface meanings of the data items were utilised, and the data organised based on patterns of semantic content. Nevertheless, a number of semantic observations may be made as regards the selection of language content made by disclosing organisations. The use of positive language to espouse the success of a company or the quality of its product line occurred in approximately 12% of the statements. Even more noticeable was the apparent avoidance of negative language, relating to what a disclosing organisation had *not* done to prevent modern slavery, throughout the dataset. Indeed, although the Act permits companies to state that ‘no steps have been taken’, only a handful of statements reported as much. The same may also be stated as regards statements that reported that a particular action, such as training, had *not* been undertaken, or that KPIs had *not* been established to assess effectiveness. Relatedly, extremely few companies acknowledged that their own activities had the potential to contribute to an environment conducive to modern slavery despite such a possibility being clearly outlined within the statutory guidance.[[1543]](#footnote-1543) It is tentatively suggested that these linguistic observations give credence to critical perceptions linking a firm’s disclosures in this area to corporate marketing efforts.[[1544]](#footnote-1544)

Somewhat relatedly, in a significant number of cases attempts were made to shift perceptions regarding the responsibility for supply chain management, and thus, CSP. Some statements emphasised the reputation of its direct supply chain and a number of disclosing organisations companies “expect[ed] these entities to have suitable anti-slavery and human trafficking policies and processes in place” (e.g. F10, L27, R21). Such suppliers in some cases are described as “large multinational corporations” with one statement (G3) providing that they are “publicly listed entities that are subject to high levels of regulation and public scrutiny.” Other statements more directly highlighted the lack of “direct [company] control” (U15) with compliance being “ultimately our suppliers’ responsibility” (e.g. P25, P26, V14, V33). Indeed, a common text string that appeared in 16 different statements outlined that “It is not practical for us [the firm] to check any sub-contractors or suppliers to our suppliers.” In one case, the role of the host state was mentioned, with the statement outlining that it would only contract with overseas labour providers that were “approved by local government agencies.” (R34)

A small number of statements (3%) in some way acknowledged that a business model based on extensive outsourcing could be conducive to the increased use of modern slavery within the supply chain, as was argued in chapter 2. Some statements phrased this in general terms, outlining that “many businesses unintentionally encourage slavery and human trafficking through the procurement of products and services from the supply chain” (E33) whilst others made more specific reference to corporate policy with a common text string (11 statements) providing that the firm’s "purchasing practices which influence supply chain conditions … should … be designed to prevent purchases at unrealistically low prices, the use of labour engaged on unrealistically low wages or wages below a country's national minimum wage, or the provision of products by an unrealistic deadline.” A number of statements thus identified a potential link between “internal business procedures” (P98), “performance indicators” (V11) or “performance incentives” (V32) and the imposition of pressure on the supply chain which could lead to an increased risk of modern slavery use.

Moreover, a similarly small number *(*3%) of statements appeared to acknowledge the potential a company has to effect change within its supply chain. Within these disclosures, express terms such as “influence”, “leverage”, “reach” “under our control” or “opportunity” were used to signal the buyer-supplier relationship which in some cases was then linked to either the “purchasing power” of “organisations with significant resources” (Q31) or alternatively the “moral and ethical obligation” (W4, W7) to “play an active role in supplier development” (F33, P15, V14, V33) and “promote workers’ rights in … suppliers’ factories” (J35). Unfortunately, as the following discussion appears to show, this acceptance of responsibility does not appear to be reflected in the level of CSP in addressing modern slavery within the supply chain as suggested by the overall levels of compliance with the MSA. Finally, as will be considered, the presence of a number of market leaders was uncovered within the dataset.

**8.5.2 Overview of Procedural Compliance**

Given the limited mandatory requirements of the MSA, it was somewhat disconcerting that over 20% of the statements within the dataset did not appear to have been signed off at the highest level. The statutory guidance stated this top-down approach was required to “ensure senior level accountability, leadership and responsibility” and to give modern slavery “the serious attention it deserves” and “foster a culture in which modern slavery is not tolerated in any form.”[[1545]](#footnote-1545) Thus, a lack of verifiable board level approval suggests a lack of such ‘serious attention’ whether through a misunderstanding of the basic requirements of the Act or in the alternative, that the board had not been consulted and the statement not signed off. As a mandatory requirement, directorial signoff could be ordered by way of an injunction as provided for by s54(11) MSA. However, the injunctive power provided by the Act has to date not been used for this, or indeed any other, purpose.

As permitted by the government’s rejection of mandatory categories of reporting[[1546]](#footnote-1546) **a large proportion of the statements did not provide information in every category of suggested disclosure.** Although the MSA’s reporting was “specifically designed to minimise the burdens on business,”[[1547]](#footnote-1547) and thus did not mandate disclosure in each category, the government admitted that these areas of activity “should ideally be included in a slavery and human trafficking statement.”[[1548]](#footnote-1548) In terms of frequency, 65% of the statements reported the use of due diligence; 61% of the statements reported the use of training or awareness raising; 36% of the statements disclosed information about the supply chain; 18% of the statements provided disclosure surrounding the effectiveness of an organisations policies and procedures with 15% of statements utilising key performance indicators in the consideration of effectiveness. Taken alone, these figures are of clear concern, yet as will be considered in more detail below, even this overview significantly overstates the extent to which organisations had actually complied with the Act’s objectives.

**8.5.3 Compliance with Suggested Areas of Disclosure**

The following sections consider the disclosures made in relation to the suggested areas of disclosure outlined by the MSA. For clarity, the suggested area of disclosure and the relevant section (or sections) of the Act is provided in italics.

**8.5.3.1 Policy**

*s54(5)(b) policies in relation to slavery and human trafficking*

The 2015 statutory guidance stated that “Policies should be established and clearly communicated so that anti-slavery activity within a company and its supply chains becomes embedded as standard practice.”[[1549]](#footnote-1549) Arguably, in the absence of any separate policy, the modern slavery statement itself may be seen as a general statement of policy reflecting the disclosing organisation’s position on the issue. However, the guidance elaborated that it represents good practice for a zero tolerance approach for modern slavery to be built into contracts and represented in dialogue with suppliers.[[1550]](#footnote-1550) Yet the communication of an organisation’s policy to suppliers is frequently not considered. Indeed, the use of specific contractual controls related to the adherence to company policy on the issue as reported as being present or being implemented in just over 20% of the statements, whilst 15% only went as far as to request some sort of declaration or assurance of compliance from the supplier. Perhaps an even weaker response was found in many other disclosures which suggested that supplier management was based around the supplier simply being ‘expected’ or ‘encouraged’ to comply with the objectives of the Act with no further information provided.

A further issue regards the nature of a zero tolerance policy itself. Although the phrase “zero tolerance” was widely used (33%), some statements lacked a lucid disengagement policy in the event of supplier non-conformance. Vague repercussions were sometimes provided including that the company would “take corrective action” (F14, J7, P20), “invoke sanctions” (R32, R88), “introduce measures” (U74, X35), or that “arrangements will be reviewed” (J1, J16, U66), with non-complying suppliers being “dealt with appropriately.” (Q24, Q32) According to available good practice, an imprecise zero tolerance policy can lead to poor practice as suppliers need to be clear under what circumstances a relationship is likely to be terminated. If this is not the case, they may opt to conceal potential issues rather than seek assistance from their buyers.[[1551]](#footnote-1551) However, despite widespread information within the statutory guidance and those external information sources highlighted therein,[[1552]](#footnote-1552) very few statements made reference to the disclosing organisation’s policy on the “red flags” of forced labour with the vast majority therefore silent on issues such as the use of document retention, recruitment fees, financial penalty, and the miscommunication of employment terms.

Another concern is that any threat to disengage must clearly be meaningful in order for suppliers to take such a threat seriously.[[1553]](#footnote-1553) However, in only four statements (A68, A72, F1, F55) was it reported that the firm had disengaged suppliers for a lack of cooperation or compliance with an organisation’s code of conduct, with one specifically linking the disengagement to “forced labour or human trafficking violations” (A72). Perhaps this could be justified given that best practice dictates that termination of business relations should be a last resort[[1554]](#footnote-1554) reflecting the need for proactive measures to be taken in collaboration with the supplier in an attempt to address the issue as opposed to simply ‘walking away’. However, three quarters of the 254 statements which contained an unambiguous disengagement policy did not make reference to this factor. Any decision to disengage may impact on the aims of the MSA as regards the use of forced labour. Moreover, such a decision also has the potential to negatively impact the welfare of other supplier employees in the event of lost business.

**8.5.3.2 Supply Chain Information and Risk Identification**

*S54(5)(a) the organisation’s structure, its business and its supply chains*

*S54(5)(d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place...*

If a firm lacks a clear disengagement policy, it could be conceivably justified with reference to a lack of perceived risk. However, the low level of risk of modern slavery occurring in the supply chain was not widely emphasised with only a very small number of statements explicitly stating that there was no risk at all. A more general acknowledgement of risk echoing the narrative of the MSA was far more prevalent within the statements. Only three statements acknowledged that a high risk existed within their respective supply chains (C8, R105, R129).

In terms of specific risk identification, approximately 10% of the statements within the dataset identified (though did not necessarily disclose) a specific area of risk within the supply chain. In some of these cases, the risk was linked to the product or service, sourcing location, and/or the relationship between the firm and its suppliers. This may be taken to suggest some level of engagement with the available information resources as these factors were provided as relevant risk criteria within the 2015 statutory guidance.[[1555]](#footnote-1555) In contrast, little consideration of the heightened risk of modern slavery through the use of migrant, seasonal and temporary workers within the supply chain was evident and only a small proportion of statements acknowledged the relevance of any consideration of these forms of labour. Elsewhere awareness was also apparently lacking as regards consideration of the more opaque elements of the issue with, for example, scant regard to the irrelevance of a victim’s consent or awareness of their circumstances in relation to a finding of modern slavery.

The associated guidance makes it clear that if the enterprise identifies a risk of causing an adverse impact upon its supply chain which may enhance the likelihood of modern slavery, it should take the necessary steps to cease or prevent that impact.[[1556]](#footnote-1556) Clearly, a prerequisite for the identification of risk relates to an organisation’s identification of its suppliers through the mapping of its supply chain, starting with its first tier.[[1557]](#footnote-1557) However, although information was typically given about the nature of the business itself, no evidence was provided that suggested supply chain mapping had taken place in almost two-thirds of the dataset. Moreover, where disclosures were made as regards a company’s supply chain, the vast majority were extremely general in nature and provided little information of any note. Typical examples included that the disclosing organisation “has various suppliers from markets across the world” (A33), “deal[s] with hundreds of suppliers across a very wide range of business types” (K4), or simply that it had “a large and complex supply chain with a variety of commercial relationships with third parties” (R69).

In those statements where more information about the supply chain was provided, the disclosure related to sourcing locations, number of suppliers, or the level of expenditure. Information pertaining to the source country links closely with risk assessment yet just 20 statements made use of the Global Slavery Index as highlighted within the statutory guidance in relation to the assessment of risk. Supplier numbers were given in roughly 5% of the statements which, in some cases, were used to highlight the complexity of the problem the disclosing organisation faced. Good practice involves undertaking a spend profile which involves listing the suppliers by total spend, categorising the total spend in terms of the product or service procured, then identifying the firm’s market share with its top suppliers,[[1558]](#footnote-1558) as where expenditure is sufficiently concentrated a firm is likely to have stronger leverage over its supplier. However, total supply chain expenditure was only provided in a small handful of statements. For example, one statement provided that “over £80 million [is spent] each year on goods, services and raw materials” with another two other statements giving figures of £50 million and £23.8 million respectively for procured “goods, services and works.” Although these figures arguably illustrate the financial might potentially at a firm’s disposal, even where total spend was given, a breakdown of this spend was generally not provided, though with a well-known civil society organisation (R106) providing a notable exception.

**8.5.3.3 Due Diligence and Risk Management**

*S54(5)(c) due diligence processes in relation to slavery and human trafficking in its business and supply chains*

*S54(5)(d) …the steps it has taken to assess and manage that [the identified] risk*

The 2015 statutory guidance made it clear that due diligence in the assessment of modern slavery risk in supply chains “is good business practice and … will enable both more effective reporting and, more importantly, more effective action to address modern slavery.”[[1559]](#footnote-1559) Approximately half of the total statements reported that the company had due diligence processes in place yet the provision of detail therein was typically missing. An exception to this detail regarded the use of a whistleblowing facility which was reported in just under half of the total statements. However, the extension of such a facility to third parties and suppliers was only made clear in approximately 10% of disclosures, thus although highlighted as good practice within the guidance,[[1560]](#footnote-1560) it appears that many whistleblowing mechanisms were limited to employees as opposed to workers more generally.

The use of audits was reported in just under a quarter of the statements though disclosure relating to the intensity of these audits was often vague. Just over a third of these statements outlined that physical audits were used, with a third reporting a desk-based process, and slightly under a third of the disclosures somewhat unclear. In some cases, physical audits were restricted to “higher-risk suppliers” (F60, R95, U11) or those suppliers which had been “flagged through our processes and procedures” (O6). Despite the 2015 statutory guidance highlighting the significance of independent and unannounced audits,[[1561]](#footnote-1561) only around 5% of the statements outlined that an independent auditor was used with far fewer outlining whether the audits were announced to the supplier. Indeed, only a few disclosing organisations reported that unannounced audits were used. This lack of disclosure was compounded by the lack of information provided as regards the use of a particular standard of supplier audit utilised. Although a small number of exceptions existed which, for instance stated that SA8000 or the SEDEX Members Ethical Trade Audit (SMETA) was the preferred audit standard, the general lack of information could conceivably be equated to a prevalence of internal or non-specialist audit standards. This also suggests a lack of information sharing of information as regards audits. The associated guidance states that “the practice of sharing audits will create a critical accountability mechanism and promote greater supply chain transparency for both suppliers and purchasers”,[[1562]](#footnote-1562) yet the sharing of audit information by requiring suppliers to register with the Supplier Ethical Data Exchange (SEDEX) was extremely limited. Indeed, only one statement cautioned against the potentially negative effect of over-auditing a supplier and explicitly supported “mutual recognition platforms for audits to encourage our suppliers to focus on remediation and improvements rather than re-audit by multiple customers” (F39).

More broadly, the 2015 guidance highlighted the weakness of a reliance on a standard social audit approach to hidden instances of modern slavery due to the potential for the presentation of fake records along with coaching or pressuring of workers to lie.[[1563]](#footnote-1563) In spite of this warning, very few statements acknowledged this deficiency in their approach to the issue, perhaps suggesting the continued use of existing processes. Only eight statements appeared to acknowledge weaknesses involved with a standard audit-based approach to addressing the issue. For example, one statement reported that the disclosing organisation had “shifted to a performance improvement plan (PIP) approach with suppliers after deciding that audits alone were not always a meaningful tool for changing suppliers' behaviour” (A72). The need for a more rounded approach was emphasised in another statement highlighting that “we understand that there are limitations to ethical audits … we need to complement our ethical audits with training and capacity building to enable our suppliers to make further improvements” (A68). Relatedly, the statutory guidance states that to enhance the investigative process “it is advisable that businesses seek to investigate working conditions with support from expert independent, third parties and civil society stakeholders”,[[1564]](#footnote-1564) yet very few disclosures suggested that this had been undertaken and whilst there were exceptions, again, it is conceivable that organisations are simply doing what they were doing before with no attempt to upgrade their processes in order to accommodate the more recent information relating to the risks of modern slavery in the supply chain.

As regards collaboration more broadly, a willingness to work with suppliers is evident in some statements, with the importance of long-term relationships with suppliers highlighted, a factor which is also deemed as potentially relevant to good practice within the statutory guidance.[[1565]](#footnote-1565) However, it is apparent in the guidance that further collaboration beyond the supplier may be required to ‘accelerate’ learning and action[[1566]](#footnote-1566) and improve industry-wide labour standards.[[1567]](#footnote-1567) On this point, the associated guidance suggests that “Major buyers are increasingly more open to dialogue with trade unions and multi-stakeholder initiatives.”[[1568]](#footnote-1568) Yet whilst there is an apparent willingness to engage with multi-stakeholder initiatives within some statements, only 3 disclosures highlighted the importance of trade unions in addressing the issue, whether based on their legitimacy as a representative of labour or the practicality of informing risk assessment by way of their ability to “capture additional channels of communication.” The guidance appears to highlight the potential significance of trade unions,[[1569]](#footnote-1569) as a strategic partner,[[1570]](#footnote-1570) certainly in a remedial function,[[1571]](#footnote-1571) yet little specific mention of these organisations is made within the statements.[[1572]](#footnote-1572) Certainly, there is no suggestion of any requirement for suppliers to recognise a trade union, as has since been called for by civil society and trade union bodies.[[1573]](#footnote-1573)

As highlighted by the associated guidance, the risk of forced labour increases along the supply chain.[[1574]](#footnote-1574) Accordingly, the statutory guidance outlines that organisations should “engage their lower tier suppliers where possible.”[[1575]](#footnote-1575) However, very few statements considered the communication of policies and processes beyond the disclosing organisation’s immediate suppliers. The use of ‘flow down’ contractual provisions within supply contracts or purchase agreements was evident in 3% of the statements, in which tier one suppliers were contractually obliged to “implement measures to ensure that their suppliers also comply” (V10). However, the more prevalent trend was for vague expectations of tier one to ensure tier two compliance (7%). Whereas training or awareness raising was stated as being provided to tier one suppliers within a very small number of statements (2%), only one statement within the whole dataset reported that the company ran “supplier workshops on Modern Slavery for [both] 1st and 2nd tier suppliers” (F37). A further 5 statements (0.5%) reported that a tier one supplier was “required” (G36, M4, P106, U12, U16) to provide training to its own suppliers.

Finally, although the statutory guidance document seeks clarification of a company’s approach to the remediation of victims and prospective measures to protect them from further vulnerability,[[1576]](#footnote-1576) there was a noticeable lack of consideration for the victims with very few statements outlining any policy or provision for their welfare upon identification. This highlights the perception of risk as pertaining to the business rather than to the potential victim of modern slavery, a topic of discussion considered in chapter 4. Indeed, a small number of statements highlighted the risk of the issue to the company itself for example stating that such illicit activity “puts our reputation at risk” (W11) or that the organisation’s “success and reputation is inextricably linked to the performance and ethicality of suppliers” (Q26). Good practice dictates that the company should develop a corrective action plan to protect and support rehabilitation, repatriation (if relevant and desired by the worker), and reintegration into the labour market and community.[[1577]](#footnote-1577) These corrective action plans are likely to be more effective if they are in place prior to any realisation of stakeholder risk but in the few cases where they were mentioned, it appears their introduction represented a purely reactive exercise. Furthermore, good practice also suggests that the organisation should collaborate with public or non-governmental victim support providers where possible in the creation of victim support action plans,[[1578]](#footnote-1578) yet only three of these statements outlined a partnership with a particular civil society organisation as regards the provision of remedial action.

**8.5.3.4 Staff Training**

*S54(5)(f) the training about slavery and human trafficking available to its staff*

The use of training and/or awareness raising was prominent within the dataset with over half of the statements analysed outlining its use at the time of disclosure. Many of these statements provided an insight as to the type of personnel targeted by such activities. A small number of statements highlighted that management or new starters had been targeted, with a far larger number stating that all staff or relevant members of staff had been the focus of the programme with relevant staff members taken to include “key supply chain management personnel” (P23), “procurement teams” (R34, P50, R106) and “human resources professionals” (A1, A23, A47, F56, N6). Aside from this, however, the details of what the training actually involved were, in general, extremely vague with little information provided as regards either the methods utilised or the content therein.

In many cases the intensity and specificity of the training undertaken was unclear. Terms such as “awareness raising”, “education” and “briefings” were used in some statements which appeared to be distinct from more intensive notions of training and where training methods were specified these ranged from “workshops” and “face to face training” to “distributing email and newsletter communication” and “a firm wide announcement.” Details regarding the actual content of the training were only provided in a small number of statements with some statements outlining broader objectives such as bringing “contents of the United Nations Global Compact and Code of Conduct to the attention of all employees” (V37). Such disclosures when viewed alongside reports stating that modern slavery training was incorporated within Human Rights or Code of Conduct training potentially give rise to the possibility that little may have changed as regards an employee’s training requirements within some firms.

**8.5.3.5 Assessment of Effectiveness**

*S54(5)(e) 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*

A general lack of disclosure regarding the effectiveness of the company’s policies and practices on addressing modern slavery in the supply chain was observed. Although it is acknowledged that the dataset comprised the first set of statements mandated by s54 of the MSA, a lack of consideration of effectiveness suggests that a holistic approach is not being taken to the design of anti-slavery policies and procedures with respect to the disclosing organisation’s supply chain. Moreover, the reluctance to consider effectiveness in terms of key performance indicators (KPIs) as suggested by the Act[[1579]](#footnote-1579) could conceivably represent an attempt to reduce the administrative burden of having to update future statements, given the annual nature of the reporting requirement. Alternatively, there may be a reluctance to provide a performance benchmark which could potentially be used in an attempt to discredit corporate efforts in this area.

The guidance provides that “Carefully designed KPIs could help a business to demonstrate as clearly as possible if they are making progress over time in preventing modern slavery in their business or supply chains.”[[1580]](#footnote-1580) It was found that in those statements where effectiveness was considered this was, in most cases, accompanied by the use of KPIs. The guidance notes three types of KPIs which could be used to measure the performance of any anti-slavery actions taken: indicators relating to staff awareness and decision-making; indicators relating to grievance or whistleblowing procedures raised; and finally, indicators relating to visibility, leverage and oversight of suppliers in relevant goods and services supply chains.[[1581]](#footnote-1581) Examples of all three categories were evident in the dataset. These were most typically given as: the number of staff members trained; number of instances of modern slavery reported; and the number of audits conducted are representative of each category. In other instances, vague KPIs were used with no disclosure made as regards how, for example “communication and personal contact with the next link in the supply chain and their understanding of, and compliance with, our expectations” (as provided within a common text string found in 17 statements) could or should be measured.

Just under a third of the total statements included some sort of plan for future action. Although some of these outlined plans in ambiguous terms, for instance, stating that the company would “review” its policies or “take steps” to improve its practices, most plans provided more detail as regards the intended areas for development, including training and development, communication of policy to suppliers, the inclusion of clauses within supply chains, or the further enhancement of due diligence processes. In around a quarter of those statements which were more specific as regards to what was planned, the extensiveness of the ‘to do’ list suggested that very little had been completed to date. The statutory guidance states that “Organisations will need to build on what they are doing year on year”[[1582]](#footnote-1582) thus reflecting an objective for continuous improvement, partly due to “the continuously changing nature of modern slavery.” [[1583]](#footnote-1583) Indeed, the annual nature of the reporting requirement under the MSA offers the potential for observers to monitor whether firms improve their disclosures year on year. This is particularly the case where future action plans have been disclosed in sufficient detail and thus potentially provide a somewhat measurable set of commitments when examined in the light of future disclosures made in accordance with the MSA. This is clearly an area for future empirical research.

**8.5.4 The Presence of Market Leaders**

From the preceding discussion, it should be clear that overall compliance with the MSA has been poor, an observation that appears especially true as regards suggestions of compliance with the substantive aims of the Act. However, the analysis has also shown that a small number of disclosures suggest that some action is being taken by a small number of organisations in attempting to address the issue. Put simply, the coding process appears to have uncovered the existence of market leaders within the dataset. This appears consistent with other research in this area.[[1584]](#footnote-1584)

In terms of length and detail, the most insightful, conclusive, and convincing statements originated from a large CSO (R106) and a well-known high street employee cooperative (F32) with a reputation for ‘doing good’ and thus an organisational structure free from the shareholder pressures associated with the corporate form. However, aside from these clear frontrunners, a small number of market leaders appeared across a number of industrial sectors, particularly those identified as being of higher risk in chapter 2. A selection of these market leaders will be considered in the following section.

**8.5.4.1 Examples of Market Leaders**

In the electronics industry, statement U41 as made in compliance with both the California Transparency in Supply Chain Act 2010 (CTSCA) and the MSA 2015, offered a relatively detailed insight into the company’s risk assessment and risk profiling process. The statement offered an extensive list of the company’s expectations surrounding specific elements of forced labour, detailing its requirements on issues such as supplier employment contracts and recruitment fees, with confirmation provided that such requirements were represented as terms within procurement contracts. Details were provided about the company’s supplier assessment and audit process with numerical information about non-conformances provided. Specifics about the type of audit were provided with the disclosure reporting whether such audits were independent (in-house and independent audits were utilised) and unannounced (audits were not unannounced). It should be noted that disclosure as regards independence and announcement is required by the CTSCA although not by the MSA.[[1585]](#footnote-1585) Links were provided throughout the statement, for example to the CSR report which summarised key audit findings. The statement also reported that supplier training via workshops was provided where high levels of risk were identified. Moreover, details of supplier requirements as regards remedying non-compliance were provided, and third party whistleblowing facilities were in place. Finally, the statement reported collaborative effort was taking place both within the EICC (Electronics Industry Code of Conduct) and with a number of prominent civil society organisations.

In the food industry, statement A51 provided a detailed account of its tier one supply chain and the type of audits used. For lower tiers, the company acknowledged the significance of traceability and disclosed traceability figures (in terms of the percentage of its inputs that can be traced to source) along with its current traceability targets. The statement also provided a good example of specific risk identification with the company disclosing the number of suppliers it deemed to be of high risk over the previous three years along with details of the remediation process for such suppliers with support provided by the firm. The unusual step of disclosing that instances of modern slavery had been found in its supply chain was also taken. One of the ‘top tips’ in the statutory guidance is to specify that “actions by specific country will help readers to understand the context of any actions or steps taken to minimise risks.”[[1586]](#footnote-1586) Seemingly in response to this, the disclosing organisation provided a number of case studies within its supply operations in Turkey (hazelnuts), Ivory Coast (cocoa), and Thailand (seafood) along with clear examples of civil society collaboration.

In retail and fashion, statement F37 provided a link to an interactive map showing a complete list of the company’s first tier food and clothing suppliers. The statement reported that the company’s standard contractual terms had been amended to include obligations on suppliers to conduct regular modern slavery risk assessments within their own supply chains, implement appropriate controls to prevent modern slavery, and provide immediate notification if they become aware of any modern slavery within their own supply chains. Detail was provided on the company’s risk analysis and assessment process which, the statement reported, had allowed the prioritisation of supply chain due diligence. The statement specifically acknowledged the limitations of a standard ethical audit in addressing the issue and stated that this led to the use of specialist audits, in collaboration with “leading forced labour experts”, in a number of higher risk locations which had also included visits to second and third tier supplier sites. Moreover, the company acknowledged the recent and topical impact of Syrian migration on the risk of modern slavery in Turkey, one of its productive regions, and reported that it had responded accordingly by running supplier workshops on the issue for first and second tier suppliers in the area.

In construction, modern slavery statement E27 illustrated that the company had very little in place to prevent the use of modern slavery in its supply chain. However, the statement disclosed a detailed plan of action to be implemented within a time period of 18 months. Here the firm committed to a comprehensive series of measures. These included a commitment to develop a purchasing code of conduct, seek legal advice to enhance contractual provisions to specifically reference modern slavery, conduct onsite audits using third party auditors, investigate and implement best practices, document an internal anti-slavery policy and develop a specific anti-slavery training course for relevant employees. The statement reported that the company would also seek to implement an appropriate industry standard benchmarking tool to assess effectiveness. Finally, the organisation reported that it would communicate its standpoint on anti-slavery in corporate communications and in order to signal its intentions to its supply chain, had moved to a ‘chain of custody’ basis for certain materials and products purchased from higher risk countries beyond the EU and North America. It appears that the company had acknowledged its lack of preventative infrastructure to the issue of modern slavery and had made a number of specific commitments to address this deficiency. Given the detailed nature of the plans made coupled with the annual requirement for organisations to produce a statement, the disclosure provided a set of commitments against which progress could potentially be ascertained through recourse to future disclosure statements.

Of course, these statements were not without flaws. The first (U47) noticeably did not contain any consideration of effectiveness or a plan for future action. These omissions suggested that the statement was originally drafted to comply with the requirements of the CTSCA, as considered in chapter 5, as opposed to the MSA. Two of the three case studies and future plan of actions provided in the second statement (A51) focused solely on child labour as opposed to other instances of modern slavery suggesting the (albeit welcome) developments may have been implemented as a defensive mechanism in response to recent media coverage in the area. The third (F37) failed to disclose the identity of the “forced labour experts” it had collaborated with, and the final statement considered (E27) had not actually implemented anything. However, in terms of disclosure these organisations’ statements may be deemed market leaders as the disclosures therein clearly outperform the vast majority of statements created in response to the requirements of the MSA.

**8.6 Summary of Key Findings**

Table 2 below provides a summary of the key findings of this empirical study.

*Table 2: Summary of key findings*

|  |  |  |
| --- | --- | --- |
| **Level of Obligation** | **Related provision** | **Key Finding** |
| N/A | N/A | Initial observations were that the average statement was short in length. A lack of care (grammar, spelling etc.) was evident in some statements suggesting a lack of effort/care taken in the drafting process. Duplicate text strings across statements published by different companies were observed. This could be the result of common legal advice or reflect the act of copying from other company’s statements. Attempts were made to market the company or its products within some statements. Although many statements supported the aims of the Act, some statements attempted to shift all responsibility for action onto suppliers. |
| Mandatory | MSA 2015 s54(6)(a):  Statement must be approved by the board and signed off by a director | The majority of statements had been signed off at board level. However, a substantial number (20%) were not in compliance with this mandatory requirement. |
| Mandatory | MSA 2015 s54(4)(b):  Where no steps have been taken to eradicate modern slavery, the statement should state that the organisation has taken no such steps | Very few statements disclosed that no steps had been taken, a mandatory requirement where this was the case. It is also notable that the disclosure of any particular step not being taken was also very rare. In contrast, a sizeable number of firms used the disclosure to espouse the success of the firm or the quality of its product line. |
| Suggested | MSA 2015 s54(5)(a):  Information about the organisation’s structure, its business and its supply chains | Very limited information was provided in relation to the supply chain in the vast majority of statements. There was also no evidence that efforts had been made to map the supply chain in the majority of statements. In those statements providing information on the supply chain, this was typically done in very general terms. |
| Suggested | MSA 2015 s54(5)(b):  Information about its policies in relation to slavery and human trafficking | The majority of statements professed a strong commitment to the aims of the Act with a “zero tolerance” approach to the use of modern slavery by suppliers widely professed. The use of links to separate policy documents was very rare. The communication of forced labour policies to suppliers did not appear widespread. Moreover, many companies did not report that they had incorporated forced labour provisions within supply contracts. In many cases an unambiguous disengagement policy was outlined yet in only four cases had a supplier been disengaged for non-compliance. |
| Suggested | MSA 2015 s54(5)(d):  Information about 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 | Statements typically acknowledged a general risk of modern slavery occurring in supply chains. This relates to the suggested absence of supply chain mapping outlined above. Very little information was provided in relation to specific risk factors and even where acknowledged, these were typically not disclosed. In the absence of specific risks being provided, an assessment of the adequacy of response by the reader is significantly impeded. |
| Suggested | MSA 2015 s54(5)(c):  Information about its due diligence processes in relation to slavery and human trafficking in its business and supply chains | Approximately half of the statements reported the use of due diligence in addressing the risk of modern slavery within the supply chain. Further detail of a company’s due diligence practices was frequently omitted. Although almost half the statements referred to whistleblower facility, only a fraction of these reported that this extended beyond the company’s personnel. The use of audits was reported in a quarter of statements yet only a third of these appeared to refer to physical audits. In these cases, disclosure as regards the audit standard was, the independence of an auditor, and whether audits were announced in advance was in most cases omitted. The weakness of a reliance on an audit approach was only acknowledged in a small number of instances with little acknowledgement of the pressure that sourcing decisions can have on the supply chain. |
| Suggested | MSA 2015 s54(5)(e):  Information about 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 | The vast majority of statements did not report on the effectiveness of current policies and practices in addressing the risk of modern slavery within their supply chains. Within the small minority that did so, many referred to performance indicators relating to the number of staff members trained, audits undertaken, or instances of modern slavery found. Corresponding figures for these indicators were typically not provided. |
| Suggested | MSA 2015 s54(5)(f):  Information about the training about slavery and human trafficking available to its staff | Over half the statements reported the use of staff training or awareness raising as regards the issue. Many statements outlined the type of personnel targeted, in most cases referring to all or relevant staff members. In most cases both the method and content of the training/awareness raising was unspecified leaving the intensity of the training unclear. The extension of training to suppliers appeared to be exceedingly rare. |
| Voluntary engagement with best practice by Market Leaders | Statutory and associated guidance to MSA 2015 | Disclosure relating to engagement with best practices found or signposted within the statutory guidance was limited. However, a number of market leaders in this area were identified. |

**8.7 Conclusion**

When she was Home Secretary, Amber Rudd observed that “the challenge for businesses is to take serious and effective steps to identify and root out contemporary slavery which can exist in any supply chain, in any industry.”[[1587]](#footnote-1587) However, as considered above, the findings suggest a widespread lack of effort both in the production of the statement and in the level of action taken as suggested therein. Of particular concern was the low rate of disclosure surrounding effectiveness of an organisation’s policies and procedures. In addition, whilst it may be justifiable for a disclosing organisation to restrict its precautionary activity based on the risks identified, the findings suggest a widespread lack of disclosure of supply chain mapping and risk identification. A less palatable alternative regards the extent to which suitable supply chain mapping had been undertaken at all.

Without detailed information as regards the identification of risk it is difficult to assess the corporate response in terms of the management of such risk. However, the preceding discussion has highlighted the possibility of disparity between what may be termed business risk and the risk of modern slavery use by suppliers. The real test for the regulation of such social externalities relates to corporate action beyond the win-win scenario. The MSA itself may itself be seen as a business risk, as candidly reported within one statement (U61). From this insight, it follows that disclosing organisations may assess the extent to which compliance is necessary based on the risk of non-compliance. The water is further muddied by the conventions of CSR reporting/marketing seemingly restricting disclosure in certain areas. This is most obviously exemplified by the mere handful of statements admitting that no preventative steps had been taken, despite this being perfectly acceptable in terms of strict legal compliance.

It is acknowledged that the study was taken from the first set of statements and thus the possibility for a lack of understanding of what was expected from the disclosure existed. However, in contrast the lack of guidance accompanying the enactment of the CTSCA, [[1588]](#footnote-1588) the statutory guidance accompanying the MSA was relatively detailed, especially if read in conjunction with the associated guidance signposted therein. Moreover, the analysis of the statements suggested a lack of engagement with the guidance material across a number of those areas considered. Thus, although the update the guidance received in 2017 is potentially a signal of continued government interest, the effectiveness of this update remains open to question, as does the level of governmental commitment given recent comments on the lack of available resource for engagement by the Anti-Slavery Commissioner with the business community. [[1589]](#footnote-1589)

The research suggests that a small number of organisations have made relatively detailed disclosures reflecting at least some level of engagement with the guidance material. Yet although the instance of market leaders is to be welcomed in the provision of best practice disclosure practices, the extent to which ‘best practice’, in any substantive sense, goes to address the issue and will typically be constrained by the need to deliver shareholder value. Indeed, in only one instance was there any evidence of an attempt to rein in the problematic business model examined in chapter 2. In this instance a large scale exporter of seafood from Thailand (A72) disclosed that “In 2015 [the company] identified external preprocessors as being at very high risk of illegal or forced labour within our supply chain in Thailand. In January 2016 we ceased all work with external preprocessors, bringing over 1200 workers within our own factories and ensuring that they were safely and legally employed.” Although in this instance, the high profile given to the issue within the media had led to the firm reportedly addressing the issue, such pressure cannot be relied upon to drive CSP. Indeed, there was no suggestion that other firms within the dataset involved within high profile sectors such as apparel, tobacco, and cocoa were following suit. As the then Home Secretary recently stated, “transparency statements on their own are not enough”[[1590]](#footnote-1590) yet where perceptions of business risk and social risk diverge, it appears that the majority of companies will opt for the reduced cost of inaction over any meaningful engagement with the problem. This finding is corroborated by a smaller scale study of FTSE 100 statements undertaken by the Business and Human Rights Resource Centre which also identified a substantial gap between a "cluster of leading companies [reportedly] taking robust action" and the majority of companies showing a "lacklustre response".[[1591]](#footnote-1591) More broadly, the conclusions drawn by the Joint Parliamentary Committee on Human Rights in 2017,[[1592]](#footnote-1592) and the Government’s recent decision to undertake a legislative review of the Act, appear to correlate with the findings of this study.

**8.7.1 A Note on the Limitations of this Exercise**

The aim of this exercise was to gain an insight into corporate compliance with the procedural and substantive aims of the UK’s Modern Slavery Act 2015 as an example of disclosure-based regulation that is ultimately reliant upon the market for enforcement. Although the research arguably provides an evaluation of compliance with the mandatory requirements of the MSA and whether or not a company had responded to one or more of the suggested areas of disclosure, it does not claim to offer a precise evaluation of compliance with the substantive aims of the Act. It should be once again emphasised that this study was limited to a consideration of the effort as *suggested* by the disclosure statements. As such, it cannot be argued that such research can be used to conclusively and definitively state what a company is or is not doing to combat slavery in its supply chain. A consideration of the Strategic Reports produced in accordance with s414C of the Companies Act 2006 may provide further information of corporate social effort more generally. Probing interviews with procurement or CSR professionals within the disclosing organisations provide another avenue for insight. However, to some extent, one must accept the logic that if a firm is taking action to address the issue of modern slavery, it is likely that it would select to disclose such actions. It follows, therefore, that if a firm was not taking the issue seriously in an operational sense, it is likely that it may choose not to provide detailed disclosures in the area either.

**8.7.2 Future Empirical Research**

As the largest study of its kind into the initial response to the reporting requirements of the MSA, it is hoped that the findings of this research may act as a benchmark for future studies in relation to suggested compliance with the MSA. Therefore this study may prove useful to other researchers and policy makers concerned with the ongoing monitoring of organisational responses to the MSA. The transparent nature of the method of analysis, the availability of the coding schedule, and the clear reference to statutory guidance and associated guidance listed therein, ensures the internal validity of the research. These steps also provide for replication, and thus consistency, in future studies of this nature. As such, it is also hoped that the research may have applicability to other such studies of disclosure-based regulation drafted to address issues of CSP.

This study has focused on the generation of a broad picture of the dataset. In doing so the research has sought to consider how ‘Business’ as a whole had responded to the MSA as opposed to any sectoral analysis. The research identified a small number of companies within different sectors whose suggested compliance appeared to show a greater level of commitment to the aims of the MSA. The opportunity remains for future research to focus more narrowly on levels of suggested compliance across different industrial sectors.

**Chapter 9: A Duty-Based Approach?**

**9.0 Introduction**

The UNGPs established the concept of due diligence as the tool by which a company may enhance its CSP. However, the absence of any binding international instrument has positioned the state as a potential norm leader[[1593]](#footnote-1593) in instilling the concept of due diligence into corporate practice. The disclosure-based approach taken by the UK, as with the international voluntary approach, places an undue reliance on the investor and the consumer as a means to incentivise adequate CSP in this regard. In light of the weaknesses of the international voluntary and domestic disclosure-based approaches, this chapter considers an approach stemming from a recent development in the French law mandating the use of due diligence over the supply chain through the imposition of a legal duty to do so.

Consideration of the duty-based model is pertinent to the discussion of CSP regulation of companies within the UK given the possibility for a similar model to be implemented here in the future. Indeed, there have been calls for the imposition of a duty-based model in a recent Parliamentary report published by the Joint Committee on Human Rights.[[1594]](#footnote-1594) Moreover, advanced regulatory discussions on the introduction of a duty to undertake due diligence are taking place in a number of European jurisdictions,[[1595]](#footnote-1595) with the Netherlands very recently imposing a duty-based model of their own. As such, the potential for a regulatory norm to be established and cascade into the UK appears to be very real. Given the lack of consistency in the models currently being considered by various domestic legislators questions remain as to its eventual form should it be introduced into the UK.

This chapter will be structured as follows. Firstly, the French Duty of Vigilance will be examined and a number of potential weaknesses identified. Secondly, the potential for the model to become a regulatory norm is considered. This is achieved through a consideration of the opposition that the French law faced prior to its implementation, highlighting potential obstacles to such a duty elsewhere. Following this, the influence of the French law upon regulatory discourse within a number of other European jurisdictions is briefly explored. Thirdly, consideration will be given as to the form of a duty-based model should such a norm cascade into the UK. Here, it will be suggested that in contrast to the imposition of a duty within the civil law within the French model, a more natural setting in the UK context may be to emulate anti-corruption legislation and position a duty to undertake due diligence within the criminal law. Finally, an evaluation of the duty-based approach as a means to enhance the CSP will be undertaken. Here, it be suggested that in the absence of sufficient regulatory risk, corporate resources may not be adequately redirected to the effective implementation of due diligence processes.

**9.1 The Duty of Vigilance in French Law**

In 2018, France implemented a legal obligation applicable to very large companies incorporated in France that employ, over two consecutive years, more than 5,000 domestic employees if headquartered in French territory, or 10,000 employees if headquartered elsewhere. [[1596]](#footnote-1596) This duty of vigilance[[1597]](#footnote-1597) (‘Devoir de Vigilance’) [[1598]](#footnote-1598) was developed by a small group of activists, lawyers, and left-wing deputies with the aim of implementing the UNGP derived concept of human rights due diligence into corporate behaviour.

In order to be in compliance with the French law, an applicable company must satisfy three requirements. Firstly, a vigilance plan should be established which should include reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, the health and safety of people, and the environment. The vigilance plan must include a risk map which includes risk identification, analysis and prioritisation. A description of the processes and procedures for regular risk assessment of subsidiaries, subcontractors and suppliers must be provided, with reasoning given for their use relative to the results of the risk-mapping phase. Appropriate actions to mitigate any identified risks or to prevent serious harm occurring must be specified and a process for impact reports drawn up. This must be done in consultation with the company’s representative trade unions, reflecting a formal role for such organisations within the framework.[[1599]](#footnote-1599) The plan must include a mechanism for monitoring and evaluating the effectiveness of those measures implemented.[[1600]](#footnote-1600)

Secondly, this vigilance plan should be effectively implemented with a report produced detailing how this has been achieved. At the date of this thesis, little information is available in relation to what is expected in order to comply with this obligation but there is no suggestion of any evidentiary requirements to be incorporated within this report. It is likely that guidance will be issued in elucidating what should be included. However, given the broad scope of the law in terms of the variety of social harms covered, the potential for a lack of specificity exists. As such, although statutory guidance will play a part in any subsequent consideration of the effectiveness of any plan, a greater understanding of the duty’s requirements in specific situations will likely require the matter to be considered before the courts. However, as will be considered shortly, a number of factors suggest that legal action may not be particularly forthcoming.

Finally, in incorporating the UNGPs need to both ‘know’ a company’s human rights risks and ‘show’ the application of proper due diligence to address them, both the vigilance plan and the implementation report must be publically disclosed within the company’s annual report.[[1601]](#footnote-1601) Under the law, a concerned party, which would include a CSO, has standing to request that a judge compel a company to establish, implement, or publish a vigilance plan via an injunction.

The French law creates a private right of action in tort for a concerned party with standing to bring a civil action against a non-compliant company. From an economic perspective, the imposition of such a right may be justified as permitting the rebalancing of social cost between the producer and those harmed. Put simply, in theory, the right enables those harmed by the externalisation of social cost to utilise the right in seeking recompense. Given the financial and informational deficiencies of victims of forced labour it is unlikely that the actual victims of forced labour would exploit this right directly. However, civil society organisations, which have standing within the French court system,[[1602]](#footnote-1602) would be able to take the lead in any litigation under the duty.

**9.1.1 Evaluation of the Duty of Vigilance**

Although the provision of a legal right of action provides a mechanism whereby redress may be sought, the French law arguably does little to address the power imbalance between the large corporate actor and those harmed by its actions.[[1603]](#footnote-1603) Under the French law, and despite the initial draft proposal providing for the alternative,[[1604]](#footnote-1604) the burden of proof lies with the claimant. As such, it is up to the victim or its civil society representative to prove the defective implementation of the vigilance plan and a causal link between this and the harm suffered. This would arguably be very difficult. Firstly, it would require uncovering an instance of human rights abuse in the first place which is particularly difficult in relation to the hidden nature of forced labour. Secondly, it places an onerous evidential burden on the claimant and an apparent need for ‘insider information’ as regards the internal workings of a company’s management systems.

Furthermore, prior to showing the existence of such a causal link, which may be difficult in the context of supply chain abuse, the claimant would have to show that the relationship between the defendant company and its supplier fell within the scope of the Act. It is clear that a vigilance plan must extend beyond the company to include consideration of “the companies it controls, either directly or indirectly, as well as the activities of subcontractors and suppliers.” However, there is seemingly a caveat, with the law limiting such consideration of the activities of subcontractors and suppliers to those “with whom an established business relationship is maintained.”[[1605]](#footnote-1605) Aside from causing evidential difficulties for the claimant in accessing records of any business relationship, the limitation raises further concerns from both a conceptual and practical perspective.

Conceptually, the French law appears to retain the ‘sphere of influence’ approach to corporate responsibility rejected by the UNGPs in favour of the notion of corporate ‘impact’, discussed in chapter 4. Although subsequently incorporated into an EU-wide understanding of the notion,[[1606]](#footnote-1606) the French position here thus appears to reflect a step back to a notion of responsibility more closely linked to the philanthropic leanings of earlier definitions.[[1607]](#footnote-1607) In attempting to implement the UNGPs’ due diligence requirement into national law this view ignores the negative effect a company can have on its supply chain, and instead appears to simply ask ‘what can the firm do to help?’

In terms of practical effect, the limitation of scope in this way would, based on the existing legal definition, only cover businesses with whom the company has a stable, regular and ongoing relationship, and that generates a certain volume of business.[[1608]](#footnote-1608) In the absence of any direct relationship with the second tier, this may serve to limit the scope of the law to certain first tier suppliers with whom a stable relationship is maintained. This may both enhance the use of intermediaries in the shifting of responsibility over the supply chain given that these entities have minimal direct human rights risk as they do not partake in production, and/or further incentivise the use of short term supplier contracts amongst smaller suppliers. Ultimately, the restriction in scope would seemingly exclude consideration of those suppliers typically further down the supply chain where the level of competition, and indeed the risk of forced labour, is greatest.

A further barrier to potential effectiveness lies in the potential for legal and professional consultants to frame the language of vigilance plans to inhibit liability as far as is possible. This is a particular possibility given the current absence of specificity in terms of what exactly is required, reflecting a potential catch 22 situation in which case law is required for such specifics yet specifics are potentially needed to inform any decision to litigate. More broadly, the limited resources of the civil society sector may reduce the likelihood of legal action especially when contrasted with those of the companies to which the law applies. Relevant too to any decision to litigate is the particular level of uncertainty under the French legal system regarding the potential financial costs of an unsuccessful action.[[1609]](#footnote-1609) Taken together these factors may lead to a corporate perception of a low probability of legal enforcement.

Yet risk may be viewed in terms of probability but also in terms of magnitude. The issue of magnitude was potentially much more significant under the law as initially proposed with the incorporation of significant financial penalties within the statute, alongside the aforementioned reversed burden of proof. More specifically, under the original drafting of the law, a French court could impose a civil fine of up to 10 million euros in relation to breach of duty, understood as “the failure to establish, publish or effectively implement a vigilance plan.”[[1610]](#footnote-1610) This would have had the effect of creating a strict liability offence for applicable companies for failing to disclose a plan, arguably a clearer and greater impetus for disclosure than the risk of private action. Where harm existed, and could be shown to have been caused by a breach of duty, a maximum fine of 30 million euros was originally permitted.

**9.1.2 Opposition to the Introduction of the Duty of Vigilance**

Prior to its introduction, the proposed law faced a confrontational business community,[[1611]](#footnote-1611) along with right-wing politicians,[[1612]](#footnote-1612) that strongly opposed the imposition of such an obligation,[[1613]](#footnote-1613) just as the imposition of a legal duty in relation to modern slavery was opposed by corporate interests in the UK.[[1614]](#footnote-1614) Indeed, the Bill, tabled in 2013, took over four years of lobbying to secure its passage through the National Assembly (two readings) and the Senate (two readings). Arguments opposing the Bill centred upon issues of national competitiveness and the risk of capital flight[[1615]](#footnote-1615) along with complaints relating to the vagueness of the law[[1616]](#footnote-1616) and that the financial repercussions of a breach of duty were far too onerous.[[1617]](#footnote-1617) Although the former lines of argument were eventually overcome, the latter two heralded success for the opposition following the referral of the Bill, by 120 right-wing legislators to the French constitutional court (*Conseil constitutionnel*)[[1618]](#footnote-1618) on the grounds of unconstitutionality.

The French constitutional court judged the imposition of a fine as equivalent to a criminal sanction. Although the establishment of a civil liability was deemed constitutional, the definition of what would constitute a breach of the law was “insufficiently clear and precise” for criminal offences and penalties.[[1619]](#footnote-1619) Under the French constitution, therefore, it appeared that the criminal law’s preference for bright-line rules was deemed incompatible with due diligence as envisaged by the UNGPs as a flexible, risk-based process rather than an exact formula of action. The discretion afforded to the company via a current understanding of due-diligence was thus successfully argued by corporate interests to restrict the sanctions available. The effect of the constitutional court’s ruling was to limit the remedy of the law to the compensation of victims in line with the principles of pre-existing tort law discussed earlier.[[1620]](#footnote-1620)

**9.2 The Influence of the French Model on other European Jurisdictions**

Finnemore and Sikkink[[1621]](#footnote-1621) outline an international “norm lifecycle” whereby a norm emerges from within the domestic context through the efforts of “norm entrepreneurs”, such as the group of French lobbyists considered previously. The next step involves the ‘cascading’ of the norm to other states with the concept of socialization suggesting that other countries in a region may adopt such norms due to a sort of cross-jurisdictional ‘peer pressure’ motivated by legitimation, conformity, and esteem. Indeed, it is significant to note that although France has taken the lead in the establishment of such a duty,[[1622]](#footnote-1622) the model has influenced legislative discussions within a significant number of European jurisdictions.[[1623]](#footnote-1623) The final stage of the life cycle, in which a norm becomes internationalised, may never occur. However, given the number of European jurisdictions considering proposals for the introduction of a legal duty to conduct due diligence, there is a significant possibility that such an approach may cascade into UK law. However, any model implemented may not necessarily be based upon the French model. Indeed, the Netherlands implemented a variant of the duty-based model in May 2019 and a proposed duty in Switzerland is at a relatively advanced stage within the legislative process. Although both inspired by the French development and facing similar levels of opposition, key differences exist.

In Switzerland, the Responsible Business Initiative (RBI)[[1624]](#footnote-1624) was launched by the Swiss Coalition for Corporate Justice (SCCJ) as a citizen’s initiative within the Swiss system of direct democracy. As with the French law, the duty applies to large firms[[1625]](#footnote-1625) and seeks to establish the potential for civil liability in tort for corporate human rights violations.[[1626]](#footnote-1626) However, along with the difficulties faced by citizens’ initiatives more generally,[[1627]](#footnote-1627) political and business opposition to the proposal[[1628]](#footnote-1628) has resulted in a significantly weakened version of the duty being considered. Clearly illustrating the difficulties facing proposed legislation of this type, a counter proposal by the Swiss National Council dispensed with any idea of corporate responsibility over the supply chain by limiting due diligence to the company and its subsidiaries over which control is exercised.[[1629]](#footnote-1629) Representing a step backwards as regards the scope of CSP, which had seemingly been agreed upon by the international community,[[1630]](#footnote-1630) this counter proposal appears to be reluctantly supported by members of the civil society coalition behind the original drafting,[[1631]](#footnote-1631) it appears that this could be the basis of the law should it be enacted. Suffice to say that such a revision would completely fail to address the negative impacts of a business model based on global outsourcing as explored in chapter 2.

Facing stiff opposition, [[1632]](#footnote-1632) the Child Labour Due Diligence Law (Wet zorgplicht kinderarbeid)[[1633]](#footnote-1633) was narrowly[[1634]](#footnote-1634) adopted by the Dutch Senate in May 2019. The law will come into force at the earliest on 1 January 2020, although the exact date is still to be set. In contrast to the Swiss proposal, the Dutch model is specifically focused on the supply chain. However, instead of focusing on human rights more broadly, as per the French law and the Swiss proposal, the Dutch law is restricted to the issue of child labour.[[1635]](#footnote-1635) Furthermore, in contrast to the French law and Swiss proposal, and indeed, the UK’s MSA, the duty is not restricted to large companies. However, the Dutch government may exempt particular companies or industrial sectors should they deem the risk of child labour to be low.

The Dutch Child Labour Due Diligence Law creates a duty for an applicable company to disclose a statement outlining the details of a risk assessment of child labour within the supply chain. Where a ‘reasonable suspicion’ of child labour exists, a plan of action should also be disclosed which the company has adopted in order to address this risk. As opposed to the annual requirement of the French law, the Dutch law appears to require only a single statement to be provided. This appears somewhat strange given the dynamic nature of supply chain relationships and the associated labour risks therein. From a compliance perspective it also of concern given that legislation contains no other monitoring mechanisms.

In contrast to the French law, the Dutch legislation retains the sanction of financial penalty. A small, largely symbolic, civil fine[[1636]](#footnote-1636) may be imposed by the regulatory authority[[1637]](#footnote-1637) for the non-submission of a statement or plan.[[1638]](#footnote-1638) More substantially, following a third party complaint,[[1639]](#footnote-1639) typically from a CSO, an investigation may be triggered and the issuance of a remedial order given. If the remedial order is not followed, the company may be fined up to a maximum of 750,000 euros or 10% of the company’s turnover, with a director facing possible imprisonment.[[1640]](#footnote-1640)

A number of potential barriers to effectiveness may be identified. Firstly, as with the French Duty of Vigilance, the Dutch law limits its scope in relation to the supply chain. As such the risk assessment, and therefore also the action plan, should only include those suppliers that “can be reasonably known and that are accessible.” This may limit consideration to the first tier and further incentivise a ‘hands off’ approach to supplier relations via the use of intermediaries to coordinate productive activity, as discussed in chapter 2. Secondly, significant questions remain as to how the effectiveness of an action plan, and the due diligence taken therein, is to be judged.[[1641]](#footnote-1641) The law as it stands provides no criteria to assess the content and quality of the statements nor the risk assessment or action plan. As observed by prominent CSO commentators, this gives rise to the potential for variable corporate responses and a danger of minimal compliance.[[1642]](#footnote-1642) It is hoped that the Dutch government may elaborate on these factors.[[1643]](#footnote-1643) As the law currently stands, significant questions are raised in relation to its enforceability. Finally, of course, it requires the establishment of a ‘reasonable suspicion’ of child labour, before the company is required to do anything. This requirement may be difficult to fulfil.

**9.3 How Might the Duty be Implemented in the UK?**

In light of the differences outlined within the French, Swiss, and Dutch approaches,[[1644]](#footnote-1644) questions remain as to the eventual form of the model that could potentially be adopted in the UK[[1645]](#footnote-1645) should the regulatory norm cascade onto these shores. It is suggested that should a duty-based approach be introduced by the UK legislators, there are a number of reasons why it may be better located within the criminal, as opposed to the civil, law.

Firstly, a civil duty as enforced by a private right of action may not be effective within the UK. As mentioned previously, victims of modern slavery are unlikely to be able bring an action against in relation to a breach of duty without civil society assistance. This is particularly true for overseas victims found within global supply chains. However, CSOs lack standing within the UK courts in relation to civil litigation[[1646]](#footnote-1646) and thus could not bring an action as per the French model. As such, the victim would need to bring the claim which, for overseas victims, would necessarily bring considerations of extraterritoriality into play. From a legal perspective, this may not necessarily bar an action, given that the UK has, in recent years, moved to restrict arguments of forum non conveniens by companies domiciled in the UK for overseas tort victims.[[1647]](#footnote-1647) However, the need to convince an overseas victim of modern slavery to bring an action in the UK and attend court may be a significant barrier. This appears particularly true when combined with the relatively high cost of civil litigation in the UK,[[1648]](#footnote-1648) a reduced availability of legal aid,[[1649]](#footnote-1649) and the limited nature of pro bono services.

A second reason that any potential duty to undertake due diligence on supply chain operations should be positioned within the criminal law is that a similar model has been implemented in the UK within the Bribery Act 2010 (BA),[[1650]](#footnote-1650) and more recently, the Criminal Finances Act 2017 (CFA).[[1651]](#footnote-1651) Introducing the extraterritorial corporate offences of a failure to prevent bribery, and a failure to prevent tax evasion, a company is assigned a responsibility to prevent an ‘associated person’ from committing bribery or the facilitation of tax evasion. With an ‘associated person’ broadly defined[[1652]](#footnote-1652) the circumstances are somewhat akin to a supply chain for corrupt activities, with the legislation providing that a company may be prosecuted even where it was not involved in the act or unaware of the activities taking place. In both Acts the due diligence requirement is framed as a defence to prosecution where the company has adequate[[1653]](#footnote-1653) (BA) or reasonable[[1654]](#footnote-1654) (CFA) procedures in place to prevent ‘an associated person’ from undertaking such conduct. What is adequate or reasonable in the circumstances thus sets the scope of the duties therein.

A key advantage over a civil duty is that, if it followed the BA and CFA approach, the burden of proof would fall upon the company to show that it has adequate procedures in place to prevent the offence occurring. As has been outlined, within a tortious model, as per the French law of Vigilance, the burden is placed on the claimant to show a causal link between inadequate due diligence and the harm caused. A second advantage is that any decision to prosecute would be taken by the State, as opposed to civil society. Providing investigatory powers were made available within this relevant legislation, this would serve to nullify, or at least reduce, the resource-based barriers to action outlined in relation to private enforcement. Furthermore, the criminal nature of non-compliance may enhance perceptions of severity so long as enforcement is forthcoming. It is too early to comment on this in relation to the CFA but, following initial concerns of ‘prosecution inertia’,[[1655]](#footnote-1655) there has evidently been a willingness to enforce the provisions of the BA. Here both prosecution[[1656]](#footnote-1656) and, reflecting a responsive regulatory approach, Deferred Prosecution Agreements (DPAs)[[1657]](#footnote-1657) have been used to sanction ineffective corporate action.

Although little research exists on the effectiveness of a duty-based approach, a study by Lebaron and Rühmkorf compared the effects of the Bribery Act 2010 to that of the MSA on corporate non-financial disclosure and found greater engagement with the former. The researchers “observed a clear hierarchy between bribery and forced labour in terms of [Supplier-related] contractual stringency, the [strength of] language that is being used and the quantity and quality of [CSR and Sustainability] reporting.”[[1658]](#footnote-1658) Despite its insightfulness in highlighting the weakness of the disclosure-based regime,[[1659]](#footnote-1659) it does not follow that a duty-based model would have the same effect if applied to the issue of forced labour in the global supply chain. At the heart of the duty-based approach is the creation of an incentive for a company to enhance its identification, assessment and mitigation of social externalities in the face of compliance risk. It follows that there must be a perception of compliance risk. Although the Bribery Act has been enforced, regulatory responsibility for any potential duty relating to forced labour within the supply chain would almost certainly not be placed with the same prosecuting agency.[[1660]](#footnote-1660) This raises the issue of whether a willingness to enforce would exist if such a duty were implemented within the UK.

**9.4 The Danger of a Lack of Compliance Risk**

Whether a duty to undertake due diligence on the supply chain is implemented within the civil law or the criminal law, there is a need for active enforcement to ensure a perception of compliance risk and incentivise the implementation of effective due diligence. Ethical arguments have long failed to incentivise widespread corporate action, thus it is suggested that genuine compliance risk is necessary. The question is whether sufficient compliance risk would exist were a duty-based model be implemented in the UK.

Insights may be gleaned from the level of suppport provided to the UK’s current regulatory framework regarding modern slavery in the supply chain. Whilst the UK government has been highly vocal in its commitment to addressing the issue,[[1661]](#footnote-1661) there is little evidence of such commitment since the implementation of the MSA in 2015. Certainly, there have been persistent complaints of a lack of resources available to the office of the Anti-Slavery Commissioner with a lack of funding,[[1662]](#footnote-1662) significant inconsistencies in the setting and allocation of budgets, and lengthy delays in the recruitment of staff.[[1663]](#footnote-1663) The UK government has continued to trade with a significant number of companies who have failed to publish anti-slavery statements in line with the MSA 2015.[[1664]](#footnote-1664) Calls from the former Anti-Slavery Commissioner Kevin Hyland for a central public database of applicable firms were rejected, as was the potential to allow for legislative change to permit fines to be imposed on non-disclosing companies.[[1665]](#footnote-1665) Indeed, the power available within the MSA to enforce disclosure by way of an injunction[[1666]](#footnote-1666) has not once been used.[[1667]](#footnote-1667) It follows therefore, that in the current political environment, there is no guarantee that there will be sufficient resource made available to enforce a potential duty within the UK law.

It also remains to be seen whether a sufficient regulatory risk is perceived by those companies affected by France’s Duty of Vigilance. A number of studies have been undertaken on the vigilance plans disclosed since the introduction of the law in 2017. Whilst no public registry of applicable companies exists, it has been observed that several companies who likely fall within the law have failed to publish a plan.[[1668]](#footnote-1668) Whilst typically strong policy commitments are made,[[1669]](#footnote-1669) one study of 68 vigilance plans found that they were often short[[1670]](#footnote-1670) with only half complying with all the requirements of the law.[[1671]](#footnote-1671) Indeed, a slightly earlier study of 64 plans suggested that more than two thirds provided no evidence of an updated human rights risk assessment being undertaken[[1672]](#footnote-1672) suggesting that aside from a handful of market leaders,[[1673]](#footnote-1673) many firms were operating in much the same way as before. The lack of human rights risk identification was corroborated by a third, smaller study of 20 plans, which highlighted that the typical plan provided limited insight into the practical implementation of any due diligence processes.[[1674]](#footnote-1674) In summarising the combination of a strong policy commitment with a typically “ambiguous and unfocused disclosure”[[1675]](#footnote-1675), this final study concluded that “the readeris left with an abstract sense of good intent but no tangibleevidence of what the company is doing in practice.”[[1676]](#footnote-1676)

In the absence of tangible evidence, a company’s system of due diligence remains unsubstantiated until a suspected instance of modern slavery is uncovered and the company called to account. In contrast to the preventative aims of due diligence system, the duty-based model would therefore appear to operate in a decidedly ex post fashion. However, the danger of a company being called to account appears to be insufficiently high. As such in the absence of risk, a duty-based approach, whether based within the civil or criminal law, may fail to stimulate effective corporate action. In determining the extent to which preventative action has been taken there is once again a significant reliance placed upon corporate-led disclosure and the judgment of market-based actors. Put simply, even where an instance of forced labour is uncovered in a company’s supply chain through media or civil society investigation within, no legal action may result. In practice, therefore, the impact of a duty being imposed on a company to prevent these activities from occurring may be significantly less than was envisaged.

In summary, it is observed that a duty-based model of regulation may not significantly enhance the effectiveness of corporate self-regulation. The level of compliance risk, or perceptions thereof,[[1677]](#footnote-1677) may be insufficiently high to incentivise effective corporate action. In other words, the company may opt to comply in a merely bureaucratic fashion. Fundamentally, the model presumes the existence of adequate resource and a willingness to enforce which may not be forthcoming due to political or resource based reasons. Relatedly, the danger of inadequate corporate action is exacerbated by the absence of an ex ante monitoring mechanism. As no checks are undertaken unless a human right violation is uncovered and litigation or prosecution commenced, a company’s due diligence system is left unchecked and unverified. It follows that in the absence of an adequate risk of enforcement together with a lack of an appropriate monitoring mechanism, in terms of effect, the model may not significantly differ from the voluntary and disclosure-based approaches considered previously.

**9.5 Conclusion**

The French duty of vigilance unquestionably reflects a ‘historic step’[[1678]](#footnote-1678) forward in the regulation of corporate social performance. However, whilst the law offers a welcome development from the voluntary or disclosure based models considered in chapters 4 and 5, it is perhaps a smaller one than might have been hoped. Restrictions in scope within the French model and those proposed or enacted in other jurisdictions significantly impact on the use of a duty-based approach to address the issue of forced labour within the supply chain. Indeed, such restrictions may perversely incentivise the disconnection or shortening of relationships with those suppliers that undertake productive, as opposed to coordinative, activity. Furthermore, questions are raised as to the generation of sufficient regulatory risk through potentially inadequate levels of enforcement due to an over reliance on civil society resource and, in any future UK context, a presumption of a willingness for the state to enforce which may not exist.

The following chapter will seek to consider how the potential effectiveness of the three regulatory models considered in this thesis may be enhanced.

**Chapter 10: Recommendations**

**10.0 Introduction**

This chapter aims to enhance the effectiveness of the three regulatory models considered within this thesis in addressing the use of forced labour within the supply chain as a facet of CSP. Three sets of recommendations are put forward in an attempt to inform the achievement of this aim.

The first set of recommendations attempt to enhance the effectiveness of the disclosure-based requirements of the MSA. The UK government has seemingly restricted the UK’s regulation of modern slavery within the supply chain to the confines of a disclosure-based model based upon the production of a modern slavery statement.[[1679]](#footnote-1679) However, the Government has also stated that it is “determined to ensure that these statements can be used to hold companies to account as intended.”[[1680]](#footnote-1680) Respecting the boundaries laid down by the UK government, the first recommendation suggests that the MSA 2015 would be made more effective by enhancing the specificity of its disclosure requirements and allowing consumers to enforce the accuracy of corporate disclosures made. Although still limited by the social, psychological and cognitive barriers considered in chapter 7, it is suggested that the veracity of corporate disclosure is required to increase the potential for coordinated consumer action based upon civil society access to reliable information. Put simply, there is little point in attempting to inform the market so it may apply pressure on companies to improve the CSP, if the information presented does not reflect the true picture.

The second set of recommendations move beyond respecting the UK’s regulatory authority to suggest that, Brexit permitting,[[1681]](#footnote-1681) a stronger model of regulation based around a legal duty to undertake due diligence should be imposed upon it from the European Union (EU).[[1682]](#footnote-1682) Within the EU Parliament, there has been some support for the imposition for a duty to undertake due diligence in relation to human rights violations in supply chain.[[1683]](#footnote-1683) This may be perceived as an acknowledgement of the limitations of individual nation states to address issues of social welfare within a globalised system of production.[[1684]](#footnote-1684) Alternatively, given the differences between the duty as implemented in France and those being debated in Switzerland, the Netherlands and Germany, EU intervention here may be required to prevent disruption to the internal market by ‘levelling the playing field’ between member states.[[1685]](#footnote-1685) However, as chapter 9 suggests, although the duty-based model represents a significant step-forward in CSP regulation, it may ultimately prove ineffective. This is due to a lack of any external verification of a company’s systems of due diligence. As such, it is put forward that the duty-based approach could be remodelled to mandate the verification of these systems. It is also posited that the proposed EU duty be narrowed from the broader scope of the French duty to focus on the use of forced labour permitting greater specificity as to what is expected of a company’s due diligence system. It is suggested that in narrowing the scope and providing for third party verification, such a model may appeal to EU regulators given that a similar approach has been taken by the EU in the regulation of conflict minerals and illegal timber.

The final section considers a variety of means to weaken the primacy of the shareholder in strategic decision-making. It has been argued throughout this thesis that the primacy of the shareholder interest is the key driver of the problematic business model considered in chapter 2. As such, it is necessary to consider how the consideration of stakeholder interests at board-level may be increased. Three developments or potential developments will be considered that have arisen in recent policy, review and political debate. The first considers the current focus of increased diversity on the board and its potential to enhance the internalisation of social costs. The second centres on a recommendation made within the recent review of the MSA, for a designated board member to be made personally accountable for issues of anti-slavery related CSP. In observing a number of weaknesses in these two approaches, it will be suggested that stakeholder voice would be better amplified through direct stakeholder representation on the board. Here the potential for employee and consumer representation on the board as a means to enhance CSP will be considered. Through greater representation of stakeholder interests at the board level, it is suggested that companies may voluntarily do more to enhance their social performance. In this sense, this final set of recommendations may be seen as enhancement to the voluntary approach to CSP taken by the international community.

**10.1 Enhancing the Disclosure-Based Approach**

As was considered in chapter 5, the UK has taken a disclosure-based approach to the specific issue of forced labour use within the supply chain. In contrast to annual reporting requirements, also considered in chapter 5, which were primarily targeted at shareholders, the MSA more actively targeted the consumer as a mechanism to enhance CSP in this area. The chapter discussed a number of weaknesses with the instrument that may impede its ability to ensure companies adequately inform the consumer market. The lack of quality in many disclosures is exemplified within the empirical study in chapter 8. Many of the weaknesses of the current disclosure requirements have been acknowledged within an independent review of the MSA,[[1686]](#footnote-1686) and a number of sensible recommendations made. These recommendations, discussed in chapter 5, focus on mandating the disclosure of information in clearly defined areas and introducing stiffer penalties for non-compliance.

The independent review was restricted, through the government’s remit, to tinkering with the disclosure-based model.[[1687]](#footnote-1687) However, noting that “Consumers are viewed as playing an essential role in eradicating modern slavery in the UK”,[[1688]](#footnote-1688) the panel appear to question the current ability of consumers to do so. Here, the panel cite a study on consumer attitudes to modern slavery undertaken at the University of Glasgow, [[1689]](#footnote-1689) highlighting that “consumers are often unaware of the critical role they play”[[1690]](#footnote-1690) in enhancing CSP. The review thus called for the Anti-Slavery Commissioner to commission further research to understand “how consumer attitudes to modern slavery can be influenced”, in order “to leverage purchasing power to eradicate modern slavery in supply chains.”[[1691]](#footnote-1691)

Chapter 7 suggested that the consumer is at present unreliable as a mechanism to enhance CSP due to a number of cognitive, situational and psychological barriers. However, it was also conceded that in some instances ethical consumers do exist, and where problems of collective action can be overcome, can make a difference. This accords with the perspective taken by the review in that that the potential exists to expand the effectiveness of consumers if awareness can be raised as regards the role assigned to them.

Chapter 5 observed that a stumbling block to the supply of information to civil society groups coordinating consumer action regards the difficulty in ensuring the accuracy of corporate disclosures. Although consumer law appears to provide the potential for consumers to enforce the veracity of the contents of codes of conduct, the law here has not been properly tested. As such, in addition to the resource-based constraints of funding litigation exacerbated by the accepted legal principles precluding representation by representative groups, the law here remains unclear. Moreover, it is even less clear, based on an examination of the legislation, as to whether consumer law on misleading information may be extended to cover modern slavery statements. In light of this uncertainty, it is suggested that the MSA should more specifically provide the right for consumers to seek legal redress for any inaccuracies in disclosures. It is hoped that in giving consumers legal rights to enforce the contents of corporate disclosure in this way, awareness may be raised of their assigned role in tackling modern slavery. Along with more specifically including the consumer in the disclosure process, the fruits of more accurate disclosure would flow to civil society in order to better inform the coordination of targeted consumer action.

**10.1.1 Amending the Modern Slavery Act to Permit Private Action**

Consumer protection through legislative intervention is typically justified by the presence of informational asymmetry between producer and consumer representing a notion of market failure. Neoliberal economic theory conceives the individual as a rational decision maker operating within a conceptualisation of society based upon private property rights. Yet as Habermas observes, this notion is independent of the idea of citizenship or the moral person.[[1692]](#footnote-1692) The framing of a person in this way thus limits the individuals’ role in enhancing social welfare to their position within the market.[[1693]](#footnote-1693) The regulatory discourse surrounding the MSA, however, has actively sought to frame the consumer as a means to enhance CSP as opposed to placing a restrictive emphasis on the satisfaction of individual utility. Whether this is framed as a rational utility maximiser pursuing their self-interest, or as prosocial altruism, the consumer is framed by the legislation as the primary vehicle to eradicate modern slavery within supply chains. This makes it paradoxical that the consumer has no legal right to ensure the accuracy of the corporate disclosure on the basis of which they make their purchasing decisions.

Section 54 of the MSA should be amended to allow individuals to challenge companies where information has been uncovered by civil society or media investigation casting doubt on the veracity of their modern slavery statements. The section should provide for injunctive action to be taken by the courts to mandate the rectification of the statement. However, it is suggested that in addition to the injunctive power, provision should be made to impose some financial consequences on companies that make inaccurate disclosures. Given the potential difficulty in assessing damage in these circumstances, it is suggested that a statute makes provision for the imposition of a fine. This is recommended for a number of reasons. Firstly, the proceeds could be used to resource the consumer litigation fund, discussed shortly. Secondly, the involvement in the consumer as ‘whistle blower’ may serve to raise awareness amongst consumers of their role within the regulatory regime. A provision on costs could be included within the legislation so as not to dissuade consumer action. Finally, and most pertinently, the risk of significant financial penalty may serve to dissuade inaccuracy or carelessness by companies in the drafting of modern slavery statements.

Chapter 8 has illustrated that many modern slavery statements contain vague provisions that provide little useful information to the consumer. Should the MSA provide for redress as regards the provision of inaccurate information, it is acknowledged that this could have the effect of incentivising further imprecision. The independent review of the MSA recommended that a template should be used[[1694]](#footnote-1694) which is a sensible development. However, little further detail was provided. It is suggested here that specific provisions could be included within the template that require the firm to provide a closed answer. For instance, the template could mandate the company to disclose the total number of supplier audits undertaken and whether these audits were independent or unannounced. Similarly, the identity of the auditor (if independent) could be mandated and whether off site interviews had been conducted (so to encourage supplier workers to speak up). The company could be made to state whether subcontracting is permitted within supply contracts and, if not, whether the company was satisfied that such provisions were being complied with. The template could mandate whether training for procurement staff was provided online or in a formal learning environment and whether any whistle blower facility was available for third parties or restricted to direct employees.

The use of closed questions in this way both reduces the opportunity for vague or non-conclusive answers. It also forces companies to include information that may be perceived as negative, which as chapter 8 observed, is seemingly omitted from their modern slavery statements. Finally, a set of closed answer questions within the template allow for quick access to pertinent information and may help make statements more concise. Indeed, a recent study of consumer preferences suggests that simpler, shorter content within modern slavery statements is viewed positively.[[1695]](#footnote-1695) Moreover, such a format would better allow for greater comprehensibility and comparability,[[1696]](#footnote-1696) due to its susceptibility to quantitative analysis and benchmarking by CSOs.

**10.1.2 Facilitating Access to Justice**

A further problem, as highlighted by the discussion of potentially relevant consumer law in chapter 7 concerns access to justice. The disparity in resources between a large company and the consumer is an obvious barrier to enforcement. The costs of litigation are typically high relative to the financial resources of the final consumer.[[1697]](#footnote-1697) As such, although the rights of a UK citizen in in relation to access to justice and an effective remedy is formally protected under the European Convention of Human Rights (ECHR),[[1698]](#footnote-1698) they are frequently not realised in practice. Along with restrictive rules on locus standi, lengthy procedures with high legal costs have been identified as common barriers amongst EU member states.[[1699]](#footnote-1699) Such factors need to be addressed in order to facilitate the enforcement of the veracity of the contents of a modern slavery statement. One line of argument is to extend the availability of group litigation (class actions) within the UK in order to allow a number of affected consumers to share the burden of litigation. The use of test cases[[1700]](#footnote-1700) can help reduce costs and are already permitted within the UK.[[1701]](#footnote-1701) However, even here the costs may remain prohibitively expensive. Funding is thus a key issue.

Legal aid represents the classic solution to funding civil claims and thus facilitating access to justice. However, extensive cuts to the provision of legal aid were made in the 2012 Legal Aid, Sentencing and Punishment of Offenders Act (LASPO). The UK government’s focus on austerity has seen public spending on legal aid decrease by over £1 billion between 2013 and 2018.[[1702]](#footnote-1702) Indeed, by the end of the 2019-2020 fiscal year, the Ministry of Justice will have seen its budget cut by approximately 40%,[[1703]](#footnote-1703)among the deepest of any government department. The effects of such policy have been a reduced availability of legal aid with provisions available under strict merit conditions and for a shrinking number of individuals.[[1704]](#footnote-1704) A review of the impacts of the LASPO Act led to a small amount of additional funding.[[1705]](#footnote-1705) However, this was limited to a number of specific areas relating to, for example, social welfare claimants and areas involving children.[[1706]](#footnote-1706) Given that the impact of legal aid cuts has led to unrepresented defendants facing charges under the criminal law,[[1707]](#footnote-1707) it seems unlikely that legal aid for consumer actions will be extended any time soon.

A number of possible alternatives exist but, in most, are unsuitable in the present context. Firstly, conditional fee agreements (‘no win, no fee’) are unlikely to be attractive to law firms given that it may be unlikely that the sums awarded would be sufficiently lucrative to garner the interest of the legal sector. Similarly, private third party funding, whereby a third party funds the litigation in return for a percentage fee, is typically limited to high value cases.[[1708]](#footnote-1708) It may be viable for a CSO, such as a consumer rights group, to directly fund such litigation. This would allow the third party to circumvent the restrictions on legal standing. However, given the resource issues facing such organisations,[[1709]](#footnote-1709) such funds are unlikely to be readily available on a routine basis. Finally, legal expense insurance is a potential option but this is arguably more suited to other, typically civil law, jurisdictions associated with more predictable litigation costs. Moreover, the significant financial risks involved may lead insurers to exclude actions of this type from the insurance schemes offered.[[1710]](#footnote-1710)

It is suggested that perhaps the most suitable option to facilitate consumer access to justice is via a public litigation fund. Indeed, such funds exist in other common law jurisdictions, most notably Hong Kong and Canada. Perhaps most relevant to the present discussion, given that it specifically applies to consumers, is the Consumer Legal Action Fund (CLAF) in Hong Kong.[[1711]](#footnote-1711) The CLAF is managed by the Consumer Council of Hong Kong and provides financial assistance to allow legal claims by individual consumers and groups of consumers. In order to apply for litigation funding four criteria must be met. Firstly, the case must relate to a consumer transaction; secondly, the case must involve significant injustice or public interest; thirdly, consumer must have exhausted all other means of dispute resolution (such as the use of a complaint mechanisms), and; finally, the consumer must not be able to qualify for legal aid. Such criteria appear sensible and would arguably apply to the proposed amendment to the MSA discussed above. Should such a fund model be transplanted to the UK, therefore, providing that a consumer had made a purchase, an action could be brought against the company supplying it should its modern slavery statement prove inaccurate.

The CLAF is funded via a registration fee and a percentage taken from any sum awarded. In exchange for a very small, non-refundable registration fee to the fund,[[1712]](#footnote-1712) the fund covers all legal costs and expenses arising from the litigation. If the case is unsuccessful, the consumer need not repay anything and is thus insulated against all financial risk. If the consumer is successful, a contribution to the fund must be made. This contribution is calculated based on a figure of 10% of the amount awarded plus the costs and expenses incurred less the costs recovered from the other party.

The CLAF model arguably provides an interesting mechanism in funding consumer litigation. Yet it is suggested that the proposed litigation fund be financed through the fines imposed upon companies. However, as with the CLAF, a similarly small registration fee or ‘contribution’ should be required in order to help prevent vexatious claims. Given that the current UK government has been reluctant even to set up a public repository of modern slavery statements, it is highly unlikely that this public fund will be established by the state. As such, it is likely that the fund would need to be managed by civil society, perhaps in conjunction with a law firm specialising in pro-bono human rights work. It is conceded that the initial capital required by the proposed fund would be likely be reliant upon philanthropic contributions.[[1713]](#footnote-1713)

**10.1.3 Summary of First Recommendation**

Consumer protection has been described as “a case of successful regulation” as it allows consumer demands to be met and companies to attain consumer trust.[[1714]](#footnote-1714) However, as it stands the MSA has the potential to do neither. The accuracy of the information is a baseline requirement for a disclosure-based approach yet remains unquestioned by the legislator. This section has called for the Act to be amended in two regards. The first suggested amendment seeks to increase the specificity of the content disclosed within modern slavery statements. The second suggested amendment would permit consumers to seek legal action against companies whose disclosures prove to be inaccurate in light of media or civil society investigations.

**10.2 Verification of the Duty to Undertake Due Diligence**

This section considers the second set of recommendations. The imposition of a legal duty for a firm to undertake due diligence on its supply chain was considered in detail in chapter 9. It was discussed that a recent development in the French law had imposed a duty upon firms to produce a vigilance plan providing information of its due diligence systems. It was acknowledged that, whilst a duty to undertake human rights due diligence undoubtedly represents a significant legal development, its practical impact may be limited. As such, the second recommendation put forward within this thesis is the introduction of a legal instrument at EU level that would impose a duty on large companies to develop, implement and disclose due diligence systems intended to monitor their supply chains for forced labour. That system would have to comply with the minimum standards laid down by law, and it would be mandatory that the existence and operation of these processes be externally verified by a third party. This model would therefore create an evidentiary burden for a company to show that its systems meet the specifications found within the proposed legislation. This would serve to relocate the source of compliance risk from the finding of a causative breach, as per the French duty of vigilance, to focus more centrally on a company’s due diligence processes. This arguably provides a better ‘regulatory fit’ with the preventative objective of the due diligence concept more broadly.

The model has some pedigree in addressing the use of conflict minerals[[1715]](#footnote-1715) and illegal timber within the global supply chains of European companies. As such, reference will be made to the EU Conflict Minerals Regulation (EUCMR),[[1716]](#footnote-1716) which is yet to come into effect,[[1717]](#footnote-1717) and the road-tested EU Timber Regulation (EUTR)[[1718]](#footnote-1718) which has applied to timber importers since 2013.

**10.2.1 Specification of Minimum Standards**

The concept of due diligence aims to incorporate the knowledge and expertise of the regulated entity in the design and implementation of management processes. It is suggested that certain minimum standards should be set in accordance with current best practice. Given that no single authoritative guidance exists,[[1719]](#footnote-1719) it is suggested that those CSOs with expertise in the area could be utilised in the design and drafting of the minimum standards. This has some credence in current practice with CSO involvement in the design of EU environmental standards being encouraged for some time.[[1720]](#footnote-1720) Indeed, a number of CSOs have provided detailed guidance on the issue of forced labour within the supply chain as signposted within the statutory guidance to the MSA. A further benefit of including CSOs within a drafting process is the legitimation this collaboration provides through the idea of the CSO acting as a proxy for stakeholder interests.

In contrast to the broad nature of social impact as found within the French duty of vigilance,[[1721]](#footnote-1721) a narrow focus on the specific issue of forced labour arguably allows for greater specificity within the legislation.[[1722]](#footnote-1722) For example, the standards could require that supplier expectations should include a prohibition on the payment of recruitment fees or the withholding of documentation or pay. It could be specified that these requirements be specifically outlined within the supply contract along with the consequences of non-compliance. Another requirement would be for the use of independent, unannounced supplier audits to be used, with records of these audits being kept for a period of say, five years. The firm could be required to provide evidence that its procurement staff have received particular training content on the implications of their purchase decisions. Supply chain mapping could be a minimum requirement with the publication of supplier lists made mandatory to allow for greater civil society oversight.[[1723]](#footnote-1723) These minimum standards could be found within the primary legislation itself, or perhaps better reflecting the evolving nature of best practice, in secondary legislation that may be updated on a periodic basis.

**10.2.2 Specification and the Question of Scope**

A key issue in the imposition of due diligence requirements regards the question of scope. In other words, how far down the supply chain should a company be expected to implement the regulatory standards imposed? As was observed in chapter 9, the French duty of vigilance, as implemented, is seemingly limited to the duty to undertake due diligence on those suppliers with whom it has a “stable and established relationship.” This would likely equate to the first tier and thus fail to address the higher risk of forced labour use within the lower tiers of the supply chain.[[1724]](#footnote-1724) However, neither the timber nor conflict minerals regulation restrict the scope of their respective due diligence requirements to the first tier. To do so would undermine the rationales for both initiatives with both illegal logging and conflict mineral extraction found at the far end of the supply chain.

It is suggested that the approach to scope taken by the illegal timber regulation is particularly informative here. Under the EUTR the issue of scope is addressed through its incorporation within the risk assessment component of the due diligence process. It is specified that each product line imported into the EU must be assessed by the company as representing a negligible or non-negligible risk.[[1725]](#footnote-1725) This is a specification of the due diligence process. In determining this risk, the importer should consider such factors as supplier certification and geographic area, but also the complexity[[1726]](#footnote-1726) of the supply chain.[[1727]](#footnote-1727) It follows that where a supply chain is complex and the company lacks information of lower tiers, a risk assessment should more likely result in the finding of ‘non-negligible’ risk. This designation forms the basis for subsequent risk management in terms of the measures taken to reduce potential negative impact. As such, a further specification of the due diligence process under the EUTR is that non-negligible risk should be minimised by the implementation of adequate and proportionate measures. Similarly applicable to the issue of forced labour within the supply chain, this may include requiring additional information from suppliers or requiring third party certification of suppliers further upstream.[[1728]](#footnote-1728) A corollary of this approach is thus an incentive for buyers to insist upon supplier certification both as a contributory factor to a finding of non-negligible risk, and as a means of risk management where non-negligible risk has been found. Similar provisions could be used within the proposed instrument on forced labour.

**10.2.3 The Verifier**

The next stage of the proposed model is a mandatory process of verification. Even where binding standards are set, it is clear that the level of engagement among firms may vary.[[1729]](#footnote-1729) As such, the aim of the verification process is to ensure that the specifications mandated by the regulation have been implemented and that a minimum standard of due diligence is in operation. The proposed instrument would thus place an evidential burden on a company to illustrate that their due diligence systems have been implemented in accordance with the detailed requirements of the legislation. For example, supply chain maps could be demanded, audit records required, or details on how forced labour risks have been addressed following issues of supplier non-compliance or potential concern. Where such evidence is not forthcoming, the auditor would be placed under a duty to notify the competent authority of the member state.

A key question within this model of regulation regards the identity of the verifier. The proposed model follows the EUTR and EUCMR in looking to the independent private sector to undertake the process of verification. As was observed in chapter 3 however, the use of auditors as ‘regulatory intermediaries’[[1730]](#footnote-1730) in the monitoring of corporate management systems has created a number of problems. Indeed, according to Andrew Tyrie, the chair of the UK’s Competition and Markets Authority (CMA) “more than a quarter of big company audits are considered sub-standard by the regulator.”[[1731]](#footnote-1731) However, in spite of the apparent weaknesses of the audit approach, it is arguably better to have *some* oversight of a company’s due diligence processes as opposed to none at all. Indeed, as Sir Donald Brydon, currently undertaking an independent review of the audit sector,[[1732]](#footnote-1732) observes that: "not everything is broken and many audits are conducted to a very high quality".[[1733]](#footnote-1733) Moreover, the proposed instrument could include provisions that permit closer regulatory oversight of the auditor.

**10.2.4 Tiered Oversight**

The proposed model of regulation would require that the auditor must be accredited at the EU level.[[1734]](#footnote-1734) More specifically including the auditor within the regulatory framework would give greater recognition to its role as an intermediary in the regulatory process and serve to ensure that the communication of audit expectations is synonymous across auditors from different member states. In addition to this accreditation, the proposed instrument should require that the auditor be monitored by the competent authority of the member state. As the Office of Safety & Standards (OSS) is empowered to undertake the role of competent authority for the EUTR, it is likely that the same body could undertake the role for the proposed instrument to ensure due diligence as regards forced labour within the supply chain.

The next tier of oversight would require the performance of the member state and its competent authority to be monitored at the EU level. Under the EUTR, for example, member states must report to the EU Commission biannually.[[1735]](#footnote-1735) This would permit the review of the functioning and effectiveness of the Regulation to be reviewed on a periodic basis at the central level. A potential concern here[[1736]](#footnote-1736) is that inconsistent levels of monitoring, and indeed, enforcement, could be undertaken by different member states. [[1737]](#footnote-1737) This would serve to create a ‘loophole’ whereby unverified products could be more easily introduced into the EU market via certain states.[[1738]](#footnote-1738)However, given its oversight, this issue could arguably be addressed over time through enlisting central EU mechanisms. Indeed, a formal warning by the EU against Belgium’s competent authority in relation to a lack of monitoring effort in relation to the EUTR saw a swift and significant response. [[1739]](#footnote-1739)

**10.2.5 Addressing Non-Compliance**

Where a company has not evidenced to the auditor that its due diligence practices accord to the minimum standards of the proposed instrument, a number of enforcement options should be available to the competent authority. A potential issue with regulation at the regional level is the risk of inconsistency as regards the sanctions available to competent authorities across member states. EU regulation often affords discretion to the member states in terms of legislating for the available penalties.[[1740]](#footnote-1740) For instance, the EU instrument may simply specify that such sanctions should be ‘‘effective, dissuasive and proportionate.’[[1741]](#footnote-1741) In order to prevent the creation of a loophole, as outlined previously, it is suggested a minimum set of penalties should be required as being available to all competent authorities across the EU.[[1742]](#footnote-1742)

It is suggested that a responsive regulatory approach[[1743]](#footnote-1743) is taken to the enforcement of the proposed instrument. Fines and the seizure of non-verified goods could comprise the lower end of the sanction spectrum with the suspension of authorisation to import from particular countries for repeated or serious non-compliance.[[1744]](#footnote-1744) This, more serious, sanction arguably has the potential to interfere with the operation of a business model actively seeking the lowest cost source of production. Ultimately a verified system of due diligence could be made a requirement of EU market access thus preventing companies from operating within the region as the final option for a habitual failure to comply. It is also significant to state that should an instance of forced labour be uncovered within a company’s supply chain yet its due diligence process has been verified as being in accordance with the required minimum standards, the company is by definition, exonerated from any fault.

**10.2.6 Summary of Second Recommendation**

It has been suggested that duty to undertake supply chain due diligence could be enhanced through a process of specification and verification. As the proposed model essentially attempts to raise the bar of poorly performing companies to those with greater levels of CSP, it may be possible to garner support amongst CSP market leaders. Indeed, it has been suggested that part of the reason that the EUTR came about was due to a strategic alliance between market leaders, keen to ‘level the playing field’, and civil society actors.[[1745]](#footnote-1745) As chapter 8 has suggested that market leaders currently exist in terms of their due diligence processes to address forced labour in the supply chain, it is suggested that the potential exists for civil society to use this as a starting point to push for the verification model of regulation proposed. Certainly there has been support in the EU parliament for the imposition of a legal duty to prevent human rights violations,[[1746]](#footnote-1746) however, should it be based upon the notion of due diligence, it must be shaped to incorporate a requirement for verification.

**10.3 Enhancing CSP via the Constitution of the Board**

This section considers the third set of recommendations and in doing so necessarily considers a number of alternatives that are somewhat disregarded as a means to enhance anti-slavery CSP. The guidance of the MSA observes that: “top management is best placed to implement changes in the business.”[[1747]](#footnote-1747) Indeed, the Company Law Reform process at the turn of the millennium,[[1748]](#footnote-1748) gave considerable attention to stakeholders and the importance of boards of directors taking account of their interests as a means to achieve the success of the company. However, given the widespread abuses found within the supply chain, it appears that companies can be successful in meeting their objective of maximising shareholder value without taking account of their stakeholders much at all. The business case for CSP, as encapsulated by s172 of the Companies Act 2006, is arguably weak. As such, the duty to have regard to stakeholder interests under s172 is unlikely to enhance the extent to which companies take account of stakeholder interests within the supply chain. It is suggested that if forced labour within the supply chain, as a stakeholder interest, is to be taken seriously, then it needs to be better incorporated at the board level.

This section falls in line with those discussed previously in the attempt to provide a somewhat palatable response to the problem at hand. As such, three potential developments will be considered that have arisen in recent policy, review and political debate. The first, reflecting the current emphasis of policy makers in relation to the board’s constitution, focuses on increasing the diversity of the board as regards gender and ethnicity. More specifically, it will be considered whether a more diverse board would lead to greater stakeholder consideration. The second, drawing from a suggestion made within the recent review of the MSA, considers the potential of a designated board member being made responsible for the anti-slavery efforts of the company. The third, moves away from mere tinkering with the board to a more proximate form of stakeholder representation via the mandatory imposition of stakeholder representatives at board-level. Although it is difficult to conceive how forced labour victims as a stakeholder group might directly represented on the board,[[1749]](#footnote-1749) it is suggested that their interests may be indirectly enhanced through the use of employee and consumer representation.

**10.3.1 Board Diversity**

There has been a strong policy focus on increasing the gender and ethnic diversity of the board in recent years.[[1750]](#footnote-1750) According to the Financial Reporting Council, “diversity … is very important in ensuring effective engagement with key stakeholders and in order to deliver the business strategy.”[[1751]](#footnote-1751) Whilst significant increases have been seen as regards the number of women on boards of UK companies,[[1752]](#footnote-1752) there has been little change in terms of ethnic minority representation.[[1753]](#footnote-1753) Although enhanced diversity is a welcome objective in itself, the question here relates to the relevance of board heterogeneity to CSP more broadly.

It has been suggested that increased board diversity serves to reduce ‘groupthink’, or the phenomenon whereby decision-making outcomes generated by a group of similar people are more likely to be dysfunctional and irrational.[[1754]](#footnote-1754) Dallas highlights the inherent limitations to the individual’s “field of vision”, in terms of their recognition of problems, range of alternatives, and ultimately, in their decisions.[[1755]](#footnote-1755) Drawing upon what is known as upper-echelon theory,[[1756]](#footnote-1756) Dallas outlines that such limitations may derive from the individual’s perspectives, values, beliefs, networks and affiliations.[[1757]](#footnote-1757) As such, those persons who have similar experiences and background may have limited scope in undertaking a decision-making function. It follows that heterogeneity should theoretically allow for the consideration of a broader range of information.[[1758]](#footnote-1758)

Ultimately, Dallas argues that diverse boards have the potential to broaden the focus of the organisation beyond the share price, to more effectively incorporate the interests of other stakeholders.[[1759]](#footnote-1759) However, Dallas concedes that inconsistency exists in relation to studies of the impact of heterogeneity on, for example, innovation in the workplace more generally.[[1760]](#footnote-1760) This is problematic because much of her assertions are based on the premise that diversity necessarily equates to broader thinking. A brief perusal of the more recent literature more specifically examining the relationship between board diversity and CSP paints the same inconsistent picture. Some studies observe a correlation between gender diversity and a firm’s social and environmental performance,[[1761]](#footnote-1761) whereas others do not.[[1762]](#footnote-1762) Moreover, whilst proponents of greater diversity on boards as a means to enhance CSP highlight the significance of difference to the decision-making process,[[1763]](#footnote-1763) the potential for assimilation is somewhat conspicuously omitted. Thus whilst women, for example, may typically possess more communal traits relative to men[[1764]](#footnote-1764) which in theory, could lead to greater consideration of stakeholder interests,[[1765]](#footnote-1765) the possibility of their suppression or reformulation during their ‘rise to the top’ is not considered. Finally, of course, the same incentives to prioritise shareholder interests within the UK’s system of corporate governance exist, whatever the director’s gender or skin colour. As such, even though increased diversity may be desirable in terms of reducing groupthink, it is arguably insufficient as a solution to the problem under consideration.

**10.3.2 A Designated Anti-Slavery Board Member**

The recent independent review of the MSA was limited by its governmental remit to providing recommendations to fine tune the disclosure-based model taken in relation to modern slavery within the supply chain.[[1766]](#footnote-1766) In spite of this restriction, the review panel “strongly believe[d] that businesses should be required to have a named, designated board member who is personally accountable for the production of the [MSA] statement.”[[1767]](#footnote-1767) Clearly intended to apply to the companies covered by s54 of the MSA, the report’s suggestion would require companies with a turnover of £36 million or more to designate a director to fulfil this requirement.

Whilst this notion of a designated director forms the starting point for the following discussion, it should not be thought that the Independent Review’s suggestion was limited to mere disclosure. Arguably exceeding its restrictive remit, the Review provides that: a “Failure to fulfil modern slavery statement reporting requirements or *to act when instances of slavery are found* should be an offence under the Company Directors Disqualification Act 1986.”[[1768]](#footnote-1768) This notion that the director should be required to *act* upon a finding of modern slavery arguably goes further than a mere transparency approach. Perhaps, for this reason the Review provides no further detail as regards this particular suggestion. It will, however, be considered here.

Once a finding of forced labour or modern slavery has been established through civil society investigation, the director would be under a personal obligation to address the issue. This would require action to be taken by the company at the designated director’s bequest. The type of action required would depend on the circumstances of the finding but could include for example disengagement, capacity building, higher quality audits, and the payment of redress to forced labour victims. It is suggested that specialist CSO involvement could be mandated by the proposed regulation in the determination of appropriate action. Where the CSO feels that the director has taken inadequate action (or none at all) to address the issue and remedy the situation, the CSO should raise the matter with the Modern Slavery Commissioner who would then commence disqualification proceedings.[[1769]](#footnote-1769) Alternatively, a bolstered Modern Slavery Commissioner could be more actively involved within the remediation process and monitoring thereof. However, this would require the necessary resources to be made available. This may not be forthcoming in the present political climate.

It is made clear in the independent review that the source of the obligation would stem from an amendment to the grounds for disqualification under the Company Directors Disqualification Act (CDDA). The CDDA means to provide a “deterrent effect on further misconduct” and encourage “higher standards of honesty and diligence in corporate management.”[[1770]](#footnote-1770) A director falling within the grounds of the Act is typically found to be ‘unfit’ of holding the office of director and thus is disqualified by order of the court.[[1771]](#footnote-1771) In the present scenario, therefore, the amendment of the CDDA would require notion of ‘unfitness’ to be extended to reflect an adherence to the requirements in question.

The period of disqualification under the CDDA is dependent on the grounds for disqualification but the average length of disqualification in 2013 was six years.[[1772]](#footnote-1772) Along with the stigma attached to being disqualified,[[1773]](#footnote-1773) recent reforms have permitted the court to make a compensation order against the disqualified director, allowing the director to be held personally liable.[[1774]](#footnote-1774) Although currently limited to the compensation of creditors of an insolvent company, this could theoretically be extended to apply to involuntary creditors, thus potentially providing financial redress to victims of modern slavery, where the director has failed to act. Perhaps more pertinently in a dissuasive sense, given the size of the companies covered by the MSA, are the financial implications of a director not being in service during the period of disqualification.

The problem with this suggestion is that a reliance upon civil society investigation remains. Echoing the criticism of a corporate, as opposed to individual, duty-based approach, as per the French Duty of Vigilance, directorial action becomes a purely reactive process. This is of particular concern in relation to force labour within the supply chain given the difficulty civil society faces in uncovering it in the first place. In the absence of a finding, the company at large is free to continue to squeeze the supply chain in order to maximise the extraction of value destined for the shareholder. Indeed, for the designated director, the current structure of executive pay would remain an incentive for them to do so.

**10.3.3 Stakeholder Representation on the Board**

This thesis has argued that the maximisation of shareholder value is the main driver of inadequate CSP. In order to weaken the pressures associated with shareholder value, it is necessary to move away from the prioritisation of the shareholder interest. As such, the board must be made more amenable to the incorporation of stakeholder interests in its strategic decision-making. It is suggested that this may be achieved through the direct incorporation of employee and consumer representatives at the board level. Moreover, in contrast to the more extreme suggestions seeking to create a more sustainable economic model,[[1775]](#footnote-1775) the reconstitution of the board in this manner is highly topical, and just maybe, politically possible.

Indeed, prior to her election in 2016, Theresa May pledged that: “If I’m prime minister ... we’re going to have not just consumers represented on company boards, but workers as well.”[[1776]](#footnote-1776) Once elected, the government promptly u-turned on this pledge, however the momentum for change has seemingly been taken up by the opposition. Opposition leader Jeremy Corbyn has outlined his desire for worker directors elected by the workforce in public and private companies with more than 250 staff,[[1777]](#footnote-1777) a significantly lower threshold than the last time employee representation received such policy attention.[[1778]](#footnote-1778) Whilst the Labour party has not suggested consumer representation on the board, it has outlined a more active role for consumers in interfering with the alignment of director and shareholder interests through voting on executive pay.[[1779]](#footnote-1779) The imposition of a consumer representative at the board level is arguably not a huge step away from such a proposal. Employee and consumer representation will now be considered.

**10.3.3.1 Employee Representation**

Employee representation is used here to refer to an employee or number of employees being elected, by a company’s workers, to take a place on the board. Before its recent political resurgence in the context of growing income inequality within the UK, the idea of employee representation on boards has not been on the policy agenda since the mid-1970s, most notably with the Bullock Inquiry on industrial democracy.[[1780]](#footnote-1780) Representation at the board-level differs from forms of indirect participation, such as works councils, as it attempts to permit employee input into the company’s strategic decision-making as opposed to day-to-day operational matters within the workplace.[[1781]](#footnote-1781) Employee representation may be achieved through a two-tier board structure as per the German model, or within a single board as seen in countries like Sweden and Norway.[[1782]](#footnote-1782) It makes sense, given that UK companies have a single tier board system, for the latter model to be emulated.

It is suggested that the imposition of employee representatives on the board may serve to both enhance the interests of workers within the supply chain, and CSP more broadly. Firstly, notions of international worker solidarity may serve to lead employee directors to consider the welfare of the workers in supply chains. Indeed, trade unions have forged international alliances in an attempt to counteract the negative forces of globalisation on domestic workforces.[[1783]](#footnote-1783) However, it is acknowledged that the level of trade unionism within firms and industries may differ considerably. Where trade unionism is low, workers may be less informed as regards the fates of overseas workers within the supply chain, or may be less inclined to ‘stand together’ with them. Secondly, employees would potentially oppose plans to further outsource productive processes, given that this may equate to redundancies. Here, one might contrast the approach taken to outsourcing overseas between the US, as a model of shareholder primacy, and Germany, as a model of employee representation on the board.[[1784]](#footnote-1784) Companies in Germany selected to outsource 11% of its manufacturing jobs overseas between 2000 and 2009.[[1785]](#footnote-1785) In the same period, the US outsourced approximately a third. Indeed, during this period, only the UK outsourced more.[[1786]](#footnote-1786) As Parker, an analyst for Forrester observes, **“Compared to US and UK companies, German interest in outsourcing has been much smaller.”**[[1787]](#footnote-1787) **Thirdly, and in relation to the issue of CSP more broadly, employees, as a group, may seek to push for longer term decision making within the company to reflect the nature of their interest. Indeed,** given that they cannot diversify their human capital away from the firm, **employees, in contrast to shareholders, may** also be more averse to reputational risks facing the company.

**10.3.3.2 Consumer Representation**

The idea of a consumer representative on a company board is less well established than for employee representatives given the latter’s use in other jurisdictions. Although the imposition of employee representative is far from straightforward, it is relatively simple to identify the source of the representative (an employee) and the body that will vote to elect them to the board (the workforce). For consumer representatives, however, this is less straightforward. According to Keay, it may be difficult to identify the consumers of a company.[[1788]](#footnote-1788) However, it is suggested that in a time of loyalty cards and the routine addition of customers to a mailing list following a purchase, this is arguably resolvable.[[1789]](#footnote-1789)

A more difficult question concerns the identity of the representatives themselves. Past examples of consumer representation typically came in relation to the operation of a ‘consultative council’ within a nationalised industry to which consumers may submit complaints.[[1790]](#footnote-1790) These consultative councils were primarily comprised of members of local authorities, which although appropriate in relation to state monopolies in the provision of utilities or transport, are less so within the present context. A more recent example, again stemming from the public sector, but this time from the United States, may be informative here. The U.S. Food and Drug Administration (FDA) routinely include consumer representatives on its advisory committees to represent consumer interests.[[1791]](#footnote-1791) Along with a certain level of technical proficiency in terms of the analysis of relevant data and research design, the representative must be able to discuss the benefits and risks of products under review. Moreover, the FDA state that it is essential for consumer representatives to have “an affiliation with and/or active participation in consumer or community-based organizations” and so applicants must demonstrate active participation within such groups.[[1792]](#footnote-1792) Arguably, a similar model could be applied to consumer representation on the boards of large companies here, with a requirement for active participation within consumer rights or ethical consumer organisations.

A key question relates to the relationship between consumer representation and enhanced CSP. In chapter 7, it was outlined that there may be conflict between the demand for low prices and ethical purchasing decisions. However, it was also outlined that consumers wish to be ethical, or at least be seen to be ethical. Indeed, when asked, consumers repeatedly outline that they are willing to pay for more ethical produce. Yet the very nature of strategic decision-making reduces the immediacy of the financial implications of enhanced CSP. It is suggested that the reduced proximity to the purchase decision may serve consumer representatives to communicate these good intentions to the corporate board. Moving the issue beyond the purchase decision to the longer term would arguably downplay the significance of the more immediate cognitive and psychological barriers to ethical purchasing considered in chapter 7. Moreover, the notion of brand appeal may give rise to longer term considerations of product quality over price. Greater consideration of consumer interests in this manner may serve to dilute the focus on delivering shareholder value and give greater credence to longer term considerations including that of more ethical production.

**10.3.4 Reformulation of Section 172 of the Companies Act 2006**

Under the present law on directors’ duties, all directors, whether representative or not, would be subject to the duty under s172 “to promote the success of the company for the benefit of its members.”[[1793]](#footnote-1793) As has been considered in chapter 2, the UK courts reluctance to interfere with business decisions means that a director has significant discretion in this area and thus in practice the prioritisation of the shareholder has been achieved by the UK system of corporate governance more broadly. However, given the proposals here there is a likelihood of confusion as to the proper role of representative directors. For example, a study of workers on boards observed that “corporate managers and workers had widely divergent definitions of the worker director role: management emphasized downward communication from the board to employees, whereas worker directors and their constituents stressed the protection of workers' interests as the main function of worker directors.”[[1794]](#footnote-1794)

The duty under s172 as currently drafted is incompatible with the notion of the representative director given that it is centred on the business case which, as has been repeatedly stressed throughout this thesis, may not necessarily be forthcoming. Under the current law, should a representative director indiscreetly favour a stakeholder interest, “a real risk of litigation”[[1795]](#footnote-1795) stemming from disgruntled shareholders could arise. Moreover, as was considered in chapter 3, a key problem with the shareholder value model, even where the business case does apply, is its shift towards the short term. Despite the UK seemingly being keen on elongating the corporate decision-making process following the dramatic effects of the financial crisis, it has not seen fit to revise s172, as the most blatant statement of the intended corporate objective, to reflect this.

However, neither should the duty of representative directors be owed to the respective constituents. Providing that an employee representative should act purely on behalf of the workers, for example, would see the position becoming little more than that of a trade union steward. Such a position would potentially lead to a situation of perpetual conflict between the employee representative and non-representative directors during meetings of the board. It is contended that such a position would not necessarily serve to enhance the consideration of stakeholder interests but simply create an atmosphere of discord.

It is therefore suggested that s172 be reformulated to provide that the duty of (all) directors is “to promote the success of the company.” This reformulation thus removes the notion that a single interested party should be prioritised. This arguably better facilitates the inclusion of representative directors into the UK’s system of corporate governance. Consumer representative directors would thus have a duty to promote the success of the company for the benefit of its customers, employee representatives would thus have a duty to promote the success of the company for the benefit of its employees. A focus is thus placed on acknowledging the greater range of stakeholder interests incorporated within the board’s constitution stemming from consumer and employee representation. It is acknowledged that the discretion available to directors means that these directors could choose to prioritise such interests anyway, and thus, as before, s172 remains essentially unenforceable. However, the amendment of s172 would clarify the purpose of the representative directors as not necessarily being linked to the prioritisation of the shareholder interest, so long as a rational suggestion exists that shareholders may also benefit over the long term..[[1796]](#footnote-1796) Furthermore, amending s172 in this way would arguably provide a symbolic clean page for any future discussion on further reformulating the UK’s system of corporate governance.

**10.3.5 Summary of Third Recommendation**

This section has considered a number of ways in which the stakeholder interest may be afforded greater voice at the board level as a means to dilute the primacy of the shareholder in corporate decision-making and enhance CSP. Firstly, it was observed that increasing the diversity of the board could potentially assist in addressing issues of groupthink but given the UK’s broader system of corporate governance, may be unlikely to amplify the stakeholder interest. Secondly, the suggestion put forward within the MSA review for a designated director to address negative instances of anti-slavery CSP was considered. Although welcomed, it was outlined that founding the basis of directorial action upon the finding of an instance of forced labour within the supply chain once again places too great a reliance on the investigatory resources of civil society. The potential exists, therefore, for a designated director to do very little unless an instance of this most hidden of corporate externalities is uncovered. Finally, it was recommended that the board be reconstituted to incorporate representatives of employee and consumer interests. It was suggested that diluting the shareholder voice in this way might serve to enhance CSP based upon the nature of the respective interests. In order to add clarity to their role, it was highlighted that s172 of the Companies Act 2006 should be amended to reduce the potential of an overly restrictive, or expansive, interpretation of their role.

**10.3.6 Conclusion**

This chapter has outlined a number of suggestions for change in order to better enhance the internalisation of social cost. Credence has been given to putting forward recommendations that may have appeal to the regulatory authorities, and thus have the potential to guide future regulation in this area. In doing so, this chapter has sought to address some of the weaknesses of the three regulatory models considered in this thesis. In summary, the disclosure-based model may be enhanced through greater specificity and the empowerment of consumers to uphold the veracity of corporate disclosures; the duty-based model may be improved through the specification and verification of a minimum standard of due diligence; the voluntary approach may be made more effective through the greater inclusion of non-shareholder interests through the reconstitution of the board.

**Chapter 11: Conclusion**

**11.0 Introduction**

The aim of this short chapter is twofold. Firstly, it will be illustrated how the research questions outlined in chapter 1 have been addressed through a summary of the relevant findings of this thesis. Secondly, the research process undertaken has uncovered a number of areas that have been identified as ripe for further investigation. This thesis will thus conclude by highlighting these areas in the hope that they may guide future research in this field of study.

**11.1 Addressing the Research Questions**

1. *How has the UK system of corporate governance contributed to the problem of forced labour use within the global supply chain?*

Chapter 3 has analysed the way in which the UK’s system of corporate governance has prioritised the short-term interests of the shareholder in corporate decision-making. It was argued that executive and shareholder interests have been successfully aligned through executive remuneration and the market for corporate control to position the maximisation of shareholder value as the core objective. It has been suggested that a global workforce vulnerable to exploitation has facilitated the strategic development and refinement of a business model based upon value extraction. The pressures placed on the supply chain to ‘squeeze’ out this value have led suppliers to use various coping mechanisms in order to meet the production and cost-based targets demanded from them. In labour intensive industries, suppliers are forced to reduce costs through the subcontracting of production and the use of cheaper, more vulnerable labour. It has not been suggested that corporate management have sought to enslave people within the productive process yet the relentless redistribution of value from stakeholder to shareholder has created an environment conducive to the use of forced labour.

1. *To what extent is the current regulation of CSP related to the use of forced labour within the global supply chain likely to be effective in enhancing corporate social performance?*

A number of meta-regulatory techniques discussed in chapter 3 have been applied to the regulation of CSP over the global supply chain beyond the national jurisdiction. Chapter 4 explored the rejection of a binding model of corporate regulation at the international level. In turning its back on the direct regulation of the multinational company as a non-state actor international efforts have attempted to enlist the management systems of companies to enhance their human rights-related CSP through the attempting to shape corporate self-regulation. Whist the focus of the UN Global Compact was essentially on the creation of a standardised corporate code of conduct, the UN Guiding Principles on Business and Human Rights (UNGPs) more clearly sought to implement a risk-based and management-based regulatory approach to enhancing CSP. Indeed, the UNGPs have actively shaped the regulatory discourse in this area. This has been achieved primarily through a focus on a company’s negative CSP impact.

The notion of impact as a basis for CSP directly correlates to the internalisation of social cost as a justification of regulatory intervention in this area. The idea that as impact is measurable, then it may be correlated to the concept of risk, which is seen as both identifiable and manageable, as was outlined in chapter 3. This core focus on risk is key to understanding the regulatory design of the UNGPs and the way in which subsequent domestic CSP regulation has been shaped. The notion of risk is used as a means to set regulatory expectations with the management systems of companies called upon to identify, quantify, and mitigate the risk of negative CSP impacts through the notion of due diligence.

Indeed, all three approaches considered within this thesis aim to encourage companies to incorporate forced labour due diligence into their existing risk management systems. The underlying notion of RBR/MBR in this context is that the lead firms have the greatest contextualised knowledge of the risk and how to control it. However, as was observed in chapter 3, risk is typically based upon past experience. Given that companies have frequently used low quality and low cost audits to maintain the legitimacy of a business model based upon globalised outsourcing, such expertise may not necessarily be forthcoming. Indeed, the extent and means by which the companies implement due diligence processes is left very much to the discretion afforded to companies through the meta-regulatory approach. This discretion has been justified by the need to avoid a one-size fits all approach in the acknowledgement of difference between firms in relation to their business and supply chain operations. However, the extent of the discretion given has been criticised within this thesis given that it negates the incorporation of any generally applicable best practice identified by CSO specialists in the area of forced labour within the supply chain.

Chapter 5 considered the ability of the UK’s disclosure-based regulation to adequately inform stakeholders. This model of regulation has thus shifted the responsibility to incentivise the company to act over to investor and consumer actors. In other words, these actors have been designated as regulatory mechanisms to reduce the discretion available to companies through the alignment of regulatory and corporate interests. Through an analysis of the UK’s non-financial annual reporting regime and the Modern Slavery Act 2015 (MSA), it was observed that a lack of standardisation across these reporting requirements afforded significant discretion to the firm in determining the quality of its disclosure and thus the extent of its transparency. The lack of mandatory categories of reporting provides an obvious example, with the empirical study in chapter 8 finding that the vast majority of firms chose not to disclose information in the areas suggested within the MSA. Yet even if information is disclosed within these relatively broad areas, the discretion afforded to firms in relation to the quality of the information fails to ensure its usefulness to stakeholders.

As chapter 3 observed, the relative palatability of the disclosure-based model of CSP regulation is based upon its rationale as a means to enhance the efficiency of the market through the reduction of informational asymmetry. However, the failure of the regulation to implement associated rules to ensure sufficient levels of standardisation through restricting the discretion afforded to companies impedes the ability for comparison by market actors. This is further impeded within the MSA due to the lack of a public repository and a list of applicable companies being made available. Underlying the disclosure-based approach is the notion that adequately informed investors and consumers will apply pressure to those companies with inadequate CSP to improve their performance. In other words, these actors have been designated as However, the ability and willingness for each actor to do so in any reliable sense was called into question within chapters 6 and 7. For investors, the business case as a means to incentivise action through exit or engagement does not appear wholly convincing. Whilst it is not suggested that ‘good’ companies cannot do well, or that negative CSP is without financial consequence, the inconsistent realisation of these outcomes may simply not be sufficiently convincing to the rational investor. Furthermore, even if desired, effective engagement may simply not be possible. For consumers, a number of cognitive, psychological, and situational barriers raise doubts as to the reliability of the consumer as a whole to enhance the internalisation of social cost. It was acknowledged that coordinated consumer action remains a distinct possibility as per a number of high profile and successful boycotts in the past. However, given the inadequacies of corporate disclosure, the ability for civil society to engage consumers to act is undermined by an inability to question the veracity of the information presented. As such, the business case for companies utilising their resources to deal with their social externalities, underlying both the voluntary and disclosure-based approaches, is simply not strong enough to ensure adequate CSP.

In light of this finding, chapter 9 analysed the imposition of a duty to undertake due diligence as first introduced by the French Duty of Vigilance. Due to the influence of the French law on a number of other jurisdictions, the possibility was raised that the duty-based approach could cascade into the UK. However it was also illustrated that little consensus appears to exist in terms of how exactly the duty-based model should be designed. As such it was suggested that the UK may follow its anti-corruption regulation in establishing a duty to undertake due diligence within the criminal law. It was acknowledged that the duty-based model arguably represents a substantive step forward in supply chain regulation. The inclusion of legal consequences for inadequate CSP as a means to regulate the discretion of companies to the extent of their engagement with the regulatory objectives is, in the context of CSP regulation, a significant development.

However, unfortunately, whether based in the civil law as per the French model, or within the criminal law, it was argued that the potential for the duty-based approach to enhance anti-slavery CSP could be limited by the level of this compliance risk being inadequate. The chapter observed the reliance the approach places on civil society to uncover instances of forced labour, along with an apparent unwillingness of the UK to adequately resource enforcement efforts, could mean that the incentive for effective corporate action under the instrument may simply not exist.

1. *To what extent do the modern slavery statements, published in response to s54 of the UK’s Modern Slavery Act 2015, suggest that organisations have complied with the procedural requirements of the Act and its broader substantive aim to enhance anti-slavery CSP?*

The findings of the large study in chapter 8 suggest a widespread lack of effort as regards both disclosure and the extent to which measures have been taken to enhance anti-slavery CSP. For example, there was little sign of supply chain mapping and risk identification, or at least disclosure thereof. Moreover, the majority of statements did not consider the effectiveness of the steps taken to eradicate forced labour in the supply chain suggesting a lack of engagement with the issue. It was highlighted that a number of market leaders existed. However even here there was little sign of significant interference with the underlying problem of the business model identified in chapter 3. Indeed, there was a clear reliance on the audit as a means to undertake due diligence, but the details provided were typically vague. There is some suggestion, based upon the lack of engagement with the best practice provided in the MSA guidance material, that many firms had not taken steps to address the issue and were simply carrying on as before. The findings of the study thus provide an insight into the actual, as opposed to potential, effectiveness of the UK’s current approach to the issue of forced labour within the supply chain. The insight provided is unfortunately, somewhat negative. This is perhaps unsurprising given the findings related to the second research question, as summarised above.

1. *How might the regulation of UK based companies be improved to address the problem of forced labour within the global supply chain?*

This thesis has identified a number of key weaknesses in relation to each of the three regulatory approaches. The final substantive chapter of this thesis (chapter 11) began, as its starting point, the need to provide a set of proposals that may appear palatable to key regulators. As such, a number of recommendations have been suggested that build upon regulatory discourse and existing regulatory models to go some way to address the weaknesses of each regulatory approach.

The first set of recommendations address the UK’s current disclosure-based approach to anti-slavery CSP. Here the proposed amendments to the MSA attempt to raise consumer awareness and better facilitate civil-society led collective action through mandating greater specificity within modern slavery statements and empowering consumers to play a more active role within the disclosure process. It was suggested that a public litigation fund be set up to allow for consumer-led litigation in relation to inaccurate or misleading corporate disclosures.

The second set of recommendations address the weakness of a duty-based approach in relation to anti-slavery CSP. Based on the potential for a lack of compliance risk as a means to incentivise adequate CSP through the imposition of a legal duty, a change in law at the EU level has been proposed. This proposal involves a mandatory requirement for minimum standards of due diligence to be undertaken with corporate efforts in this regard subject to independent verification. It is submitted that the addition of ‘verifiers’ to the regulatory framework would create a gatekeeping role for independent auditors given their strategic position over the company as a regulated entity. An accreditation process would serve to regulate the verifiers.

Finally, it has been suggested that CSP may be undertaken voluntarily by the company should the alignment of corporate decision making to shareholder interests be weakened. This set of proposals thus consider the reconstitution of the board to allow for greater stakeholder voice. It was suggested that increased board diversity or the use of a designated director could be insufficient to amplify stakeholder interests. However, direct worker and consumer representation may serve to elongate the decision-making process and raise the significance of CSP matters within corporate strategy. It was argued that has the potential to enhance the effectiveness of the voluntary approach taken to CSP as taken by the international human rights community.

**11.2 Future research**

A number of areas for future research have been identified through the process of writing this thesis. Firstly, in analysing the focus on market actors taken by the voluntary and disclosure-based models, credence was given to the investor and the consumer as key stakeholders in this regard. It was evident from a brief consideration of the literature that the potential for the employee to enhance CSP is somewhat under researched. The employee was incorporated into the discussion with the worker representative, a core recommendation of chapter 10. However, this represented an acknowledgment that the longer-term interest of the employee as a stakeholder may indirectly benefit CSP. Further study is required to consider the potential for employees to directly impact upon corporate decision-making to enhance CSP, or perhaps illustrate that they are unable or unwilling to do so.

Secondly, the empirical study of modern slavery statements focused on the generation of a broad picture in considering the corporate response to the MSA. Given that the research was undertaken in the first year of the Act’s application, and thus represents a base line study of the corporate response, a second follow up investigation would seek to investigate the extent to which the picture has changed (if at all). An alternative suggestion involves a narrower focus to be taken in the provision of a sectoral analysis of modern slavery statements. One would hope that greater levels of engagement with the broader substantive aims of the Act would be apparent in those companies operating in higher risk industries.

Thirdly, the final report of the Modern Slavery Act Review was laid in Parliament on 22nd May 2019. The recommendations put forward within the report were considered in chapter 5. Future research will be necessary in considering both the government’s discourse in this area, and the impact of the recommendations should they be introduced. It appears that the outgoing Prime Minister may have committed to establishing a central registry of modern slavery statements.[[1797]](#footnote-1797) However, no further information exists as to the more intrusive suggestions proposed within the report. Moreover, questions remain as regards the government’s commitments to the issue, particularly given the departure of Theresa May as its most vocal spokesperson.

Fourth, in discussing the alignment of shareholder and executive interests in chapter 3, the Non-Executive Director (NED) was observed as playing a significant role in ensuring the board focus on satisfying the shareholder interest. Although, reference was made to a small number of critical commentators in this area, it is very apparent that critical literature in this area is currently quite limited. Qualitative study in this area as a means to better understand the role of the NED may provide insight into their potential, if any, to play a greater role in enhancing CSP, or at least in elongating the time-frame of the decision-making process.

Finally, the uncertainty of Brexit raises numerous opportunities for study.[[1798]](#footnote-1798) If the UK should finally leave the EU, the effect of leaving on a multitude of areas currently regulated at the regional level would need to be considered by legal researchers. Of course, of greater concern is that by leaving the EU, the potential for more progressive regulation to enhance CSP at the regional level could disappear.

**Appendix**

**Coding Schedule**

**Total number of statements = 935**

|  |  |  |
| --- | --- | --- |
| **Category 1** | **Procedural compliance** | **Frequency** |
| *Subtheme 1a:*  *Mandatory requirements* | | |
|  | Director’s name/signature present | 696 |
| *Subtheme 1b:*  *Suggested categories of disclosure* | | |
|  | Due diligence mentioned | 609 |
|  | Information on supply chain provided | 341 |
|  | Training & Awareness raising utilised | 570 |
|  | Effectiveness considered | 168 |
|  | KPIs considered as regards effectiveness | 140 |

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| **Category 2** | **Indicators of commitment** | **Frequency** |
|  | Strong expression of commitment to aims of MSA | 653 |
|  | Duplicate text strings comprises more than 75% of text | 24 |
|  | Contains spelling, punctuation, grammar errors or unnatural repetition | 46 |
|  | Outlines potential to affect change in supply chain | 31 |
|  | Acknowledgement that business model could be causative | 30 |
|  | Attempt to shift responsibility for supply chain management | 82 |

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| **Category 3** | **Management of the supply chain** | **Frequency** |
| *Subtheme 3a:*  *Communication of policy to suppliers* | | |
|  | Communication of anti-slavery policy to suppliers mentioned | 272 |
|  | Expresses that policy has been communicated or is in process of being communicated | 160 |
| *Subtheme 3b:*  *Approach taken to supplier compliance* | | |
|  | Vague expectation/requirement/encouragement for suppliers to comply | 181 |
|  | Supplier declaration/assurance of compliance | 137 |
|  | Demonstration of compliance | 47 |
|  | Specific contractual controls present | 205 |
|  | Contractual controls where possible/appropriate/necessary | 21 |
|  | Contractual terms mandate only legal compliance | 32 |
|  | Contractual controls mentioned but vague as regards contents | 8 |
| *Subtheme 3c:*  *Approach to supplier non-compliance* | | |
|  | Phrase ‘zero tolerance’ used | 311 |
|  | Vague repercussions for supplier non-compliance | 50 |
|  | Clear disengagement policy | 254 |
|  | Work with suppliers to improve with threat of disengagement | 43 |
|  | Work with suppliers to improve without threat of disengagement | 12 |
|  | Disengagement actually used | 4 |
| *Subtheme 3d:*  *Stakeholder consideration* | | |
|  | Clear disengagement policy but no consideration of victims or welfare of disengaged supplier employees | 181 |
|  | Policy or provision for victims of modern slavery | 25 |
|  | Partnership with civil society to aid victims | 3 |
|  | Provision of information on sources of help for victims | 5 |
| *Subtheme 3e:*  *Tier 2 suppliers* | | |
|  | Tier 2 suppliers considered | 137 |
|  | Vague expectations of tier 2 suppliers | 70 |
|  | Direct communication to tier 2 | 7 |
|  | ‘Flow down’ provisions used | 28 |
|  | Provides training to tier 2 suppliers | 1 |
|  | Requires direct suppliers to provide training to their suppliers | 4 |

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| **Category 4** | **Risk identification and prevention** | **Frequency** |
| *Subtheme 4a:*  *Perceptions of risk* | | |
|  | General risk of modern slavery acknowledged | 105 |
|  | Specific risk of modern slavery identified within supply chain | 95 |
|  | Reference to Global Slavery Index made in assessment of risk | 20 |
|  | High risk of modern slavery in supply chain disclosed | 3 |
|  | Low risk of modern slavery emphasised | 121 |
|  | No risk of modern slavery in supply chains | 12 |
| *Subtheme 4b:*  *Evidence of supply chain mapping* | | |
|  | No supply chain information | 597 |
|  | Supply chain described (to some extent) | 338 |
|  | Very general supply chain information | 257 |
|  | More specific information provided | 81 |
|  | Number of total suppliers provided | 15 |
|  | Number of first tier suppliers provided | 39 |
|  | Specific information of source locations provided | 24 |
|  | Total annual supply chain expenditure provided | 7 |
|  | Supplier database/list maintained but no further information | 2 |
|  | Further supply chain information accessible or available on request | 3 |
|  | All sourcing transactions (over £99.99) made available on website | 1 |
| *Subtheme 4c:*  *Knowledge of modern slavery demonstrated* | | |
|  | Broad definition of modern slavery provided | 190 |
|  | Issue of migrant labour noted in context of greater risk | 24 |
|  | Issue of seasonality noted in context of greater risk | 88 |
|  | Use of temporary workers mentioned | 81 |
|  | Use of casual workers mentioned | 8 |
|  | Temporary workers linked to risk | 39 |
|  | Casual workers linked to risk | 1 |
|  | Policies linked to specific modern slavery concerns (linked to restriction of movement due to withholding of wages, lodging of documents or deposits, work finding fees, or use of debt) | 25 |
|  | Victim’s consent or ignorance of situation acknowledged as potential restriction to identification | 9 |
| *Subtheme 4d:*  *Due diligence* | | |
|  | Due diligence is used | 609 |
|  | Whistleblowing facility in place | 425 |
|  | Whistleblowing facility limited to employees | 114 |
|  | Whistleblowing facility extended beyond employees (to “suppliers”, “external stakeholders” or “third parties”) | 90 |
|  | Whistleblowing facility to be extended beyond employees | 2 |
|  | Use of audits reported | 215 |
|  | Use of audits limited to productive concerns | 2 |
|  | Supplier agreement permits audits | 33 |
|  | Audit are based on supplier self-assessment | 74 |
|  | Physical audits are used | 87 |
|  | Independent auditors are used | 52 |
|  | Unannounced audits are used | 7 |
|  | Unannounced audits may be used in some instances | 3 |
|  | Disclosing organisation reserves the right to use unannounced audits | 4 |
|  | Unannounced audits not used | 10 |
|  | SEDEX Members Ethical Trade Audit (SMETA) standard used | 8 |
|  | SA8000 audit standard used | 2 |
|  | Weakness of audit approach acknowledged | 8 |
|  | Suppliers required to register with SEDEX | 9 |
|  | Will require suppliers to register with SEDEX in future | 8 |
| *Subtheme 4e:*  *Training and Awareness Raising* | | |
|  | Training/awareness raising mentioned | 570 |
|  | Training/awareness raising methods disclosed | 74 |
|  | Content of training/awareness raising disclosed | 31 |
|  | Implementation or development of training/awareness raising being considered | 165 |
|  | Training/awareness raising provided to tier 1 suppliers | 19 |

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| **Category 5** | **Collaboration** | **Frequency** |
| *Subtheme 5a:*  *Collaboration with suppliers* | | |
|  | Express willingness to collaborate with suppliers | 113 |
|  | Significance of long-term relationship with supplier highlighted | 105 |
| *Subtheme 5b:*  *Collaboration across the industry* | | |
|  | Express willingness to collaborate across industry | 20 |
| *Subtheme 5c:*  *Collaboration in MSIs* | | |
|  | Willingness to collaborate in MSI - SEDEX | 56 |
|  | Willingness to collaborate in MSI - ETI | 47 |
|  | Willingness to collaborate in MSI – Stronger Together | 47 |
|  | Willingness to collaborate in MSI – AIM-PROGRESS | 4 |
|  | Willingness to collaborate in MSI – Better Cotton Initiative | 1 |
|  | Willingness to collaborate in MSI – Sustainable Natural Rubber Initiative | 2 |
|  | Willingness to collaborate in MSI – Shrimp Sustainable Supply Chain taskforce | 3 |
|  | Willingness to collaborate in MSI – disclosing organisation is member of UN Global Compact Network Modern Slavery Working Group | 6 |
| *Subtheme 5d:*  *Collaboration with trade unions* | | |
|  | Trade unions mentioned | 15 |
|  | Outlines a role for trade unions to play | 3 |

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| **Category 6** | **Reflection** | **Frequency** |
| *Subtheme 6a:*  *Effectiveness* | | |
|  | Effectiveness considered | 163 |
|  | Reference made to Key Performance Indicators (KPIs) | 151 |
|  | KPIs specified | 113 |
|  | KPIs in development | 19 |
|  | KPIs not specified | 9 |
| *Subtheme 6b:*  *Key Performance Indicators (KPIs)* | | |
|  | KPI linked to audits | 46 |
|  | KPI linked to training/awareness raising | 31 |
|  | KPI linked to follow up or corrective action | 2 |
|  | Relevance of capacity building and steps taken with higher risk suppliers acknowledged | 1 |
| *Subtheme 6c:*  *Plan for future action* | | |
|  | Plan for future action included | 275 |
|  | Plan for future action provided in vague terms | 54 |
|  | Plan for future action provided in more detail | 221 |

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| **Category 7** | **Reputation** | **Frequency** |
| *Subtheme 7a:*  *Positive language* | | |
|  | Positive language used with reference to commercial success, innovation, product superiority or social commitment | 112 |
| *Subtheme 7b:*  *Negative language* | | |
|  | Negative language used | 29 |
|  | Reports that no steps have been taken | 10 |
|  | Reports that a particular action has not been taken (e.g. training not given) | 10 |
|  | Reports that no KPIs used in consideration of effectiveness | 9 |

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6. ibid Section 1(5). [↑](#footnote-ref-6)
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66. ibid. [↑](#footnote-ref-66)
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81. *Salomon v Salomon & Co Ltd [1896] UKHL 1*. [↑](#footnote-ref-81)
82. L Stout, ‘The Shareholder Value Myth’ (2013) 771 <http://scholarship.law.cornell.edu/facpub/771>. [↑](#footnote-ref-82)
83. Armen A Alchian and Harold Demsetz, ‘Production, Information Costs, and Economic Organization’ 62 The American Economic Review 777. [↑](#footnote-ref-83)
84. “The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals… Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals.” Buckley, LJ in *Gramophone and Typewriter Ltd v Stanley* p105-106. [↑](#footnote-ref-84)
85. J Kay, ‘Shareholders Think They Own the Company — They Are Wrong’ *The Financial Times (online)* (London, 10 November 2015) <https://www.ft.com/content/7bd1b20a-879b-11e5-90de-f44762bf9896>. [↑](#footnote-ref-85)
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94. HA Simon, *Models of Man: Social and Rational* (Wiley 1957). [↑](#footnote-ref-94)
95. This ‘firm-specific human capital’ (FSHC) may be given as comprising the “knowledge and skills that are specialized to a given enterprise, as well as effort that has been put forth towards the goals of the enterprise”. M Blair, ‘Firm-Specific Human Capital and Theories of the Firm’ in M Blair and M Roe (eds), *Employees and Corporate Governance* (Brookings Institution Press 1999) 62. Within a team production theory of the firm economic rents, or value, are generated by coordinated activity between employer and employee working together in concert. The effectiveness of this ‘team’, and thus the total amount of value generated, is enhanced by the employees’ firm specific investments and therefore desirable from an economic efficiency perspective. See: Blair and Stout (n 29). [↑](#footnote-ref-95)
96. M Blair, *Ownership and Control* (Brookings Institution Press 1995) 238. [↑](#footnote-ref-96)
97. L Lan and L Heracleous, ‘Rethinking Agency Theory: The View from the Law’ (2010) 35 Academy of Management Review 294. [↑](#footnote-ref-97)
98. The possibility of an implied relational contract existing between two business entities was rejected by the UK Court of Appeal in *Baird Textile Holdings Ltd v Marks & Spencer plc [2001] EWCA Civ 274*. [↑](#footnote-ref-98)
99. The notion of share price as an all-knowing signal of worth is further perpetuated within social norms such as business schools and contemporary corporate legal advice. See: David Millon, ‘Two Models of Corporate Social Responsibility’ (2011) 46 Wake Forest Law Review 523. On the importance of incorporating the human rights agenda into business schools in general, see: Ken Mcphail, ‘Corporate Responsibility to Respect Human Rights and Business Schools’ Responsibility to Teach It: Incorporating Human Rights into the Sustainability Agenda’ (2013) 22 Accounting Education 391. [↑](#footnote-ref-99)
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103. David Millon, ‘Why Is Corporate Management Obsessed with Quarterly Earnings and What Should Be Done About It?’ (2002) 70 Geo. Wash. L. Rev 890. [↑](#footnote-ref-103)
104. Stout, ‘New Thinking on Shareholder Primacy’ (n 36) 16. [↑](#footnote-ref-104)
105. P Stafford, ‘HFT Accounts for Three-Quarters of UK Trading’ *The Financial Times (online)* (London, 24 January 2011) <http://www.ft.com/cms/s/0/b11931b0-279a-11e0-a327-00144feab49a.html#axzz4BqvJuIUO>. [↑](#footnote-ref-105)
106. Business Innovation and Skills Committee, ‘Business, Innovation and Skills Committee - Third Report: The Kay Review of UK Equity Markets and Long-Term Decision Making’ <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmbis/603/60302.htm> section 2. [↑](#footnote-ref-106)
107. A Smith and S Foley, ‘Criticism of Short-Term Investing Grows after Woodford Departure’ *The Financial Times (online)* (London, 18 October 2013). [↑](#footnote-ref-107)
108. A Haldane, ‘Patience and Finance’, *Oxford China Business Forum, Beijing* (2010) 30 <http://www.bankofengland.co.uk/archive/Documents/historicpubs/speeches/2010/speech445.pdf>. [↑](#footnote-ref-108)
109. MFS, ‘Lengthening the Time Horizon’ (2015) <https://www.mfs.com/wps/FileServerServlet?servletCommand=serveUnprotectedFileAsset&fileAssetPath=/files/documents/news/mfse\_time\_wp.pdf>. [↑](#footnote-ref-109)
110. The Economist reports that US corporate share buybacks comprised 60% of cash returns in 2013. See: ‘The Repurchase Revolution’ [2014] *The Economist* <http://www.economist.com/news/business/21616968-companies-have-been-gobbling-up-their-own-shares-exceptional-rate-there-are-good-reasons>. [↑](#footnote-ref-110)
111. Share buy-backs as a percentage of total net income for shareholders have gradually increased since US laws on buy backs were relaxed in the early 1980s. See Exhibit 2 in: B Jiang and T Koller, ‘Paying Back Your Shareholders’ (2011) <http://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/paying-back-your-shareholders>. [↑](#footnote-ref-111)
112. According to Dubravko Lakos-Bujas, Head of US Equity Strategy at JP Morgan, as quoted in: S Ro, ‘How Companies Pay for Those Billion Dollar Stock Buybacks’ (*Business Insider*, 2015) <http://uk.businessinsider.com/how-companies-fund-share-buybacks-2015-11> accessed 13 June 2016. [↑](#footnote-ref-112)
113. Next plc provides one example of a UK company following this model having successfully increased shareholder value via a strategy of share buy-backs. See: N Pratley, ‘Share Buybacks Are for Dummies – Unless You Follow the Wolfson Rules’ *The Guardian (online)* (London, 21 March 2013) <https://www.theguardian.com/business/2013/mar/21/lord-wolfson-next-shares-buyback>. [↑](#footnote-ref-113)
114. A Smith, ‘UK Dividend Payments Jump to Record’ *The Financial Times (online)* (London, 22 July 2013) <http://www.ft.com/cms/s/0/79c7b67a-f09f-11e2-929c-00144feabdc0.html#axzz4C7QmG3Tw>. [↑](#footnote-ref-114)
115. R Atkins, ‘Will Share Buyback Craze Spread to Europe?’ *The Financial Times (online)* (London, 28 May 2015) <http://www.ft.com/cms/s/0/c469c1f4-047b-11e5-95ad-00144feabdc0.html#axzz4C7QmG3Tw>. See also: L Laurent, ‘Europe Firms May Draw Fire by Joining Buyback Boom’ *Reuters* (London, 5 March 2015) <http://www.reuters.com/article/europe-buybacks-usa-idUSL5N0W723420150305>. [↑](#footnote-ref-115)
116. A Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Harvard University Press 1977). [↑](#footnote-ref-116)
117. W Lazonick and M O’Sullivan, ‘Maximizing Shareholder Value: A New Ideology for Corporate Governance’ (2000) 29 Economy and Society 13; W Lazonick, ‘Corporate Restructuring’ in S Ackroyd and others (eds), *The Oxford Handbook of Work and Organization* (Oxford University Press 2004). [↑](#footnote-ref-117)
118. Lazonick examined 449 companies that were publically listed on the S&P 500 between 2003 and 2012 and found that on average they used 54% of their earnings on share buy-backs and a further 37% on the payment of dividends. See: W Lazonick, ‘Profits without Prosperity’ (2014) September Harvard Business Review <http://www.6yearsdown.com/wp-content/uploads/2014/11/HBR\_Profits-Without-Prosperity\_201409.pdf>. [↑](#footnote-ref-118)
119. This led to the deaths of 11 workers, serious water and coastal pollution, harm to wildlife, and harmed the financial and social welfare of local residents. For more detail of the link between the Deepwater Horizon disaster and shareholder primacy see: Stout, ‘The Shareholder Value Myth’ (n 18) 1–5. [↑](#footnote-ref-119)
120. A Vaughan, ‘BP’s Deepwater Horizon Bill Tops $65bn’ *The Guardian (online)* (London, 16 January 2018) <https://www.theguardian.com/business/2018/jan/16/bps-deepwater-horizon-bill-tops-65bn>. [↑](#footnote-ref-120)
121. The term involuntary creditors refers to those stakeholders that have no opportunity to contract to in order to protect their own interests ex ante a harmful event. [↑](#footnote-ref-121)
122. Company Law Review Steering Group, ‘Modern Company Law For A Competitive Economy: Developing the Framework’ para 2.12. [↑](#footnote-ref-122)
123. ESHV emphasises the consideration of an extended timescale together with an increased level of attention to stakeholder relationships and impacts, along with corporate reputation. See: John Parkinson, ‘Inclusive Company Law’ in John de Lacy (ed), *The Reform of United Kingdom Company Law* (Cavendish 2002). This long-term perspective is then said to benefit the long-term interests of shareholders. See: M Jensen, ‘Value Maximization , Stakeholder Theory , and the Corporate Objective Function’ (2002) 12 Business Ethics Quarterly 235. [↑](#footnote-ref-123)
124. Companies Act 2006 Section 172(1). [↑](#footnote-ref-124)
125. ibid. [↑](#footnote-ref-125)
126. This could simply be achieved by including such considerations in the minutes of a general meeting despite ministerial statements to the alternative: “The words ‘have regard to’ mean ‘think about’; they are absolutely not about just ticking boxes … In other words ‘have regard to’ means‘ give proper consideration to’”. See: Department of Trade and Industry, ‘Companies Act 2006: Duties of Company Directors: Ministerial Statements (June 2007)’. It is acknowledged that arguments exist that the mere inclusion of such formalities within a meeting may lead to the actual consideration of such factors. See: J Loughrey, A Keay and L Cerioni, ‘Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance’ (2007) 8 Journal of Corporate Law Studies 79. [↑](#footnote-ref-126)
127. “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” (emphasis added). Companies Act 2006 Section 172(1). [↑](#footnote-ref-127)
128. # *R (People & Planet) v HM Treasury [2009] EWHC 3020*.

     [↑](#footnote-ref-128)
129. So long as these business decisions are not deemed “irrational” and are made in good faith. See: Hutton v West Cork Railway Co [1883] 23 Ch D 254 [↑](#footnote-ref-129)
130. For detailed consideration of the business judgement rule see: Douglas Branson, ‘The Rule That Isn’t a Rule - the Business Judgment Rule’ (2002) 36 Valparaiso University Law Review 632. The classic example of the operation of a business judgment rule in the US context is *Shlensky v Wrigley 95 Ill App 2d 173, 237 NE2d 776 (App Ct 1968)*. [↑](#footnote-ref-130)
131. Indeed, as far as the author is aware, there is no recorded case of an action brought by a shareholder founded upon a breach of s172 alone. [↑](#footnote-ref-131)
132. For economic arguments in support of a return to managerialism see: Stout, ‘The Shareholder Value Myth’ (n 18). [↑](#footnote-ref-132)
133. EM Dodd, ‘For Whom Are Corporate Managers Trustees?’ (1932) XLV Harvard Law Review 1145. [↑](#footnote-ref-133)
134. L Stout, ‘On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)’ (2013) 865 <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2310&context=facpub>. [↑](#footnote-ref-134)
135. Berle suggested that a public consensus was “enforced” on management through the creation of a “corporate conscience” based upon the managers’ appreciation of what the consensus entailed. According to this perspective, public consensus therefore acted as a constraint on managerial self-interest. Within the political context of the time Berle believed that state intervention due to a violation of the public consensus was a “near-certainty.” Berle (n 12) 91; 114. [↑](#footnote-ref-135)
136. Lorraine Talbot, *Progressive Corporate Governance for the 21st Century* (Routledge 2012). [↑](#footnote-ref-136)
137. For instance, following the Greenbury report many executive stock options were made performance based. [↑](#footnote-ref-137)
138. It has been reported that 4% of CEOs in the UK’s 300 largest companies were replaced following a takeover in 2018. See: C Cornish, ‘UK Chief Executives Spend Less than Five Years in the Job’ *The Financial Times (online)* (15 May 2017) <https://www.ft.com/content/ded1823a-370e-11e7-99bd-13beb0903fa3>. [↑](#footnote-ref-138)
139. It is notable that as most shareholders are no longer individuals but domestic or overseas institutional investors, they are likely to accept. [↑](#footnote-ref-139)
140. The Takeover Code (12th Edition) 2016. [↑](#footnote-ref-140)
141. The Takeover Code states that the Code is “designed principally to ensure that shareholders in an offeree company are treated fairly and are not denied an opportunity to decide on the merits of a takeover.” ibid A1. [↑](#footnote-ref-141)
142. In contrast, under United States law, certain defensive measures are permitted. For an extended analysis of the differences between the two jurisdictions in this regard, see: John Armour and David A Skeel, ‘Who Writes the Rules for Hostile Takeovers, and Why? - The Peculiar Divergence of US and UK Takeover Regulation’ (2006) 331. The EU Takeover Directive has had a minimal impact on UK law as it largely reflected the UK Takeover Code. See: Brenda Hannigan, *Company Law* (3rd edn, OUP 2012) 31. [↑](#footnote-ref-142)
143. The Takeover Code (12th Edition). In particular, see: Rules 3 and 21. Enforcement measures are provided within part 28 of the Companies Act 2006. [↑](#footnote-ref-143)
144. For a detailed consideration of the market for corporate control see: H Manne, ‘Mergers and the Market for Corporate Control’ (1965) 73 Journal of Political Economy 110; J Teall, *Governance and the Market for Corporate Control* (Routledge 2006). [↑](#footnote-ref-144)
145. Millon (n 39). [↑](#footnote-ref-145)
146. ibid. [↑](#footnote-ref-146)
147. Dodd (n 69) 1145. [↑](#footnote-ref-147)
148. This development has been informed by proponents of shareholder primacy. See in particular: M Jensen and K Murphy, ‘CEO Incentives—It’s Not How Much You Pay, But How’ [1990] Harvard Business Review. [↑](#footnote-ref-148)
149. Charlotte Villiers, ‘Controlling Executive Pay: Institutional Investors or Distributive Justice?’ [2010] Journal of Corporate Law Studies 309. [↑](#footnote-ref-149)
150. In 2014, base salary comprised 11.6% of total CEO remuneration in the median S&P 500 company. Arthur J. Gallagher & Co, ‘CEO and Executive Compensation Practices: 2015 Edition’ (2015). As reported in: M Tonello (Co-author of report), ‘CEO and Executive Compensation Practices: 2015 Edition’ (*Harvard Law School Forum on Corporate Governance and Financial Regulation*, 2015) <https://corpgov.law.harvard.edu/2015/09/15/ceo-and-executive-compensation-practices-2015-edition/> accessed 20 March 2016. [↑](#footnote-ref-150)
151. Ernst & Young, ‘Into Focus: FTSE 350 Executive and Board Remuneration Report January 2016’ (2016) 4 <http://www.ey.com/Publication/vwLUAssets/EY-Into-focus-FTSE-350-Executive-and-Board-remuneration-report-January-2016/$FILE/EY-Info-focus.pdf>. [↑](#footnote-ref-151)
152. KPMG, ‘KPMG’s Guide to Directors’ Remuneration 2014 Summary’ (2014) <https://assets.kpmg.com/content/dam/kpmg/pdf/2015/03/kpmg-guide-to-directors-remuneration-2014-summary.pdf>. [↑](#footnote-ref-152)
153. Operational value related criteria made up 70% of BPs bonus calculation. See: BP, ‘Strategy, Performance and Pay: Directors Remuneration Report 2015’ (2015) 23 <http://www.bp.com/content/dam/bp/pdf/investors/bp-directors-remuneration-report-2015.pdf>. [↑](#footnote-ref-153)
154. See: Ernst & Young (n 87). This trend appears broadly similar in the US with LTIs constituting 57.2% of total executive pay reported by firms listed on the S&P 500. See: Arthur J. Gallagher & Co (n 86). [↑](#footnote-ref-154)
155. Indeed a formal minimum share ownership requirement may be a requirement of holding a directorial position. For example, Next plc whereby the CEO must hold a minimum of 1.5 times their salary in shares with other executive directors mandated to hold at least 1 times salary. Next plc, ‘Next Plc Annual Report and Accounts, January 2016’ (2016) 56 <http://www.nextplc.co.uk/~/media/Files/N/Next-PLC-V2/documents/reports-and-presentations/2014/next-annual-report-2015-final-web.pdf>. [↑](#footnote-ref-155)
156. W Sanders and D Hambrick, ‘Swinging for the Fences: The Effects of CEO Stock Options on Company Risk-Taking’ (2007) 50 Academy of Management Journal 1055, 1063. [↑](#footnote-ref-156)
157. D Souder and P Bromily, ‘Explaining Temporal Orientation: Evidence from the Durability of Firms’ Capital Investments’ (2012) 33 Strategic Management Journal 550. [↑](#footnote-ref-157)
158. See: The UK Corporate Governance Code 2018. [↑](#footnote-ref-158)
159. The UK’s corporate governance code utilises a ‘comply or explain’ approach to compliance which is said to prevent a ‘one size fits all’ approach by allowing companies to follow and implement a generic set of best practice principles into their management systems or explain why they have chosen not to. Although the codes are in a strict sense voluntary, the UK Listing Rules, operating in a meta-regulatory capacity, provide that for a company to obtain a premium listing it must comply or explain. Of course, this does not mean that a listed company need comply but must merely explain why it has chosen not to do so. [↑](#footnote-ref-159)
160. According to Grant Thornton, in 2018 72% of FTSE 350 firms declared full compliance with the 2016 version of the Corporate Governance Code. Grant Thornton, ‘Corporate Governance Review 2018’ (2018) <https://www.grantthornton.co.uk/globalassets/1.-member-firms/united-kingdom/pdf/documents/corporate-governance-review-2018.pdf>. [↑](#footnote-ref-160)
161. See: The UK Corporate Governance Code 2018 13. [↑](#footnote-ref-161)
162. ibid 14. [↑](#footnote-ref-162)
163. Even the increase in clawback provisions, at least in their current manifestation, appears primarily linked to the prevention of earnings manipulation and the misrepresentation of firm performance. See: I Babenko and others, ‘Clawback Provisions’; M Iskandar-Datta and Y Jia, ‘Valuation Consequences of Clawback Provisions’ (2013) 88 The Accounting Review 171. [↑](#footnote-ref-163)
164. In 2016, the average UK CEO spent only 4.8 years in the position before voluntarily moving on. 3.3 per cent of CEOs were forced out and another 4 per cent changed in a takeover. As reported in: Cornish (n 74). [↑](#footnote-ref-164)
165. The UK Corporate Governance Code 2018 15. [↑](#footnote-ref-165)
166. Chartered Institute of Personnel and Development (CIPD) and The High Pay Centre, ‘RemCo Reform: Governing Successful Organisations That Benefit Everyone’ (2019) <http://highpaycentre.org/files/RemCo\_Reform\_report\_.pdf>. [↑](#footnote-ref-166)
167. ibid. [↑](#footnote-ref-167)
168. The UK Corporate Governance Code 2018 5. [↑](#footnote-ref-168)
169. The CGC recommends that at least half of board the board, excluding the chair, are NEDs. See: ibid 7. However, given the presence of NEDs is limited to one or two days a month, they may be largely ineffective aside from maintaining a corporate focus on share price given that this requires little expertise. Deakin suggests that NED focus on shareholder satisfaction may have contributed to 2008 financial crisis. Research undertaken by Shrine found a prominent practitioner who had represented many of the leading corporate boards in the United States observing that: "Boards are now overloaded with directors with zero ties to the company, financial or personal. They are not just disinterested. They are uninterested. They have no skin in the game at all. They didn’t participate in building the enterprise. They don’t know the key employees. They have no relationship with the history or story of the company. They are robotic in fearing personal embarrassment." See: S Deakin, ‘What Directors Do (and Fail to Do): Some Comparative Notes on Board Structure and Corporate Governance’ (2011) 55 New York Law School Law Review 526; L Strine, ‘Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System’ (2017) 126 Yale Law Journal 1870, 1927 n190. [↑](#footnote-ref-169)
170. This observation is made by a board effectiveness consultant in the following study: Chartered Institute of Personnel and Development (CIPD) and The High Pay Centre (n 102) 21. [↑](#footnote-ref-170)
171. Companies Act 2006 Section 439. [↑](#footnote-ref-171)
172. According to the CIPD, the average (mean) CEO pay in a FTSE 100 company increased by 23% between August 2017 and 2018 to £5.7 million. See: Chartered Institute of Personnel and Development (CIPD), ‘Executive Pay: Review of FTSE 100 Executive Pay’ (2018) <https://www.cipd.co.uk/Images/2018-review-ftse100-exec-pay\_tcm18-45480.pdf>. Perhaps of greater perceived concern to shareholders is the fact that executive pay within the FTSE 100 has increased at a greater pace than the index itself within certain periods. As reported in: Department for Business Innovation and Skills, ‘Executive Remuneration Discussion Paper’ 8 para 13 <https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/31660/11-1287-executive-remuneration-discussion-paper.pdf>. Proponents of current executive pay levels argue that they simply represent optimal contracting for executive talent. See for example: K Murphy and J Zabojnik, ‘CEO Pay and Appointments: A Market-Based Explanation for Recent Trends’ (2004) 94 American Economic Review 192; X Gabaix and A Landier, ‘Why Has CEO Pay Increased so Much?’ (2008) 123 Quarterly Journal of Economics 49. For a discussion on the validity of this argument with reference to a number of recent examples see: The Economist, ‘Executive Pay: Neither Rigged nor Fair’ *The Economist* (London, 25 June 2016). [↑](#footnote-ref-172)
173. It is acknowledged that *some* shareholders have displayed some dissatisfaction in recent years yet this is not particularly widespread. For a recent high profile example see: K Stacey, E Crooks and S Foley, ‘BP Revives Investor Fury on Executive Pay’ *The Financial Times (online)* (London, 14 April 2016) <https://www.ft.com/content/be44d458-024a-11e6-99cb-83242733f755>. [↑](#footnote-ref-173)
174. In 2017, more than 90% of votes cast were in favour of a remuneration policy in 86.57% of FTSE 350 companies. Ernst & Young, ‘AGM Trends 2017’ (2017) 18 <https://www.ey.com/Publication/vwLUAssets/ey-agm-trends-2017/$FILE/ey-agm-trends-2017.pdf>. [↑](#footnote-ref-174)
175. Linklaters, ‘Board Pay in FTSE 100 Companies in 2015: A Snapshot’ (2015) <Available at www.linklaters.com>. [↑](#footnote-ref-175)
176. C Gerner-Beuerle and T Kirchmaier, ‘Say On Pay: Do Shareholders Care?’ (2016) DP751 <http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2720481>. [↑](#footnote-ref-176)
177. According to Vince Cable, the former Business Secretary to the UK government, between 1998 and 2010 the median total remuneration of CEOs in FTSE 100 companies increased from £1m to £4.2m. Moreover, according to the High Pay Centre, a civil society ‘watchdog’, it has continued to rise thereafter. See: Vince Cable as reported in: N Pratley, ‘Shareholder Spring Is Offering Even More Sport than Usual’ *The Guardian (online)* (London, 17 May 2012) <https://www.theguardian.com/business/2012/may/17/shareholder-spring-investor-revolt-pay>. See: The High Pay Centre, ‘Http://Highpaycentre.Org/Blog/No-Change-There-Then’ (2016) <http://highpaycentre.org/blog/no-change-there-then>. [↑](#footnote-ref-177)
178. Underlying this notion is the belief that the widely dispersed nature of institutional investor’s shareholdings reflects an interest in the long-term growth of the stock market as a whole. See for example: S Deakin, ‘The Coming Transformation of Shareholder Value’ (2005) 13 Corporate Governance. [↑](#footnote-ref-178)
179. See: P Myners, ‘Institutional Investment in the United Kingdom: A Review (The Myners Report)’ (2001) <http://uksif.org/wp-content/uploads/2012/12/MYNERS-P.-2001.-Institutional-Investment-in-the-United-Kingdom-A-Review.pdf>; HM Treasury, ‘A Review of Corporate Governance in UK Banks and Other Financial Industry Entities (The Walker Review)’ (2009). [↑](#footnote-ref-179)
180. UK Stewardship Code 2012. [↑](#footnote-ref-180)
181. The notion that corporate reputation could act as a means to enhance CSP was put forward within the Company Law Review. Company Law Review Steering Group (n 58) para 2.13; 2.21. [↑](#footnote-ref-181)
182. This was phrased by the Company Law Review Steering Group as: ‘the need to build long-term and trusting relationships with employees, suppliers, customers *and others* to secure the success of the company over time’ Department of Trade and Industry, ‘Modern Company Law for a Competitive Economy: Strategic Framework’ (1999) para 5.1.22. (emphasis added) [↑](#footnote-ref-182)
183. Indeed the initial use cost minimisation strategies by ‘outsourcing pioneers’ allowed for competitive strategies based on price reductions, at least initially, with their stagnation as a result of a diminishing cost based competitive advantage over competitors. These price reductions and the hardening of consumer expectations of price levels, along with an increasingly ‘throwaway’ consumer culture, have compounded the firm’s inability to generate value from price rises. For a discussion on throwaway culture see: T Cooper, ‘Slower Consumption Reflections on Product Life Spans and the “Throwaway Society”’ (2005) 9 Journal of Industrial Ecology 51. [↑](#footnote-ref-183)
184. W Milberg and D Winkler, *Outsourcing Economics* (Cambridge University Press 2013). [↑](#footnote-ref-184)
185. ibid. See also: W Milberg, ‘Shifting Sources and Uses of Profits: Sustaining US Financialisation with Global Value Chains’ (2008) 37 Economy and Society 420. [↑](#footnote-ref-185)
186. RH Coase, ‘The Nature of the Firm’ (1937) 4 Economica 386. [↑](#footnote-ref-186)
187. M et al Boudreau, ‘The Benefits of Transaction Cost Economics: The Beginning of a New Direction’, *ECIS* (LSE 2007) <http://is2.lse.ac.uk/asp/aspecis/20070019.pdf>. [↑](#footnote-ref-187)
188. R Cooter and T Ulen, *Law and Economics* (6th edn, Pearson 2012) 88–90. [↑](#footnote-ref-188)
189. As Langlois observes*,* transaction costs are dynamic. R Langlois, ‘Transaction-Cost Economics in Real Time’ (1992) 1 Industrial and Corporate Change 99. [↑](#footnote-ref-189)
190. R Langlois, ‘The Vanishing Hand: The Changing Dynamics of Industrial Capitalism’ (2003) 12 Industrial and Corporate Change 351. [↑](#footnote-ref-190)
191. G Grossman and E Helpman, ‘Integration versus Outsourcing in Industry Equilibrium’ (2002) 117 The Quarterly Journal of Economics 85. [↑](#footnote-ref-191)
192. Langlois (n 126). Where a productive task requires specialised technologies or highly qualified employees, it is typically more efficient to organise in house. O Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications: A Study in the Economics of Internal Organization* (Free Press 1975). [↑](#footnote-ref-192)
193. *Salomon v Salomon & Co Ltd [1896] UKHL 1* (n 17); *Adams v Cape Industries plc [1990] Ch 433*. [↑](#footnote-ref-193)
194. Limited inroads have been made into the liability of a parent company for the harm caused by subsidiary operations. See: *Chandler v Cape plc [2012] EWCA Civ 525*. [↑](#footnote-ref-194)
195. G Gereffi and K Fernandez-Stark, ‘Global Value Chain Analysis: A Primer’ (2011) 6. [↑](#footnote-ref-195)
196. R Kaplinsky and M Morris, *A Handbook for Value Chain Research* (International Development Research Centre (IDRC) 2001). [↑](#footnote-ref-196)
197. A Sen, *Development as Freedom* (Oxford University Press 1999); A Sen, ‘Work and Rights’ (2000) 139 International Labour Review 119. [↑](#footnote-ref-197)
198. See for example: S Barrientos, G Gereffi and A Rossi, ‘Economic and Social Upgrading in Global Production Networks: A New Paradigm for a Changing World’ (2011) 150 International Labour Review 319; A Rossi, ‘Does Economic Upgrading Lead to Social Upgrading in Global Production Networks? Evidence from Morocco.’ (2013) 46 World Development 223. [↑](#footnote-ref-198)
199. It is also notable that the significance of CSP to the potential for social upgrading has been acknowledged by leading commentators in the GVC/GPN field. G Gerefﬁ and J Lee, ‘Economic and Social Upgrading in Global Value Chains and Industrial Clusters: Why Governance Matters’ (2016) 133 Journal of Business Ethics 25. [↑](#footnote-ref-199)
200. See for example: Gary Gereffi and Miguel Korzeniewicz, ‘The Organization of Buyer-Driven Global Commodity Chains: How U.S. Retailers Shape Overseas Production Networks’, *Commodity Chains and Global Capitalism* (1994); G Gereffi, J Humphrey and T Sturgeon, ‘The Governance of Global Value Chains’ 12 Review of International Political Economy 78. [↑](#footnote-ref-200)
201. Gereffi and Korzeniewicz (n 136) 95. [↑](#footnote-ref-201)
202. A Chandler, ‘Organizational Capabilities and the Economic History of the Industrial Enterprise’ (1992) 6 Journal of Economic Perspectives 79, 88–89. (emphasis added) [↑](#footnote-ref-202)
203. K Cowling and R Sugden, ‘The Essence of the Moden Corporation: Markets, Strategic Decision-Making and the Theory of the Firm’ (1998) 66 The Manchester School 59, 67. [↑](#footnote-ref-203)
204. Antoine Aglietta, Michel & Rebérioux, *Corporate Governance Adrift: A Critique of Shareholder Value* (Edward Elgar 2005) 1. [↑](#footnote-ref-204)
205. For a consideration of the evolution of the business model concept see: P Ahokangas and I Atkova, ‘Unveiling the Janus Face of the Business Model’, *29th Research in Entrepreneurship and Small Business Conference* (2015) <https://www.researchgate.net/publication/282604734\_Unveiling\_the\_Janus\_face\_of\_the\_business\_model>. [↑](#footnote-ref-205)
206. A Osterwalder, Y Pigneur and C Tucci, ‘Clarifying Business Models: Origins, Present, and Future of the Concept’ (2005) 16 Communications of the Association for Information Systems 4. *(Emphasis added)* [↑](#footnote-ref-206)
207. R Amit and C Zott, ‘Value Creation in E-Business’ (2001) 22 Strategic Management Journal 493, 493. [↑](#footnote-ref-207)
208. H Chesbrough, ‘Business Model Innovation: It Is Not Just about Technology Anymore’ (2007) 35 Strategy and Leadership 12, 12. [↑](#footnote-ref-208)
209. Value is added to a product, resource or service through the productive process and may be calculated by taking the value of output minus the value of inputs. This widely accepted definition of value has been criticised for being defined by lead firm interests rather than that of other stakeholders within the productive process, such as employees and their families and the community at large. See: K Raworth and T Kidder, ‘Mimicking “Lean” in GVCs: It’s the Workers Who Get Leaned on’, *Frontiers of Supply Chain Research* (Stanford University Press 2009) 189. [↑](#footnote-ref-209)
210. Chesbrough (n 144) 12. [↑](#footnote-ref-210)
211. S Shafer, H Smith and J Linder, ‘The Power of Business Models’ (2005) 48 Business Horizons 199, 202. [↑](#footnote-ref-211)
212. Y Doz and M Kosonen, ‘Embedding Strategic Agility: A Leadership Agenda for Accelerating Business Model Renewal’ (2010) 43 Long Range Planning 370, 371. [↑](#footnote-ref-212)
213. C Baden-Fuller and V Mangematin, ‘Business Models: A Challenging Agenda’ (2013) 11 Strategic Organization 418, 418. [↑](#footnote-ref-213)
214. C Zott and R Amit, ‘Business Model Design and the Performance of Entrepreneurial Firms’ (2007) 18 Organization Science 181, 181. [↑](#footnote-ref-214)
215. S Arndt and H Kierzkowski, ‘Introduction’ in S Arndt and H Kierzowski (eds), *Fragmentation: New Production Patterns in the World Economy* (Oxford University Press 2001). [↑](#footnote-ref-215)
216. RC Feenstra, ‘Integration of Trade Disintegration of Production in the Global Economy’ (1998) 12 Journal of Economic Perspectives 31. [↑](#footnote-ref-216)
217. M Timmer and others, ‘Slicing Up Global Value Chains’ (2014) 28 Journal of Economic Perspectives 99. [↑](#footnote-ref-217)
218. Gereffi, Humphrey and Sturgeon (n 136). [↑](#footnote-ref-218)
219. Core competencies can be defined as those activities that provide a company with its competitive advantage. Such competencies can be identified by their difficulty of imitation, their potential in accessing a variety of markets, and significant contribution, in terms of customer perceived benefits to the final product. See: CK Prahalad and G Hamel, ‘The Core Competence of the Corporation’ [1990] Harvard Business Review <https://hbr.org/1990/05/the-core-competence-of-the-corporation>. Clearly, core competencies are likely to be developed in those activities in which the most value is added to the final product. These typically include product design, branding and marketing. [↑](#footnote-ref-219)
220. The Stolper-Samuelson and Heckscher-Ohlin theorems of international trade suggest that in sectors that use low and unskilled labour (such as apparel), those nations where low and unskilled labour is a relatively abundant factor of production will enjoy comparative advantage. [↑](#footnote-ref-220)
221. FJ Contractor and others, ‘Reconceptualising the Firm in a World of Outsourcing and Offshoring: The Organizational and Geographical Relocation of High-Value Company Functions’ (2010) 47 Journal of Management Studies 1417. [↑](#footnote-ref-221)
222. An oft-cited study into the value breakdown of an Apple iPod in 2010 found that Apple retained between 33%-50% of its value. The same study found that assembly & testing by Chinese workers captured only 2%. See: J Dedrick, K Kraemer and G Linden, ‘Who Profits from Innovation in GVC? A Study of the Ipod and Notebook PCs.’ (2010) 19 Industrial and Corporate Change 81. [↑](#footnote-ref-222)
223. The consolidation of large companies through merger and acquisition activity in many industries has compounded such power within fewer and fewer global buyers. See: Milberg and Winkler (n 120). [↑](#footnote-ref-223)
224. S Barrientos, ‘Contract Labour: The “Achilles Heel” of Corporate Codes in Commercial Value Chains’ (2008) 39 Development and Change 977. [↑](#footnote-ref-224)
225. For an illuminating critique of intellectual property law in a broad sense see: S Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York University Press 2003). [↑](#footnote-ref-225)
226. This reflects the idea that a lead firm *drives* the supply chain in terms of dictating the conditions of production to independent suppliers, which then has implications on their general inclusion or exclusion along with their ability to ‘upgrade’ to higher value activities. See: C Dolan and J Humphrey, ‘Governance and Trade in Fresh Vegetables: The Impact of UK Supermarkets on the African Horticulture Industry’ (2000) 37 Journal of Development Studies 147; H Schmitz and P Knorringa, ‘Learning from Global Buyers’ (2000) 37 Journal of Development Studies 177. [↑](#footnote-ref-226)
227. R Emerson, ‘Power-Dependence Relations’ (1962) 27 American Sociological Review 31. [↑](#footnote-ref-227)
228. T Casciaro and MJ Piskorski, ‘Power Imbalance and Interorganisational Relations: Resource Dependency Theory Revisited.’, *Paper presented at the Academy of Management, New Orleans* (2004). [↑](#footnote-ref-228)
229. Dahl views power in this manner as a situation whereby “A has power over B to the extent that he can get B to do something that B would not otherwise do.” See: R Dahl, ‘The Concept of Power’ in R Bell, D Edwards and R Harrison (eds), *Political Power: A Reader in Theory and Research* (Free Press 1969). [↑](#footnote-ref-229)
230. It is acknowledged that the mere consideration of the dyadic relationship would be insufficient to assess the true power of one entity over another without a consideration of the wider social context. However, it is put forward that the GVC/GPN approach to such analysis allows consideration of the systemic factors outside of the direct ‘entity A – entity B’ relationship. For a detailed discussion on the bases of power see: M Rogers, ‘Instrumental and Infra-Resources: The Bases of Power’ (1974) 79 American Journal of Sociology 1418. [↑](#footnote-ref-230)
231. R Kaplinsky, ‘Global Value Chains, Where They Came from, Where They Are Going and Why This Is Important’ (2013) 68. [↑](#footnote-ref-231)
232. From a theoretical perspective this is explained in the GVC/GPN literature through the concept of industrial or economic ‘upgrading.’ See for example: Gary Gereffi, ‘International Trade and Industrial Upgrading in the Apparel Commodity Chain’ (1999) 48 Journal of International Economics 37; K Fernandez-Stark, S Frederick and G Gereffi, ‘The Apparel Global Value Chain. Economic Upgrading and Workforce Development’ (2011) <http://www.cggc.duke.edu/pdfs/2011-11-11\_CGGC\_Apparel-Global-Value-Chain.pdf>. [↑](#footnote-ref-232)
233. It should be noted that whilst the transfer of knowledge enables such outsourcing but may also allow for the opportunistic theft of corporate information thus the ability to codify such information is of paramount importance to the global buyer. See: Lorraine Talbot, ‘Operationalizing Sustainability in Company Law Reform Through a Labour-Centred Approach: A UK Perspective’ (2014) 11 European Company Law 94.See also: Contractor and others (n 157). [↑](#footnote-ref-233)
234. Kaplinsky (n 167). [↑](#footnote-ref-234)
235. Milberg and Winkler (n 120). [↑](#footnote-ref-235)
236. P Dicken, *Global Shift: Reshaping the Global Economic Map in the 21st Century* (Sage 2006); G Gereffi and O Memedovic, ‘The Global Apparel Chain: What Prospects for Upgrading in Developing Countries?’ (2004) <http://www.globalvaluechains.org>. [↑](#footnote-ref-236)
237. By way of illustration Larsson, Buhr and Mark-Herbert’s study of the Swedish garment industry found that there could be as many as eight vertical links up the supply chain between raw material and consumption of the final product. See: A Larsson, K Buhr and C Mark-Herbert, ‘Corporate Responsibility in the Garment Industry: Towards Shared Value’ in MA Gardetti and AL Torres (eds), *Sustainability in Fashion and Textiles: Values, Design, Production and Consumption* (Greenleaf 2013). [↑](#footnote-ref-237)
238. For example, Foxconn (based in Taiwan) is utilised by Apple to manage its mobile telephony supply chains and assemble final products. For example Li and Fung (based in Hong Kong) as utilised by firms such as Calvin Klein, Walmart and Marks and Spencer, along with Topman, Next and Primark following Li and Fung’s purchase of May Trading Ltd in 2014. [↑](#footnote-ref-238)
239. Gereffi (n 168). [↑](#footnote-ref-239)
240. For example, Li and Fung (as contracted firms such as Calvin Klein, Walmart, Marks and Spencer, Topman, Next and Primark) manage a growing network of over 15,000 suppliers in over 40 countries. “Li and Fung” (2015) http://www.lifung.com/our-business. [↑](#footnote-ref-240)
241. F Palpacuer, P Gibbon and L Thomsen, ‘New Challenges for Developing Country Supliers in Global Clothing Chains: A Comparative European Perspective’ (2005) 33 World Development 409. [↑](#footnote-ref-241)
242. Coase (n 122). [↑](#footnote-ref-242)
243. Site specificity is a type of asset specificity related to the productive process. Williamson (n 128). [↑](#footnote-ref-243)
244. J Lee and G Gereffi, ‘The Co-Evolution of Concentration in Mobile Phone Global Value Chains and Its Impact on Social Upgrading in Developing Countries’ (2013) 25. [↑](#footnote-ref-244)
245. G Gereffi, ‘Review Symposium: On Richard M. Locke, The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy’ (2014) 12 Socio-Economic Review 219. [↑](#footnote-ref-245)
246. ibid. [↑](#footnote-ref-246)
247. Ron Martin, compliance director at VF (owner of a number of high profile brands including Lee, Wrangler, The North Face, Nautica, Timberland and Vans) suggests that where less than 5% of a supplier’s capacity is used to satisfy the orders of a particular buyer, the buyer’s leverage to improve conditions is somewhat limited. However, where this figure exceeds 15% or 20% the buyer “can probably get them to paint the factory pink.” As quoted in: A Harney, *The China Price: The True Cost of Chinese Competitive Advantage* (Penguin 2009) 207–208. [↑](#footnote-ref-247)
248. For example, Fred Gehring, CEO of Tommy Hilfiger states: "When … [Li and Fung] go to a factory and place orders, they get better clout than if we went on our own." As reported in: S Kapner, ‘The Unstoppable Fung Brothers’ (*Fortune*, 2009) <http://archive.fortune.com/2009/12/07/news/international/li\_fung.fortune/index.htm> accessed 16 April 2016. [↑](#footnote-ref-248)
249. See for example: E Dou, ‘Apple Shifts Supply Chain Away From Foxconn to Pegatron’ *The Wall Street Journal (online)* (New York, 29 May 2013) <http://www.wsj.com/articles/SB10001424127887323855804578511122734340726>. [↑](#footnote-ref-249)
250. This power imbalance is not solely reflected in the terms of trade but also in the reliance shown in corporate structures and strategic operations. For instance, Li and Fung, the world’s largest apparel sourcing firm, has an entire business unit dedicated to satisfying its contract with Walmart. As reported in: R Ross and others, ‘A Critical Corporate Profile of Li & Fung’ (2014) 31 <http://commons.clarku.edu/mosakowskiinstitute/31>. As a further example, Foxconn recently committed to invest $2.6 billion in a new factory for the exclusive production of screen displays for Apple at the lead firm’s bequest. See: T Culpan, ‘Foxconn Unit to Build Dedicated Taiwan Display Plant’ (*Bloomberg*, 2014) <http://www.bloomberg.com/news/articles/2014-11-20/foxconn-unit-to-raise-investment-in-panel-plant-for-apple> accessed 14 May 2015. [↑](#footnote-ref-250)
251. ‘Apple Profit Margin (Quarterly)’ (*Ycharts.com*, 2015) <http://ycharts.com/companies/AAPL/profit\_margin> accessed 14 May 2015. [↑](#footnote-ref-251)
252. As reported in: C Haslam and others, ‘Apple’s Financial Success: The Precariousness of Power Exercised in Global Value Chains’ (2013) 37 Accounting Forum 268. [↑](#footnote-ref-252)
253. A Lee, ‘Li & Fung Profit Falls Amid Weak U.S., Europe Demand’ (*Bloomberg*, 2015) <http://www.bloomberg.com/news/articles/2015-08-20/li-fung-profit-falls-20-amid-weak-demand-in-u-s-europe> accessed 12 November 2015. [↑](#footnote-ref-253)
254. V Chan, ‘Li & Fung Net Tops Estimates; Brands Listing Is Sought’ (*Bloomberg*, 2014) <http://www.bloomberg.com/news/articles/2014-03-20/li-fung-net-tops-estimates-seeks-global-brands-listing>. [↑](#footnote-ref-254)
255. For example, Target and Next reported a 2011 pre–tax profit margin of 7.5% and 16.6% respectively. See: Target Brands Inc., ‘2012 Annual Report (Financial Summary)’ (2012) <https://corporate.target.com/annual-reports/2012/financials/financial-summary>; Next plc, ‘2012 Annual Report’ (2012) <http://www.nextplc.co.uk/~/media/Files/N/Next-PLC/pdfs/latest-news/2012/ar2012.pdf>. [↑](#footnote-ref-255)
256. The United States and European fashion and textile industries are an obvious example. [↑](#footnote-ref-256)
257. Transnational mergers and acquisitions increased from $156 billion to $1100 billion between 1992 and 1997. See: P Nolan, ‘Industrial Policy in the 21 St Century: The Challenge of the Global Business Revolution.’ in HJ Chang (ed), *Rethinking Development Economics* (Anthem Press 2003). [↑](#footnote-ref-257)
258. Milberg and Winkler (n 120) 103–156. [↑](#footnote-ref-258)
259. ibid. [↑](#footnote-ref-259)
260. C Mac Coille, ‘The Impact of Low-Cost Economies on UK Import Prices’ (2008) 48 Bank of England Quarterly Bulletin 58. [↑](#footnote-ref-260)
261. Milberg and Winkler report that US import prices (excluding food and oil) have on average experienced a slight downward trend since the mid-1990s. See: Milberg and Winkler (n 120) 121. [↑](#footnote-ref-261)
262. The European Central Bank (ECB) found that import price inflation between 1996 and 2005 fell by an average of 2%. See: ECB, ‘Effects of the Rising Trade Integration of Low-Cost Countries on Euro Area Import Prices’ (2006) August ECB Monthly Bulletin 56. [↑](#footnote-ref-262)
263. Milberg and Winkler (n 120) 103. [↑](#footnote-ref-263)
264. Post-Keynesian theory as given by Kalecki’s formulation of price markup considers the ability of the firm to markup prices as a function of the ‘degree of monopoly’ of the firm. This may be determined by various environmental or institutional factors including levels of advertising expenditure, trade union strength, substitution by consumers, and market entry by new competitors. See: M Kalecki, *Theory of Economic Dynamics* (Routledge 1954). [↑](#footnote-ref-264)
265. See for example: Cambridge Econometrics, ‘Consumer Prices in the UK: Explaining the Decline in Real Consumer Prices for Cars and Clothing and Footwear (A Report for the Department for Business, Innovation & Skills)’ (2015). [↑](#footnote-ref-265)
266. For example, the use of Quick Response (QR) strategies within the fashion industry in the late 1990s reduced final prices by up to 32%. M Christopher, B Lowson and H Peck, ‘Fashion Logistics and Quick Reponse’ in J Fernie and L Sparks (eds), *Logistics and Retail Management: Emerging Issues and New Challenges in the Retail Supply Chain* (3rd edn, Kogan Page 2009). [↑](#footnote-ref-266)
267. V Romei, ‘How Wages Fell in the UK While the Economy Grew’ *Financial Times (online)* (London, 2 March 2017) <https://www.ft.com/content/83e7e87e-fe64-11e6-96f8-3700c5664d30>. [↑](#footnote-ref-267)
268. Office for National Statistics (ONS), ‘Shrinkflation: How Many of Our Products Are Getting Smaller?’ (2019) <https://www.ons.gov.uk/economy/inflationandpriceindices/articles/theimpactofshrinkflationoncpihuk/howmanyofourproductsaregettingsmaller>. [↑](#footnote-ref-268)
269. G LeBaron and others, ‘Confronting Root Causes: Forced Labour in Global Supply Chains’ (2018) 53 <https://www.opendemocracy.net/beyondslavery/genevieve-lebaron-neil-howard-cameron-thibos-penelope-kyritsis/confronting-root-causes>. [↑](#footnote-ref-269)
270. J Froud and others, ‘Apple Business Model Financialization across the Pacific’ (2012) University of Manchester, CRESC Working Paper 111 <http://www.cresc.ac.uk/sites/default/files/WP111 Apple Business Model (April 2012).pdf>. [↑](#footnote-ref-270)
271. P Gibbon, J Bair and S Ponte, ‘Governing Global Value Chains: An Introduction’ (2009) 37 Economy and Society 315. [↑](#footnote-ref-271)
272. Harney reports that clothing brands have been found to demand lower prices from its supply chain on an annual and even quarterly basis. Harney (n 183) 40. [↑](#footnote-ref-272)
273. R Locke, *The Promise and Limits of Private Power* (Cambridge University Press 2013) 127. [↑](#footnote-ref-273)
274. Traditionally a two-season affair reflecting the sensible demands for warmer clothing for the autumn/winter and lighter items for the spring/summer, much of the fashion industry was formally based on a large scale and standardised production run better allowing for the forecast trends and consumer demand. However, clothing retailers subsequently moved towards a model that offered consumers enhanced variety through increased stock turnover based on an increase in the number of ‘seasons’ within stores. See: V Bhardwaj and A Fairhurst, ‘Fast Fashion: Reponse to Changes in the Fashion Industry’ (2010) 20 The International Review of Retail, Distribution and Consumer Research 165. [↑](#footnote-ref-274)
275. Locke (n 209) 127. [↑](#footnote-ref-275)
276. ibid 126–127. [↑](#footnote-ref-276)
277. F Abernathy and others, *A Stitch in Time: Lean Retailing and the Transformation of Manufacturing: Lessons from the Apparel and Textile Industries* (OUP 1999). [↑](#footnote-ref-277)
278. For instance, toy production and the electronics industry quickly followed suit. See: L Sluiter, *Clean Clothes: A Global Movement to End Sweatshops* (Pluto Press 2009) 248; Locke (n 209). [↑](#footnote-ref-278)
279. Locke (n 209) 128. [↑](#footnote-ref-279)
280. D Tyler, J Heeley and T Bhamra, ‘Supply Chain Influences on New Product Development in Fashion Clothing’ (2006) 10 Journal of Fashion Marketing and Management 316. [↑](#footnote-ref-280)
281. Locke (n 209). [↑](#footnote-ref-281)
282. R Kaipia, H Korhonen and H Hartiala, ‘Planning Nervousness in a Demand Supply Network: An Empirical Study’ (2006) 17 The International Journal of Logistics Management 95. [↑](#footnote-ref-282)
283. Sluiter observes that these entities have become very efficient in squeezing the profit out of lower tiers of the supply chain. Sluiter (n 214) 245. [↑](#footnote-ref-283)
284. Harney (n 183) 208. [↑](#footnote-ref-284)
285. ibid. [↑](#footnote-ref-285)
286. I Kaminski, ‘Chemical Firm Fined £3m for Toxic Vapour Cloud That Killed Worker’ *The Guardian (online)* (London, 9 November 2016) <https://www.theguardian.com/environment/2016/nov/09/chemical-firm-fined-3m-for-toxic-vapour-cloud-that-killed-worker>. [↑](#footnote-ref-286)
287. A Wasley, K Hansen and F Harvey, ‘Revealed: MRSA Variant Found in British Pork at Asda and Sainsbury’s’ *The Guardian (online)* (London, 3 October 2016) <https://www.theguardian.com/environment/2016/oct/03/revealed-mrsa-variant-found-in-british-pork-at-asda-and-sainsburys>. [↑](#footnote-ref-287)
288. Sluiter (n 214) 243. [↑](#footnote-ref-288)
289. D Pyper and J Delebarre, ‘Zero-Hours Contracts (House of Commons Briefing Paper Number 06553, 3 October 2016)’ (2016) 06553 <www.parliament.uk/briefing-papers/sn06553.pdf>. [↑](#footnote-ref-289)
290. M Aleksynska and J Berg, ‘Firms’ Demand for Temporary Labour in Developing Countries: Necessity or Strategy?’ (2016) ILO Conditions of work and employment Series No. 77; M Serrano, M Marasigan and V Pupos, ‘Between Flexibility and Security: The Rise of Non - Standard Employment in Selected ASEAN Countries (ASEAN Services Employees Trade Unions Council Report)’ (2014). [↑](#footnote-ref-290)
291. According to the Office for National Statistics, in 2017 1.8 million contracts were being performed by employees that did not guarantee a minimum number of hours. See: Office for National Statistics (ONS), ‘Contracts That Do Not Guarantee a Minimum Number of Hours: April 2018’ (2018) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/april2018>. [↑](#footnote-ref-291)
292. Aleksynska and Berg (n 226). [↑](#footnote-ref-292)
293. Raworth and Kidder (n 145) 170. [↑](#footnote-ref-293)
294. S Dhanarajan, ‘Managing Ethical Standards: When Rhetoric Meets Reality’ (2005) 15 Development in Practice 529, 531. [↑](#footnote-ref-294)
295. Rossi (n 134); J Allain and others, ‘Forced Labour’s Business Models and Supply Chains’ (2013) <https://www.jrf.org.uk/report/forced-labour’s-business-models-and-supply-chains>. [↑](#footnote-ref-295)
296. E Cline, *Over-Dressed: The Shockingly High Cost of Global Fashion* (Penguin 2012) 182. [↑](#footnote-ref-296)
297. Allain and others (n 231). [↑](#footnote-ref-297)
298. A Campos, M van Huijstee and M Theuws, ‘From Moral Responsibility to Legal Liability? Modern Day Slavery Conditions in the Global Garment Supply Chain and the Need to Strengthen Regulatory Frameworks: The Case of Inditex-Zara in Brazil’ (2015) <http://www.cleanclothes.org/resources/national-cccs/from-moral-responsibility-to-legal-liability>. [↑](#footnote-ref-298)
299. For a detailed consideration of the extensive subcontracting of work ‘shadow factories’ see: Harney (n 183) 33–55. [↑](#footnote-ref-299)
300. Harney (n 183). [↑](#footnote-ref-300)
301. Kaipia, Korhonen and Hartiala (n 218). [↑](#footnote-ref-301)
302. In some cases, state-based prison regimes may force prisoners to work as part of the terms of imprisonment for punitive reasons yet even here the provision of labour in this way is likely to have an economic benefit. [↑](#footnote-ref-302)
303. J Mantz, ‘Improvisational Economies: Coltan Production in the Eastern Congo’ (2008) 16 Social Anthropology 34. As cited in: A Crane, ‘Modern Slavery as a Management Practice: Exploring the Conditions and Capabilities for Human Exploitation’ (2013) 38 Academy of Management Review 49, 54. [↑](#footnote-ref-303)
304. Crane (n 239) 54. [↑](#footnote-ref-304)
305. Ethical Trading Initiative, ‘ETI Base Code Guidance: Modern Slavery’ <https://www.ethicaltrade.org/resources/base-code-guidance-modern-slavery>; S McGrath, ‘Fuelling Global Production Networks with Slave Labour?: Migrant Sugar Cane Workers in the Brazilian Ethanol GPN’ (2013) 44 Geoforum 32; Verité, ‘Forced Labor in the Production of Electronic Goods in Malaysia: A Comprehensive Study of Scope and Charateristics’ (2014) <https://www.verite.org/sites/default/files/images/VeriteForcedLaborMalaysianElectronics2014.pdf>; Verité, ‘Research on Indicators of Forced Labor in the Production of Goods: A Multicountry Study’ (2014). [↑](#footnote-ref-305)
306. Verisk Maplecroft, ‘Human Rights Outlook 2016’ (2016) <https://www.maplecroft.com/portfolio/new-analysis/2016/02/15/human-rights-outlook-2016/>. [↑](#footnote-ref-306)
307. S New, ‘Modern Slavery and the Supply Chain: The Limits of Corporate Social Responsibility?’ (2015) 20 Supply Chain Management: An International Journal 697; E Marks and A Olsen, ‘The Role of Trade Unions in Reducing Migrant Workers’ Vulnerability to Forced Labour and Human Trafficking in the Greater Mekong Subregion’ [2015] Anti-Trafficking Review (online) <http://www.antitraffickingreview.org/index.php/atrjournal/article/view/84/141>. [↑](#footnote-ref-307)
308. B Selwyn, ‘Poverty Chains and Global Capitalism’ (2018) 23 Competition and Change 71. (Publication forthcoming) [↑](#footnote-ref-308)
309. R Plant, ‘Forced Labour, Slavery and Poverty Reduction: Challenges for Development Agencies. Presentation to UK High-Level Conference to Examine the Links between Poverty, Slavery and Social Exclusion Foreign and Commonwealth Office and DFID, London, 30 October 2007’. [↑](#footnote-ref-309)
310. LeBaron and others (n 205) 7. [↑](#footnote-ref-310)
311. ibid 40. [↑](#footnote-ref-311)
312. Forced labour is also linked to the lower levels of education and literacy associated with low skilled work. Higher standards of education and literacy significantly reduce the risk of vulnerability due to the individual being more aware of their rights and better able to read contracts and recognise situations that could lead to exploitation. See: International Labour Organization (ILO), ‘Profits and Poverty: The Economics of Forced Labour’ (2014) <http://www.ilo.org/wcmsp5/groups/public/---ed\_norm/---declaration/documents/publication/wcms\_243391.pdf>. [↑](#footnote-ref-312)
313. ibid. [↑](#footnote-ref-313)
314. D McNally, *Global Slump* (PM Press 2010); L Vosko, *Temporary Work: The Gendered Rise of a Precarious Employment Relationship* (University of Toronto Press 2000); J Fudge and K Strauss, *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge 2013); J Peck, *Workfare States* (Guilford Press 2001); R Cox, *Production, Power and World Order* (Columbia University Press 1987); J Harrod, *Power, Production and the Unprotected Worker* (Columbia University Press 1987). [↑](#footnote-ref-314)
315. International Labour Organization (ILO), *Non-Standard Employment Around The World: Understanding Challenges, Shaping Prospects* (ILO 2016). [↑](#footnote-ref-315)
316. International Trade Union Confederation (ITUC), ‘Scandal inside the Global Supply Chains of 50 Top Companies’ (2016). [↑](#footnote-ref-316)
317. A larger supply of labour available for exploitation has been linked to increased incidence of labour coercion since times of European colonial expansion. See: D Acemoglu, S Johnson and J Robinson, ‘Reversal of Fortune: Geography and Instiutions in the Making of the Modern World Income Distribution’ (2002) 117 The Quarterly Journal of Economics 1231. [↑](#footnote-ref-317)
318. In contract theory the notion of outside options (alternative employment opportunities) correlates to reservation utility which may be defined as the expected utility a worker believes he or she can get in a job elsewhere, less the transaction costs of searching, applying etc. A scarcity in the supply of labour increases the marginal product of labour among competing industrial sectors and should result in the availability of alternative employment opportunities [↑](#footnote-ref-318)
319. Chwe links the lack of alternatives to victims of forced labour where violence is involved. See: M Chwe, ‘Why Were Workers Whipped? Pain in a Principal-Agent Model’ (1990) 100 The Economic Journal 1109. See also: Fair Labor Association, ‘Understanding the Characteristics of the Sumangali Scheme in Tamil Nadu Textile and Garment Industry and Supply Chain Linkages’ (2012) 2 <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2749&context=globaldocs>. [↑](#footnote-ref-319)
320. K Upadhyaya, ‘Poverty, Discrimination and Slavery: The Reality of Bonded Labour in India, Nepal, and Pakistan’ *Anti-Slavery International* (London, 2008). [↑](#footnote-ref-320)
321. Centre for Research on Multinational Corporations (SOMO) and India Committee of the Netherlands (ICN), ‘Captured by Cotton’ (2011) <http://www.somo.nl/publications-en/Publication\_3673>. [↑](#footnote-ref-321)
322. Although caste-based discrimination is prohibited in India by Article 15 of the Indian Constitution, enforcement of this law is weak. It is estimated that there are approximately 200 million Dalits or ‘untouchables’ in India. See: ibid 9–10. [↑](#footnote-ref-322)
323. A lack of alternatives is a clear driver of recruitment into the Sumangali system of textile workers in India. See: Fair Labor Association (n 255). [↑](#footnote-ref-323)
324. The Global Initiative Against Transnational Organised Crime, ‘Understanding Illicit Trade: Impact of Human Trafficking and Smuggling on the Private Sector’ (2016) <http://globalinitiative.net/understanding-illicit-trade-impact-of-human-trafficking-and-smuggling-on-the-private-sector/>. [↑](#footnote-ref-324)
325. See foreword in: International Labour Organization (ILO), ‘Employment Practices and Working Conditions in Thailand’s Fishing Sector’ (2013) <http://www.ilo.org/dyn/migpractice/docs/184/Fishing.pdf>. [↑](#footnote-ref-325)
326. K Hodal, C Kelly and F Lawrence, ‘Revealed: Asian Slave Labour Producing Prawns for Supermarkets in US, UK’ *The Guardian (online)* (London, 10 June 2014) <http://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour>. [↑](#footnote-ref-326)
327. International Labour Organization (ILO), ‘Employment Practices and Working Conditions in Thailand’s Fishing Sector’ (n 261) 46. [↑](#footnote-ref-327)
328. International Labour Organization (ILO), ‘Employment Practices and Working Conditions in Thailand’s Fishing Sector’ (n 261). [↑](#footnote-ref-328)
329. ibid 49. [↑](#footnote-ref-329)
330. ibid 70. [↑](#footnote-ref-330)
331. ibid. [↑](#footnote-ref-331)
332. For details of the violence used against migrant workers in the Thai Prawn industry see: F Lawrence, ‘Thai Seafood Industry Censured over Burmese Migrant’s Trafficking Ordeal’ *The Guardian (online)* (London, 4 March 2014) <http://www.theguardian.com/global-development/2014/mar/04/thai-seafood-industry-burmese-migrant-trafficking-ordeal>. [↑](#footnote-ref-332)
333. A 2015 Associated Press report found evidence of forced migrant labour within prawn peeling factories. See: M Mason and others, ‘Global Supermarkets Selling Shrimp Peeled by Slaves’ *Associated Press* (14 December 2015) <Global supermarkets selling shrimp peeled by slaves>. [↑](#footnote-ref-333)
334. Seafish is a Non-Departmental Public Body (NDPB) established by the Fisheries Act 1981 to improve efficiency and raise standards across the seafood industry [↑](#footnote-ref-334)
335. Seafish.org, ‘Focus on Ethical Issues in Seafood: Thailand Profile’ (2015) <http://www.seafish.org/media/Publications/ThailandEthicsProfile\_201509.pdf>. [↑](#footnote-ref-335)
336. N Adisai, ‘Thai Government Says It’s Not Ignoring Shrimp Sheds Slavery’ *Associated Press* (21 December 2015) <http://bigstory.ap.org/article/7ac110691b6a4ef380b957e628d6a455/thai-government-says-its-not-ignoring-shrimp-sheds-slavery>. [↑](#footnote-ref-336)
337. Hodal, Kelly and Lawrence (n 262). [↑](#footnote-ref-337)
338. For example, in 2013, shortly before the media and civil society exposure of forced labour in the Thai seafood supply chain, Walmart undertook a $15 billion share buy-back and increased its annual dividend by 17% to $1.88 per share. In 2015 Nestle, another firm implicated by the scandal, issued a buy-back of 8 billion Swiss francs in 2014 with Costco also raising dividends by 14% and reauthorized a buy-back of $4 billion. See respectively: S Schaefer, ‘Wal-Mart’s $15B Buyback: The Company It Keeps’ (*Forbes*, 2013) <https://www.forbes.com/sites/steveschaefer/2013/06/07/wal-marts-15b-buyback-the-company-it-keeps/#8e357032ec5d> accessed 17 May 2016; Nestle, ‘Nestlé Completes CHF 8 Billion Share Buyback Programme’ (2015) <http://www.nestle.com/media/news/nestle-completes-chf-8-billion-share-buyback-programme> accessed 15 May 2016; L Beilfuss, ‘Costco Raises Dividend, Reauthorizes Repurchase Program’ *The Wall Street Journal (online)* (New York, 17 April 2015) <http://www.wsj.com/articles/costco-raises-dividend-reauthorizes-repurchase-program-1429307280>. [↑](#footnote-ref-338)
339. As quoted in: Hodal, Kelly and Lawrence (n 262). [↑](#footnote-ref-339)
340. For further consideration see: B Cragg, ‘Home Is Where the Halt Is: Mandating Corporate Social Responsibility through Home State Regulation and Social Disclosure’ (2010) 24 Emory International Law Review 735, 751–754. [↑](#footnote-ref-340)
341. For an overview of the kafala system see: A Khan and H Harroff-Tavel, ‘Reforming the Kafala: Challenges and Opportunities in Moving Forward’ (2011) 20 Asian and Pacific Migration Journal 293. [↑](#footnote-ref-341)
342. On the inability of states to affect the global mobility of capital see: S Edwards, ‘How Effective Are Capital Controls?’ (1999) 13 Journal of Economic Perspectives 65; J Goodman and L Pauly, ‘The Obsolescence of Capital Controls?’ (1993) 46 World Politics 50. [↑](#footnote-ref-342)
343. The existence of a ‘race to the bottom’ as regards the regulation and enforcement of labour standards has been put forward by a number of authors. See for example: R Davies and K Vadlamannati, ‘A Race to the Bottom in Labour Standards? An Empirical Investigation’ (2013) 103 Journal of Development Economics 1. In other quarters, the notion has been disputed. See for example: D Drezner, ‘The Race to the Bottom Hypothesis: An Empirical and Theoretical Review’. [↑](#footnote-ref-343)
344. In 2015 there were more than 4000 EPZs worldwide representing an increase of approximately 3000 over the previous twenty years. See: United Nations, ‘Enhancing the Contribution of Export Processing Zones to the Sustainable Development Goals: An Analysis of 100 EPZs and a Framework for Sustainable Economic Zones’ (2015) <https://unctad.org/en/PublicationsLibrary/webdiaepcb2015d5\_en.pdf>. [↑](#footnote-ref-344)
345. Layna Mosley, *Labor Rights and Multinational Production* (Cambridge University Press 2011). [↑](#footnote-ref-345)
346. International Labour Organization (ILO), ‘Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children’ (2011) <https://www.ilo.org/global/topics/forced-labour/policy-areas/statistics/WCMS\_182084/lang--en/index.htm>. [↑](#footnote-ref-346)
347. V Peterson, *A Critical Rewriting of Global Political Economy: Integrating Reproductive, Productive and Virtual Economies* (Routledge 2003) 51. [↑](#footnote-ref-347)
348. M Ford, ‘Trade Unions, Forced Labour and Human Trafficking’ [2015] Anti-Trafficking Review (online) 11 <https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2732867>. [↑](#footnote-ref-348)
349. Marks and Olsen (n 243). [↑](#footnote-ref-349)
350. For example a recent report produced by Jobs With Justice Education Fund and Asia Floor Wage Alliance observed that upon the raising of a grievance, the management of an Indonesian Walmart supplier terminated the employment of all trade union officials and the majority of trade union members before replacing them with new workers. A paramilitary unit was subsequently used to disperse the union-led protest. See: Community Legal Education Center, LIPS Sedan and Society for Labour and Development, ‘New Findings on Conditions Across Walmart’s Garment Supplier Factories in Cambodia, India and Indonesia’ (2015) <http://www.jwj.org/wp-content/uploads/2015/06/150609\_WalmartSupplyChainReport.pdf>. [↑](#footnote-ref-350)
351. See for example the negative views held by the world’s largest retailer, Walmart, on unionisation and how these views permeate the management of the company: S Greenhouse, ‘How Walmart Persuades Its Workers Not to Unionize’ (*The Atlantic*, 2015) <http://www.theatlantic.com/business/archive/2015/06/how-walmart-convinces-its-employees-not-to-unionize/395051/> accessed 18 October 2016. [↑](#footnote-ref-351)
352. Asia Floor Wage Alliance, ‘Precarious Work in the Walmart Global Value Chain’ (2016) <https://asia.floorwage.org/workersvoices/reports/precarious-work-in-the-walmart-global-value-chain/view>. [↑](#footnote-ref-352)
353. For a more doctrinal account of the use of social contractual provisions in supply contracts see: A Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Edward Elgar 2015). [↑](#footnote-ref-353)
354. See for example: Locke (n 209); Mosley (n 281). [↑](#footnote-ref-354)
355. Clean Clothes Campaign, ‘Cashing In - Giant Retailers, Purchasing Practices, and Working Conditions in the Garment Industry’ (2009) <https://cleanclothes.org/resources/publications/cashing-in.pdf/view>. [↑](#footnote-ref-355)
356. WSR Network, ‘What Is Worker-Driven Social Responsibility?’ (2017) <https://www.business-humanrights.org/sites/default/files/documents/What\_is\_WSR\_0.pdf>. [↑](#footnote-ref-356)
357. ibid. [↑](#footnote-ref-357)
358. ibid. [↑](#footnote-ref-358)
359. WSR Network, ‘Accord on Fire and Building Safety in Bangladesh’ (2019) <https://wsr-network.org/success-stories/accord-on-fire-and-building-safety-in-bangladesh/> accessed 10 December 2019. [↑](#footnote-ref-359)
360. WSR Network (n 62). [↑](#footnote-ref-360)
361. S Gill and A Cutler, *New Constitutionalism and World Order* (Cambridge University Press 2014). [↑](#footnote-ref-361)
362. LeBaron and others (n 205) 34. [↑](#footnote-ref-362)
363. ‘Fair Food Program’ <https://www.fairfoodprogram.org/> accessed 10 January 2020. [↑](#footnote-ref-363)
364. ‘How America’s “ground Zero” for Modern Slavery Was Cleaned up by Workers Group’ (*CNN (online)*, 28 September 2018) <https://edition.cnn.com/2017/05/30/world/ciw-fair-food-program-freedom-project/index.html> accessed 10 January 2019. [↑](#footnote-ref-364)
365. ibid. [↑](#footnote-ref-365)
366. D Jones, ‘How The World Has Changed Since Rana Plaza’ [2014] *Vogue* <https://www.vogue.co.uk/article/bangladesh-rana-plaza-anniversary-fashion-revolution-day>. [↑](#footnote-ref-366)
367. For further detail see: A Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Edward Elgar 2015) 213–228. [↑](#footnote-ref-367)
368. Section 16 of the Accord states: *“*The Training Coordinator appointed by the SC [Steering Committee] shall establish an extensive fire and building safety training program. The training program shall be delivered by a selected skilled personnel by the Training Coordinator at Tier 1 facilities for workers, managers and security staff to be delivered with involvement of trade unions and specialized local experts. These training programmes shall cover basic safety procedures and precautions, as well as enable workers to voice concerns and actively participate in activities to ensure their own safety. Signatory companies shall require their suppliers to provide access to their factories to training teams designated by the Training Coordinator that include safety training experts as well as qualified union representatives to provide safety training to workers and management on a regular basis.*”* [↑](#footnote-ref-368)
369. Section 19A of the Accord reads that the Steering Committee will make publicly available *“*a single aggregated list of all suppliers in Bangladesh (including sub-contractors) used by the signatory companies.” It is notable that the supplier list is an aggregate list and thus does not show which factory supplies to what company with the section going on to provide that “volume data and information linking specific companies to specific factories will be kept confidential*”.* [↑](#footnote-ref-369)
370. See Paragraph 11 of the Bangladesh Accord on Fire and Building Safety. Available at: ‘Bangladesh Accord on Fire and Building Safety’ <https://bangladeshaccord.org/> accessed 10 January 2020. [↑](#footnote-ref-370)
371. Section 22 of the Accord states: *“*In order to induce factories to comply with upgrade and remediation requirements of the program, participating brands and retailers will negotiate commercial terms with their suppliers which ensure that it is financially feasible for the factories to maintain safe workplaces and comply with upgrade and remediation requirements instituted by the Safety Inspector. Each signatory company may, at its option, use alternative means to ensure factories have the financial capacity to comply with remediation requirements, including but not limited to joint investments, providing loans, accessing donor or government support, through offering business incentives or through paying for renovations directly.*”* [↑](#footnote-ref-371)
372. For further detail see: B Hensler and J Blasi, ‘Making Global Corporations’ Labor Rights Commitments Legally Enforceable: The Bangladesh Breakthrough’ [2013] Worker Rights Consortium. [↑](#footnote-ref-372)
373. See: ‘Bangladesh Accord on Fire and Building Safety’ (n 74). [↑](#footnote-ref-373)
374. P James and others, ‘Regulating Factory Safety in the Bangladeshi Garment Industry’ (2019) 13 Regulation & Governance 431, 438–439. [↑](#footnote-ref-374)
375. See for example: Labour Behind the Label, ‘IKEA Refuses to Join Bangladesh Accord’ (2018) <https://labourbehindthelabel.org/3906-2/> accessed 10 December 2019. [↑](#footnote-ref-375)
376. The Alliance for Bangladesh Worker Safety ceased to operate as planned following their five-year term of operations. Nevertheless, detail of the initiative is still available. See: ‘Aliance for Bangladesh Worker Safety’ <http://www.bangladeshworkersafety.org/> accessed 20 December 2019. [↑](#footnote-ref-376)
377. For a detailed consideration and comparison of the two initiatives see: Rühmkorf (n 71) 213–229. [↑](#footnote-ref-377)
378. ibid 228. [↑](#footnote-ref-378)
379. ibid 224. [↑](#footnote-ref-379)
380. ibid. [↑](#footnote-ref-380)
381. James and others (n 78). [↑](#footnote-ref-381)
382. These findings are reported in the 2018 index. See: ‘Global Slavery Index’ <https://www.globalslaveryindex.org/> accessed 10 April 2019. [↑](#footnote-ref-382)
383. R Freeman, *Strategic Management A Stakeholder Approach* (Cambridge University Press 1984). [↑](#footnote-ref-383)
384. ibid 46. [↑](#footnote-ref-384)
385. ibid 32. [↑](#footnote-ref-385)
386. Freeman suggested the imposition of a duty of care upon corporate management to manage the business on behalf of its stakeholders together with a corresponding legal right to enforce this duty. R Freeman, ‘Stakeholder Theory of the Modern Corporation’ (2001) 3 Perspectives in Business Ethics 144. [↑](#footnote-ref-386)
387. See for example: L Treviño and G Weaver, ‘The Stakeholder Research Tradition: Convergent Theorists – Not Convergent Theory’ (1999) 24 Academy of Management Review 222‐7. [↑](#footnote-ref-387)
388. See for example: T Donaldson and L Preston, ‘The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications’ (1995) 20 Academy of Management Review 65‐91; T Jones and A Wicks, ‘Convergent Stakeholder Theory’ (1999) 24 Academy of Management Review 206‐21. [↑](#footnote-ref-388)
389. R Freeman and others, *Stakeholder Theory: The State of the Art* (Cambridge University Press 2010); R Freeman, J Harrison and S Zyglidopoulos, *Stakeholder Theory: Concepts and Strategies* (Cambridge University Press 2018). [↑](#footnote-ref-389)
390. Freeman, *Strategic Management A Stakeholder Approach* (n 1) 48. [↑](#footnote-ref-390)
391. T Jones, ‘Instrumental Stakeholder Theory: A Synthesis of Ethics and Economics’ (1995) 20 The Academy of Management Review 404. [↑](#footnote-ref-391)
392. R Freeman and others, ‘Stakeholder Theory(Ies): Ethical Ideas and Managerial Action’ (2012) 109 Journal of Business Ethics 1, 1. [↑](#footnote-ref-392)
393. See for example: B Burton and C Dunn, ‘Feminist Ethics as Moral Grounding for Stakeholder Theory’ (1996) 6 Business Ethics Quarterly 133; M Clarkson, ‘A Risk-Based Model of Stakeholder Theory’, *Second Toronto Conference on Stakeholder Theory.* (The Centre for Corporate Social Performance & Ethics 1994); T Donaldson and T Dunfee, *Ties That Bind* (Harvard Business School Press 1999); Donaldson and Preston (n 6); W Evan and R Freeman, ‘A Stakeholder Theory of the Modern Corporation: Kantian Capitalism’ in T Beauchamp and N Bowie (eds), *Ethical Theory and Business* (4th edn, Prentice-Hall 1993); R Freeman, ‘The Politics of Stakeholder Theory: Some Future Directions’ (1994) 4 Business Ethics Quarterly 409; R Phillips, ‘Stakeholder Theory and a Principle of Fairness’ (1997) 7 Business Ethics Quarterly 51; A Wicks, D Gilbert and R Freeman, ‘A Feminist Reinterpretation of the Stakeholder Concept’ (1994) 4 Business Ethics Quarterly 475. [↑](#footnote-ref-393)
394. N Bowie, ‘The Moral Obligations of Multinational Corporations’ in S Luper-Foy (ed), *Problems of international justice* (Westview Press 1988); R Freeman and D Reed, ‘Stockholders and Stakeholders: A New Perspective on Corporate Governance’ (1983) 25 California Management Review 93; J Nasi, ‘What Is Stakeholder Thinking? A Snapshot of a Social Theory of the Firm’ in J Nasi (ed), *Understanding stakeholder thinking* (LSR-Julkaisut Oy 1995). [↑](#footnote-ref-394)
395. C Hill and T Jones, ‘Stakeholder-Agency Theory’ (1992) 29 Journal of Management Studies 131; B Cornell and A Shapiro, ‘Corporate Stakeholders and Corporate Finance’ (1987) 16 Financial Management 5. [↑](#footnote-ref-395)
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397. M Clarkson, ‘A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance’ (1995) 20 Academy of Management Review 92‐117. [↑](#footnote-ref-397)
398. R Phillips, ‘Stakeholder Legitimacy’ (2003) 13 Business Ethics Quarterly 25. [↑](#footnote-ref-398)
399. Freeman, ‘Stakeholder Theory of the Modern Corporation’ (n 4). [↑](#footnote-ref-399)
400. R Mitchell, B Agle and D Wood, ‘Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts’ (1997) 22 The Academy of Management Review 853. [↑](#footnote-ref-400)
401. D Patten, ‘Intra‐industry Environmental Disclosures in Response to the Alaskan Oil Spill: A Note on Legitimacy Theory’ (1992) 17 Accounting, Organizations and Society 471‐5. [↑](#footnote-ref-401)
402. Freeman, ‘The Politics of Stakeholder Theory: Some Future Directions’ (n 11) 417. [↑](#footnote-ref-402)
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405. C Lindblom, ‘The Implications of Organizational Legitimacy for Corporate Social Performance and Disclosure’, *Critical Perspectives on Accounting Conference* (1994). [↑](#footnote-ref-405)
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407. Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (Routledge 2011) 79. [↑](#footnote-ref-407)
408. For further consideration of the relationship between law and society. See: M Travers, *Understanding Law and Society* (Routledge 2010). [↑](#footnote-ref-408)
409. Lindblom (n 23). [↑](#footnote-ref-409)
410. BP, ‘Sustainability Review 2008’ (2008) <https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/sustainability/archive/archived-reports-and-translations/2008/bp\_sustainability\_review\_2008.pdf>. [↑](#footnote-ref-410)
411. A Lustgarten, *Run to Failure: BP and the Making of the Deepwater Horizon Disaster* (W W Norton 2012). [↑](#footnote-ref-411)
412. Gray, Owen and Adams (n 21) 6. [↑](#footnote-ref-412)
413. T Hobbes, *Leviathan* (Andrew Crooke 1651). [↑](#footnote-ref-413)
414. T Locke, *Second Treatise of Government* (Churchill 1689). [↑](#footnote-ref-414)
415. J Rousseau, *Du Contrat Social* (Marc Michel Rey 1762). [↑](#footnote-ref-415)
416. See: J Rawls, *A Theory of Justice* (Harvard University Press 1971); D Gauthier, *Morals by Agreement* (Oxford University Press 1986). [↑](#footnote-ref-416)
417. See: T Donaldson, *Corporations and Morality* (Prentice-Hall 1982). [↑](#footnote-ref-417)
418. For example, Amao argues that in return for its recognition as a separate legal entity, the corporation should have a reciprocal obligation to respect human rights akin to that of a natural person. Amao (n 25) 109. [↑](#footnote-ref-418)
419. See for example: C Deegan, ‘Legitimacy Theory’ in Z Hoque (ed), *Methodological Issues in Accounting Research: Theories, Methods and Issues* (Spiramus 2006). [↑](#footnote-ref-419)
420. Donaldson (n 35). [↑](#footnote-ref-420)
421. I Wilson, *The New Rules of Corporate Conduct: Rewriting the Social Charter* (Quorum 2000) 3. [↑](#footnote-ref-421)
422. C Deegan, ‘The Legitimatizing Effect of Social and Environmental Disclosures: A Theoretical Foundation’ (2002) 15 Accounting, Auditing & Accountability Journal 282. [↑](#footnote-ref-422)
423. Deegan (n 37). [↑](#footnote-ref-423)
424. M Kelly, *The Divine Right of Capital* (Berrett-Koehler 2001). [↑](#footnote-ref-424)
425. T Donaldson and T Dunfee, ‘Integrated Social Contracts Theory’ (1995) 11 Economics and Philosophy 85. [↑](#footnote-ref-425)
426. ibid 89. [↑](#footnote-ref-426)
427. J Morrison, *The Social License* (Palgrave Macmillan 2014) 14. See also: L Black, *The Social Licence to Operate* (Routledge 2013). [↑](#footnote-ref-427)
428. T Donaldson and T Dunfee, ‘Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory’ (1994) 19 The Academy of Management Review 252, 267. [↑](#footnote-ref-428)
429. L Auchter, ‘Supply Chain Responsibilities and the Need for an Integrative Ethic Management in Emerging Economies’ (2015) 3 International Journal of Business and Economic Development 31. [↑](#footnote-ref-429)
430. J Bentham, *An Introduction to the Principles of Morals and Legislation* (1789). [↑](#footnote-ref-430)
431. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Clarendon 1776). [↑](#footnote-ref-431)
432. For the seminal discussion on market failure see: F Bator, ‘The Anatomy of Market Failure’ (1958) 72 The Quarterly Journal of Economics 351. [↑](#footnote-ref-432)
433. The concept of public goods stems from the work of Samuelson though he uses the term ‘collective consumption goods’. P Samuelson, ‘The Pure Theory of Public Expenditure’ (1954) 36 The Review of Economics and Statistics 387. [↑](#footnote-ref-433)
434. In common economic terms, a public good may termed as both ‘non-excludable’ and ‘non-rivalrous’. [↑](#footnote-ref-434)
435. The optimal amount of information is where the marginal cost of producing and communicating the information is equal to the marginal benefit attained from this amount of information. The difficulty in applying this theoretical device in practice is considered in: A Ogus, *Regulation: Legal Form and Economic Theory* (Clarendon 1994) 39. [↑](#footnote-ref-435)
436. A Schwartz and L Wilde, ‘Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis’ (1979) 127 University of Pennsylvania Law Review 630. [↑](#footnote-ref-436)
437. From a utilitarian perspective, therefore, increased transparency has moral value. Bentham, the founder of utilitarianism, pictured a perfectly transparent world as a gymnasium where “gesture, every turn of limb or feature, in those whose motions have a visible impact on the general happiness, will be noticed and marked down.” J Bentham, *Deontology: Or, The Science of Morality: In Which the Harmony and Co-Incidence of Duty and Self-Interest, Virtue and Felicity, Prudence and Benevolence, Are Explained and Exemplified Volume 1* (J Bowring ed, Longman 1834) 101. [↑](#footnote-ref-437)
438. A Pigou, *The Economics of Welfare* (Macmillan 1920). [↑](#footnote-ref-438)
439. Coase argues that private bargaining could resolve social problems, such as pollution, as long as property rights are well defined and transaction costs are low. See: RH Coase, ‘The Problem of Social Cost’ (1960) 3 Journal of Law and Economics 1. [↑](#footnote-ref-439)
440. Article 25 of the ILO Forced Labour Convention 1930, (No 29) provides that “The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced.” [↑](#footnote-ref-440)
441. International Labour Organization (ILO), ‘Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children’ (2011) <https://www.ilo.org/global/topics/forced-labour/policy-areas/statistics/WCMS\_182084/lang--en/index.htm>. [↑](#footnote-ref-441)
442. The suggestion here is that given the global nature of the market for productive capacity, increases in production costs resulting from higher labour standards within one state may simply see production being shifted by global buyers to another. [↑](#footnote-ref-442)
443. For example, in the UK, the Modern Slavery Police Transformation Programme was launched in 2017 to increase the effectiveness of police investigations in this area. Detailed within the National Policing Action Plan on Modern Slavery, the programme was supported by £8.5 million in funding from the Home Office. Although originally scheduled to run over two years, the programme has subsequently been extended to March 2020. [↑](#footnote-ref-443)
444. M Foucault, *The Birth of Biopolitics: Lectures at the Collège de France* (M Senelllart ed, Picador 2004). [↑](#footnote-ref-444)
445. ibid 52. [↑](#footnote-ref-445)
446. The concept of utility is discussed further in chapter 7 [↑](#footnote-ref-446)
447. Hayek believed the free market to be "the only method by which our activities can be adjusted to each other without coercive or arbitrary intervention of authority." Friedrich A Hayek, *The Road to Serfdom* (University of Chicago Press 1994) 41. For a more recent example of such thought see: Kenneth Button, ‘Opening the Skies: Put Free Trade in Airline Services on the Transatlantic Trade Agenda’ [2014] CATO Institute, Policy Analysis <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa757\_3.pdf>. [↑](#footnote-ref-447)
448. Governance may be defined as “any strategy, tactic, process, procedure [↑](#footnote-ref-448)
449. See for example: Deregulation and Contracting Out Act 1994; Deregulation Act 2015; Cabinet Office and HM Government, ‘Red Tape Challenge’ (2011) <http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/>. Whether this deregulatory agenda has been successful is another question altogether. Notions of economic liberalisation and private sector superiority have created an increased number of commercial entities to regulate, and in response, an increased number of regulatory bodies leading some to suggest a situation of re-regulations as opposed to deregulation. See: Bronwen Morgan, ‘The Economization of Politics: Meta-Regulation as a Form of Nonjudicial Legality’ (2003) 12 Social and Legal Studies 489; Richard Snyder, *Politics after Neoliberalism: Reregulation in Mexico* (Cambridge University Press 2001). [↑](#footnote-ref-449)
450. See: Max Weber, *Economy and Society: An Outline of Interpretative Sociology* (Guenther Roth and Claus Wittich eds, University of California Press 1978). [↑](#footnote-ref-450)
451. New governance techniques are now used across a wide range of regulatory spheres including occupational health and safety, environmental and financial services regulation. [↑](#footnote-ref-451)
452. J Black, *Rules and Regulators* (Oxford University Press 1997) 90. [↑](#footnote-ref-452)
453. As Braithwaite rather bluntly puts it, “The sovereign is not dead, but it is just one source of power.” John Braithwaite, ‘Accountability and Governance under the New Regulatory State’ (2000) 58 Australian Journal of Public Administration 90. See also: Anne-Marie Slaughter, *The New World Order* (Princeton University Press 2004). [↑](#footnote-ref-453)
454. B Hutter, *Regulation and Risk: Occupational Health and Safety on the Railways* (Oxford University Press 2001) 215. [↑](#footnote-ref-454)
455. Cary Coglianese and Evan Mendelson, ‘Meta-Regulation and Self-Regulation’ in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 150. [↑](#footnote-ref-455)
456. J Freeman, ‘Private Parties, Public Functions and the New Administrative Law’ (2000) 52 Administrative Law Review 813, 831. [↑](#footnote-ref-456)
457. Coglianese and Mendelson (n 98) 150. [↑](#footnote-ref-457)
458. ibid. [↑](#footnote-ref-458)
459. ibid. [↑](#footnote-ref-459)
460. Coglianese and Mendelson (n 98). [↑](#footnote-ref-460)
461. Julia Black, ‘Paradoxes and Failures:“New Governance”Techniques and the Financial Crisis’ (2012) 75 Modern Law Review 1037, 1037. [↑](#footnote-ref-461)
462. Sharon Gilad, ‘It Runs in the Family: Meta-Regulation and Its Siblings’ (2010) 4 Regulation & Governance 485, 485. [↑](#footnote-ref-462)
463. B Morgan, *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification* (Ashgate Publishing 2003) 148. [↑](#footnote-ref-463)
464. C Parker, *The Open Corporation: Effective Self‐Regulation and Democracy* (Cambridge University Press 2002) 15. [↑](#footnote-ref-464)
465. C Parker and J Braithwaite, ‘Conclusion’ in C Parker and others (eds), *Regulating Law* (Oxford University Press 2004) 6. [↑](#footnote-ref-465)
466. G Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 Law & Society Review 239. [↑](#footnote-ref-466)
467. C Barnard, S Deakin and R Hobbs, ‘Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of the Working Time Directive’ (2004) University of Cambridge CBR Research Programme on Corporate Governance Working Paper 294. [↑](#footnote-ref-467)
468. Teubner (n 109) 254–255. [↑](#footnote-ref-468)
469. ibid 276. [↑](#footnote-ref-469)
470. Amao (n 25) 76. [↑](#footnote-ref-470)
471. O De Schutter, ‘The Implementation of Fundamental Rights through the Open Method of Coordination’ in O De Schutter and S Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Bruylant 2004). [↑](#footnote-ref-471)
472. J Cohen, *Regulating Intimacy* (Princeton University Press 2002) 4. [↑](#footnote-ref-472)
473. C Barnard and S Deakin, ‘Market Access and Regulatory Competition’ in C Barnard and J Scott (eds), *Law of the Single Market: Unpacking the Premises* (Hart 2002) 219–220. [↑](#footnote-ref-473)
474. ibid. [↑](#footnote-ref-474)
475. Christie Ford, ‘New Governance, Compliance, and Principles-Based Securities Regulation’ (2008) 45 American Business Law Journal. [↑](#footnote-ref-475)
476. Financial Services Authority, ‘Principles-Based Regulation: Focusing on the Outcomes That Matter’ (2007). [↑](#footnote-ref-476)
477. Teubner posits that the response to regulation may result in indifference of the target system to intervention, destruction of the target system, or destruction of the intervening system. See: G Teubner, ‘Juridification: Concepts, Aspects, Limits, Solutions’ in G Teubner (ed), *Juridification of Social Spheres: A Comparative analysis in the areas of labour, corporate, antitrust and social welfare law* (Walter de Guyter 1987). [↑](#footnote-ref-477)
478. Julia Black, ‘Forms and Paradoxes of Principles-Based Regulation’ (2008) 3 Capital Markets Law Journal 425, 426; Kern Alexander, ‘Principles v. Rules in Financial Regulation: Re-Assessing the Balance in the Credit Crisis Symposium at Cambridge University, 10-11 April 2008’ (2009) 10 European Business Law Review 169. [↑](#footnote-ref-478)
479. Julia Black, Martin Hopper and Christa Band, ‘Making a Success of Principles-Based Regulation’ (2007) 1 Law and Financial Markets Review 191. [↑](#footnote-ref-479)
480. R Baldwin, M Cave and M Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2nd edn, Oxford University Press 2012). [↑](#footnote-ref-480)
481. Black, Hopper and Band (n 122). [↑](#footnote-ref-481)
482. Steven Schwarcz, ‘The “Principles” Paradox’ (2009) 10 European Business Organization Law Review 175. [↑](#footnote-ref-482)
483. Iain MacNeil, ‘The Trajectory of Regulatory Reform in the UK in the Wake of the Financial Crisis’ (2010) 11 European Business Organization Law Review 483. [↑](#footnote-ref-483)
484. The UK Corporate Governance Code 2018. [↑](#footnote-ref-484)
485. ibid. [↑](#footnote-ref-485)
486. Grant Thornton, ‘Corporate Governance Review 2018’ (2018) <https://www.grantthornton.co.uk/globalassets/1.-member-firms/united-kingdom/pdf/documents/corporate-governance-review-2018.pdf>. [↑](#footnote-ref-486)
487. Julia Black, ‘The Rise, Fall and Fate of Principles Based Regulation’ (2010) 17/2010. [↑](#footnote-ref-487)
488. An example is Principle 3 of the Australian Corporate Governance Code’s requiring all companies to implement a corporate code of conduct. See: Corporate Governance Principles and Recommendations (4th edition) 2019. [↑](#footnote-ref-488)
489. Lori Bennear, ‘Are Management-Based Regulations Effective? Evidence from State Pollution PreventionPrograms’ (2007) 26 Journal of Policy Analysis and Management. [↑](#footnote-ref-489)
490. Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press 2002). [↑](#footnote-ref-490)
491. Eugene Bardach and Robert Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Temple University Press 1982). [↑](#footnote-ref-491)
492. Lori Bennear, ‘Evaluating Management-Based Regulation: A Valuable Tool in the Regulatory Tool Box?’ in Cary Coglianese and J Nash (eds), *Leveraging the private sector: Management-based strategies for improving environmental performance* (Resources for the Future 2006). [↑](#footnote-ref-492)
493. Black, ‘The Rise, Fall and Fate of Principles Based Regulation’ (n 130) 12. [↑](#footnote-ref-493)
494. Cary Coglianese and David Lazer, ‘Management-Based Regulation: Prescribing Private Management to Achieve Public Goals’ (2003) 374 Law & Society Review 691. [↑](#footnote-ref-494)
495. ibid; Neil Gunningham and Darren Sinclair, ‘Organizational Trust and the Limits of Management-Based Regulation’ (2009) 43 Law & Society Review 865; Bennear (n 132); Ford (n 118). [↑](#footnote-ref-495)
496. Bennear (n 135). [↑](#footnote-ref-496)
497. As Black points out, reliance on internal management systems is inevitable with any type of regulation (as the regulator cannot be present 24/7) but MBR recognises this ‘converts it … into a conscious regulatory strategy.” See: Black, ‘Paradoxes and Failures:“New Governance”Techniques and the Financial Crisis’ (n 104). [↑](#footnote-ref-497)
498. ibid. [↑](#footnote-ref-498)
499. Gilad (n 105). [↑](#footnote-ref-499)
500. Ian Ayers and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992). [↑](#footnote-ref-500)
501. Black, Hopper and Band (n 122); Black, ‘Forms and Paradoxes of Principles-Based Regulation’ (n 121). [↑](#footnote-ref-501)
502. Ayers and Braithwaite (n 143); Paul Kleindorfer, ‘Understanding Individuals’ Environmental Descisions: A Decision Science Approach’ in K Sexton and others (eds), *Better Environmental Decisions: Strategies for Government, Businesses and Communities* (Island Press 1999); Cary Coglianese and Jennifer Nash, ‘Environmental Management Systems and the New Policy Agenda’ in Cary Coglianese and Jennifer Nash (eds), *Regulating from the Inside: Can Environmental Management Systems Achieve Policy Goals?* (Resources for the Future 2001). [↑](#footnote-ref-502)
503. Gunningham and Sinclair (n 138). [↑](#footnote-ref-503)
504. Parker (n 133). [↑](#footnote-ref-504)
505. Colin Scott, ‘Regulation in the Age of Governance: The Rise of the Post-Regulatory State’, *The Politics of Regulation: Institutions and Regul;atory Reforms for the Age of Governance* (Edward Elgar 2004); See also: M Rahim, ‘Meta-Regulation Approach of Law: A Potential Legal Strategy to Develop Socially Responsible Business Selfregulation in Least Developed Common Law Countries’ (2011) 40 Common Law World Review 174. [↑](#footnote-ref-505)
506. Gunningham and Sinclair (n 138). p886. [↑](#footnote-ref-506)
507. Robert Morgan and Shelby Hunt, ‘The Commitment Trust Theory of Relationship Marketing’ (1994) 58 Journal of Marketing 20. [↑](#footnote-ref-507)
508. Kurt Dirks and Donald Ferrin, ‘Trust in Leadership: Meta-Analytic Findings and Implications for Research and Practice’ (2002) 87 Journal of Applied Psychology 611. [↑](#footnote-ref-508)
509. Tom Tyler, ‘Procedural Justice, Legitimacy, and the Effective Rule of Law’ [2003] Crime and Justice 283. [↑](#footnote-ref-509)
510. M Beer, ‘Why Organisational Change Programs Don’t Produce Change.’ (1990) 68 Harvard Business Review 158; AL Molinsky, ‘Sanding down the Edges: Paradoxical Impediments to Organizational Change’ (1999) 35 Journal of Applied Behavioural Science 8; B Turner, ‘Sociological Aspects of Organisational Symbolism’ (1986) 7 Organisation Studies 101. [↑](#footnote-ref-510)
511. Black, ‘Paradoxes and Failures:“New Governance”Techniques and the Financial Crisis’ (n 104). [↑](#footnote-ref-511)
512. Cary Coglianese and Jennifer Nash (eds), *Leveraging the Private Sector: Management-Based Strategies for Improving Environmental Performance* (Resources for the Future 2006). P14; Gunningham and Sinclair (n 138). [↑](#footnote-ref-512)
513. Coglianese and Lazer (n 137); Gunningham and Sinclair (n 138). [↑](#footnote-ref-513)
514. Parker (n 133) 246. Indeed, it has been argued that irresponsible corporate behaviour of the 2007-2008 financial crisis can be attributed to such misalignment. See: Professor Edward Kane of Boston College as cited in: Alexander (n 121). [↑](#footnote-ref-514)
515. Coglianese and Lazer (n 137). [↑](#footnote-ref-515)
516. Karen Palmer, Wallace Oates and Paul Portney, ‘Tightening Environmental Standards: The Benefit-Cost or the No-Cost Paradigm?’ 9 Journal of Economic Perspectives 119. [↑](#footnote-ref-516)
517. Coglianese and Lazer (n 137); Black, ‘Paradoxes and Failures:“New Governance”Techniques and the Financial Crisis’ (n 104). [↑](#footnote-ref-517)
518. Black, ‘Paradoxes and Failures:“New Governance”Techniques and the Financial Crisis’ (n 104); Christine Parker, C Nielsen and V Neilsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar 2011). [↑](#footnote-ref-518)
519. Black, ‘Forms and Paradoxes of Principles-Based Regulation’ (n 121). [↑](#footnote-ref-519)
520. Black, ‘Paradoxes and Failures:“New Governance”Techniques and the Financial Crisis’ (n 104). [↑](#footnote-ref-520)
521. ibid 1047. [↑](#footnote-ref-521)
522. See: ICAEW, ‘Internal Control: Guidance for Directors on the Combined Code (the Turnbull Report)’ (1999); Financial Reporting Council (FRC), ‘Internal Control: Revised Guidance for Directors on the Combined Code’ (2005); Financial Reporting Council (FRC), ‘Guidance on Risk Management, Internal Control and Related Financial and Business Reporting’ (2014). [↑](#footnote-ref-522)
523. See: the Hampton Review on regulation: Philip Hampton, ‘Reducing Administrative Burdens: Effective Inspection and Enforcement: Final Report’ (2005). [↑](#footnote-ref-523)
524. For a scathing comment on the increased use of risk as a concept to direct public policy see: M Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty* (Demos 2004). [↑](#footnote-ref-524)
525. See for example: Better Regulation Executive, ‘Effective Inspection and Enforcement: Implementing the Hampton Vision in the Health and Safety Executive’ (2008). [↑](#footnote-ref-525)
526. Julia Black, ‘The Emergence of Risk-Based Regulation and the New Public Risk Management in the United Kingdom’ [2005] Public Law 512. [↑](#footnote-ref-526)
527. Julia Black and R Baldwin, ‘Really Responsive Risk-Based Regulation’ (2010) 32 Law & Policy 181; Black, ‘Paradoxes and Failures:“New Governance”Techniques and the Financial Crisis’ (n 104). [↑](#footnote-ref-527)
528. Black, ‘Forms and Paradoxes of Principles-Based Regulation’ (n 121). [↑](#footnote-ref-528)
529. Gunningham and Sinclair (n 138). [↑](#footnote-ref-529)
530. ISO 31000 2009. [↑](#footnote-ref-530)
531. Knightian uncertainty refers to “risk” that is immeasurable and as such impossible to calculate. See: FH Knight, *Risk, Uncertainty and Profit* (Houghton Mifflin 1921). [↑](#footnote-ref-531)
532. Julia Black and R Baldwin, ‘When Risk-Based Regulation Aims Low: Approaches and Challenges’ (2012) 6 Regulation & Governance 2. Indeed, the need to incorporate a dynamic approach to RBR is well recognised. See: Hampton (n 166) 33. [↑](#footnote-ref-532)
533. See for example: Environment Agency, ‘Delivering for the Environment: A 21st Century Approach to Regulation’ (2005). [↑](#footnote-ref-533)
534. Black, ‘Paradoxes and Failures:“New Governance”Techniques and the Financial Crisis’ (n 104); H Rothstein and others, ‘The Risks of Risk-Based Regulation: Insights from the Environmental Policy Domain’ (2006) 32 Environment International 1056. [↑](#footnote-ref-534)
535. Fragmented regulatory powers can further exacerbate this issue. See: Black and Baldwin (n 170). [↑](#footnote-ref-535)
536. Black suggests a secondary notion of ‘institutional risk’ exists which concerns the legitimation of the regulator as a public-serving entity through the justification of regulatory decisions through reference to the likelihood of risks occurring and level of impact should such an occurrence take place. See: Black, ‘The Emergence of Risk-Based Regulation and the New Public Risk Management in the United Kingdom’ (n 169). [↑](#footnote-ref-536)
537. M Spackman, ‘Serving the Public Interest?’ (2002) 3 Risk and Regulation: CARR Review; Rothstein and others (n 177). [↑](#footnote-ref-537)
538. Black and Baldwin (n 175). [↑](#footnote-ref-538)
539. Coglianese and Mendelson (n 98) 153. [↑](#footnote-ref-539)
540. ibid. [↑](#footnote-ref-540)
541. John Braithwaite and P Drahos, *Global Business Regulation* (Oxford University Press 2000); Julia Black, ‘Enrolling Actors in Regulatory Processes: Examples from UK Financial Services Regulation’ (2003) 62 Public Law 63. [↑](#footnote-ref-541)
542. Black, ‘Paradoxes and Failures:“New Governance”Techniques and the Financial Crisis’ (n 104). [↑](#footnote-ref-542)
543. R Kraakman, ‘Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy’ (1986) 2 Journal of Law, Economics, & Organization 53. [↑](#footnote-ref-543)
544. Black, ‘Paradoxes and Failures:“New Governance”Techniques and the Financial Crisis’ (n 104). [↑](#footnote-ref-544)
545. Indeed one of the criticisms against traditional command and control regulations was the possibility of regulatory capture. See for example: Martin Molineuvo and Sebastian Saez, *Regulatory Assessment Toolkit: A Practical Methodology For Assessing Trade and Investment in Services* (World Bank 2014). [↑](#footnote-ref-545)
546. Kraakman (n 186). [↑](#footnote-ref-546)
547. Following their role ion failing to prevent the 2008 financial crisis credit rating agencies are now regulated by the EU under EU Regulation 1060/2009. [↑](#footnote-ref-547)
548. See for example the ICAEW Code of Ethics 2017. [↑](#footnote-ref-548)
549. For example, C3.7 of the Corporate Governance code states that a FTSE 350 company should put its statutory audit (as required by Section 475 of the Companies Act 2006) out to tender at least every ten years, in order to ensure the accuracy of annual financial reports. However, it is arguable that the creation of increased pressure to secure its client’s business during the next tender may further increase the risk of gatekeeper partiality. Suggestions of mandatory rotation or joint-auditing were both rejected by the Competition Commission due to the increased costs involved and negative impact on competition. See: Competition Commission, ‘Statutory Audit Services for Large Companies Market Investigation (Summary)’ (2014) <https://assets.digital.cabinet-office.gov.uk/media/5329db33e5274a2268000021/131015\_summary.pdf>. However, the European Commission appears to have seen sense on this point with the EU Parliament voting in favour of applying mandatory auditor rotation to companies. See: European Commission, ‘Statement /14/104: European Parliament Backs Commission Proposals on New Rules to Improve the Quality of Statutory Audit’ <http://europa.eu/rapid/press-release\_STATEMENT-14-104\_en.htm?locale=en>. [↑](#footnote-ref-549)
550. The UK Chairman of KPMG has previously stated that the oligopolistic nature of the audit market is undeniable. As reported in: M Marriage, ‘Big Four Accountancy Firms Plan for Forced Break-Up’ *Financial Times (online)* (London, 16 May 2018). [↑](#footnote-ref-550)
551. Recent examples include the furore surrounding the collapse of BHS and the construction group Carillion. [↑](#footnote-ref-551)
552. The term the ‘Big Four’ refers to the Professional Services firms Deloitte, Ernst and Young, KPMG and Price Waterhouse Coopers. [↑](#footnote-ref-552)
553. J Kollewe, ‘UK Competition Watchdog Investigates Scandal-Hit Audit Sector’ *The Guardian (online)* (London, October 2018) <https://www.theguardian.com/business/2018/oct/09/competition-watchdog-cma-investigate-audit-sector-accountancy-firms>. [↑](#footnote-ref-553)
554. ‘Work and Pensions and BEIS Committees Publish Report on Carillion’ (*www.parliament.uk*, 2018). [↑](#footnote-ref-554)
555. See also: Business Energy and Industrial Strategy and Work and Pensions Committees, ‘Carillion: Second Joint Report from the Business, Energy and Industrial Strategy and Work and Pensions Committees of Session 2017–19’ (2018) para 45-46. [↑](#footnote-ref-555)
556. “Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.” See: Hampton (n 166) Box E2. However, it is acknowledged that the report does make a minor concession to this point by recommending that a small element of random inspection should be maintained. See: ibid 2.31 and 2.38. [↑](#footnote-ref-556)
557. The ‘UN Norms’ prescribed a formal monitoring and complainant role for civil society. Although approved in August 2003 by the UN Sub-commission on the Promotion and Protection of Human Rights, they were subsequently abandoned by UN Commission on Human Rights. For a detailed consideration see: P Miretski and S Bachmann, ‘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. [↑](#footnote-ref-557)
558. Better Regulation Executive (n 168). [↑](#footnote-ref-558)
559. See for example the Financial Service Authority’s regulation of Northern Rock: Financial Services Authority, ‘The Supervision of Northern Rock: A Lessons Learned Review’ (2008). [↑](#footnote-ref-559)
560. Black, Hopper and Band (n 122). [↑](#footnote-ref-560)
561. A Page, ‘Self-Regulation: The Constitutional Dimension’ (1986) 49 Modern Law Review 141, 144. [↑](#footnote-ref-561)
562. A Ogus, ‘Rethinking Self-Regulation’ in R Baldwin, C Scott and C Hood (eds), *A Reader on Regulation* (Oxford University Press 1998). [↑](#footnote-ref-562)
563. Lance Moir, ‘What Do We Mean by Corporate Social Responsibility?’ (2001) 1 Corporate Governance 16. [↑](#footnote-ref-563)
564. J Black, ‘Constitutionalising Self‐Regulation’ (1996) 59 Modern Law Review 24. [↑](#footnote-ref-564)
565. See: Organisation for Economic Cooperation and Development, ‘Codes of Conduct - An Expanded Review of Their Contents’ (2001) 2001/06. [↑](#footnote-ref-565)
566. This distinction between discretionary and ethical responsibilities stems from Carroll’s conceptual model of corporate social performance. See: A Carroll, ‘A Three-Dimensional Conceptual Model of Corporate Performance’ (1979) 4 The Academy of Management Review 497. [↑](#footnote-ref-566)
567. R Baldwin, M Cave and M Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford University Press 2012) 140. [↑](#footnote-ref-567)
568. The PCC was replaced by the Independent Press Standards Organisation (IPSO) in 2014 following the critical findings of the Leveson Inquiry in 2012. The Leveson Inquiry was set up to consider the culture and practices of the UK press in the aftermath of the News International phone hacking scandal. The Inquiry was highly critical of the PCC as regards its investigations into the matter. [↑](#footnote-ref-568)
569. As cited in: Baldwin, Cave and Lodge (n 123) 140. [↑](#footnote-ref-569)
570. A Kolk, R van Tulder and C Welters, ‘International Codes of Conduct and Corporate Social Responsibility: Can Transnational Companies Regulate Themselves?’ (1999) 8 Transnational Corporations 143; G Seyfang, ‘Private Sector Self-Regulation for Social Responsibility: Mapping Codes of Conduct’ (1999) 1. [↑](#footnote-ref-570)
571. D Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (2nd edn, Brookings Institution 2006). [↑](#footnote-ref-571)
572. Baldwin terms the tendency of this approach to regulate those least in need of regulation as the ‘consensual paradox.’ R Baldwin, ‘Health and Safety at Work’ in R Baldwin and C McCrudden (eds), *Regulation and Public Law* (Weidenfeld & Nicolson 1987). See also: C Scott and J Black, *Cranston’s Consumers and the Law* (Butterworths 2000) 39. [↑](#footnote-ref-572)
573. See for example: M Sotirov, M Stelter and G Winkel, ‘The Emergence of the European Union Timber Regulation: How Baptists, Bootleggers, Devil Shifting and Moral Legitimacy Drive Change in the Environmental Governance of Global Timber Trade’ (2017) 81 Forest Policy and Economics 69. [↑](#footnote-ref-573)
574. Baldwin, Cave and Lodge (n 210) 138. [↑](#footnote-ref-574)
575. Deegan (n 40). [↑](#footnote-ref-575)
576. J Hurst, *The Legitimacy of the Business Corporation in the Law of the United States 1780‐1970* (University Press of Virginia 1970); Lindblom (n 23). [↑](#footnote-ref-576)
577. European Commission, ‘Commission Recommendation of 9 April 2014 on the Quality of Corporate Governance Reporting (“Comply or Explain”) (2014/208/EU)’. [↑](#footnote-ref-577)
578. J Meier-Schatz, ‘Objectives of Financial Disclosure Regulation’ (1986) 8 Journal of Comparative Business and Capital Market Law 219. [↑](#footnote-ref-578)
579. Black, ‘Forms and Paradoxes of Principles-Based Regulation’ (n 121). [↑](#footnote-ref-579)
580. Gilad (n 105). [↑](#footnote-ref-580)
581. The Department of Trade and Industry (DTI) operated until 2007. Its current equivalent is the Department for Business, Innovation and Skills (BIS). [↑](#footnote-ref-581)
582. See: Company Law Review Steering Group, ‘Modern Company Law For A Competitive Economy: Developing the Framework’ 152. [↑](#footnote-ref-582)
583. A Johnston and B Sjåfjell, ‘The EU’s Approach to Environmentally Sustainable Business: Can Disclosure Overcome the Failings of Shareholder Primacy?’ in M Peeters and M Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar 2019). (Forthcoming) [↑](#footnote-ref-583)
584. A Berle and G Means, *The Modern Corporation and Private Property* (Transaction Publishers 1932). [↑](#footnote-ref-584)
585. C Villiers, ‘Disclosure Theory and the Limitations of Corporate Reports’, *Corporate Reporting and Company Law* (Cambridge University Press 2012) 30. [↑](#footnote-ref-585)
586. Baldwin, Cave and Lodge (n 210) 120. In addition to the five potential weaknesses outlined here, the writers note the potential for the regulator to deem the social risk as being so great that simply informing stakeholders is inappropriate. See also: I Ramsay, *Consumer Protection* (Weidenfeld and Nicolson 1989). [↑](#footnote-ref-586)
587. See for example: M Sutton, ‘Between a Rock and a Judicial Hard Place: Corporate Social Responsibility Reporting and Potential Legal Liability under Kasky v Nike’ (2004) 72 University of Missouri-Kansas Law Review 1159. [↑](#footnote-ref-587)
588. Villiers (n 228). [↑](#footnote-ref-588)
589. Baldwin, Cave and Lodge (n 210) 71. [↑](#footnote-ref-589)
590. *Caparo Industries PLC v Dickman [1990] UKHL 2*. [↑](#footnote-ref-590)
591. Englard highlights that the wealth of a damage-causing defendant provides a strong moral argument for legal liability. I Englard, *Corrective and Distributive Justice: From Aristotle to Modern Times* (Oxford University Press 2009) 15. This is arguably even more the case where the defendant’s wealth is derived from the risky activity in question. [↑](#footnote-ref-591)
592. M Conway, ‘A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains’ (2015) 40 Queens Law Journal 741. [↑](#footnote-ref-592)
593. *Chandler v Cape plc [2012] EWCA Civ 525*. [↑](#footnote-ref-593)
594. # Based upon an application of the test in *Chandler v Cape*, the argument that a holding company could owe a duty of care over a subsidiary in which it had appointed a health and safety manager failed in *Thompson v The Renwick Group Plc (2014) EWCA Civ 635*.

     [↑](#footnote-ref-594)
595. *Okpabi and others v Royal Dutch Shell Plc and another [2018] EWCA Civ 191*. It is notable that the issue of parental corporate responsibility for community and the environmental stakeholders will soon be revisited by the High Court being given leave to proceed by the Supreme Court in *Lungowe v Vedanta Resources plc [2019] UKSC 20*. [↑](#footnote-ref-595)
596. *Doe I v Wal-Mart Stores 572 F (3d) 677 (9th Cir 2009) [Wal-Mart Stores 9th Cir]*. For a detailed consideration see: H Revak, ‘Corporate Codes of Conduct: Binding Contract or Ideal Publicity?’ (2012) 63 Hastings Law Journal 1645. [↑](#footnote-ref-596)
597. The Occupiers’ Liability Acts (1957 and 1984) impose a duty of care upon occupiers of land to protect others from harm, as far as it is reasonable to do. [↑](#footnote-ref-597)
598. Section 34 of the Environmental Protection Act 1990. [↑](#footnote-ref-598)
599. The Regulator in this case would be the Environment Agency who may impose an unlimited fine for breach [↑](#footnote-ref-599)
600. Section 7(2) of the Bribery Act 2010. [↑](#footnote-ref-600)
601. T Honoré, ‘Are Omissions Less Culpable?’ in P Cane and J Stapleton (eds), *Essays for Patrick Atiyah* (Clarendon 1991). [↑](#footnote-ref-601)
602. See for example: *Bolitho v City and Hackney Health Authority 1997 4 All ER 771, HL*. [↑](#footnote-ref-602)
603. C Denvir, N Baklmer and P Pleasence, ‘When Legal Rights Are Not a Reality: Do Individuals Know Their Rights and How Can We Tell?’ (2013) 35 Journal of Social Welfare and Family Law 139. [↑](#footnote-ref-603)
604. K Bumiller, ‘Victims in the Shadow of the Law: A Critique of the Model of Legal Protection’ (1987) 12 Signs 421. [↑](#footnote-ref-604)
605. These costs do not simply relate to the legal costs of representation but a variety of costs relating to the pursuit of justice through the courts. For further information see: J Verdonschot and others, ‘Measuring Access to Justice: The Quality of Outcomes’ (2008) TISCO Working Paper Series on Civil Law and Conflict Resolution Systems 14. [↑](#footnote-ref-605)
606. For a broader discussion on the implications of practicing law for lower income individuals see: S Wexler, ‘Practicing Law for Poor People’ (1970) 79 The Yale Law Journal 1049. [↑](#footnote-ref-606)
607. N Phillips and L Sakamoto, ‘Global Production Networks, Chronic Poverty and “Slave Labour” in Brazil’ (2012) 47 Studies in Comparative International Development 287. [↑](#footnote-ref-607)
608. See generally: A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006). [↑](#footnote-ref-608)
609. Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2. [↑](#footnote-ref-609)
610. S Tharoor, ‘Why America Still Needs the United Nations’ [2003] *Foreign Affairs*. [↑](#footnote-ref-610)
611. Although under the guidance of Kofi Annan, the UN reached out to business and civil society organisations to provide for collaboration in certain areas, the UN does not currently appear to view these non-state actors as targets for regulation. [↑](#footnote-ref-611)
612. The UN Commission on Human Rights was superseded by the UN Human Rights Council on 15th March 2006. [↑](#footnote-ref-612)
613. Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations. UN Doc E/CN.4/Sub.2/1998/45’ (1998). [↑](#footnote-ref-613)
614. Sub-Commission on the Promotion and Protection of Human Rights, *The Effects of the Working Methods and Activities of Transnational Corporations on the Enjoyment of Human Rights, UN Doc E/CN.4/Sub.2/2001/40* (2001). [↑](#footnote-ref-614)
615. D Weissbrodt and M Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (2003) 97 American Journal of International Law 901, 913–915. [↑](#footnote-ref-615)
616. S Deva, ‘UN’s Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in Right Direction?’ (2004) 10 ILSA Journal of International & Comparative Law 493, 497. [↑](#footnote-ref-616)
617. Part A of the UN Norms provided a number of ‘General Obligations’ listed as follows: the duty of due diligence to ensure that business activities do not directly or indirectly contribute to human rights abuses; the duty to ensure that corporations do not benefit from such abuses; the duty to refrain from undermining efforts to promote human rights; the duty of a corporation to use its influence to promote human rights; the obligation to assess the human rights impact of the corporation; and the overall responsibility to avoid complicity in human rights abuses. Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2. [↑](#footnote-ref-617)
618. Deva (n 10) 499–500. [↑](#footnote-ref-618)
619. Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2. [↑](#footnote-ref-619)
620. ibid paragraph 16(d). [↑](#footnote-ref-620)
621. ibid Articles 15-16. [↑](#footnote-ref-621)
622. For consideration see: P Miretski and S Bachmann, ‘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. [↑](#footnote-ref-622)
623. Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 Article 16. [↑](#footnote-ref-623)
624. D Kinley and R Chambers, ‘The UN Human Rights Norms for Corporations: The Private Implications of Public International Law’ (2006) 6 Human rights Law Review 447, 448–449. [↑](#footnote-ref-624)
625. L Backer, ‘Multinational Corporations, Transnational Law: The United Nation’s Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law’ (2006) 37 Columbia Human Rights Law Review 287. [↑](#footnote-ref-625)
626. Deva (n 10) 511–513. [↑](#footnote-ref-626)
627. According to the United States Mission to International Organisations, the UN Norms were “doomed from the outset.” As reported in: Miretski and Bachmann (n 16) 33. [↑](#footnote-ref-627)
628. For a consideration of the specific responses from a number of UN member states see: Miretski and Bachmann (n 16). [↑](#footnote-ref-628)
629. UN Human Rights Council’s open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIWG), ‘Legally Binding Instrument to Regulate International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises: Zero Draft’ <https://www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf>. [↑](#footnote-ref-629)
630. International Organisation of Employers and others, ‘Business Response to the Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (“Zero Draft Treaty”) and the Draft Optional Protocol’ (2018) <https://cdn.iccwbo.org/content/uploads/sites/3/2018/10/icc-joint-business-response-zero-draft-2018.pdf> accessed 1 February 2019. [↑](#footnote-ref-630)
631. A Angelini, ‘The Way Ahead for a UN Treaty on Business and Human Rights’ (*Fair Observer*, 2019) <https://www.fairobserver.com/world-news/un-treaty-business-human-rights-brumadino-dam-collapse-news-15215/> accessed 6 May 2019. [↑](#footnote-ref-631)
632. U.S. Mission to International Organizations, ‘The United States’ Opposition to the Business and Human Rights Treaty Process’ (2018) <https://geneva.usmission.gov/2018/10/15/the-united-states-opposition-to-the-business-and-human-rights-treaty-process/> accessed 1 March 2019. [↑](#footnote-ref-632)
633. The Core Coalition, ‘What Is the Proposed Treaty on Business and Human Rights?’ <https://corporate-responsibility.org/proposed-treaty-business-human-rights/> accessed 10 June 2016. [↑](#footnote-ref-633)
634. Friends of the Earth Europe, ‘Leak: EU to Back out of UN Treaty on Business and Human Rights’ (2019) <http://www.foeeurope.org/leak-eu-un-treaty-human-rights-130319> accessed 30 March 2019. [↑](#footnote-ref-634)
635. This was briefly argued in relation to extraterritorial torts committed by companies under the US Alien Torts Statute. However the door was seemingly slammed shut on the matter by the US Supreme Court in *Kiobel v Royal Dutch Petroleum Co, 569 US 108 (2013)*. [↑](#footnote-ref-635)
636. A Peters, *Beyond Human Rights* (Cambridge University Press 2016) 102. [↑](#footnote-ref-636)
637. ‘Global Compact (Website)’ (2015) <https://www.unglobalcompact.org/what-is-gc/participants> accessed 14 October 2015. [↑](#footnote-ref-637)
638. See for example: The Global Ethic Foundation, ‘UN Global Compact under Criticism’ (2015) <http://www.global-ethic-now.de/gen-eng/0d\_weltethos-und-wirtschaft/0d-03-neue-art/0d-03-106-global-com-kritik.php#> accessed 13 October 2015. [↑](#footnote-ref-638)
639. K Annan, *We The Peoples: A UN for the 21st Century* (Paradigm 2014). [↑](#footnote-ref-639)
640. ‘Sharpening the Tools: An Interview with John Ruggie’ (*UN Global Compact*) <http://globalcompact15.org/interviews/john-ruggie> accessed 1 May 2019. [↑](#footnote-ref-640)
641. OHCHR, ‘Briefing Paper on the Global Compact and Human Rights: Understanding Sphere of Influence and Complicity’ 17; See also: UN Press Release SG/SM/6881, ‘Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos’, *World Economic Forum in Davos* (1999) <http://www.un.org/press/en/1999/19990201.sgsm6881.html>. [↑](#footnote-ref-641)
642. Rhys Jenkins, R Pearson and G Seyfang, ‘Introduction’ in Rhy Jenkins, Ruth Pearson and Gill Seyfang (eds), *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy* (Earthscan 2002) 3. [↑](#footnote-ref-642)
643. As reported in: K Chu and B Davis, ‘China, Levi Strauss and the Long-Simmering Battle Over Labor Rights’ *The Wall Street Journal (online)* (New York, 24 November 2015) <https://blogs.wsj.com/chinarealtime/2015/11/24/china-levi-strauss-and-the-long-simmering-battle-over-labor-rights/>. [↑](#footnote-ref-643)
644. A Kolk, R van Tulder and C Welters, ‘International Codes of Conduct and Corporate Social Responsibility: Can Transnational Companies Regulate Themselves?’ (1999) 8 Transnational Corporations 143; G Seyfang, ‘Private Sector Self-Regulation for Social Responsibility: Mapping Codes of Conduct’ (1999) 1. [↑](#footnote-ref-644)
645. See: UN Global Compact, ‘The Ten Principles’ <www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> accessed 9 October 2012. [↑](#footnote-ref-645)
646. It is notable that the UN had unsuccessfully attempted to introduce an international code of conduct on previous occasions in the 1970s and 1980s. See: Development and International Economic Cooperation: Transnational Corporations, UN Doc. E/1 990/94; Draft United Nations Code of Conduct on Transnational Corporations, May 1983, 23 ILM 626 (1984). [↑](#footnote-ref-646)
647. D Berliner and A Prakash, ‘From Norms to Programs: The United Nations Global Compact and Global Governance’ (2012) 6 Regulation & Governance <http://faculty.washington.edu/aseem/gc.pdf>. [↑](#footnote-ref-647)
648. For one submission only if the COP does not meet these three requirements, the company’s disclosure will be categorised as a ‘Learner COP’ and a twelve-month grace period will be given to the company to make the necessary additions or amendments. If a company fails to complete a COP, its status is downgraded from ‘active’ to ‘non-communicating’. If it fails to complete a COP for two consecutive years, it will be expelled and its name will be published on the Global Compact website. See: UN Global Compact Office, ‘Basic Guide: Communication on Progress’. [↑](#footnote-ref-648)
649. In the first eleven years of its operation, 2000 or 15% of member companies were delisted suggesting that for some, admittedly often smaller firms, even this level of reporting was ‘not worth the effort’. See: J Knudsen, ‘Which Companies Benefit Most from UN Global Compact Membership?’ (*European Business Review*, 2011) <http://www.europeanbusinessreview.com/?p=3167> accessed 13 October 2015; J Knudsen, ‘Company Delistings from the UN Global Compact: Limited Business Demand or Domestic Governance Failure?’ (2011) 103 Journal of Business Ethics 331. This reluctance for smaller firms to provide social reports accords with that which has been observed in relation to GRI reporting. See H Brown, ‘Global Reporting Initiative’ in T Hale and D Held (eds), *The Handbook of Transnational Governance: Institutions and Innovations* (Polity Press 2011); G Sarfaty, ‘Measuring Corporate Accountability through Global Indicators’ in S Merry, K Davis and B Kingsbury (eds), *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law* (Cambridge University Press 2015). [↑](#footnote-ref-649)
650. Strong criticism was received from civil society commentators highlighting that many companies were signing up to the Global Compact in order to ‘blue wash’ their current operations by using the United Nations logo on their website and correspondence. Indeed the existence of ‘blue rinsing’ was also seemingly acknowledged by the UN Global Compact’s own Executive Director’s in describing "free riders who joined but had no intention to stay engaged." As reported in: J Confino, ‘Cleaning up the Global Compact: Dealing with Corporate Free Riders’ *Guardian (online)* (26 March 2012) <http://www.theguardian.com/sustainable-business/cleaning-up-un-global-compact-green-wash>. For civil society comment see: Berne Declaration (BD), ‘NGOs Criticize “Blue Washing” by the Global Compact’ (2007) <https://www.publiceye.ch/en/media-corner/press-releases/detail/ngos-criticize-blue-washing-by-the-global-compact> accessed 10 March 2015. [↑](#footnote-ref-650)
651. UN Global Compact, ‘Transparency Builds Trust’ (2019) <https://www.unglobalcompact.org/participation/report/cop/create-and-submit/expelled?page=182&per\_page=25> accessed 4 April 2019. [↑](#footnote-ref-651)
652. UN Global Compact, ‘See Who’s Involved’ (2019) <https://www.unglobalcompact.org/what-is-gc/participants> accessed 4 April 2019. [↑](#footnote-ref-652)
653. See: Knudsen, ‘Which Companies Benefit Most from UN Global Compact Membership?’ (n 43); Knudsen, ‘Company Delistings from the UN Global Compact: Limited Business Demand or Domestic Governance Failure?’ (n 43). This reluctance for smaller firms to provide social reports accords with that which has been observed in relation to GRI reporting. See Brown (n 43); Sarfaty (n 43). [↑](#footnote-ref-653)
654. J Bremer, ‘How Global Is the Global Compact?’ (2008) 17 Busienss Ethics: European Review 227. [↑](#footnote-ref-654)
655. C Woods, ‘“It Isn’t a State Problem”: The Minas Conga Mine Controversy and the Need for Binding International Obligations on Corporate Actors’ (2015) 46 Georgetown Journal of International Law 629, 643. [↑](#footnote-ref-655)
656. J Therien and V Pouliot, ‘The Global Compact: Shifting the Politics of International Development?’ (2006) 12 Global Governance 66. [↑](#footnote-ref-656)
657. UN Guiding Principles on Business and Human Rights 2011 Principle 13. [↑](#footnote-ref-657)
658. ibid Principle 14. [↑](#footnote-ref-658)
659. ibid Principle 14 Commentary. [↑](#footnote-ref-659)
660. Ruggie highlights that “a company cannot compensate for human rights harm by performing good deeds elsewhere.” John Ruggie, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights 2008 Report’ (2008) 3 Innovations: Technology, Governance, Globalization 189. [↑](#footnote-ref-660)
661. Ruggie argued against the ‘sphere of influence’ as a basis for responsibility taken by UN Norms and the Global Compact as “companies cannot be held responsible for the human rights impacts of every entity over which they may have some leverage, because this would include cases in which they are not contributing to, nor are a causal agent of the harm in question.” ibid 5. [↑](#footnote-ref-661)
662. UN Guiding Principles on Business and Human Rights Principle 18. [↑](#footnote-ref-662)
663. ibid Principle 15(b). [↑](#footnote-ref-663)
664. SHIFT, ‘Using Leverage in Business Relationships to Reduce Human Rights Risks’ (2013). [↑](#footnote-ref-664)
665. For example, Professor John Ruggie the architect of the UNGPs believed that any broadening of the corporate responsibility beyond that which it has impacted upon (and therefore ‘done harm’) could lead to ‘strategic gaming’ by the state whereby ‘a large and profitable company operating in a small and poor country could soon find itself called upon to perform ever-expanding social and even governance functions – lacking democratic legitimacy, diminishing the State’s incentive to build sustainable capacity and undermining the company’s own economic role and possibly its commercial viability.’ UN HRC, ‘A/HRC/14/27 Business and Human Rights: Further Steps toward the Operationalization of the “Protect, Respect and Remedy” Framework’ (2010) 14. [↑](#footnote-ref-665)
666. It is acknowledged that in some instruments the notion of due diligence is extended beyond human rights to cover, for example, environmental sustainability. [↑](#footnote-ref-666)
667. International Labour Organisation (ILO), *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (5th Edition, 2017)* (2017) Principle 10(d). [↑](#footnote-ref-667)
668. Organisation for Economic Cooperation and Development, ‘OECD Guidelines for Multinational Enterprises’ <http://www.oecd.org/daf/inv/mne/48004323.pdf> IIA(10). [↑](#footnote-ref-668)
669. International Standards Organization, ‘ISO 26000: 2010’ Section 6.2.2. [↑](#footnote-ref-669)
670. International Standards Organization, ‘ISO 20400: 2017’ Section 4.5.2. [↑](#footnote-ref-670)
671. ILO, ‘The Labour Principles of the United Nations Global Compact: A Guide for Business’ 23 <https://www.unglobalcompact.org/docs/issues\_doc/labour/the\_labour\_principles\_a\_guide\_for\_business.pdf>. [↑](#footnote-ref-671)
672. ‘The application of the due diligence process to a broad range of sustainability topics in both standards is based on the UN Guiding Principles on Business and Human Rights.’ As stated in: Global Reporting Initiative and International Standards Organisation, ‘GRI G4 Guidelines and ISO 26000:2010 How to Use the GRI G4 Guidelines and ISO 26000 in Conjunction’ <http://www.iso.org/iso/iso-gri-26000\_2014-01-28.pdf>. [↑](#footnote-ref-672)
673. The UK’s Modern Slavery Act 2015 considered in chapter 5 provides a prominent example. [↑](#footnote-ref-673)
674. Foreign and Commonwealth Office, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* (2016). [↑](#footnote-ref-674)
675. See for example: European Parliament, ‘European Parliament Resolution of 25 October 2016 on Corporate Liability for Serious Human Rights Abuses in Third Countries (2015/2315(INI))’. For a more comprehensive discussion see: M Gatti, ‘Companies’ Human Rights Compliance: The EU Integrated Approach to Support the Duty to Assess and Address Human Rights Related Risks of Business Activities’ (2017) 3 EU Law Journal 57. [↑](#footnote-ref-675)
676. G7, ‘Leaders’ Declaration G7 Summit 7-8 June 2015’ 5 <https://sustainabledevelopment.un.org/content/documents/7320LEADERS STATEMENT\_FINAL\_CLEAN.pdf>. [↑](#footnote-ref-676)
677. See generally: R Gleich, T Hasselbach and G Dr Kierans (eds), *Value in Due Diligence: Contemporary Strategies for Merger and Acquisition Success* (Routledge 2018). [↑](#footnote-ref-677)
678. J Bonnitcha and R McCorquodale, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights’ (2017) 28 European Journal of International Law 899. [↑](#footnote-ref-678)
679. ibid 899. [↑](#footnote-ref-679)
680. For Bonnitcha and McCorquodale, the UNGPs do not satisfactorily clarify the relationship between the two conceptions based on a lack of clarity as to when due diligence is sufficient to meet “the responsibility to respect human rights” and when such responsibility is strict. The writers suggest that the former should be limited to business relationships, as per the supply chain, whilst the strict notion regards the direct infringement of human rights by a company. See: Bonnitcha and McCorquodale (n 72). [↑](#footnote-ref-680)
681. “Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.” UN Guiding Principles on Business and Human Rights Principle 17 (commentary). [↑](#footnote-ref-681)
682. It appears that this was an intentional decision based on the wide scope of the initiative in applying to all companies, across all industries, and in relation to all internationally recognised human rights. Subsequent effort has been expended by various civil society organisations in attempting to guide the due diligence process. For a non-exhaustive list see: Business and Human Rights Resource Centre, ‘Human Rights Due Diligence’ <https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-companies/type-of-step-taken/human-rights-due-diligence> accessed 10 May 2019. [↑](#footnote-ref-682)
683. M Foucault, ‘Governmentality’ in G Burchell, C Gordon and P Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991). [↑](#footnote-ref-683)
684. G Raj-Reichert, ‘Safeguarding Labour in Distant Factories: Health and Safety Governance in an Electronics Global Production Network’ (2013) 44 Geoforum 23. [↑](#footnote-ref-684)
685. ibid. [↑](#footnote-ref-685)
686. B Townley, ‘Beyond Good and Evil: Depth and Division in the Management of Human Resources’ in A McKinlay and K Starkey (eds), *Foucault, Management and Organisational Theory* (Sage 1998); V Higgins and W Larner, *Calculating the Social: Standards and the Reconfiguration of Governing* (Pelgrave Macmillan 2010). [↑](#footnote-ref-686)
687. N Rose, *Powers of Freedom* (Cambridge University Press 1999). [↑](#footnote-ref-687)
688. The UNGPs acknowledge the significance of audits as a means to track performance. UN Guiding Principles on Business and Human Rights Principle 20 (commentary). [↑](#footnote-ref-688)
689. Locke considers the use of social audits by Nike and Hewlett Packard in this regard. R Locke, *The Promise and Limits of Private Power* (Cambridge University Press 2013). [↑](#footnote-ref-689)
690. T Bartley, *Rules Without Rights* (Oxford University Press 2018) 178. [↑](#footnote-ref-690)
691. G LeBaron and J Lister, ‘Benchmarking Global Supply Chains: The Power of the “ethical Audit” Regime’ (2015) 41 Review of International Studies 905. [↑](#footnote-ref-691)
692. ibid 17. [↑](#footnote-ref-692)
693. D O’Rourke, ‘Monitoring the Monitors: A Critique of Corporate Third-Party Labor Monitoring’ in R Jenkins, R Pearson and G Seyfang (eds), *Corporate responsibility and labour eights: Codes of conduct in the global economy* (Earthscan 2002). [↑](#footnote-ref-693)
694. LeBaron and Lister (n 85). [↑](#footnote-ref-694)
695. R Locke, ‘Can Global Brands Create Just Supply Chains? A Forum on Corporate Responsibility for Factory Workers.’ (*Boston Review*, 2013); T Frank, ‘Confessions of a Sweatshop Inspector’ [2008] *Washington Monthly* <https://washingtonmonthly.com/features/2008/0804.frank.html%0D>. [↑](#footnote-ref-695)
696. Business for Social Responsibility, ‘Supply Chains and the OECD Guidelines for Multinational Enterprises. BSR Discussion Paper on Responsible Supply Chain Management’, *10th OECD roundtable of corporate reponsibility* (2010) <http://www.oecd.org/investment/mne/45534720.pdf>. [↑](#footnote-ref-696)
697. P Lund-Thomsen and A Lindgreen, ‘Corporate Social Responsibility in Global Value Chains: Where Are We Now and Where Are We Going?’ (2014) 123 Journal of Business Ethics 11. [↑](#footnote-ref-697)
698. H Keller, ‘Corporate Codes of Conduct and Their Implementation: The Question of Legitimacy’ in R Wolfrum and V Roben (eds), *Legitimacy in International Law* (Springer 2008) <http://www.yale.edu/macmillan/Heken\_Keller\_Paper.pdf>. [↑](#footnote-ref-698)
699. Bartley (n 84) 176. [↑](#footnote-ref-699)
700. O’Rourke, D. as cited in: S Clifford and S Greenhouse, ‘Fast and Flawed Inspections of Factories Abroad’ *The New York Times* (New York, 1 September 2013) <http://www.nytimes.com/2013/09/02/business/global/superficial-visits-and-trickery-undermine-foreign-factory-inspections.html?pagewanted=all&\_r=1>. [↑](#footnote-ref-700)
701. For example, according to Clifford and Greenhouse some auditors receive only five days of training. ibid. [↑](#footnote-ref-701)
702. Bartley (n 84) 177. [↑](#footnote-ref-702)
703. ibid 176. [↑](#footnote-ref-703)
704. For example, the market value of SGS, Intertek and Bureau Veritas has more than doubled since 2008. [↑](#footnote-ref-704)
705. L Fransen and B Burgoon, ‘Privatising or Socialising Corporate Responsibility: Business Participation in Voluntary Programmes’ (2014) 53 Business & Society 583. [↑](#footnote-ref-705)
706. For comment see: Dan Viederman from NGO social auditing firm Verité: D Viederman, ‘Preventing Another Bangladesh Tragedy: From Auditing Problems to Implementing Solutions’ (*Schwab Foundation for Social Entrepreneurship*, 2013) <http://www.schwabfound.org/content/preventing-another-bangladesh-tragedy-auditing-problems-implementing-solutions>. [↑](#footnote-ref-706)
707. Perhaps the best known example is the Rana Plaza complex in Bangladesh in which two separate factories had received certification as being compliant with the industry driven Business Social Compliance Initiative (BSCI). Another example involved the Chinese owned Rosita Knitwear factory in Bangladesh which supplies numerous European firms including the UK-based British Home Stores (BHS). The factory was awarded the highest level of certification by a professional services firm in line with the BSCI. Hundreds of ticks were marked in the correct boxes and no employee complaints in relation to working conditions were noted. Following a riot at the factory ten months after the audit, numerous human rights violations came to light including threats, beatings, mandatory overtime, and the withholding of pay. An example of a non-industry led initiative is the Ali Enterprises factory fire in Pakistan in which 289 people were killed by smoke inhalation, burns, and a stampede. The factory was awarded SA8000 certification by the professional audit firm RINA less than a month before. An investigation following the fire found no emergency exits, barred windows an entire mezzanine floor which had been illegally built upon. See respectively: Clean Clothes Campaign, ‘BSCI 10th Anniversary Shame over Rana Plaza’ (2013) <https://cleanclothes.org/news/2013/06/25/bsci-10th-anniversary-shame-over-rana-plaza> accessed 12 June 2016; Clifford and Greenhouse (n 94); Institute for Global Labour and Human Rights, ‘Bangladeshi Workers Fight Back’ (2012) <http://www.globallabourrights.org/reports/bangladeshi-workers-fight-back> accessed 22 October 2015; Clean Clothes Campaign, ‘Widow from 2012 Factory Fire Petitions KiK’ (2015) <http://www.cleanclothes.org/news/press-releases/2015/03/05/widow-from-2012-factory-fire-petitions-kik> accessed 24 October 2015. [↑](#footnote-ref-707)
708. S Barrientos and S Smith, ‘Do Workers Benefit from Ethical Trade? Assessing Codes of Labour Practice in Global Production Systems’ (2007) 28 Third World Quarterly 713. [↑](#footnote-ref-708)
709. See: K Raworth and T Kidder, ‘Mimicking “Lean” in GVCs: It’s the Workers Who Get Leaned on’, *Frontiers of Supply Chain Research* (Stanford University Press 2009) 177–178. [↑](#footnote-ref-709)
710. Clifford and Greenhouse (n 94). [↑](#footnote-ref-710)
711. For instance, this instance by lead firms upon objective evidence may exclude the contents of worker interviews as evidence of non-compliance with the supply contract or code of conduct. See: Bartley (n 84) 178. [↑](#footnote-ref-711)
712. Off-site interviews are not required for SA8000, BSCI or WRAP certification or for members of the FLA or ETI. However such interviews are undertaken the night before the physical audit by Verité D Hirt, ‘Verité: Auditing Labor Standards’ (2007) 07-17. [↑](#footnote-ref-712)
713. Bartley (n 84) 176. [↑](#footnote-ref-713)
714. Clifford and Greenhouse (n 94). According to Ruwanpura and Wrigley the practice of audit economisation has accelerated since the financial crisis led to an increased focus on cost minimisation. K Ruwanpura and N Wrigley, ‘The Costs of Compliance? Views of Sri Lankan Apparel Manufacturers in Times of Global Economic Crisis’ (2011) 11 Journal of Economic Geography 1031. [↑](#footnote-ref-714)
715. Raworth and Kidder (n 103). [↑](#footnote-ref-715)
716. N Khara and P Lund-Thomsen, ‘Value Chain Restructuring, Work Organization, and Labor Outcomes in Football Manufacturing in India’ (2012) 16 Competition and Change 261; Ruwanpura and Wrigley (n 108). [↑](#footnote-ref-716)
717. Lund-Thomsen and Lindgreen (n 91). [↑](#footnote-ref-717)
718. L Preuss, ‘In Dirty Chains? Purchasing and Greener Manufacturing’ (2001) 34 Journal of Business Ethics 345. [↑](#footnote-ref-718)
719. Raworth and Kidder (n 103); Locke (n 83); Preuss (n 112); G LeBaron, ‘Subcontracting Is Not Illegal but Is It Unethical? Business Ethics, Forced Labour, and Economic Success’ (2013) 20 Journal of Diplomacy and International Relations; E Cline, *Over-Dressed: The Shockingly High Cost of Global Fashion* (Penguin 2012); L Barnes and G Lea-Greenwood, ‘Fast Fashioning the Supply Chain’ (2006) 10 Journal of Fashion Marketing and Management 259; Barrientos and Smith (n 102). [↑](#footnote-ref-719)
720. R Locke, M Amengual and A Mangla, ‘Virtue out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains’ (2009) 37 Politics and Society 319. [↑](#footnote-ref-720)
721. LeBaron (n 113). [↑](#footnote-ref-721)
722. Locke (n 83) 124. [↑](#footnote-ref-722)
723. LeBaron (n 113). [↑](#footnote-ref-723)
724. D Hernandez, ‘Zara Contractor in Brazil Accused of Slave Labor’ *Los Angeles Times (online)* (24 August 2011) <http://latimesblogs.latimes.com/laplaza/2011/08/zara-brazil-slavery-allegations-contractor-bolivians.html>. [↑](#footnote-ref-724)
725. D Boyd and others, ‘CSR in Global Supply Chains: A Procedural Justice Perspective’ (2007) 40 Long Range Planning 341. [↑](#footnote-ref-725)
726. A De Chiara and T Spena, ‘CSR Strategy in Multinational Firms: Focus on Human Resource, Supplier and Community’ (2011) 2 Journal of Global Responsibility 60. [↑](#footnote-ref-726)
727. Locke (n 83). [↑](#footnote-ref-727)
728. S Frenkel and D Scott, ‘Compliance, Collaboration, and Codes of Labor Practice: The Adidas Connection’ (2002) 45 California Management Review 29; Locke, Amengual and Mangla (n 114). [↑](#footnote-ref-728)
729. A former employee of H&M, a member of the Fair Labor Association with a detailed supplier code of conduct is quoted by Bartley as stating that the company “would dump the order in front of [several] suppliers and ask them for a price … then choose the lowest among them. In the middle of the year, they might renegotiate prices again.” Bartley (n 84) 179. [↑](#footnote-ref-729)
730. Frenkel and Scott (n 122). [↑](#footnote-ref-730)
731. Boyd and others (n 119). [↑](#footnote-ref-731)
732. Locke (n 83) 127. [↑](#footnote-ref-732)
733. Locke (n 83). [↑](#footnote-ref-733)
734. For example, Nike, Timberland, and Gap have acknowledged this issue. Nike and Timberland as reported in: ibid. and Gap as reported in: L Sluiter, *Clean Clothes: A Global Movement to End Sweatshops* (Pluto Press 2009) 241–242. [↑](#footnote-ref-734)
735. As reported by: J Ruggie, ‘Ruggies Remarks to the Fair Labor Association and the German Network of Business Ethics’, *Forum on Corporate Social Responsibility, June 14, 2006* (2006) <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf>. See also: Locke (n 83). [↑](#footnote-ref-735)
736. Locke (n 83). [↑](#footnote-ref-736)
737. Oxfam, ‘The People behind the Prices: A Focused Human Rights Impact Assessment of SOK Corporation’s Italian Processed Tomato Supply Chains’ (2019) <https://www.oxfam.org/en/research/people-behind-prices>. [↑](#footnote-ref-737)
738. UN Guiding Principles on Business and Human Rights Principle 17 Commentary. [↑](#footnote-ref-738)
739. ibid. [↑](#footnote-ref-739)
740. Locke (n 83). [↑](#footnote-ref-740)
741. Ruggie (n 129). [↑](#footnote-ref-741)
742. B Kytle and J Ruggie, ‘Corporate Social Responsibility as Risk Management: A Model for Multinationals’ (2005) 10 1. [↑](#footnote-ref-742)
743. ‘United Nations Global Compact’ Principle 1. [↑](#footnote-ref-743)
744. United Nations, ‘Frequently Asked Questions about the Guiding Principles on Business and Human Rights’ 9 <http://www.ohchr.org/Documents/Publications/FAQ\_PrinciplesBussinessHR.pdf>. [↑](#footnote-ref-744)
745. ‘United Nations Global Compact’ (n 137) Principle 1. [↑](#footnote-ref-745)
746. JM Amerson, ‘“The End of the Beginning?”: A Comprehensive Look at the U.N.’s Business and Human Rights Agenda from a Bystander Perspective’ (2013) 17 Fordham J. Corp. & Fin. L. 871. [↑](#footnote-ref-746)
747. K Parella, ‘Outsourcing Corporate Accountability’ (2014) 89 Washington Law Review 747. [↑](#footnote-ref-747)
748. D Bilchitz, ‘The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?’ (2010) 7 International Journal on Human Rights 199. [↑](#footnote-ref-748)
749. The UNGPs provide that “for as long as the [human rights] abuse continues [within the supply chain] and the enterprise remains in the relationship, [the company] should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal - of the continuing connection.” UN Guiding Principles on Business and Human Rights Principle 19 Commentary. Yet as was observed in chapter 2, legal risk for supply chain operations in any traditional sense is simply not present. [↑](#footnote-ref-749)
750. European Commission, ‘A Renewed EU Strategy 2011-14 for Corporate Social Responsibility’. [↑](#footnote-ref-750)
751. International Labour Organisation (ILO) (n 61). [↑](#footnote-ref-751)
752. For example, the European Commission makes specific reference to the ILO Tripartite Declaration of Principles concerning Multinational Enterprises on Social Policy as opposed to other ILO instruments given that it is the only ILO text specifically addressed to enterprises. [↑](#footnote-ref-752)
753. International Labour Organization (ILO), ‘Forced Labour Convention, 1930 (No. 29)’; International Labour Organization (ILO), ‘Abolition of Forced Labour Convention, 1957 (No. 105)’. [↑](#footnote-ref-753)
754. ILO, ‘Multinational Enterprises’ (*Multinational Enterprises*, 2015) <http://www.ilo.org/empent/units/multinational-enterprises/lang--en/index.htm> accessed 14 October 2015. [↑](#footnote-ref-754)
755. ILO, ‘ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (4th Ed. 2006)’ <http://www.ilo.org/public/english/employment/multi/download/declaration2006.pdf>. [↑](#footnote-ref-755)
756. International Labour Organisation (ILO) (n 61) 3. [↑](#footnote-ref-756)
757. ibid 8. [↑](#footnote-ref-757)
758. J Černič, ‘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. [↑](#footnote-ref-758)
759. For instance, Clapham gives the example of the anonymization of multinational companies in such reports. See: Clapham (n 2) 216. [↑](#footnote-ref-759)
760. International network for economic social and cultural rights (Escr-net), ‘Steps Toward Corporate Accountability for Human Rights: Escr-Net Report to Ohchr on the Human Rights Responsibilities of Business (13 September 2004)’ (2004) <https://www.escr-net.org/>. [↑](#footnote-ref-760)
761. For further discussion see: Andrew Johnston, ‘ISO 26000 : Guiding Companies to Sustainability through Social Responsibility ?’ (2012) 9 European Company Law 110. [↑](#footnote-ref-761)
762. ISO, ‘It’s Crystal Clear. No Certification to ISO 26000 Guidance Standard on Social Responsibility’ (2010) <http://www.iso.org/iso/news.htm?refid=Ref1378>. [↑](#footnote-ref-762)
763. International Standards Organization, ‘ISO 26000: 2010’ (n 63) 1. [↑](#footnote-ref-763)
764. For exemplification see: Johnston (n 155) 116. [↑](#footnote-ref-764)
765. ISO 26000 PPO Secretariat, ‘ISO 26000 Post Publication Activities and the 2012 Survey’, *ISO 26000 International Workshop* (2012) <http://www.iso.org/iso/iso26000\_workshop2012\_presentations?llNodeId=409771&llVolId=-2000>. [↑](#footnote-ref-765)
766. International Standards Organization, ‘ISO 20400:2017 Sustainable Procurement Guidance’. [↑](#footnote-ref-766)
767. It is notable that the prevention of forced and child labour is considered as core subject. ISO 20400:2017 Sustainable Procurement Guidance Table A.1 page 42 [↑](#footnote-ref-767)
768. International Standards Organisation, ‘ISO 20400: Sustainable Procurement’ (2017) <https://iso26000.info/iso20400/> accessed 10 October 2018. [↑](#footnote-ref-768)
769. International Standards Organisation, ‘ISO 20400 - Sustainable Procurement (Overview)’ <https://www.iso.org/publication/PUB100410.html>. [↑](#footnote-ref-769)
770. International Standards Organization, ‘ISO 20400: 2017’ (n 64) Section 4.4 Drivers for Sustainable Procurement. [↑](#footnote-ref-770)
771. Organisation for Economic Cooperation and Development, ‘OECD Guidelines for Multinational Enterprises (2000 Edition)’ II.10. [↑](#footnote-ref-771)
772. ibid III.14. [↑](#footnote-ref-772)
773. The Commentary to the 2000 revision of the OECD Guidelines on MNEs stated: “Established or direct business relationships are the major object … rather than all individual or ad hoc contracts or transactions that are based solely on open market operations or client relationships.” ibid. [↑](#footnote-ref-773)
774. R Mares, ‘The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments’ (2010) 79 Nordic Journal of International Law 193. For details of the multi-stakeholder consultation process involved in the 2011 revision see: Organisation for Economic Cooperation and Development, ‘Consultation on the Update of the OECD Guidelines for Multinational Enterprises’ (2010) <http://www.oecd.org/daf/inv/mne/consultationontheupdateoftheoecdguidelinesformultinationalenterprises.htm> accessed 15 October 2018. [↑](#footnote-ref-774)
775. Organisation for Economic Cooperation and Development, ‘OECD Guidelines for Multinational Enterprises’ (n 62) Commentary on General Policies para. 14. [↑](#footnote-ref-775)
776. ibid IIA(10). [↑](#footnote-ref-776)
777. # See for example: *ECCHR, Sherpa & UGF vs Cargill Cotton (UK NCP, 2010)*. Available at: http://oecdwatch.org/cases/Case\_195 For commentary see: M Mirovalev and A Kramer, ‘In Uzbekistan, the Practice of Forced Labor Lives On During the Cotton Harvest’ *The new York Times* (New York, 17 December 2013) A10 <http://www.nytimes.com/2013/12/18/world/asia/forced-labor-lives-on-in-uzbekistans-cotton-fields.html?\_r=0>.

     [↑](#footnote-ref-777)
778. Organisation for Economic Cooperation and Development, ‘National Contact Points for the OECD Guidelines for Multinational Enterprises’ (2015) <http://www.oecd.org/investment/mne/ncps.htm> accessed 20 October 2015. [↑](#footnote-ref-778)
779. *Global Witness v Afrimex (UK NCP, 2007)*. Available at: http://oecdwatch.org/cases/Case\_114 [↑](#footnote-ref-779)
780. In this case, the UK government took no further steps to monitor the adherence of Afrimex to the UK NCP’s final statement and recommendations. [↑](#footnote-ref-780)
781. European Center for Constitutional and Human Rights, ‘Forced Labor of Children and Adults in Uzbekistan: How Effective Is the OECD Complaint Mechanism?’ (2013). [↑](#footnote-ref-781)
782. OECD Watch, ‘Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct’ (2015) 4 <http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/OECDWATCH\_RRR\_04.pdf>. [↑](#footnote-ref-782)
783. UN Guiding Principles on Business and Human Rights Principle 21 Commentary. [↑](#footnote-ref-783)
784. ibid. [↑](#footnote-ref-784)
785. It is notable that the UNGPs also acknowledge that “formal reporting is itself evolving from traditional annual reports and corporate responsibility/sustainability reports, to include online updates and integrated financial and non-financial reports.” ibid. [↑](#footnote-ref-785)
786. Organisation for Economic Cooperation and Development, ‘OECD Guidelines for Multinational Enterprises’ (n 62) 29. [↑](#footnote-ref-786)
787. International Standards Organization, ‘ISO 26000: 2010’ (n 63) Provision 7.5, Box 15. [↑](#footnote-ref-787)
788. Indeed, the decision to legislate s54 of the Modern Slavery Act resulted largely from the pressure imposed by a number of CSOs such as Anti-Slavery International and the Walk Free Foundation. G LeBaron and A Rühmkorf, ‘The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK Modern Slavery Act’ (2017) 0 Socio-Economic Review 1, 16. [↑](#footnote-ref-788)
789. Companies Act 2006 Section 441. [↑](#footnote-ref-789)
790. ibid Section 423(1)(a). [↑](#footnote-ref-790)
791. ibid Section 437(1). [↑](#footnote-ref-791)
792. Directive 2013/34/EU. It is also notable that Regulation (EC) No 1606/2002 requires all listed companies to prepare their consolidated financial statements in accordance with the International Financial Reporting Standards (IFRS), previously known as the International Accounting Standards (IAS). [↑](#footnote-ref-792)
793. Department of Trade and Industry, ‘Modern Company Law for a Competitive Economy: Strategic Framework’ (1999) 51. [↑](#footnote-ref-793)
794. ibid. [↑](#footnote-ref-794)
795. Companies Act 2006 Section 172(1). [↑](#footnote-ref-795)
796. Andrew Johnston, ‘After the OFR: Can UK Shareholder Value Still Be Enlightened?’ (2007) 7 European Business Organization Law Review (EBOR) 817, 829. [↑](#footnote-ref-796)
797. According to the Company Law Review: “informing shareholders of the issues and their relevance [might] reduce short-term pressures by shareholders on directors.” Department of Trade and Industry (n 6) 51. [↑](#footnote-ref-797)
798. The Company Law review provided that “Enhanced reporting obligations operating within a structure of enlightened shareholder value have the capacity in principle to achieve the objectives of a more pluralist approach, by ensuring that it is in the self-interest of members that such pressures should be satisfied.” See: ibid. [↑](#footnote-ref-798)
799. Johnston (n 9) 829. [↑](#footnote-ref-799)
800. Companies Act 1985 (Operating and Financial Review and Directors’ Report etc.) Regulations 2005 Schedule 7ZA Section 4.1 provided that: “The review must include— (a) information about environmental matters (including the impact of the business of the company on the environment), (b) information about the company’s employees, and (c) information about social and community issues.” [↑](#footnote-ref-800)
801. ibid Schedule 7ZA Section 4.2. [↑](#footnote-ref-801)
802. ibid Schedule 7ZA Section 5(a). [↑](#footnote-ref-802)
803. B Horrigan, *Corporate Social Responsibility in the 21st Century* (Edward Elgar 2010) 259–260. [↑](#footnote-ref-803)
804. D Arsalidou, ‘The Withdrawal of the Operation and Financial Review in the Companies Bill 2006: Progression or Regression?’ (2007) 28 The Company Lawyer 131. [↑](#footnote-ref-804)
805. Companies Act 1985 (Operating and Financial Review and Directors’ Report etc.) Regulations 2005 Schedule 7ZA Section 8. [↑](#footnote-ref-805)
806. The duty to prepare the OFR was introduced into the Companies Act 1985 Section 234AA as amended by Companies Act 1985 (Operating and Financial Review and Directors’ Report etc.) Regulations 2005. [↑](#footnote-ref-806)
807. See: Johnston (n 9); N Rowbottom and M Schroeder, ‘The Rise and Fall of the UK Operating and Financial Review’ (2014) 27 Accounting, Auditing & Accountability Journal 655. [↑](#footnote-ref-807)
808. It is acknowledged that there exist some minor differences between the business review and Strategic Report. However, the provisions that may potentially relate to corporate social performance remain unchanged. [↑](#footnote-ref-808)
809. Companies Act 2006 Section 414C as implemented by the Companies Act 2006 (Strategic Report and Directors Report) Regulations 2013. [↑](#footnote-ref-809)
810. Companies Act 2006 Section 414C. [↑](#footnote-ref-810)
811. ibid Section 414C(2). [↑](#footnote-ref-811)
812. ibid Section 414C(7). [↑](#footnote-ref-812)
813. The guidance acknowledges that it uses the broader description of ‘development, performance, position or future prospects of the entity’ rather than the ‘development, performance or position of the company’s business’ contained in the Act. Financial Reporting Council, ‘Guidance on the Strategic Report’ 7. [↑](#footnote-ref-813)
814. ibid. [↑](#footnote-ref-814)
815. ibid 89. [↑](#footnote-ref-815)
816. ibid 19. (emphasis added) [↑](#footnote-ref-816)
817. In providing this definition, the UN Guiding Principles Reporting Framework, a voluntary initiative at the international level undertaken, use the term ‘saliency’ as opposed to ‘materiality’. It is suggested that this reflects an attempt to retake terminological control as regards the boundaries of what may be termed relevant information. See: SHIFT and MAZARS, ‘UN Guiding Principles Reporting Framework: Salient Human Rights Issues’ (2017) <https://www.ungpreporting.org/resources/salient-human-rights-issues/>. [↑](#footnote-ref-817)
818. Financial Reporting Council (FRC), ‘Audit Quality Thematic Review: Materiality’ (2017). [↑](#footnote-ref-818)
819. Financial Reporting Council (n 26) 66. [↑](#footnote-ref-819)
820. ibid 89. [↑](#footnote-ref-820)
821. According to the feedback statement provided by the FRC following the consideration of a draft version of the guidance, “Many respondents commented that the wording in the materiality section should be made clearer so that information is disclosed in the Strategic Report when it is material to shareholders.” Financial Reporting Council (FRC), *Feedback Statement: Amendments to Guidance on the Strategic Report Non-Financial Reporting* (2018) 11. [↑](#footnote-ref-821)
822. Financial Reporting Council (n 26) 4. [↑](#footnote-ref-822)
823. O Aiyegbayo and C Villiers, ‘The Enhanced Business Review: Has It Made Corporate Governance More Effective?’ (2011) 7 Journal of Business Law 699, 8. [↑](#footnote-ref-823)
824. Pricewaterhouse Coopers LLP, ‘Searching for Buried Treasure A Review of 2015 Strategic Reporting Practices in the FTSE 350’ (2015) 1 <https://www.pwc.co.uk/services/audit-assurance/searching-for-buried-treasure.html>. [↑](#footnote-ref-824)
825. “There is also a danger, evident in some areas already, that reporting duties without real content will lead to perfunctory, ‘boilerplate’ compliance – costs without benefit” Department of Trade and Industry (n 6) 52. [↑](#footnote-ref-825)
826. Directive 2014/95/EU. See also: European Commission, ‘A Renewed EU Strategy 2011-14 for Corporate Social Responsibility’; European Parliament, ‘Corporate Social Responsibility: Accountable, Transparent and Responsible Business Behaviour and Sustainable Growth (2012/2098(INI))’ (2013). [↑](#footnote-ref-826)
827. European Commission, ‘Single Market Act Twelve Levers to Boost Growth and Strengthen Confidence: “Working Together to Create New Growth”’ 15. [↑](#footnote-ref-827)
828. Directive 2014/95/EU amending Directive 2013/34/EU. [↑](#footnote-ref-828)
829. Companies Act 2006. s414CA-CB [↑](#footnote-ref-829)
830. The reporting requirement also applies to banking and insurance companies whether traded or not, providing the minimum employee threshold is met. ibid Section 414CA(1). [↑](#footnote-ref-830)
831. ibid Section 414CA(1) read in conjunction with Section 414CA(4) [↑](#footnote-ref-831)
832. ibid Section 414CB(1). [↑](#footnote-ref-832)
833. ibid. [↑](#footnote-ref-833)
834. ibid Section 414CB(2)(b). [↑](#footnote-ref-834)
835. ibid. [↑](#footnote-ref-835)
836. ibid Section 414CB(2)(c). [↑](#footnote-ref-836)
837. ibid Section 414CB(4). [↑](#footnote-ref-837)
838. ibid Section 414CB(2)(d). [↑](#footnote-ref-838)
839. ibid Section 414CB(2)(e). [↑](#footnote-ref-839)
840. ibid Section 414CB(3). (emphasis added) [↑](#footnote-ref-840)
841. Directive 2014/95/EU Recital 4. [↑](#footnote-ref-841)
842. ibid Recital 3. [↑](#footnote-ref-842)
843. European Commission, ‘Communication from the Commission: Guidelines on Non-Financial Reporting’ <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/guidelines\_on\_non-financial\_reporting.pdf>. [↑](#footnote-ref-843)
844. Art. 2(16) of the Accounting Directive (Directive 2013/34/EU) defines materiality as “the status of information where its omission or misstatement could reasonably be expected to influence decisions that users make on the basis of the financial statements of the undertaking. The materiality of individual items shall be assessed in the context of other similar items.” [↑](#footnote-ref-844)
845. European Commission, ‘Communication from the Commission: Guidelines on Non-Financial Reporting’ (n 56) 5. [↑](#footnote-ref-845)
846. ibid. [↑](#footnote-ref-846)
847. ibid. [↑](#footnote-ref-847)
848. ibid 9. [↑](#footnote-ref-848)
849. ibid. [↑](#footnote-ref-849)
850. ibid. [↑](#footnote-ref-850)
851. It is also notable that elsewhere within the guidelines, repeated reference is made to “investors and other stakeholders” with a broad aim of enhanced transparency stated as providing “increased trust among stakeholders, including investors and consumers.” See: European Commission, ‘Communication from the Commission: Guidelines on Non-Financial Reporting’ (n 56). [↑](#footnote-ref-851)
852. Directive 2014/95/EU Article 2. [↑](#footnote-ref-852)
853. Financial Reporting Council (n 26) 89. [↑](#footnote-ref-853)
854. See for example: Pricewaterhouse Coopers LLP, *The Non-Financial Reporting Regulations What Do They Mean in Practice?* (2017) 6 <https://www.pwc.co.uk/audit-assurance/assets/pdf/non-financial-reporting-regulations-2017.pdf>. [↑](#footnote-ref-854)
855. Directive 2014/95/EU Recital 6. [↑](#footnote-ref-855)
856. As cited in ibid Recital 3. [↑](#footnote-ref-856)
857. Indeed, the European Commission actively “encourages companies to avail themselves of the flexibility under the Directive when disclosing non-financial information.” European Commission, ‘Communication from the Commission: Guidelines on Non-Financial Reporting’ (n 56) 1. [↑](#footnote-ref-857)
858. However, following the recommendations of the Kingman review, the FRC’s days appear to be numbered. The Kingman review recommended that the FRC should be replaced with an independent statutory regulator, accountable to Parliament, with a new mandate, new clarity of mission, new leadership and new powers. The new regulatory body would be called the Audit, Reporting and Governance Authority. See: J Kingman, ‘Independent Review of the Financial Reporting Council (FRC) 2018: Final Report’ (2018). [↑](#footnote-ref-858)
859. Financial Reporting Council (FRC), ‘How We Review Reports and Accounts’ <https://www.frc.org.uk/accountants/corporate-reporting-review/how-we-review-reports-and-accounts> accessed 20 September 2018. [↑](#footnote-ref-859)
860. ibid. [↑](#footnote-ref-860)
861. Financial Reporting Council (FRC), ‘Annual Review of Corporate Governance and Reporting 2017/2018’ (2018) 57. [↑](#footnote-ref-861)
862. Financial Reporting Council (FRC), ‘How We Review Reports and Accounts’ (n 72). [↑](#footnote-ref-862)
863. Financial Reporting Council (FRC), ‘Annual Review of Corporate Governance and Reporting 2017/2018’ (n 74) 58. [↑](#footnote-ref-863)
864. Financial Reporting Council (FRC), ‘How We Review Reports and Accounts’ (n 72). Where this is not the case, a review group is set up to formally liaise with the company and again listen to any explanation given. Where the review group is still not satisfied with the outcome it may apply to court for a declaration requiring the company directors to revise the report. The FRC derives this power from the Companies Act 2006 Section 456. [↑](#footnote-ref-864)
865. Pricewaterhouse Coopers LLP (n 37). [↑](#footnote-ref-865)
866. ibid 4. [↑](#footnote-ref-866)
867. ibid 19. [↑](#footnote-ref-867)
868. The Chartered Institute of Internal Auditors as cited in: A Smith, ‘UK Companies Do Little to Prove Their Ethics’ *The Financial Times (online)* (London, 18 January 2015) <http://www.ft.com/cms/s/0/32468250-9ef3-11e4-ba25-00144feab7de.html#axzz41wxokqs6>. [↑](#footnote-ref-868)
869. The Non-Financial Disclosure Directive came into application on 1st January 2017. [↑](#footnote-ref-869)
870. See: Pricewaterhouse Coopers LLP (n 67). [↑](#footnote-ref-870)
871. Deloitte, ‘Annual Report Insights 2018 — Surveying FTSE Reporting’ (2018) 18 <https://www.iasplus.com/en-gb/publications/global/surveys/annual-report-insights-2018-surveying-ftse-reporting>. [↑](#footnote-ref-871)
872. C Villiers, ‘Disclosure Theory and the Limitations of Corporate Reports’, *Corporate Reporting and Company Law* (Cambridge University Press 2012) 34. [↑](#footnote-ref-872)
873. J Brown and S De Tore, ‘Rationalizing the Disclosure Process: The Summary Annual Report’ (1989) 39 Case Western Reserve Law Review p56 and footnote 77. [↑](#footnote-ref-873)
874. Villiers (n 88) 34. [↑](#footnote-ref-874)
875. The Home Office, ‘Independent Review of the Modern Slavery Act 2015: Final Report’ (2019) 39. [↑](#footnote-ref-875)
876. For a broad commentary on the Modern Slavery Act 2015 see: J Haynes, ‘The Modern Slavery Act (2015): A Legislative Commentary’ (2015) 37 Statute Law Review 1. [↑](#footnote-ref-876)
877. European Convention of Human Rights Article 4: Prohibition of Slavery and Forced Labour [↑](#footnote-ref-877)
878. The case regarded a woman held in domestic servitude in the UK. The European Court of Human Rights held that “the legislative provisions in force in the United Kingdom at … were inadequate to afford practical and effective protection against treatment falling within the scope of Article 4 of the Convention . . . Instead of enabling the authorities to investigate and penalise such treatment, the authorities were limited to investigating and penalising criminal offences which often – but do not necessarily – accompany the offences of slavery, servitude and forced or compulsory labour. Victims of such treatment who were not also victims of one of these related offences were left without any remedy.*”* *CN v The United Kingdom 4239/08 - HEJUD [2012] ECHR 1911* at para. 46. [↑](#footnote-ref-878)
879. LeBaron and Rühmkorf (n 1) 16. [↑](#footnote-ref-879)
880. As the inspiration for the MSA, the CTCSA was enacted by the US State in 2010. The legislation was formally proposed by the then Senate President, Darrell Steinberg. The source of the proposal was the Alliance to Stop Slavery and End Trafficking (ASSET) and was co-sponsored by the Coalition to Abolish Slavery and Trafficking (CAST) and supported by the Consumer Federation of California. For further detail see: S Gebauer, ‘Complying with the California Transparency in Supply Chains Act 2010’ (2011) Corporate Compliance and Ethics Professional, White Paper; J Pickles and S Zhu, ‘The California Transparency in Supply Chains Act’ (2013) 15 <http://www.capturingthegains.org/pdf/ctg-wp-2013-15.pdf>. [↑](#footnote-ref-880)
881. LeBaron and Rühmkorf (n 1). [↑](#footnote-ref-881)
882. ibid. [↑](#footnote-ref-882)
883. ibid. [↑](#footnote-ref-883)
884. ibid 21. [↑](#footnote-ref-884)
885. Although smaller more radical CSOs continued to reject such moves, others made the decision to collaborate with the MNEs in perceiving a disclosure based approach as a ‘first step’ in the right direction, and a pre-requisite for achieving any sort of legislative enactment. See: ibid 22–23. [↑](#footnote-ref-885)
886. California Transparency in Supply Chains Act, SB657 2010. [↑](#footnote-ref-886)
887. Modern Slavery Act 2015 Section 54(7)(a). [↑](#footnote-ref-887)
888. ibid Section 54(7)(b). [↑](#footnote-ref-888)
889. It is noted that the statutory guidance to the MSA does provide that “Any relevant material used in other related reports may be used in an organisation’s slavery and human trafficking statement.” The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2017)’ 10. [↑](#footnote-ref-889)
890. The guidance to the CTSCA provides that “California, which boasts the world’s seventh-largest economy and the country’s largest consumer base, is unique in its ability to address this issue, and as a result, to help eradicate human trafficking and slavery worldwide“ Attorney General California Department of Justice, ‘The California Transparency in Supply Chains Act: A Resource Guide’ i. [↑](#footnote-ref-890)
891. According to the statutory guidance to the MSA, the objective is deemed to inform “the public, consumers,

     employees and investors.” The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2017)’ (n 105). [↑](#footnote-ref-891)
892. ibid 6. [↑](#footnote-ref-892)
893. The Home Office, ‘Independent Review of the Modern Slavery Act 2015: Final Report’ (n 91) 44. [↑](#footnote-ref-893)
894. Modern Slavery Act 2015 Section 54(12). In addition to companies, the MSA 2015 also applies to partnerships and body corporates. It is interesting to note that the Act uses these specific terms in preference to the more inclusive terminology of a ‘firm’ which the Companies Act 2006 s1173(1) defines as “any entity, whether or not a legal person, that is not an individual and includes a body corporate, a corporation sole and a partnership or other unincorporated association.” [↑](#footnote-ref-894)
895. ibid Section 54(1). [↑](#footnote-ref-895)
896. ibid Section 54(6). [↑](#footnote-ref-896)
897. ibid Section 54(4)(a). [↑](#footnote-ref-897)
898. ibid Section 54(4)(b). [↑](#footnote-ref-898)
899. ibid Section 54(2)(b). [↑](#footnote-ref-899)
900. ibid Section 54(12). [↑](#footnote-ref-900)
901. Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015 Section 3(1)(b). Section 1(2) of the Regulations holds that a ‘subsidiary undertaking’ may be defined by reference to the Companies Act 2006 Section 1162. [↑](#footnote-ref-901)
902. As provided by the Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015 Section 2 for the purpose of fulfilling the minimum turnover requirement given in the Modern Slavery Act 2015 Section 54(2)(b). The figure of £36 million is significant as it is consistent with the definition of a large firm provided in the Companies Act 2006. See: Companies Act 2006 Section 465 as amended by the Companies, Partnerships and Groups (Accounts and Reports) Regulations 2015 Regulation 9. [↑](#footnote-ref-902)
903. A Gentleman, ‘UK Firms Must Show Proof They Have No Links to Slave Labour under New Rules’ *The Guardian (online)* (London, 28 October 2015) <http://www.theguardian.com/world/2015/oct/28/uk-companies-proof-no-links-slave-labour-supply-chain>. [↑](#footnote-ref-903)
904. The requirement to publish a statement may be enforced by the Secretary of State via an application for the High Court for a mandatory injunction under Modern Slavery Act 2015 Section 54(11). As Section 54(11) confirms: in Scotland the same goal may be achieved via for specific performance of a statutory duty under section 45 of the Court of Session Act 1988. [↑](#footnote-ref-904)
905. The Home Office, ‘Modern Slavery and Supply Chains Government Response: Summary of Consultation Responses and next Steps’ para 5.1. [↑](#footnote-ref-905)
906. As reported in: E Phillips, ‘U.K. Anti-Slavery Disclosure Law Will Apply to Thousands of Companies’ *The Wall Street Journal* (New York, 30 July 2015) <http://www.wsj.com/articles/uk-anti-slavery-disclosure-law-will-apply-to-thousands-of-companies-1438287500>. [↑](#footnote-ref-906)
907. The Home Office, ‘Modern Slavery and Supply Chains Government Response: Summary of Consultation Responses and next Steps’ (n 121) para 5.1. [↑](#footnote-ref-907)
908. Modern Slavery Act 2015 Section 54(5). (emphasis added) [↑](#footnote-ref-908)
909. ibid Section 54(5)(e). (emphasis added) [↑](#footnote-ref-909)
910. P Chandran, ‘A Loophole in the Slavery Bill Could Allow Companies to Hide Supply Chain Abuses’ *The Guardian (online)* (24 March 2015) <http://www.theguardian.com/global-development/2015/mar/24/loophole-modern-slavery-bill-transparency-supply-chain-abuses>. [↑](#footnote-ref-910)
911. The Home Office, ‘Modern Slavery and Supply Chains Consultation: Consultation on the Transparency in Supply Chains Clause in the Modern Slavery Bill’ (2015) 14. (emphasis added) [↑](#footnote-ref-911)
912. International Labour Organization (ILO), ‘Profits and Poverty: The Economics of Forced Labour’ (2014) <http://www.ilo.org/wcmsp5/groups/public/---ed\_norm/---declaration/documents/publication/wcms\_243391.pdf>. [↑](#footnote-ref-912)
913. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2017)’ (n 105) 32. [↑](#footnote-ref-913)
914. Under the CTSCA, a company must firstly disclose to what extent it engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. Second, to what extent it conducts audits of suppliers with explicit disclosure required as to whether these audits are a) independent and b) unannounced. Third, to what extent it requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the countries in which they are doing business. Fourth, to what extent it maintains accountability standards and procedures for employees or contractors that fail to meet company standards regarding slavery and human trafficking. Finally, to what extent it provides employees and management training on slavery and human trafficking. California Transparency in Supply Chains Act, SB657. [↑](#footnote-ref-914)
915. The Home Office, ‘Explanatory Notes: Modern Slavery Act 2015’ (2015) 37. [↑](#footnote-ref-915)
916. Joint Committee on Human Rights, ‘Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability. Sixth Report of Session 2016–17’ 38. [↑](#footnote-ref-916)
917. ibid. [↑](#footnote-ref-917)
918. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2017)’ (n 105) 12. [↑](#footnote-ref-918)
919. The Australian Modern Slavery Act 2018 came into effect on 1st January 2019. The Australian law largely mimics the areas of disclosure suggested by the UK MSA. However, under the Australian Act disclosure within these areas is mandatory. [↑](#footnote-ref-919)
920. This happened despite business opposition to the contrary. During the consultation period, the Business Council of Australia argued for the proposed Bill to ‘limit the reporting burden’ as regards the areas that should be reported upon. See: Joint Standing Committee on Foreign Affairs Defence and Trade, ‘Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia’ (2017) para 5.69. [↑](#footnote-ref-920)
921. It is acknowledged that the sample size is larger as regards the empirical data relating to the MSA. [↑](#footnote-ref-921)
922. Know the Chain, ‘Know the Chain - California Act for Human Trafficking in Supply Chains’ 4 <http://www.theguardian.com/global-development-professionals-network/humanity-united-partner-zone/know-the-chain-slavery-resource> accessed 13 February 2014. [↑](#footnote-ref-922)
923. See: Attorney General California Department of Justice (n 106). [↑](#footnote-ref-923)
924. The Home Office, ‘Home Office Tells Business: Open up on Modern Slavery or Face Further Action’ (2018) <https://www.gov.uk/government/news/home-office-tells-business-open-up-on-modern-slavery-or-face-further-action> accessed 20 December 2018. [↑](#footnote-ref-924)
925. It is acknowledged that efforts have been made in the written communication of expectations to businesses both by the UK Anti-Slavery Commissioner and by the Californian Attorney General. See: Independent Anti-Slavery Commissioner, ‘Engagement with Business Leaders’ (2018) <http://www.antislaverycommissioner.co.uk/priorities/priority-4-private-sector-engagement/engagement-with-business-leaders/> accessed 19 January 2018; A Chilton and G Safarty, ‘The Limitations of Supply Chain Disclosure Regimes’ (2016) 766. [↑](#footnote-ref-925)
926. The Home Office, ‘Modern Slavery and Supply Chains Government Response: Summary of Consultation Responses and next Steps’ (n 121) para 6.16. [↑](#footnote-ref-926)
927. It is also omitted from both the CTSCA and the recent Australian Modern Slavery Act. In relation to the former, 2600 firms were sent the CTSCA guidance documentation by the Office of the California Attorney general yet the identity of such firms was not made public. As reported in: Know the Chain, ‘Five Years of the California Transparency in Supply Chains Act’ (2015) 4 <https://www.knowthechain.org/wp-content/uploads/2015/10/KnowTheChain\_InsightsBrief\_093015.pdf>. [↑](#footnote-ref-927)
928. As quoted in: Joint Committee on Human Rights (n 132) 39. [↑](#footnote-ref-928)
929. Companies Act 2006 Section 441. [↑](#footnote-ref-929)
930. (Australian) Modern Slavery Act 2018 Part 3. [↑](#footnote-ref-930)
931. ‘Independent Review of the Modern Slavery Act. Second Interim Report: Transparency in Supply Chains’ (2018) 12. [↑](#footnote-ref-931)
932. Modern Slavery (Transparency in Supply Chains) Bill 2017. [↑](#footnote-ref-932)
933. Joint Committee on Human Rights (n 132) 42. [↑](#footnote-ref-933)
934. Modern Slavery (Transparency in Supply Chains) Bill 2017 Section 1. [↑](#footnote-ref-934)
935. ibid. [↑](#footnote-ref-935)
936. See: ‘Successful Private Members’ Bills since 1983’ (*www.parliament.uk*, 2017) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04568#fullreport> accessed 20 October 2018. [↑](#footnote-ref-936)
937. ‘Private Members’ Bills’ (*www.parliament.uk*) <https://www.parliament.uk/about/how/laws/bills/private-members/> accessed 15 November 2018. [↑](#footnote-ref-937)
938. The Home Office, ‘Independent Review of the Modern Slavery Act 2015: Final Report’ (n 91). [↑](#footnote-ref-938)
939. ibid 41. [↑](#footnote-ref-939)
940. ibid. [↑](#footnote-ref-940)
941. ibid. [↑](#footnote-ref-941)
942. ibid 41–42. [↑](#footnote-ref-942)
943. ibid. [↑](#footnote-ref-943)
944. ibid 43. [↑](#footnote-ref-944)
945. ibid 40. [↑](#footnote-ref-945)
946. According to an announcement made by the UK Home Office “Businesses that don't say how they guard against these crimes in their supply chains risk being publicly named.” The Home Office, ‘Home Office Tells Business: Open up on Modern Slavery or Face Further Action’ (n 140). [↑](#footnote-ref-946)
947. The Anti-Slavery Commissioner’s remit solely covers prosecutions for human trafficking and slavery by individuals in a more direct sense as outlined in Part 1 of the Modern Slavery Act 2015. [↑](#footnote-ref-947)
948. The Home Office, ‘Independent Review of the Modern Slavery Act 2015: Final Report’ (n 91) 43. [↑](#footnote-ref-948)
949. ibid. [↑](#footnote-ref-949)
950. ibid. [↑](#footnote-ref-950)
951. The Home Office, ‘Government Commissions Independent Review of the Modern Slavery Act 2015’ (2018) <https://www.gov.uk/government/news/government-commissions-independent-review-of-the-modern-slavery-act-2015> accessed 9 August 2018. [↑](#footnote-ref-951)
952. The Home Office, ‘Review of the Modern Slavery Act 2015: Terms of Reference’ (2018) <https://www.gov.uk/government/publications/modern-slavery-act-2015-independent-review-terms-of-reference/review-of-the-modern-slavery-act-2015-terms-of-reference#scope-of-the-review> accessed 20 September 2018. [↑](#footnote-ref-952)
953. The Home Office, ‘Independent Review of the Modern Slavery Act 2015: Final Report’ (n 91) 42. [↑](#footnote-ref-953)
954. ibid 43. [↑](#footnote-ref-954)
955. ibid 41. [↑](#footnote-ref-955)
956. ibid 45. [↑](#footnote-ref-956)
957. The need for adequate resourcing is acknowledged within the review. ibid 43. [↑](#footnote-ref-957)
958. Joint Committee on Human Rights (n 132) 6. [↑](#footnote-ref-958)
959. The Home Office, ‘Independent Review of the Modern Slavery Act 2015: Final Report’ (n 91) 44–45. [↑](#footnote-ref-959)
960. ibid 45. [↑](#footnote-ref-960)
961. LeBaron and Rühmkorf (n 1) 20. [↑](#footnote-ref-961)
962. The Home Office, ‘Modern Slavery and Supply Chains Government Response: Summary of Consultation Responses and next Steps’ (n 121). [↑](#footnote-ref-962)
963. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2017)’ 3. [↑](#footnote-ref-963)
964. See for example: M Connor, ‘Business and Human Rights: Interview with John Ruggie’ [2011] *Business Ethics Magazine (online)* <http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/>. [↑](#footnote-ref-964)
965. J Wesley, *The Works of the Reverend John Wesley*, vol 1 (Emery and Waugh 1831) 447–448. [↑](#footnote-ref-965)
966. This was most obviously directed against DOW Chemicals, the manufacturer of Napalm. [↑](#footnote-ref-966)
967. For a consideration of these early divestment strategies and their impact see: H Holzhauer, ‘Socially Responsible Investing’ in H Baker and G Filbeck (eds), *Portfolio Theory and Management* (Oxford University Press 2013). [↑](#footnote-ref-967)
968. J Hawley, ‘Setting the Scene’ in T Hebb and others (eds), *The Routledge Handbook of Responsible Investment* (2015). [↑](#footnote-ref-968)
969. Principles for Responsible Investment (PRI), ‘What Is Responsible Investment?’ (2019) <https://www.unpri.org/pri/what-is-responsible-investment> accessed 1 March 2019. [↑](#footnote-ref-969)
970. ibid. [↑](#footnote-ref-970)
971. This may be in relation to understanding the broader operating environment. For example, although sustainability is not readily linked to hedge funds, in recent years the demand for hedge funds that consider ESG factors has significantly increased. However, even here the use of such information is again linked to financial materiality. See: G Filbeck, T Krause and L Reis, ‘Socially Responsible Investing in Hedge Funds’ (2016) 17 Journal of Asset Management 408. [↑](#footnote-ref-971)
972. Hawley (n 6). [↑](#footnote-ref-972)
973. Principles for Responsible Investment (PRI) (n 7). [↑](#footnote-ref-973)
974. C Revelli, ‘Socially Responsible Investing (SRI): From Mainstream to Margin?’ (2017) 39 Research in International Business and Finance 711. [↑](#footnote-ref-974)
975. A Haldane, ‘The Short Long’, *29th Société Universitaire Européene de Recherches Financières Colloquium: New Paradigms in Money and Finance?, Brussels, May 2011* (2011) 2. [↑](#footnote-ref-975)
976. JM Keynes, ‘Letter to Francis Curzon, 18th March 1938’ in R Skidelsky (ed), *John Maynard Keynes: Vol 3 Fighting for Britain 1937–1946* (Macmillan 2000). [↑](#footnote-ref-976)
977. Business Innovation and Skills Committee, ‘Business, Innovation and Skills Committee - Third Report: The Kay Review of UK Equity Markets and Long-Term Decision Making’ <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmbis/603/60302.htm> section 2. [↑](#footnote-ref-977)
978. A Smith and S Foley, ‘Criticism of Short-Term Investing Grows after Woodford Departure’ *The Financial Times (online)* (London, 18 October 2013). [↑](#footnote-ref-978)
979. A Haldane, ‘Patience and Finance’, *Oxford China Business Forum, Beijing* (2010) 30 <http://www.bankofengland.co.uk/archive/Documents/historicpubs/speeches/2010/speech445.pdf>. [↑](#footnote-ref-979)
980. B Richardson, ‘Financial Markets and Socially Responsible Investing’, *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press 2015) 236. See also: J Gifford, ‘The Changing Role of Asset Owners in Responsible Investment’ in T Hebb and others (eds), *The Routledge Handbook of Responsible Investment* (Routledge 2016) 440. [↑](#footnote-ref-980)
981. J Marlowe, ‘Socially Responsible Investing and Public Pension Fund Performance’ (2014) 38 Public Performance & Management Review 337. See also: J Sandberg and others, ‘The Heterogeneity of Socially Responsible Investment’ (2009) 87 Journal of Business Ethics 519. [↑](#footnote-ref-981)
982. UNEP-FI, ‘Show Me The Money: Linking Environmental,Social and Governance Issues to Company Value’ (2006) 4. [↑](#footnote-ref-982)
983. Richardson identifies three justifications for responsible investment: complicity; leverage; and universal ownership. The former two are more readily associated with ethical concerns, with the latter the focus on institutional investors as agents for change, discussed later in this chapter. B Richardson, ‘Socially Responsible Investing for Sustainability: Overcoming Its Incomplete and Conflicting Rationales’ (2013) 2 Transnational Environmental Law 311. [↑](#footnote-ref-983)
984. Principles for Responsible Investment (PRI) and CFA Institute, ‘ESG in Equity Analysis and Credit Analysis: An Overview’ (2018) <https://www.unpri.org/investor-tools/what-is-esg-integration/3052.article>. [↑](#footnote-ref-984)
985. A study of communications between professional investors found the motivation of financial impact or reputational risk was frequently emphasised over any notion of social responsibility. See: Novethic, ‘Achieving Investment Objectives Through ESG Integration’ (2010) <https://www.novethic.com/fileadmin/user\_upload/tx\_ausynovethicetudes/pdf\_complets/ESG\_Integration\_2010.pdf>. [↑](#footnote-ref-985)
986. Richardson, ‘Financial Markets and Socially Responsible Investing’ (n 18) 234. [↑](#footnote-ref-986)
987. ibid. [↑](#footnote-ref-987)
988. S Waddock and S Graves, ‘The Corporate Social Performance Financial Performance Link’ (1997) 18 Strategic Management Journal 303. [↑](#footnote-ref-988)
989. A McWilliams and D Siegel, ‘Corporate Social Responsibility and Financial Performance: Correlation or Misspecification?’ (2000) 21 Strategic Management Journal 603. [↑](#footnote-ref-989)
990. G Hirigoyen and T Poulain-Rehm, ‘Relationship between Corporate Social Responsibility and Financial Performance: What Is the Causality?’ (2015) 4 Journal of Business and Management 18. [↑](#footnote-ref-990)
991. It should be noted that the reviews could overlap to some extent as regards the literature considered. It should also be noted that a number of event studies could be present within the studies reviewed. [↑](#footnote-ref-991)
992. P Cochran and R Wood, ‘Corporate Social Responsibility and Financial Performance’ (1984) 27 The Academy of Management Journal 42, 54. [↑](#footnote-ref-992)
993. A Ullmann, ‘Data in Search of a Theory: A Critical Examination of the Relationships among Social Performance, Social Disclosure, and Economic Performance of US Firms’ (1985) 10 Academy of Management Review 540, 1. [↑](#footnote-ref-993)
994. K Aupperle, A Carroll and J Hatfield, ‘An Empirical Examination of the Relationship between Corporate Social Responsibility and Profitability’ (1985) 28 The Academy of Management Journal 446. [↑](#footnote-ref-994)
995. D Wood and R Jones, ‘Stakeholder Mismatching: A Theoretical Problem in Empirical Research on Corporate Social Performance’ (1995) 3 International Journal of Organizational Analysis 229, 261. [↑](#footnote-ref-995)
996. M Pava and J Krausz, ‘The Association between Corporate Social-Responsibility and Financial Performance: The Paradox of Social Cost’ (1996) 15 Journal of Business Ethics 321. [↑](#footnote-ref-996)
997. P van Beurden and T Gössling, ‘The Worth of Values: A Literature Review on the Relation between Corporate Social and Financial Performance’ (2008) 82 Journal of Business Ethics 407. [↑](#footnote-ref-997)
998. This figure refers to 53% of the 80 studies in which CSP was considered an independent variable. [↑](#footnote-ref-998)
999. M Orlitzky, F Schmidt and S Rynes, ‘Corporate Social and Financial Performance: A Meta-Analysis’ (2003) 24 Organization Studies 403. [↑](#footnote-ref-999)
1000. J Margolis, H Elfenbein and J Walsh, ‘Does It Pay to Be Good? A Meta-Analysis and Redirection of Research on the Relationship between Corporate Social and Financial Performance’ (2007) 1 <http://ssrn.com/abstract=1866371>. [↑](#footnote-ref-1000)
1001. J Entine, ‘The Myth of Social Investing’ (2003) 20 Organization and Environment Environment 1. This point may be repeated as regards the relative financial performance of environmentally focused SRI finds against a backdrop of declining fossil fuel prices currently being experienced. [↑](#footnote-ref-1001)
1002. W Lu and others, ‘A Decade’s Debate on the Nexus between Corporate Social and Corporate Financial Performance: A Critical Review of Empirical Studies 2002–2011’ (2014) 79 Journal of Cleaner Production 195. [↑](#footnote-ref-1002)
1003. H Kiymaz, ‘SRI Mutual Fund and Index Performance’ in H Baker and J Nofsinger (eds), *Socially responsible finance and investing: Financial institutions, corporations, investors, and activists* (Wiley 2012). [↑](#footnote-ref-1003)
1004. ibid. [↑](#footnote-ref-1004)
1005. J Posnikoff, ‘Divestment from South Africa: They Did Well by Doing Good’ (1997) 15 Contemporary Economic Policy 76. [↑](#footnote-ref-1005)
1006. P Wright and S Ferris, ‘Agency Conflict and Corporate Strategy: The Effect of Divestment on Corporate Value’ (1997) 18 Strategic Management Journal 77. [↑](#footnote-ref-1006)
1007. S Teoh, I Welch and C Wazzan, ‘The Effect of Socially Activist Investment Policies on the Financial Markets: Evidence from the South African Boycott’ (1999) 72 Journal of Business 35. [↑](#footnote-ref-1007)
1008. J Kim, ‘Assessing the Long-Term Financial Performance of Ethical Companies’ (2010) 18 Journal of Targeting, Measurement and Analysis for Marketing 199. [↑](#footnote-ref-1008)
1009. R Garcia-Castro, M Arino and M Canela, ‘Does Social Performance Really Lead to Financial Performance? Accounting for Endogeneity.’ (2010) 92 Journal of Business Ethics 107; R Peters and M Mullen, ‘Some Evidence of the Cumulative Effects of Corporate Social Responsibility on Financial Performance’ (2009) 3 Journal of Global Business Issues 1. [↑](#footnote-ref-1009)
1010. A number of other writers hold the same view on this point. See: J Griffin and J Mahon, ‘The Corporate Social Performance and Corporate Financial Performance Debate: Twenty-Five Years of Incomparable Research’ (1997) 36 Business and Society 5; I Maron, ‘Toward a Unified Theory of the CSP CFP Link’ (2006) 67 Journal of Business Ethics 191; L Preston and P O’Bannon, ‘The Corporate Social-Financial Performance Relationship: A Typology and Analysis’ (1997) 36 Business and Society 419; M Wu, ‘’Corporate Social Performance, Corporate Financial Performance, and Firm Size: A Meta Analysis’ (2006) 8 Journal of American Academy of Business 163. [↑](#footnote-ref-1010)
1011. M Andersen and J Dejoy, ‘Corporate Social and Financial Performance: The Role of Size, Industry, Risk, R&D and Advertising Expenses as Control Variables’ (2011) 116 Business and Society Review 237; Lu and others (n 40). [↑](#footnote-ref-1011)
1012. D Wood, ‘Measuring Corporate Social Performance: A Review’ (2010) 12 International Journal of Management Reviews 50, 59. [↑](#footnote-ref-1012)
1013. J Margolis and J Walsh, *People and Profits? The Search for a Link between a Comapny’s Social and Financial Performance* (Lawrence Eelbaum Associates Inc 2001). [↑](#footnote-ref-1013)
1014. Lu and others (n 40). [↑](#footnote-ref-1014)
1015. Social ratings agencies exist to provide investors and asset managers with SRI analyses in order to assist portfolio composition. The criteria of certain social ratings agencies often form the criteria for an SRI index as is the case with the frequently used Kinder, Lydenberg and Domini & Co. (KLD) benchmark which is a frequently used benchmark for the consideration of individual firms yet also forms the criteria for the KLD (Domini) 400 social index. A second example is Vigeo whose criteria provide the listing methodology for the Advanced Sustainable Performance Index (ASPI). [↑](#footnote-ref-1015)
1016. Lu and others (n 40). [↑](#footnote-ref-1016)
1017. Note: the KLD criteria allow for up to 5% or $500,000 of an included firm’s business to come from gambling. MSCI Inc., ‘MSCI KLD 400 Social Index Methodology’ 10 <https://www.msci.com/eqb/methodology/meth\_docs/MSCI\_KLD\_400\_Social\_Index\_Methodology\_February2015.pdf>. [↑](#footnote-ref-1017)
1018. Mattingly identifies 100 studies utilising the KLD criteria between 1994 and 2011. J Mattingly, ‘Corporate Social Performance: A Review of Empirical Research Examining the Corporation–Society Relationship Using Kinder, Lydenberg, Domini Social Ratings Data’ (2015) Published Business & Society 1. See also: E de Quevedo-Puente, J de la Fuente-Sabaté and J Delgado-García, ‘Corporate Social Performance and Corporate Reputation: Two Interwoven Perspectives’ (2007) 10 Corporate Reputation Review 60; Myths and Realities of Social Investing, ‘Waddock, S.’ (2003) 16 Organization and Environment 369; Wood (n 50). [↑](#footnote-ref-1018)
1019. Kinder, Lydenberg, Domini and Company, Inc. is now commonly known as KLD, for KLD Research & Analytics, Inc.) [↑](#footnote-ref-1019)
1020. For more information as regards the history and background of the KLD social rating agency and index see: Wood (n 50) 56. [↑](#footnote-ref-1020)
1021. Mattingly (n 56). [↑](#footnote-ref-1021)
1022. C Liston-Heyes and G Ceton, ‘Journal of Business Ethics’ (2009) 89 Journal of Business Ethics 283. [↑](#footnote-ref-1022)
1023. In particular both reviews undertaken by Margolis and Walsh, along with the review conducted by Pava and Krausz, include studies which use Fortune Magazine’s ‘Most Admired Companies’, a survey based data set reflecting the stated views of ‘business insiders’, as a signifier of positive CSP. See: Margolis and Walsh (n 51); Margolis, Elfenbein and Walsh (n 38); Pava and Krausz (n 34). [↑](#footnote-ref-1023)
1024. Orlitzky, Schmidt and Rynes (n 37). [↑](#footnote-ref-1024)
1025. Wood and Jones (n 33). [↑](#footnote-ref-1025)
1026. Specifically the KLD ‘strength’ of ‘Supply Chain Policies, Programs & Initiatives’ and the KLD ‘concern’ of ‘Supply Chain Controversies’ were added to the KLD criteria and database in 2010. [↑](#footnote-ref-1026)
1027. A Chatterji, D Levine and M Toffel, ‘How Well Do Social Ratings Actually Measure Coprorate Social Responsibility?’ (2009) 18 Journal of Economics and Management Strategy 125. [↑](#footnote-ref-1027)
1028. ibid 125. [↑](#footnote-ref-1028)
1029. ibid 163. [↑](#footnote-ref-1029)
1030. J Bragdon and J Marlin, ‘Is Pollution Profitable?’ (1972) 19 Risk Management 9; B Spicer, ‘Investors, Corporate Social Performance and Information Disclosure: An Empirical Study’ (1975) 53 Accounting Review 94. [↑](#footnote-ref-1030)
1031. K Levy and G Shatto, ‘Social Responsibility in Large Electric Utility Firms: The Case for Philanthropy’ (1980) 2 Research in Corporate Social Performance and Policy 237. [↑](#footnote-ref-1031)
1032. Posnikoff (n 43); Teoh, Welch and Wazzan (n 45); Wright and Ferris (n 44). [↑](#footnote-ref-1032)
1033. B Kedia and E Kuntz, ‘The Context of Social Performance: An Empirical Study of Texas Banks’ in L Preston (ed), *Research in Corporate Social Performance and Policy* (JAI Press, 1981). [↑](#footnote-ref-1033)
1034. McGraw Hill Financial, ‘S&P Dow Jones Indices: Dow Jones Sustainability Indices Methodology’ <http://www.djindexes.com/mdsidx/downloads/meth\_info/methodology-dj-sustainability-indices.pdf>. [↑](#footnote-ref-1034)
1035. FTSE International Limited, ‘Index Inclusion Rules for the FTSE4GOOD Index Series Version 1.7’ <http://www.ftse.com/products/downloads/F4G-Index-Inclusion-Rules.pdf>. [↑](#footnote-ref-1035)
1036. JSE Limited, ‘JSE SRI Index: Background and Criteria’. [↑](#footnote-ref-1036)
1037. Sandberg and others (n 19) 522. [↑](#footnote-ref-1037)
1038. ‘Governance’ was found to be the most important ESG factor. Eurosif, ‘Corporate Pension Funds and Sustainable Investment Study’ (2011) <http://www.eurosif.org/wp-content/uploads/2014/07/coporate-pensiosn-funds.pdf>. [↑](#footnote-ref-1038)
1039. As reported in: Mackenzie, ‘Nothing but a “G” Thang’ *The Financial Times (online)* (London, 26 November 2015) <https://ftalphaville.ft.com/2015/11/26/2145911/nothing-but-a-g-thang/>. [↑](#footnote-ref-1039)
1040. A Kempf and P Osthoff, ‘The Effect of Socially Responsible Investing on Portfolio Performance’ (2007) 13 European Financial Management 908; J Dravenstott and N Chieffe, ‘Corporate Social Responsibility: Should I Invest for It or against It?’ (2011) 20 Journal of Investing 108. [↑](#footnote-ref-1040)
1041. Here, as Hawley observes, it is the process, not the outcome, that is rated. Hawley (n 6) 27. [↑](#footnote-ref-1041)
1042. See MSCI ESG Impact Monitor as part of MSCI KLD 400 Social Index listing criteria. MSCI ESG Research Inc., ‘MSCI ESG Impact Monitor’ <https://www.msci.com/documents/1296102/1636401/MSCI\_ESG\_Impact\_Monitor\_Factsheet\_July+2015.pdf/85a6d881-f061-46af-b058-175c7441508d>; MSCI Inc. (n 55). [↑](#footnote-ref-1042)
1043. The term ‘alpha’ refers to the active return on investment over and above the market index or benchmark that is taken to represent the market’s movement as a whole. [↑](#footnote-ref-1043)
1044. It is acknowledged that the Dow Jones Sustainability Index does offer a number of sub-indices that uses enhanced screening to exclude these activities. [↑](#footnote-ref-1044)
1045. The index excludes: “components for controversial weapons; cluster munitions, anti-personnel mines, depleted uranium, chemical/biological weapons and nuclear weapons.” FTSE International Limited (n 73) para 4.2. [↑](#footnote-ref-1045)
1046. On the topic of health and safety but referring back to the positive criteria of SRI indices discussed in the previous paragraph, the DJSI awarded Nestle the top possible score of 100/100 within the Health & Nutrition category of CSP. [↑](#footnote-ref-1046)
1047. MSCI Inc. (n 55). [↑](#footnote-ref-1047)
1048. See for example: Y Wang, ‘Corporate Social Responsibility and Stock Performance—Evidence from Taiwan’ (2011) 2 Modern Economy 788. [↑](#footnote-ref-1048)
1049. This view of CSP being treated as an ‘overall score’ is consistent with the observations of Perrini et al See: F Perrini and others, ‘Deconstructing the Relationship Between Corporate Social and Financial Performance’ (2011) 102 Journal of Business Ethics 59, 68. [↑](#footnote-ref-1049)
1050. ibid. [↑](#footnote-ref-1050)
1051. J Mattingly and S Berman, ‘Measurement of Corporate Social Action Discovering Taxonomy in the Kinder Lydenburg Domini Ratings Data’ (2006) 45 Business & Society 20. [↑](#footnote-ref-1051)
1052. A Barnea and A Rubin, ‘Corporate Social Responsibility as a Conflict between Shareholders.’ (2010) 97 Journal of Business Ethics 71. [↑](#footnote-ref-1052)
1053. Nestle, ‘Environmental Leadership: Nestlé Tops Category in Dow Jones Sustainability Index’ (2015) <http://www.nestle.com/media/news/Nestle-environmental-leadership-Dow-Jones-Sustainability-Index-2015> accessed 25 January 2016. [↑](#footnote-ref-1053)
1054. Fair Labor Association, ‘2014 Assessments of Nestlé Cocoa Supply Chain in Ivory Coast’ (2015) <http://www.fairlabor.org/report/2014-assessments-nestlé-cocoa-supply-chain-ivory-coast>. [↑](#footnote-ref-1054)
1055. It is noted that in 2006 Porter and Kramer observed that numerous CSR strategies were ineffective due to a consideration of CSR in a generic fashion as opposed to placing an emphasis on those most appropriate for that specific firm. However, it is put forward that the age of the study suggests that this finding may no longer be accurate in light of the developments in both corporate risk management and the use of corporate social responsibility as a strategic tool. See: M Porter and M Kramer, ‘Strategy & Society: The Link between Competitive Advantage and Corporate Social Responsibility’ (2006) 84 Harvard Business Review 78. [↑](#footnote-ref-1055)
1056. C Flood, ‘Standards for Socially Responsible Investment Too Sloppy’ *The Financial Times (online)* (London, December 2015) <http://www.ft.com/cms/s/0/10d06388-9a75-11e5-987b-d6cdef1b205c.html#axzz3zfaATqZp>. [↑](#footnote-ref-1056)
1057. Tilney Bestinvest, ‘Our Guide to Ethical and Green Investing’ (2016) <http://www.bestinvest.co.uk/media/838033/ethical investing tilneyb.pdf>. [↑](#footnote-ref-1057)
1058. Castlefield, ‘Winners and Spinners Report 2015 Reveals Best in Class Ethical Funds but Disappointingly Also Uncovers Evidence of “Greenwash” in This Year’s Review of the Ethical Investment Market.’ (2015) <http://www.castlefield.com/media/1103/winners-and-spinners-castlefield-press-release-final.pdf>. [↑](#footnote-ref-1058)
1059. ibid. [↑](#footnote-ref-1059)
1060. M Jayne and G Skerratt, ‘Socially Resposnible Investment in the UK - Criteria That Are Used to Evaluate Sustainability’ (2003) 10 Corporate Social Responsibility and Environmental Management 1. [↑](#footnote-ref-1060)
1061. ‘The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report’ (2012) <https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf> para 9.11. [↑](#footnote-ref-1061)
1062. As Stephen Hine of the Ethical Investment Research and Information Service (EIRIS) states, the public “should be aware of what the criteria (funds use to screen companies) are and take a proper judgement”. As quoted in: Reuters, ‘Investors Remain Split on Morality of Oil Majors’ (2007) <http://uk.reuters.com/article/energy-ethical-investment-idUKNOA54932920070105>. [↑](#footnote-ref-1062)
1063. Principles for Responsible Investment (PRI) (n 7). [↑](#footnote-ref-1063)
1064. For more information on the conduct of event studies and possible empirical and theoretical issues see: A MacKinlay, ‘Event Studies in Economics and Finance’ (1997) 35 Journal of Economic Literature 13; A McWilliams and D Siegel, ‘Event Studies in Management Research: Theoretical and Empirical Issues’ (1997) 40 Academy of Management Journal 626. [↑](#footnote-ref-1064)
1065. An abnormal return may be defined as the returns generated by a shareholding or portfolio that differs from the expected rate of return over a given period of time thus, for example, if a 2% return was expected but no return was forthcoming, the abnormal return would be equal to -2%. [↑](#footnote-ref-1065)
1066. The Toxic Release Inventory Program is a publically accessible resource enabling the widespread access to information relating to toxic chemical releases and pollution prevention activities as reported by industrial and federal production facilities. See: United States Environmental Protection Agency, ‘Toxics Release Inventory (TRI) Program’ <https://www.epa.gov/toxics-release-inventory-tri-program> accessed 20 October 2018. [↑](#footnote-ref-1066)
1067. For example, Jones and Rubin find no correlation between adverse news and share price in the case of 14 industrial accidents in the energy sector. However, the cases studies occurred between 1970 and 1992 suggesting that the findings of this study could be somewhat out of date. K Jones and P Rubin, ‘Effects of Harmful Environmental Events on Reputations of Firms’ in M Hirschey, K John and A Makhija (eds), *Advances in Financial Economics Vol 6.* (2001). [↑](#footnote-ref-1067)
1068. See for example: G Capelle-Blancard and M Laguna, ‘How Do Stock Markets React to Industrial Accidents? The Case of Chemical and Oil Industry’, *European Economic Association Annual Congress* (2006) <http://www.eea-esem.com/files/papers/EEA-ESEM/2006/2893/Capelle-Blancard Laguna.pdf>; B Dasgupta, *Structural Adjustment, Global Trade and the New Political Economy of Development* (Zed Books 1998); J Hamilton, ‘Pollution as News: Media and Stock Market Reactions to the Toxics Release Inventory Data’ (1995) 28 Journal of Environmental Economics and Management 98; S Konar and M Cohen, ‘Information as Regulation: The Effect of Community Right to Know Laws on Toxic Emissions’ (1997) 32 Journal of Environmental Economics and Management 109; R Klassen and C McLaughlin, ‘The Impact of Environmental Management on Firm Performance’ (1996) 42 Management Science 1199; S Gupta and B Goldar, ‘Do Stock Markets Penalize Environment-Unfriendly Behaviour? Evidence from India’ (2005) 52 Ecological Economics 81; M White, ‘Investor Response to the Exxon Valdez Oil Spill’ (1996) <http://libra.virginia.edu/catalog/libraoa:7896>. [↑](#footnote-ref-1068)
1069. Salinger observed a 27% reduction in the market value of the Union Carbide Corporation consecutive to the explosion at Bhopal corresponding to a -31.5% abnormal return. M Salinger, ‘Value Event Studies’ (1992) 74 The Review of Economics and Statistics 671, 676. [↑](#footnote-ref-1069)
1070. White finds a 19% loss in share price in the first 120 days following the Exxon Valdez oil spill. White (n 106). [↑](#footnote-ref-1070)
1071. The BP share price fell by more than half in the financial quarter after the BP Deepwater Horizon explosion. [↑](#footnote-ref-1071)
1072. Capelle-Blancard and Laguna (n 106). [↑](#footnote-ref-1072)
1073. J Lott, J Karpoff and G Rankine, ‘Environmental Violations, Legal Penalties, and Reputation Costs’ (1999) 71 <http://chicagounbound.uchicago.edu/law\_and\_economics/195/>; Jones and Rubin (n 105). [↑](#footnote-ref-1073)
1074. P Koh, C Qian and H Wang, ‘Firm Litigation Risk and the Insurance Value of Corporate Social Performance’ (2014) 35 Strategic Management Journal 1464. [↑](#footnote-ref-1074)
1075. Even the production of defective products may not necessarily be linked to a devaluation by the market. P Bromiley and A Marcus, ‘The Deterrent to Dubious Corporate Behavior: Profitability, Probability and Safety Recalls’ (1989) 10 Strategic Management Journal 233. [↑](#footnote-ref-1075)
1076. Although as Capelle-Blancard and Laguna note: the presence and number of fatalities in environmental disasters may heighten the impact of media coverage on share price. Capelle-Blancard and Laguna (n 106). [↑](#footnote-ref-1076)
1077. N Dag, H Eije and B Pennink, ‘Human Rights and Multinational Firm Returns’ (1998) Research Report 01/1998 <https://www.researchgate.net/publication/4868767\_Human\_Rights\_and\_Multinational\_Firm\_Returns>. [↑](#footnote-ref-1077)
1078. The study considered cases of age discrimination, child labour, gender discrimination, intimidation, racial discrimination, religious discrimination and other discrimination. [↑](#footnote-ref-1078)
1079. V Kappel, P Schmidt and A Ziegler, ‘Human Rights Abuse and Corporate Stock Performance - an Event Study Analysis’ (2009) <http://www.eea-esem.com/files/papers/EEA-ESEM/2009/854/wp.pdf> accessed 10 December 2015. [↑](#footnote-ref-1079)
1080. On this point it should be noted that the sampling of the study strongly favoured the former group with 74 companies and 122 associated events considered for the US along with 7 companies and 8 events for the UK. [↑](#footnote-ref-1080)
1081. For example, Hirsh and Cha consider the impact on share price of announced settlements and verdicts finding employment discrimination in 174 U.S. sexual and discrimination law suits. They find that 63% of verdicts and settlements result in negative stock returns for the defendant companies. See: C Hirsh and Y Cha, ‘Employment Discrimination Lawsuits and Corporate Stock Prices’ (2015) 2 Social Currents 40. [↑](#footnote-ref-1081)
1082. This case regarded the behaviour of senior executives in a recorded meeting to discuss a class action suit for discriminatory behaviour as regards the promotion of black people within the organisation. Once the existence of the incriminating recordings was made public, Texaco’s stock price fell by over 6%. The stock price fell a further 2.5% upon Texaco’s admission of guilt and consequent $175 million settlement offer 12 days later. See: S Pruitt and L Nethercutt, ‘The Texaco Racial Discrimination Case and Shareholder Wealth’ (2002) 23 Journal of Labor Research 685. [↑](#footnote-ref-1082)
1083. M Rock, ‘Public Disclosure of the Sweatshop Practices of American Multinational Garment/Shoe Makers/Retailers: Impacts on Their Stock Prices’ (2001). [↑](#footnote-ref-1083)
1084. L Boudreau, R Makioka and M Tanaka, ‘The Impact of the Rana Plaza Collapse on Global Retailers’ (2015) <http://web.stanford.edu/~mrtanaka/Mari Tanaka - PhD Candidate - Stanford\_files/rana\_retailers151213.pdf>. [↑](#footnote-ref-1084)
1085. B Jacobs and V Singhal, ‘The Effect of the Rana Plaza Disaster on Shareholder Wealth of Retailers: Implications for Sourcing Strategies and Supply Chain Governance’ (2017) 49 Journal of Operations Management 52. [↑](#footnote-ref-1085)
1086. E Boyle, M Higgins and G Rhee, ‘Stock Market Reaction to Ethical Initiatives of Defence Contractors: Theory and Evidence’ (1997) 8 Critical Perspectives on Accounting 541. [↑](#footnote-ref-1086)
1087. At the time of this study, the KLD 400 Social Index was known as the Domini 400 Social Index. [↑](#footnote-ref-1087)
1088. L Becchetti, R Ciciretti and I Hasan, ‘Corporate Social Responsibility and Shareholder’s Value: An Event Study Analysis’ (2007) 2007–6 <www.frbatlanta.org>. [↑](#footnote-ref-1088)
1089. A Cheung, ‘Do Stock Investors Value Corporate Sustainability? Evidence from an Event Study’ (2011) 99 Journal of Business Ethics 145. [↑](#footnote-ref-1089)
1090. Becchetti, Ciciretti and Hasan (n 126). [↑](#footnote-ref-1090)
1091. D Rushe, ‘BP Set to Pay Largest Environmental Fine in US History for Gulf Oil Spill’ *The Guardian (online)* (London, 2 July 2015) <http://www.theguardian.com/environment/2015/jul/02/bp-will-pay-largest-environmental-fine-in-us-history-for-gulf-oil-spill>. [↑](#footnote-ref-1091)
1092. For details see: J Mervin, ‘Counting the Cost of the BP Disaster One Year On’ (*BBC (online)*, 2011) <http://www.bbc.co.uk/news/business-13120605> accessed 1 February 2016. [↑](#footnote-ref-1092)
1093. For details see: R Hotten, ‘Volkswagen: The Scandal Explained’ (*BBC (online)*, 2015) <http://www.bbc.co.uk/news/business-34324772> accessed 1 October 2016. [↑](#footnote-ref-1093)
1094. For instance, Zadek comments that during the Nike boycott in the late 1990s working conditions at Nike’s factories were likely no worse than in those producing goods for its competitors. S Zadek, ‘The Path To Corporate Responsibility’ (2004) 82 Harvard Business Review 125. [↑](#footnote-ref-1094)
1095. For example, in the aftermath of the Nike sweatshop scandal, the stock price of Reebok rose considerably. See: B Wazir, ‘Nike Accused of Tolerating Sweatshops’ *The Guardian (online)* (2001) <http://www.theguardian.com/world/2001/may/20/burhanwazir.theobserver>. See also: R Kalra, G Henderson Jr. and G Raines, ‘Contagion Effects in the Chemical Industry Following the Bhopal Disaster’ (1995) 8 Journal Of Financial And Strategic Decisions 1. [↑](#footnote-ref-1095)
1096. Morgan Stanley, ‘Sustainable Signals: The Individual Investor Perspective’ (2015) <http://www.morganstanley.com/sustainableinvesting/pdf/Sustainable\_Signals.pdf>. [↑](#footnote-ref-1096)
1097. ibid 4. [↑](#footnote-ref-1097)
1098. As reported in: UK Sustainable Investment and Finance Association (UKSIF), ‘“Make Our Money Count” – Public Demand for Sustainable Pensions & Savings Reaches Record High’ (2015) <http://uksif.org/2015/10/19/make-our-money-count-public-demand-for-sustainable-pensions-savings-reaches-record-high/>. [↑](#footnote-ref-1098)
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1100. Office for National Statistics, ‘Share Ownership - Share Register Survey Report, 2014 Release’ (2015) <http://www.ons.gov.uk/ons/rel/pnfc1/share-ownership---share-register-survey-report/2014/index.html>. [↑](#footnote-ref-1100)
1101. Individual share ownership has dropped from around 50% of the market in the early 1960s. P Myners, ‘Institutional Investment in the United Kingdom: A Review (The Myners Report)’ (2001) 27 <http://uksif.org/wp-content/uploads/2012/12/MYNERS-P.-2001.-Institutional-Investment-in-the-United-Kingdom-A-Review.pdf>. [↑](#footnote-ref-1101)
1102. L Aguilar, ‘Institutional Investors: Power and Responsibility’, *Georgia State University, J. Mack Robinson College of Business, Center for the Economic Analysis of Risk (CEAR). Department of Finance, CEAR Workshop — Institutional Investors: Control, Liquidity, and Systemic Risks* (2013) <http://www.sec.gov/News/Speech/Detail/Speech/1365171515808>. [↑](#footnote-ref-1102)
1103. S Çelik and M Isaksson, ‘Institutional Investors as Owners: Who Are They and What Do They Do?’ (2013) 11 9–12 <http://www.oecd.org/corporate/ca/oecdcorporategovernanceworkingpapers.htm>. [↑](#footnote-ref-1103)
1104. As recognised by the Myners Review, most of the business that life insurers conduct is now not straightforward insurance, but savings and investment. See: Myners (n 139). [↑](#footnote-ref-1104)
1105. S Çelik and M Isaksson, ‘Institutional Investors and Ownership Engagement’ (2014) 2013/2 OECD Journal: Financial Market Trends <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.441.3775&rep=rep1&type=pdf>. [↑](#footnote-ref-1105)
1106. J Hawley and A Williams, *The Rise of Fiduciary Capitalism* (University of Pennsylvania Press 2000). [↑](#footnote-ref-1106)
1107. J Hawley, S Kamath and A Williams, ‘Introduction’ in J Hawley, S Kamath and A Williams (eds), *Corporate Governance Failures: The Role of Institutional Investors in the Global Financial Crisis* (University of Pennsylvania Press 2011) 1. [↑](#footnote-ref-1107)
1108. S Gillian and L Starks, ‘Corporate Governance Proposals and Shareholder Activism: The Role of Institutional Investors’ (2000) 57 Journal of Financial Economics 275. [↑](#footnote-ref-1108)
1109. Institute of Chartered Accountants in Engand and Wales (ICAEW), ‘Shareholder Responsibilities and the Investing Public: Exercising Ownership Rights through Engagement’ 6. [↑](#footnote-ref-1109)
1110. Hawley and Williams (n 144). [↑](#footnote-ref-1110)
1111. Although sovereign wealth funds may incorporate savings and pension reserve funds for future generations, another use of such funds are for fiscal stabilisation, which depending on the circumstances, may be required at relatively shorter notice. See: P Kunzel and others, ‘Investment Objectives of Sovereign Wealth Funds—A Shifting Paradigm’ (2011) WP/11/19. [↑](#footnote-ref-1111)
1112. Although UK state pensions are funded by national insurance contributions and invested within government securities, occupational pensions and those of a personal nature are included within this ambit. [↑](#footnote-ref-1112)
1113. J Doh and D Zachar, ‘Social Activism and Nongovernmental Organizations’ in H Baker and J Nofsinger (eds), *Socially responsible finance and investing: Financial institutions, corporations, investors, and activists* (Wiley 2012); J Angel and P Rivoli, ‘Does Ethical Investing Impose a Cost upon the Firm? A Theoretical Perspective’ (1997) 6 The Journal of Investing 57. [↑](#footnote-ref-1113)
1114. W Bratton and J McCahery, ‘Introduction’ in W Bratton and J McCahery (eds), *Institutional Investor Activism* (Oxford University Press 2015). [↑](#footnote-ref-1114)
1115. ‘The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report’ (n 99) para 1.30. [↑](#footnote-ref-1115)
1116. Myners (n 139) 89–91; HM Treasury, ‘A Review of Corporate Governance in UK Banks and Other Financial Industry Entities (The Walker Review)’ (2009) 70–71. [↑](#footnote-ref-1116)
1117. Famed Wall Street takeover defence attorney, Martin Lipton, states that “Virtually every activist attack involves reduction in assets, reduction in invested capital, reduction in R&D, reduction in future capex and, most significant for the economy, reduction in employment” as quoted in S Foley, ‘Shareholder Activism: Battle for the Boardroom’ *The Financial Times (online)* (23 April 2014) <http://www.ft.com/cms/s/2/a555abec-be32-11e3-961f-00144feabdc0.html#axzz3ySRjQpCm>. [↑](#footnote-ref-1117)
1118. G Deakin, S. & Slinger, ‘Hostile Takeovers , Corporate Law, and the Theory of the Firm’ (1997) 24 Journal of Law and Society 124. [↑](#footnote-ref-1118)
1119. For instance, Royal Dutch Shell (‘Shell’) experienced the largest shareholder revolt in UK corporate history in May 2009, after nearly 60% of shareholders voted against management’s proposed pay policy. Royal Dutch Shell had decided to award its chief executive, Jeroen van der Veer, a pay package worth £9.1m, an increase of 58% on 2007. Investor anger was stoked after Royal Dutch Shell missed its target of finishing third in a league table of big oil companies ranked by shareholder returns. [↑](#footnote-ref-1119)
1120. M Jennings, *Business: Its Legal, Ethical, and Global Environment* (9th edn, South Western Centage Learning 2012). More than 90% of UK shareholder proposals target board election or business strategies and Buchanon et al find that they “appear to be associated with neutral, at best, effects on long-term firm performance.” See: B Buchanan and others, ‘Shareholder Proposal Rules and Practice: Evidence from a Comparison of the United States and United Kingdom’ (2012) 49 American Business Law Journal 739. [↑](#footnote-ref-1120)
1121. Samuel O Idowu and others, *Dictionary of Corporate Social Responsibility* (Springer 2015). [↑](#footnote-ref-1121)
1122. The Model Articles for Public Companies allow shareholders to direct the board to take, or refrain from taking, a specified action by special resolution, which is defined in the Companies Act 2006 s283 as being 75%. Model Articles for Public Companies Article Article 4(1). [↑](#footnote-ref-1122)
1123. Aaron A Dhir, ‘Shareholder Engagement in the Embedded Business Corporation: Investment Activism, Human Rights, and TWAIL Discourse’ (2012) 22 Business Ethics Quarterly 99. [↑](#footnote-ref-1123)
1124. International Labour Organisation, ‘Domini Reaches Agreement with Nucor on Slavery in Brazil’ (2010) <http://www.ilo.org/global/topics/forced-labour/news/WCMS\_143438/lang--en/index.htm>. [↑](#footnote-ref-1124)
1125. Companies Act 2006 Section 338(4)(a). [↑](#footnote-ref-1125)
1126. ibid Section 338(1). [↑](#footnote-ref-1126)
1127. ibid Section 339(1). [↑](#footnote-ref-1127)
1128. ibid Section 314(1). [↑](#footnote-ref-1128)
1129. ibid. [↑](#footnote-ref-1129)
1130. ibid Section 340(1). [↑](#footnote-ref-1130)
1131. ibid Section 338(2)(b). [↑](#footnote-ref-1131)
1132. ibid Section 338(2)(c). [↑](#footnote-ref-1132)
1133. ibid Section 338(2)(a). [↑](#footnote-ref-1133)
1134. As the Walker Report observes: ‘Shareholders who do not exercise such governance oversight are effectively free-riding on the governance efforts of those that do.’ HM Treasury (n 154) 71. [↑](#footnote-ref-1134)
1135. For a summary of all UK resolutions on sustainability-related issues, see: CERES, ‘Shareholder Resolutions’ <http://www.ceres.org/investor-network/resolutions> accessed 1 February 2016. [↑](#footnote-ref-1135)
1136. # 17 CFR § 240.14a-8 under The Securities Exchange Act of 1934.

      [↑](#footnote-ref-1136)
1137. Companies Act 2006 Section 338(3)(a). [↑](#footnote-ref-1137)
1138. Indirect shareholders whom own shares through a nominee such as a stockbroker are eligible to be included within this figure. ibid Section 153. [↑](#footnote-ref-1138)
1139. ibid Section 338(3)(b). [↑](#footnote-ref-1139)
1140. House of Lords (Lord Hodgson of Astley Abbotts), ‘HL Deb 1 Mar 2006, Vol 060301, Col GC128 (Company Law Reform Bill)’. [↑](#footnote-ref-1140)
1141. Paid Up Capital (PUC) attaches to shares of a class, not to any shareholder and thus it is computed without regard to who owns the share. As such the calculation of PUC is unaffected by the secondary market. PUC is therefore typically equal to the issued capital and thus the PUC of a shareholding reflects the nominal value of those shares at issue. [↑](#footnote-ref-1141)
1142. A less onerous figure based on a market value was suggested but this was rejected due to an overarching aim of the reform to apply to all types of companies and thus the complexities of calculating such a value for shares held in private or unlisted public companies. See: House of Lords (Lord Sainsbury of Turville), ‘HL Deb 1 Mar 2006, Vol 060301, Col GC129 (Company Law Reform Bill)’. [↑](#footnote-ref-1142)
1143. This value correct as of 22nd June 2019. [↑](#footnote-ref-1143)
1144. See in particular: Myners (n 139); HM Treasury (n 154). See also: Andrew Johnston, ‘After the OFR: Can UK Shareholder Value Still Be Enlightened?’ (2007) 7 European Business Organization Law Review (EBOR) 817. [↑](#footnote-ref-1144)
1145. Myners (n 139). [↑](#footnote-ref-1145)
1146. HM Treasury, ‘Myners Principles for Institutional Investment Decision-Making: Review of Progress’ (2004) 15. [↑](#footnote-ref-1146)
1147. See for example: R Sutherland, ‘A Plea to Sir David: Save Our Schools, Jobs and Pensions from Britain’s Timid Investors’ *The Observer (online)* (London, 12 July 2009); B Masters and K Burgess, ‘Investors Raise Fears on “Stewardship Code”’ *Financial Times (online)* (London, 15 April 2010). [↑](#footnote-ref-1147)
1148. For example, the total assets of all pension funds in OECD countries declined by 20% between December 2007 and October 2008. C Woods, ‘Funding Climate Change: How Pension Fund Fiduciary Duty Masks Trustee Inertia and Short-Termism’ in J Hawley, S Kamath and A Williams (eds), *Corporate Governance Failures: The Role of Institutional Investors in the Global Financial Crisis* (University of Pennsylvania Press 2011). [↑](#footnote-ref-1148)
1149. D Walker, ‘A Review of Corporate Governance in UK Banks and Other Financial Industry Entities: Final Recommendations (The Walker Report)’ (2009) <http://www.icaew.com/en/library/subject-gateways/corporate-governance/codes-and-reports/walker-report>. [↑](#footnote-ref-1149)
1150. UK Stewardship Code 2012. [↑](#footnote-ref-1150)
1151. ibid, Stewardship and the Code, para 1. [↑](#footnote-ref-1151)
1152. ibid 5. [↑](#footnote-ref-1152)
1153. ibid 2. [↑](#footnote-ref-1153)
1154. ibid Principle 5. [↑](#footnote-ref-1154)
1155. ibid Principle 3. [↑](#footnote-ref-1155)
1156. ibid Principle 6. [↑](#footnote-ref-1156)
1157. ibid. [↑](#footnote-ref-1157)
1158. The Stewardship Code suggests the following: confidential discussions; holding additional meetings with management specifically to discuss concerns; expressing concerns through the company’s advisers; meeting with the chairman or other board members; intervening jointly with other institutions on particular issues; making a public statement in advance of General Meetings; submitting resolutions and speaking at General Meetings; and requisitioning a General Meeting, in some cases proposing to change board membership. [↑](#footnote-ref-1158)
1159. UK Stewardship Code Principle 4. [↑](#footnote-ref-1159)
1160. ibid 5. [↑](#footnote-ref-1160)
1161. Financial Reporting Council (FRC), ‘Proposed Revisions to the UK Corporate Governance Code (December 2017)’ (2017) 22 <https://www.frc.org.uk/getattachment/31897789-cef6-48bb-aea9-f46b8cf80d02/Proposed-Revisions-to-the-UK-Corporate-Governance-Code-Dec-2017-1.pdf>. [↑](#footnote-ref-1161)
1162. Financial Reporting Council (FRC), ‘Proposed Revision to the UK Stewardship Code. Consultation January 2019: Annex A - Revised UK Stewardship Code’ (2019) <https://www.frc.org.uk/consultation-list/2019/consulting-on-a-revised-uk-stewardship-code>. [↑](#footnote-ref-1162)
1163. A Hill, ‘Preacher Myners Is Right to Raise Hell with Investors’ *The Financial Times* (London, 22 April 2009) 18. [↑](#footnote-ref-1163)
1164. See the Chairman of the National Association of Pension Funds in: R Sullivan, ‘Collective Engagement Picking up Steam’ *Financial Times* (9 November 2009) 3. [↑](#footnote-ref-1164)
1165. B Cheffins, ‘The Stewardship Code ’ s Achilles ’ Heel’ (2010) 73 Modern Law Review 1004, 1018. [↑](#footnote-ref-1165)
1166. HM Revenue & Customs, ‘Pension Changes 2015’ (*Gov.uk*, 2015) <https://www.gov.uk/government/news/pension-changes-2015> accessed 1 February 2015. [↑](#footnote-ref-1166)
1167. David Millon, ‘Two Models of Corporate Social Responsibility’ (2011) 46 Wake Forest Law Review 523, 529. [↑](#footnote-ref-1167)
1168. Cheffins (n 203). [↑](#footnote-ref-1168)
1169. Brian Cheffins provides an excellent consideration of the history of the Stewardship Code and its potential of to affect change. See: ibid. [↑](#footnote-ref-1169)
1170. World Economic Forum, ‘The Future of Long-Term Investing’ (2011) <https://www.weforum.org/reports/future-long-term-investing>. [↑](#footnote-ref-1170)
1171. Woods (n 186) 275. [↑](#footnote-ref-1171)
1172. World Economic Forum (n 208). [↑](#footnote-ref-1172)
1173. The proliferation of innovative financial instruments, products and services has created a highly complex investment marketplace. J Hawley, K Johnson and E Waitzer, ‘Reclaiming Pension Fund Fiduciary Duty Fundamentals’ in T Hebb and others (eds), *The Routledge Handbook of Responsible Investment* (Routledge 2016). [↑](#footnote-ref-1173)
1174. This is permitted by way of the Pensions Act 1995 Section 34(2). [↑](#footnote-ref-1174)
1175. ‘The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report’ (n 99) para 3.3. See also: Financial Services Organisation, ‘Fund Management in the UK (Online Version)’ (2015) <https://www.gov.uk/government/publications/asset-fund-management-in-the-uk/fund-management-in-the-uk-online-version>. [↑](#footnote-ref-1175)
1176. Myners (n 139) 2. [↑](#footnote-ref-1176)
1177. MFS, ‘Lengthening the Time Horizon’ (2015) <https://www.mfs.com/wps/FileServerServlet?servletCommand=serveUnprotectedFileAsset&fileAssetPath=/files/documents/news/mfse\_time\_wp.pdf>. [↑](#footnote-ref-1177)
1178. C Mackenzie, ‘The Scope for Investor Action on Corporate Social and Environmental Impacts’, *Responsible Investment* (Greenleaf Publishing 2006). [↑](#footnote-ref-1178)
1179. Gifford (n 18); Hawley, Johnson and Waitzer (n 211). [↑](#footnote-ref-1179)
1180. Gifford (n 18) 440. [↑](#footnote-ref-1180)
1181. Johnston (n 182). [↑](#footnote-ref-1181)
1182. Gifford (n 18) 440. [↑](#footnote-ref-1182)
1183. Kahneman describes these short cuts as representing the substitution of a difficult question with one that is simpler to answer. D Kahneman, ‘Maps of Bounded Rationality: Psychology for Behavioral Economics’ (2003) 93 The American Economic Review 1449. [↑](#footnote-ref-1183)
1184. This is of particular concern in relation to a stock market bubble. See: R Shiller, *Irrational Exuberance* (Random House 2005). [↑](#footnote-ref-1184)
1185. R Thaler and C Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Penguin 2009). [↑](#footnote-ref-1185)
1186. MFS (n 215). [↑](#footnote-ref-1186)
1187. ‘The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report’ (n 99) para 9.2. [↑](#footnote-ref-1187)
1188. ibid para 9.18. [↑](#footnote-ref-1188)
1189. See for example: A Hesse, ‘Long Term and Sustainable Pension Investments: A Study of Leading European Pension Funds’ (2008) <http://www.sd-m.de/files/Long-term\_sustainable\_Pension\_Investments\_Hesse\_SD-M\_Asset4.pdf>; R Thornton, ‘Ethical Investment: A Case of Disjointed Thinking’ (2008) 67 Cambridge Law Journal 396; J Langbein and R Posner, ‘Social Investing and the Law of Trusts’ (1980) 79 Michigan Law Review 72. [↑](#footnote-ref-1189)
1190. It is acknowledged there are also contractual elements within the majority of pension funds. For further discussion of the implications of this see: B Richardson, ‘Do the Fiduciary Duties of Pension Funds Hinder Socially Responsible Investment?’ (2007) 22 Banking and Finance Law Review 145, 171–173. [↑](#footnote-ref-1190)
1191. LJ Millett in *Bristol and West Building Society v Mothew, [1998] Ch 1* at 18. [↑](#footnote-ref-1191)
1192. *Arklow Investments Ltd v Maclean [2000] 1 WLR 594* at 598. [↑](#footnote-ref-1192)
1193. Pensions Act 1995 Section 34. [↑](#footnote-ref-1193)
1194. Institutions for Occupational Retirement Provision (IORP) Directive 2003/41/EC. In doing so Regulation 4 of the Investment Regulations implements article 18(1) of the Institutions for Occupational Retirement Provision (IORP) Directive 2003/41/EC in placing the duty for prudence on statutory footing. It should be noted that the IORP Directive also utilises the term ‘best interests of members and beneficiaries’ at Art. 18(1)(a). [↑](#footnote-ref-1194)
1195. Institutions for Occupational Retirement Provision (IORP) Directive 2003/41/EC reg 4(1)(a). [↑](#footnote-ref-1195)
1196. ibid reg 4(1)(b). [↑](#footnote-ref-1196)
1197. LJ Millett in *Bristol and West Building Society v Mothew, [1998] Ch 1* (n 229) at 18. [↑](#footnote-ref-1197)
1198. *Aberdeen Railway Co v Blaikie Bros (1854) 1 Macq 461*. Also see: Occupational Pension Schemes (Investment) Regulations 2005 Regulation 4(2)(b). This states that “in the case of a potential conflict of interest, [pension assets must be invested] in the sole interest of members and beneficiaries” [↑](#footnote-ref-1198)
1199. Pensions Act 1995 Section 36(1). [↑](#footnote-ref-1199)
1200. See: The Law Commission, ‘Fiduciary Duties of Investment Intermediaries (Law Com No 350)’ (2014) chapter 6. [↑](#footnote-ref-1200)
1201. *Cowan v Scargill [1985] Ch 270*. [↑](#footnote-ref-1201)
1202. ibid at 286-287. [↑](#footnote-ref-1202)
1203. ibid at 288. [↑](#footnote-ref-1203)
1204. Thornton (n 227) 398. [↑](#footnote-ref-1204)
1205. *Buttle v Saunders [1950] 2 All ER 193*. This case regarded the duty of a trustee to gazump as regards the sale of a house held as trust property. [↑](#footnote-ref-1205)
1206. *Cowan v Scargill [1985] Ch 270* (n 239) at 287. [↑](#footnote-ref-1206)
1207. R Megarry, ‘Investing Pension Funds: The Mineworkers Case’ in T Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell 1989). [↑](#footnote-ref-1207)
1208. The UNEP FI is a global partnership between the United Nations Environment Programme (UNEP) and the financial sector. [↑](#footnote-ref-1208)
1209. Freshfields Bruckhaus Deringer, ‘A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment’ (2005) <http://www.unepfi.org/fileadmin/documents/freshfields\_legal\_resp\_20051123.pdf>. [↑](#footnote-ref-1209)
1210. Lord Blackburn in *Speight v Gaunt (1883) 9 App Cas 1* at 19. [↑](#footnote-ref-1210)
1211. Trustee Act 2000 Section 6(1)(b). [↑](#footnote-ref-1211)
1212. Pensions Act 1995 Section 33(1). [↑](#footnote-ref-1212)
1213. *Harries v Church Commissioners [1992] 1 WLR 1241*. [↑](#footnote-ref-1213)
1214. Negative screening may be argued to lead to an inefficient outcome due to a narrowing of the investable universe. Further arguments argue that there is an increased risk of financial detriment due to a reduction in the level of diversification and a potential increase in volatility. For more information see: R Bauer, J Derwall and R Otten, ‘The Ethical Mutual Fund Performance Debate: New Evidence from Canada’ (2007) 70 Journal of Business Ethics 111. [↑](#footnote-ref-1214)
1215. *Harries v Church Commissioners [1992] 1 WLR 1241* (n 251) at 1246. [↑](#footnote-ref-1215)
1216. Pensions Act 1995 Section 36(2)(a); Occupational Pension Schemes (Investment) Regulations 2005 Regulation 4(7). [↑](#footnote-ref-1216)
1217. See: W Sharpe, *Portfolio Theory and Capital Markets* (McGraw-Hill 1970); R Brealey and S Myers, *Principles of Corporate Finance* (McGraw-Hill 1988); E Ford, ‘Trustee Investment and Modern Portfolio Theory’ (1996) 10 Trust Law International 102. [↑](#footnote-ref-1217)
1218. Occupational Pension Schemes (Investment) Regulations 2005 Regulation 4(3). [↑](#footnote-ref-1218)
1219. Hoffman, J. in *Nestle v National Westminster Bank plc [1988] (1996) 10(1) Trust Law International 113, 115*. [↑](#footnote-ref-1219)
1220. Woods (n 186) 244. [↑](#footnote-ref-1220)
1221. R Galer, ‘Prudent Person Rule Standardfor the Investment of Pension Fund Assets’ (OECD ed, *OECD*, 2002) <http://www.oecd.org/finance/private-pensions/2488700.pdf> accessed 1 March 2018. [↑](#footnote-ref-1221)
1222. *Harries v Church Commissioners [1992] 1 WLR 1241* (n 251) at 1251. [↑](#footnote-ref-1222)
1223. The Law Commission (n 238) para 5.15. [↑](#footnote-ref-1223)
1224. B Richardson, ‘Governing Fiduciary Finance’ in T Hebb and others (eds), *The Routledge Handbook of Responsible Investment* (Routledge 2016) 653. [↑](#footnote-ref-1224)
1225. The Law Commission, ‘Pension Funds and Social Investment (Law Com No 374)’ (2017). [↑](#footnote-ref-1225)
1226. The Law Commission (n 238) para 5.8. [↑](#footnote-ref-1226)
1227. ibid para 6.30. [↑](#footnote-ref-1227)
1228. Principles for Responsible Investment (PRI), ‘Fiduciary Duty in the 21st Century: UK Roadmap’ (2016) <https://www.unpri.org/fiduciary-duty/fiduciary-duty-in-the-21st-century-uk-roadmap/264.article>. [↑](#footnote-ref-1228)
1229. Financial Reporting Council (FRC), ‘Proposed Revision to the UK Stewardship Code. Consultation January 2019: Annex A - Revised UK Stewardship Code’ (n 200) 2. [↑](#footnote-ref-1229)
1230. The Law Commission (n 238) para 5.100. [↑](#footnote-ref-1230)
1231. It is significant to highlight from a policy perspective, the UK government appeared to approve the Law Commission’s findings in this area, describing them as “useful guidance.” Department for Work and Pensions, ‘Consultation on Changes to the Investment Regulations Following the Law Commission’s Report “Fiduciary Duties of Investment Intermediaries”’ (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/407937/Condoc\_27\_02\_15\_to\_DWP.pdf> para 19. [↑](#footnote-ref-1231)
1232. An exception is made for charity employers. On this point, Richardson raises the pragmatic issue of how a court would calculate damages if a fiduciary failed to invest ethically as required by the investment mandate, particularly if no financial detriment occurred. See: Richardson, ‘Do the Fiduciary Duties of Pension Funds Hinder Socially Responsible Investment?’ (n 228) 164. One possibility, suggested by Perez, is the creation of a new tortious remedy, as developed by the Israeli Supreme Court (in *Daaka v Carmel Hospital - Haifa, Supreme Court Case 2781/93* and *Tnuva v Ravi Tufic, Supreme Court Case 1338/97*) based not on financial harm “but on the grievance to the individual’s integrity or autonomy, manifested in the deliberate disregard of his moral beliefs and preferences.” See: O Perez, ‘The New Universe of Green Finance: From Self-Regulation to MultiPolar Governance’ in O Dilling, M Herberg and G Winter (eds), *Responsible Business: Self-Governance in Transnational Economic* (Hart 2008). [↑](#footnote-ref-1232)
1233. *Martin v City of Edinburgh District Council [1989] PLR 10* at 334. [↑](#footnote-ref-1233)
1234. D Hayton, *Underhill and Hayton’s Law Relating to Trusts and Trustees* (Butterworths ed, 14th edn, 1987). [↑](#footnote-ref-1234)
1235. P Docking and I Pittaway, ‘Social Investment by English Pension Funds: Can It Be Done?’ [1990] Trust Law and Practice 25. [↑](#footnote-ref-1235)
1236. Occupational Pension Schemes (Investment) Regulations 2005 Regulation 4(5). [↑](#footnote-ref-1236)
1237. ibid Regulation 4(6). [↑](#footnote-ref-1237)
1238. Impact investments may be defined as direct investment in particular projects relating to, for instance, microfinance or community solar energy. [↑](#footnote-ref-1238)
1239. This may be compounded by a lack of awareness as regards social and environmental impact investments within UK pension funds. See: Social Finance Limited, ‘Microfinance, Impact Investing, and Pension Fund Investment Policy Survey’ (2012) <http://www.socialfinance.org.uk/wp-content/uploads/2014/05/Pension\_fund\_survey\_october\_2012.pdf>. [↑](#footnote-ref-1239)
1240. *Harries v Church Commissioners [1992] 1 WLR 1241* (n 251) at 1246. [↑](#footnote-ref-1240)
1241. Lord Murray at 334 states that “I cannot conceive that trustees have an unqualified duty ... simply to invest trust funds in the most profitable investment available. To accept that without qualification would, in my view, involve substituting the discretion of financial advisers for the discretion of trustees.” [↑](#footnote-ref-1241)
1242. The Law Commission (n 238) para 5.16. [↑](#footnote-ref-1242)
1243. ibid para 5.16. [↑](#footnote-ref-1243)
1244. Freshfields Bruckhaus Deringer (n 247) 12. [↑](#footnote-ref-1244)
1245. L Ho, ‘Attributing Losses to a Breach of Fiduciary Duty’ (1998) 12 Trust Law International 66. [↑](#footnote-ref-1245)
1246. Richardson, ‘Governing Fiduciary Finance’ (n 262) 654. [↑](#footnote-ref-1246)
1247. ibid 657. [↑](#footnote-ref-1247)
1248. National Association of Pension Funds (NAPF) as cited in: S Farrell, ‘Pension Savers “Want Fund Managers to Be Tougher on Company Ethics”’ *The Guardian (online)* (London, 3 July 2014) <http://www.theguardian.com/money/2014/jul/03/pension-savers-funds-company-ethics-napf>. [↑](#footnote-ref-1248)
1249. Occupational Pension Schemes [Investment, and Assignment, Forfeiture, Bankruptcy] Amendment Regulations, 1999. [↑](#footnote-ref-1249)
1250. B Richardson, ‘Pensions Law Reform and Environmental Policy: A New Role for Institutional Investors?’ (2002) 3 Journal of International Financial Markets: Law and Regulation 159. [↑](#footnote-ref-1250)
1251. UK Sustainable Investment and Finance Association (UKSIF), ‘Responsible Business: Sustainable Pension. How the Pension Funds of the UK’s Corporate Responsibility Leaders Are Approaching Responsible Investment’ (2010); UK Sustainable Investment and Finance Association (UKSIF), ‘The Third UKSIF Report on How the UK Pension Funds of Corporate Responsibility Leaders Are Approaching Responsible Investment’ (2011). [↑](#footnote-ref-1251)
1252. UK Sustainable Investment and Finance Association (UKSIF), ‘The Third UKSIF Report on How the UK Pension Funds of Corporate Responsibility Leaders Are Approaching Responsible Investment’ (n 289). [↑](#footnote-ref-1252)
1253. This requirement is included in the Financial Conduct Authority’s (FCA) Conduct of Business Rules. Fund managers must disclose whether, and if so how, they comply with Code. If they do not comply with the Code, they must disclose their alternative investment strategy. [↑](#footnote-ref-1253)
1254. UK Stewardship Code 9. [↑](#footnote-ref-1254)
1255. J Kingman, ‘Independent Review of the Financial Reporting Council (FRC) 2018: Final Report’ (2018) 46. [↑](#footnote-ref-1255)
1256. Directive (EU) 2017/828 amending Directive 2007/36/EC. [↑](#footnote-ref-1256)
1257. Directive (EU) 2017/828 Article 3(g)(1). [↑](#footnote-ref-1257)
1258. ibid Article 3(h)(1). [↑](#footnote-ref-1258)
1259. ibid Article 3(h)(2)(b). [↑](#footnote-ref-1259)
1260. For details of the FCA’s plans and contingency plans, see: Financial Conduct Authority (FCA), ‘Consultation on Proposals to Improve Shareholder Engagement: January 2019’ (2019) <https://www.fca.org.uk/publication/consultation/cp19-07.pdf>. [↑](#footnote-ref-1260)
1261. Richardson, ‘Pensions Law Reform and Environmental Policy: A New Role for Institutional Investors?’ (n 288). [↑](#footnote-ref-1261)
1262. For example within the automatic enrolment scheme, introduced by the Pensions Act 2008 and which came into effect in 2012, the employer must contribute 1% of the employee’s salary to the fund, rising to 4% in 2018. [↑](#footnote-ref-1262)
1263. Department for Work and Pensions, ‘Clarifying and Strengthening Trustees’ Investment Duties: Government Response’ (2018) 18. [↑](#footnote-ref-1263)
1264. M Staub-Bisang, ‘Public Pension Funds: Sustainable Investment Pioneers’ *The Guardian (online)* (London, 8 August 2013) <http://www.theguardian.com/sustainable-business/public-pension-funds-sustainable-investment-pioneers>. [↑](#footnote-ref-1264)
1265. R Jones, ‘What Are the Best Ethical Funds?’ *The Guardian (online)* (London, 12 October 2013) <http://www.theguardian.com/money/2013/oct/12/what-best-ethical-funds>. [↑](#footnote-ref-1265)
1266. Ethical Investment Research and Information Service (EIRIS), ‘DC Pension Holders Seek Ethical Option’ <http://www.eiris.org/media/press-release/dc-pension-holders-seek-ethical-option-as-uk-ethical-investment-grows-to-12-2-bn/>. [↑](#footnote-ref-1266)
1267. Pertained support for ethical investment dropped from 68% to 48%. The National Association of Pension Funds as reported in: Farrell (n 286). [↑](#footnote-ref-1267)
1268. Tilney Bestinvest (n 95). [↑](#footnote-ref-1268)
1269. See: Lorraine Talbot, *Progressive Corporate Governance for the 21st Century* (Routledge 2012). [↑](#footnote-ref-1269)
1270. In 1991, UK insurance companies and pension funds held approximately half of all UK equities. Office for National Statistics as cited in: ‘The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report’ (n 99) 31. [↑](#footnote-ref-1270)
1271. I Cooper and E Kaplanis, ‘Home Bias in Equity Portfolios, Inflation Hedging, and International Capital Market Equilibrium’ (1994) 7 The Review of Financial Studies 45. [↑](#footnote-ref-1271)
1272. ‘The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report’ (n 99) para 3.3. [↑](#footnote-ref-1272)
1273. National Association of Pension Funds (NAPF) as cited in: R Evans, ‘Pension Funds Hold More Bonds than Shares for First Time since 1975’ *The Telegraph* (London, 28 January 2013) <http://www.telegraph.co.uk/finance/personalfinance/pensions/9832311/Pension-funds-hold-more-bonds-than-shares-for-first-time-since-1975.html>. [↑](#footnote-ref-1273)
1274. V Monga and M Cherney, ‘Corporate Pension Funds Pile Into Bonds’ *The Wall Street Journal* (New York, 13 April 2015) <http://www.wsj.com/articles/corporate-pension-funds-pile-into-bonds-1428969152>. [↑](#footnote-ref-1274)
1275. The abolition of UK exchange controls had almost immediate effect on capital outflows of institutional investors, and of pension funds in particular, although initially this was largely at the expense of government securities. See: The Bank of England, ‘The Effects of Exchange Control Abolition on Capital Flows’ (1981) September Bank of England Quarterly Bulletin <http://www.bankofengland.co.uk/archive/Documents/historicpubs/qb/1981/qb81q3369373.pdf>. [↑](#footnote-ref-1275)
1276. The first quarter of 2015 was the eighth consecutive quarter of net investment in overseas equity. Office for National Statistics, ‘MQ5: Investment by Insurance Companies, Pension Funds and Trusts, Q1 2015’ (2015) <http://www.ons.gov.uk/ons/dcp171778\_405881.pdf>. [↑](#footnote-ref-1276)
1277. UK Stewardship Code, ‘Application of the Code’, para 9. [↑](#footnote-ref-1277)
1278. Office for National Statistics (n 314). [↑](#footnote-ref-1278)
1279. Office for National Statistics (n 134). [↑](#footnote-ref-1279)
1280. ibid. [↑](#footnote-ref-1280)
1281. Unit Trusts are similar to mutual funds in US financial terminology. [↑](#footnote-ref-1281)
1282. Office for National Statistics (n 134). [↑](#footnote-ref-1282)
1283. Cheffins (n 203) 1021. [↑](#footnote-ref-1283)
1284. Cheffins (n 203). [↑](#footnote-ref-1284)
1285. The UK’s Financial Reporting Council merely ‘hope that investors based outside the UK will commit to the [Stewardship] Code’ Financial Reporting Council, ‘Implementation of the UK Stewardship Code’ <https://www.frc.org.uk/FRC-Documents/FRC/Implementation-of-the-UK-Stewardship-Code.pdf> para 25. [↑](#footnote-ref-1285)
1286. Interpretative bulletin relating to statements of investment policy, including proxy voting policy or guidelines, Code of Federal Regulations Table 29 Chapter XXV, 2509. 94-2, 1994 [↑](#footnote-ref-1286)
1287. C Mallin, *Corporate Governance* (4th edn, Oxford University Press 2013) 121. [↑](#footnote-ref-1287)
1288. ibid. [↑](#footnote-ref-1288)
1289. The Employees’ Retirement Income Security Act’s (ERISA) is regulated by the U.S. Department of Labor applies to all US occupational pensions. Most US state based public pensions are subject to the Uniform Prudent Investor Act. [↑](#footnote-ref-1289)
1290. For example, the largest pension fund in the US, the California Public Employees' Retirement System (CalPERS), expects its deficit to last for the next fifteen years. Reuters, ‘UPDATE 1-CalPERS Officers Propose Lower Investment Targets’ (2015) <http://uk.reuters.com/article/calpers-investment-idUKL1N12C1OY20151013?feedType=RSS&feedName=rbssFinancialServicesAndRealEstateNews> accessed 10 January 2015. [↑](#footnote-ref-1290)
1291. Principles for Responsible Investment (PRI) (n 7). [↑](#footnote-ref-1291)
1292. Pension Protection Fund (Pensionable Service) and Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations 2018. [↑](#footnote-ref-1292)
1293. Financial Reporting Council (FRC), ‘Members of the Investor Advisory Group (IAG)’ (2018) <https://www.frc.org.uk/about-the-frc/structure-of-the-frc/investor-advisory-group-(iag)/members-of-the-investor-advisory-group-(iag)> accessed 4 March 2019. [↑](#footnote-ref-1293)
1294. As quoted in: University of Cambridge Institute for Sustainability Leadership, ‘The Value of Responsible Investment’ (2014) 7 <https://www.cisl.cam.ac.uk/resources/publication-pdfs/ilg-the-value-of-responsible-investment.pdf>. [↑](#footnote-ref-1294)
1295. J Authers, ‘US Pension Funds Raise the Bar in Low Carbon Investment’ *The Financial Times (online)* (London, December 2015) <http://www.ft.com/cms/s/0/8d3e0ff4-9e37-11e5-8ce1-f6219b685d74.html#axzz3zfaATqZp>. [↑](#footnote-ref-1295)
1296. The three pillars conceptual model was put forward at the 2002 World Summit in Johannesburg. See: United Nations, ‘Report of the World Summit on Sustainable Development (Johannesburg, South Africa, 26 August-4 September 2002)’ (2002) <http://www.unmillenniumproject.org/documents/131302\_wssd\_report\_reissued.pdf>. [↑](#footnote-ref-1296)
1297. World Commission on Environment and Development, ‘Our Common Future (UN General Assembly Paper A/42/427)’ (1987) <http://www.un-documents.net/our-common-future.pdf> para 27. [↑](#footnote-ref-1297)
1298. In other words, it regards how an individual's decisions today affect what resource utilisation options are available to others in the future. [↑](#footnote-ref-1298)
1299. Water scarcity is a topical example. For instance, Coca Cola has experienced the withdrawal of consent to operate bottling facilities in India due to water shortages. See: A Chilkoti, ‘Water Shortage Shuts Coca-Cola Plant in India’ *The Financial Times (online)* (London, 19 June 2014) <http://www.ft.com/cms/s/0/16d888d4-f790-11e3-b2cf-00144feabdc0.html#axzz3uOmwADtf>. [↑](#footnote-ref-1299)
1300. It is not the intention of this chapter to afford detailed consideration to the broader compatibility of environmental sustainability to governmental objectives of economic growth. For arguments against such compatibility see: A Schnaiberg, *The Environment: From Surplus to Scarcity* (Oxford University Press 1980); T Jackson, *Prosperity without Growth* (Earthscan 2009); J Moore, *Capitalism in the Web of Life: Ecology and the Accumulation of Capital* (Verso 2015). [↑](#footnote-ref-1300)
1301. For example, Heal gives the example of British Petroleum in 1997 whereby the firm imposed a system wide cap of emissions. Previously undocumented losses due to pollution, such as the controlled burning or ‘flaring’ of natural gas from wells, were captured in order to lower emissions, leading to a net positive impact of $600 million. G Heal, ‘Corporate Social Responsibility: An Economic and Financial Framework’ (2005) 30 The Geneva Papers on Risk and Insurance Issues and Practice 387. See also: M Russo and P Fouts, ‘A Resource-Based Perspective on Corporate Environmental Performance and Profitability’ (1997) 40 Academy of Management Journal 534. [↑](#footnote-ref-1301)
1302. J Becker-Blease, ‘Corporate Socially Responsible Investments’ in H Baker and J Nofsinger (eds), *Socially responsible finance and investing: Financial institutions, corporations, investors, and activists* (Wiley 2012) 414. [↑](#footnote-ref-1302)
1303. Indeed, the Economist Magazine in reporting on the United Nations World Summit on Sustainable Development in 2002 suggests that SRI as a concept ‘risks being about everything and therefore, in the end, about nothing’. See: ‘The Johannesburg Summit: Sustaining the Poor’s Development’ [2002] *The Economist* 11. [↑](#footnote-ref-1303)
1304. World Commission on Environment and Development (n 334) para 25. [↑](#footnote-ref-1304)
1305. United Nations, ‘What Is Sustainability?’ (2015) <http://www.un.org/en/sustainablefuture/sustainability.shtml> accessed 14 December 2015. [↑](#footnote-ref-1305)
1306. UN Sustainable Development Goals 2015. [↑](#footnote-ref-1306)
1307. K Marx, *Das Capital. A Critique of Political Economy* (Regnery 1996). [↑](#footnote-ref-1307)
1308. According to the United Nations, the global population was 7.3 billion as of mid-2015 suggesting an increase of approximately 1 billion in the preceding twelve-year period. Although it can be observed that a number of countries are experiencing a high level of growth in the over 60s population, the populations of many regions remain young. For instance, over 60% of the African population is under the age of 26. United Nations Department of Economic and Social Affairs (Population Division), ‘World Population Prospects: Key Findings and Advance Tables’ (2015) <http://esa.un.org/unpd/wpp/Publications/Files/Key\_Findings\_WPP\_2015.pdf>. [↑](#footnote-ref-1308)
1309. S O’Connor, ‘Leave Robotic Jobs to Robots and Improve Humans’ Lives’ *The Financial Times (online)* (London, 5 January 2016). [↑](#footnote-ref-1309)
1310. Richardson, ‘Do the Fiduciary Duties of Pension Funds Hinder Socially Responsible Investment?’ (n 228) 162. [↑](#footnote-ref-1310)
1311. This is increasingly significant in a micro economic sense due to enhanced levels of financialisation within the global economy R Dore, ‘Financialization of the Global Economy’ (2008) 17 Industrial and Corporate Change 1097. [↑](#footnote-ref-1311)
1312. M Jensen, ‘Value Maximization , Stakeholder Theory , and the Corporate Objective Function’ (2002) 12 Business Ethics Quarterly 235. [↑](#footnote-ref-1312)
1313. As reported in the Guardian, Neil Woodford states: “Tobacco stocks are prominent in my portfolio principally because the market continues to profoundly undervalue their dependable qualities … The demand for their products is very consistent and predictable; they aren’t capital intensive businesses; they generate lots of cash; they pay sustainable and growing dividends; they don’t have to worry about new entrants; and they have significant pricing power … This isn’t so much a call about prospects for 2015, because my investment horizons are significantly longer than that. My conviction in the investment case is much greater on a five to 10-year view.” [↑](#footnote-ref-1313)
1314. D Winograd, ‘12 Things The Tobacco Industry Doesn’t Want You To Know’ (*The Huffington Post (online)*, 2013) <http://www.huffingtonpost.com/2013/07/01/tobacco-industry-e-cigarettes\_n\_3453821.html> accessed 17 December 2015. [↑](#footnote-ref-1314)
1315. National Health Service (NHS), ‘“Just One Sugary Drink a Day” Linked to Health Problems’ (2019) <https://www.nhs.uk/news/food-and-diet/just-one-sugary-drink-day-linked-health-problems/> accessed 30 May 2019. [↑](#footnote-ref-1315)
1316. See for example: EarthTalk, ‘Coca-Cola Charged with Groundwater Depletion and Pollution in India’ (2018) <https://www.thoughtco.com/coca-cola-groundwater-depletion-in-india-1204204> accessed 20 December 2018. [↑](#footnote-ref-1316)
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1318. C Dumas and E Michotte, ‘Where Dogooders Meet Bottom-Liners: Disputes and Resolutions Surrounding Socially Responsible Investment’, *Socially Responsible Investment in the 21st Century: Does it Make a Difference for Society?* (2014) 127. [↑](#footnote-ref-1318)
1319. The MSA aims “to increase transparency by ensuring the public, consumers, employees and investors know what steps an organisation is taking to tackle modern slavery.” The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2015)’ 3 <https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/471996/Transparency\_in\_Supply\_Chains\_etc\_\_A\_practical\_guide\_\_final\_.pdf>. [↑](#footnote-ref-1319)
1320. The CTSCA specifically aims “to help California consumers make better and more informed purchasing choices.” Attorney General California Department of Justice, ‘The California Transparency in Supply Chains Act: A Resource Guide’ ii. [↑](#footnote-ref-1320)
1321. The recent Australian Modern Slavery Act 2018, which largely emulates the UK MSA, aims to: “drive a ‘race to the top’ as reporting entities compete for market funding and investor and consumer support. The Bill also aims to increase awareness of modern slavery risks among the Australian business community, and assist investors and consumers to make more informed decisions when using, buying and selling goods and services.” The Parliament of the Commonwealth of Australia: House of Representatives, ‘Modern Slavery Bill 2018: Explanatory Memorandum’ <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr6148\_ems\_9cbeaef3-b581-47cd-a162-2a8441547a3d%22>. [↑](#footnote-ref-1321)
1322. See: Attorney General California Department of Justice (n 2) i. [↑](#footnote-ref-1322)
1323. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Clarendon 1776) 274. [↑](#footnote-ref-1323)
1324. J Bentham, *An Introduction to the Principles of Morals and Legislation* (1789) 14. [↑](#footnote-ref-1324)
1325. This is the notion of cardinal utility. For example see: A Marshall, *Principles of Economics* (8th edn, Macmillan 1920). [↑](#footnote-ref-1325)
1326. This is the notion of ordinal utility. For example see: J Hicks, *Value and Capital* (2nd edn, Oxford University Press 1975). [↑](#footnote-ref-1326)
1327. R Dickinson and M Carsky, ‘The Consumer as Economic Voter’, *The Ethical Consumer* (Sage 2005). [↑](#footnote-ref-1327)
1328. The exception to this is the use of so called ‘demerit’ goods, such as drugs and tobacco, which is deemed socially undesirable. These goods are over consumed if left to the market to dictate consumption based upon the fact that their negative effects are unknown or ignored by consumers. The consumption of demerit goods often leads to negative externalities whereby harm is inflicted upon a third party. The cost to society of smoking offers a good example in which the non-smoking public incur enhanced costs relating to health care. For this reason, where legal, such goods often incur heavy taxation to dissuade excess consumption. [↑](#footnote-ref-1328)
1329. It is noted that it has been questioned whether it is “total or average happiness that we seek to make a maximum*?*”H Sidgwick, *The Methods of Ethics* (7th edn, Hackett 1981) xxxvi. [↑](#footnote-ref-1329)
1330. Adam Smith famously wrote “Every individual intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his original intention. By pursuing his own interest he frequently promotes that of society more effectively than when he really intends to promote it.” A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Modern Library). [↑](#footnote-ref-1330)
1331. The term consumer sovereignty was first introduced by Hutt in in his rejection of monopoly as an advantageous market form. W Hutt, ‘Economic Method and Concept of Competition’ (1934) 2 The South African Journal of Economics 23. For an extended consideration of the definition of ‘consumer sovereignty’ see: D Dixon, ‘Consumer Sovereignty, Democracy and the Marketing Concept: A Macro-Marketing Perspective’ (1992) 9 Canadian Journal of Administrative Sciences 116. [↑](#footnote-ref-1331)
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1333. J Narver and R Savitt, *The Marketing Economy* (Holt, Rinehart & Winston 1971). [↑](#footnote-ref-1333)
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1336. Veblen’s concept of conspicuous consumption, as with its stable mate of conspicuous leisure, may be defined as that activity which is performed by the individual as a demonstration of wealth or social status. [↑](#footnote-ref-1336)
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1341. The Nielsen Company, ‘50 per Cent of Global Consumers Surveyed Willing to Pay More for Goods, Services from Socially Responsible Companies, up from 2011’ (2013) <http://www.nielsen.com/uk/en/press-room/2013/nielsen-50-percent-of-global-consumers-surveyed-willing-to-pay-more-fo.html> accessed 18 November 2015. [↑](#footnote-ref-1341)
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1344. ICM Research (on behalf of Retail Week), ‘Ethical Influence’ (2010) <http://www.icmunlimited.com/files/2011/06/1004-Ethical-influence-Apr-10.pdf> accessed 26 November 2015. [↑](#footnote-ref-1344)
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1411. Carrigan and Attalla (n 71). [↑](#footnote-ref-1411)
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1413. Andorfer and Liebe (n 86). [↑](#footnote-ref-1413)
1414. The display signs showed a photograph of an elderly woman and a small child with the following statement: “Many small-scale farmers and their families do not have enough to make a living. Buy fairly traded coffee and fight poverty in developing countries!” [↑](#footnote-ref-1414)
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1416. Andorfer and Liebe (n 86); Boulstridge and Carrigan (n 83); Carrigan and Attalla (n 71); Carrigan, Szmigin and Wright (n 83). [↑](#footnote-ref-1416)
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1440. Unfair Commercial Practices Directive 2005/29/EC. [↑](#footnote-ref-1440)
1441. ibid Article 2(e). [↑](#footnote-ref-1441)
1442. The UCPD a full harmonization directive thus national laws cannot deviate from the standards therein. See inter alia: *Case C-540/08 Mediaprint [2010] ECR I-10909*. [↑](#footnote-ref-1442)
1443. As considered previously, the average consumer is defined as being “reasonably well informed, reasonably observant and circumspect.” This is provided for within The Consumer Protection from Unfair Trading Regulations 2008, Reg. 2(2). This has been deemed by the English courts as aiming “to protect from being misled consumers who took reasonable care of themselves, rather than the ignorant, the careless or the over-hasty consumer.” Briggs, J. at 310 in *Office of Fair Trading v Purely Creative Ltd & 8 Ors [2011] EWHC*. [↑](#footnote-ref-1443)
1444. Consumer Protection from Unfair Trading Regulations 2008 Regulation 5. [↑](#footnote-ref-1444)
1445. ibid Regulation 5(3)(b). [↑](#footnote-ref-1445)
1446. ibid Regulation 5(2). [↑](#footnote-ref-1446)
1447. ibid Regulation 2(1). [↑](#footnote-ref-1447)
1448. Office of Fair Trading (OFT), ‘Consumer Protection from Unfair Trading: Guidance on the UK Regulations (May 2008) Implementing the Unfair Commercial Practices Directive’ 33. [↑](#footnote-ref-1448)
1449. Consumer Protection from Unfair Trading Regulations 2008 Regulation 5(3)(b). (emphasis added) [↑](#footnote-ref-1449)
1450. D Chiari, ‘Is Corporate Social Responsibility So Soft? The Relationship between Corporate Social Responsibility and Unfair Commercial Practice Law’ (2017) 8 The King’s Student Law Review 162, 172. [↑](#footnote-ref-1450)
1451. See s1502 of the US Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. [↑](#footnote-ref-1451)
1452. E Pedersen and M Andersen, ‘Safeguarding Corporate Social Responsibility (CSR) in Global Supply Chains: How Codes of Conduct Are Managed in Buyer‐supplier Relationships’ (2006) 6 Journal of Public Affairs 228. [↑](#footnote-ref-1452)
1453. The sole example given within the guidance involves a company committing to the use of sustainable wood within its code of conduct, then indicating that it is bound by it in commercial practice via the use of a sustainable wood certification logo within an advertising campaign. Office of Fair Trading (OFT) (n 130) 33. [↑](#footnote-ref-1453)
1454. A Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Edward Elgar 2015). [↑](#footnote-ref-1454)
1455. Note that this is an aspect of the UCPD where the maximum harmonisation principle does not apply. [↑](#footnote-ref-1455)
1456. See: Unfair Commercial Practices Directive 2005/29/EC Preamble at paragraph 22. [↑](#footnote-ref-1456)
1457. Office of Fair Trading (OFT) (n 130) 53. [↑](#footnote-ref-1457)
1458. Both the regulation and the associated guidance are very specific in their use of the term “code of conduct” and remain silent as to their applicability to any other variant of non-financial disclosure. [↑](#footnote-ref-1458)
1459. Consumer Protection from Unfair Trading Regulations 2008 Regulation 5(2). [↑](#footnote-ref-1459)
1460. ibid Regulation 5(4)(c). [↑](#footnote-ref-1460)
1461. The Regulations provide that these matters may be: (a)the existence or nature of the product; (b)the main characteristics of the product (as defined in paragraph 5); (c)the extent of the trader’s commitments; (d)the motives for the commercial practice; (e)the nature of the sales process; (f)any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product; (g)the price or the manner in which the price is calculated; (h)the existence of a specific price advantage; (i)the need for a service, part, replacement or repair; (j)the nature, attributes and rights of the trader (as defined in paragraph 6); (k)the consumer’s rights or the risks he may face. ibid Regulation 5(4). [↑](#footnote-ref-1461)
1462. ibid Regulation 5(4)(c). [↑](#footnote-ref-1462)
1463. According to the guidance: “It is not necessary to show that the prohibited behaviour was the only, or even the main cause, to enter into the contract.” See: Department for Business Innovation and Skills, ‘Misleading and Aggressive Commercial Practices - New Private Rights for Consumers: Guidance on the Consumer Protection (Amendment) Regulations 2014’ 6. [↑](#footnote-ref-1463)
1464. Consumer Protection from Unfair Trading Regulations 2008 Part 4A. As amended by Consumer Protection (Amendment) Regulations 2014. [↑](#footnote-ref-1464)
1465. Consumer Protection from Unfair Trading Regulations 2008 Regulation 27(j)(4). As amended by Consumer Protection (Amendment) Regulations 2014. [↑](#footnote-ref-1465)
1466. According to the guidance: “The amounts awarded for distress and inconvenience should be restrained and modest, in accordance with the general law in England and Wales and Scotland. Only in exceptional circumstances would these exceed £1,000, and in most cases, a nominal award, or an amount below £1,000 would be appropriate.” Department for Business Innovation and Skills (n 145). [↑](#footnote-ref-1466)
1467. ibid 14. [↑](#footnote-ref-1467)
1468. Consumer Protection from Unfair Trading Regulations 2008 Regulation 17(1)(a). [↑](#footnote-ref-1468)
1469. ibid Regulation 17(1)(b). [↑](#footnote-ref-1469)
1470. Unfair Commercial Practices Directive 2005/29/EC Article 11(1). [↑](#footnote-ref-1470)
1471. For example, the Consumers Association, owner of ‘Which?’ was founded in 1957. [↑](#footnote-ref-1471)
1472. Enterprise Act 2002. [↑](#footnote-ref-1472)
1473. For a recent example of a ‘super complaint’ in relation to higher prices being charged to existing as opposed to new customers in utilities contracts see: ‘“Loyalty Penalty” Super-Complaint’ (*Gov.uk*, 2018) <https://www.gov.uk/cma-cases/loyalty-penalty-super-complaint>. [↑](#footnote-ref-1473)
1474. Gabriel and Lang (n 22) 194. [↑](#footnote-ref-1474)
1475. Business and Human Rights Resource Centre, ‘Lidl Lawsuit (Re: Working Conditions in Bangladesh)’ (2014) <https://www.business-humanrights.org/en/lidl-lawsuit-re-working-conditions-in-Bangladesh> accessed 20 May 2018. [↑](#footnote-ref-1475)
1476. It was alleged that working conditions within Bangladeshi textile plants within Lidl’s supply chain did not comply with labour standards as set out by the ILO and BSCI code of conduct.  It was also alleged that companies in Lidl’s supply chain had violated labour laws, including discrimination based on sex and restrictions being placed on the rights to freedom of association and collective bargaining.  It was claimed that the Bangladeshi employees worked excessive overtime with no extra overtime pay and were not entitled to a day off after six consecutive working days. It was also alleged that workers were subjected to harassment and payroll deductions taken as punitive measures. [↑](#footnote-ref-1476)
1477. A consent decree refers to a court order in which a person or company agrees to take specific actions as part of a settlement of a lawsuit without admitting guilt or fault. [↑](#footnote-ref-1477)
1478. Sherpa, ‘Samsung: Sherpa and ActionAid France File a Second Lawsuit Following the Closing of the Case by the Public Prosecutor’ (2018) <https://www.asso-sherpa.org/samsung-sherpa-and-actionaid-france-file-a-second-lawsuit-following-the-closing-of-the-case-by-the-public-prosecutor> accessed 27 June 2018. [↑](#footnote-ref-1478)
1479. European Coalition for Corporate Justice, ‘Sherpa and Action Aid Continue Actions against Samsung for Misleading Information over Working Conditions’ (2018) <http://corporatejustice.org/news/6599-sherpa-and-action-aid-continue-actions-against-samsung-for-misleading-information-over-working-conditions> accessed 27 June 2018. [↑](#footnote-ref-1479)
1480. Business and Human Rights Resource Centre, ‘Samsung Lawsuit (Re Misleading Advertising & Labour Rights Abuses)’ (2019) <https://www.business-humanrights.org/en/samsung-lawsuit-re-misleading-advertising-labour-rights-abuses> accessed 7 February 2019. [↑](#footnote-ref-1480)
1481. M Carrington, D Zwick and B Neville, ‘The Ideology of the Ethical Consumption Gap’ (2015) Published Marketing Theory 1. [↑](#footnote-ref-1481)
1482. No consideration was given to the matter within the recent green paper on Modernising Consumer Markets Department for Business Innovation and Skills, ‘Modernising Consumer Markets, Consumer Green Paper, April 2018’. [↑](#footnote-ref-1482)
1483. The Core Coalition, ‘Register of Slavery & Human Trafficking Corporate Statements Released to Date to Comply with UK Modern Slavery Act’ <http://business-humanrights.org/sites/default/files/documents/CORE BHRRC Analysis of Modern Slavery Statements FINAL\_March2016.pdf>; Ergon Associates, ‘Reporting on Modern Slavery: The Current State of Disclosure’ (2016). [↑](#footnote-ref-1483)
1484. M Crotty, *The Foundations of Social Research: Meaning and Perspective in the Research Process* (Sage 1998) 42. [↑](#footnote-ref-1484)
1485. D Burr, *Social Constructionism* (2nd edn, Routledge 2003) 4. [↑](#footnote-ref-1485)
1486. A Bryman, *Social Research Methods* (4th edn, OUP 2012) 33. [↑](#footnote-ref-1486)
1487. J Marecek, M Crawford and D Popp, ‘On the Construction of Gender, Sex, and Sexualities’ in A Eagly, A Beall and R Sternberg (eds), *The Psychology of Gender* (2nd edn, Guilford Press 2004). [↑](#footnote-ref-1487)
1488. K Gergen, ‘Social Psychology as Social Construction: The Emerging Vision’ in K McGarty and A Haslam (eds), *The Message of Social Psychology: Perspectives on Mind in Society* (Wiley 1996). [↑](#footnote-ref-1488)
1489. Marecek, Crawford and Popp (n 5). [↑](#footnote-ref-1489)
1490. D Cohen and B Crabtree, ‘The Interpretivist Paradigm’ (2006) <http://www.qualres.org/HomeInte-3516.html> accessed 15 December 2017. [↑](#footnote-ref-1490)
1491. N Denzin and Y Lincoln, *The SAGE Handbook of Qualitative Research* (3rd edn, Sage 2005) 3. [↑](#footnote-ref-1491)
1492. J Mason, *Qulitative Researching* (2nd edn, Sage 2002) 56. [↑](#footnote-ref-1492)
1493. N Forster, ‘The Analysis of Company Documentation’ in C Cassell and G Symon (eds), *Qualitative Methods in Organizational Research* (Sage 1994). [↑](#footnote-ref-1493)
1494. R Baumeister and D Hutton, ‘Self-Presentation Theory: Self-Construction and Audience Pleasing’ in B Mullen and G Goethals (eds), *Theories of Group Behavior* (Springer 1987). [↑](#footnote-ref-1494)
1495. P Burnard, ‘Interpreting Text: An Alternative to Some Current Forms of Textual Analysis in Qualitative Research’ (1995) 1 Social Sciences in Health 236. [↑](#footnote-ref-1495)
1496. E Goffman, *The Presentation of Self in Everyday Life* (Penguin 1971). [↑](#footnote-ref-1496)
1497. R Harré and others, ‘Recent Advances in Positioning Theory’ (2009) 19 Theory and Psychology 5, 6. [↑](#footnote-ref-1497)
1498. F Moghaddam and R Harré, ‘Words, Conflicts and Political Processes’ in F Moghaddam and R Harré (eds), *Words of Conflict, Words of War: How the language we use in political processes sparks fighting* (2010) 2. [↑](#footnote-ref-1498)
1499. L van Langenhove and R Harré, ‘Introducing Positioning Theory’, *Positioning Theory* (Blackwell 1999) 25. [↑](#footnote-ref-1499)
1500. ibid. [↑](#footnote-ref-1500)
1501. The theory has been used, for example, in relation to teachers. See: C Redman, ‘Planning Professional Development: Meeting the Needs of Teacher Participants’ in S Rodrigues (ed), *International Models of Teacher Professional Development in Science Education: Changes influenced by politics, pedagogy and innovation* (Nova Science Publishers 2005). [↑](#footnote-ref-1501)
1502. See for example in relation to public relations: M James, ‘Situating a New Voice in Public Relations: The Application of Positioning Theory to Research and Practice’ (2015) 154 Media International Australia, Incorporating Culture & Policy 34. [↑](#footnote-ref-1502)
1503. Harré and others (n 15). [↑](#footnote-ref-1503)
1504. The Home Office as cited in: National Audit Office (NAO), ‘Reducing Modern Slavery (HC 630)’ (2017) 26 <https://www.nao.org.uk/wp-content/uploads/2017/12/Reducing-Modern-Slavery.pdf>. [↑](#footnote-ref-1504)
1505. There have been calls for a list of applicable companies to be implemented. See: Joint Committee on Human Rights, ‘Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability. Sixth Report of Session 2016–17’ 39. [↑](#footnote-ref-1505)
1506. Business and Human Rights Resource Centre, ‘Modern Slavery Act Statement Registry’ (2016) <https://business-humanrights.org/en/uk-modern-slavery-act-registry> accessed 12 November 2016. [↑](#footnote-ref-1506)
1507. See for example: The Business and Human Rights Resource Centre “has won a big following among companies, governments, investors, non-government organizations and journalists.” In: A Maitland, ‘A Fair Approach to Human Rights’ *The Financial Times (online)* (London, 19 June 2008) <https://www.ft.com/content/36cca41c-3e10-11dd-b16d-0000779fd2ac>. [↑](#footnote-ref-1507)
1508. The Registry is guided and supported by a governance committee which includes the following civil society organisations: Freedom Fund, Humanity United, Freedom United, Anti-Slavery International, the Ethical Trading Initiative, CORE Coalition, UNICEF UK, Focus on Labour Exploitation (FLEX), Trades Union Congress and Oxfam GB.  [↑](#footnote-ref-1508)
1509. In some instances, statements incorporated multiple companies within a corporate group whereas in other cases separate statements existed for one or more subsidiaries. These separate subsidiary statements were retained in the set where they differed but were removed where they were duplicated. In three instances, the repository included entries for statements but no statement was available on the company’s website at the time of the analysis. As such these entries were ignored. [↑](#footnote-ref-1509)
1510. N Fielding and R Lee, *Computer Analysis and Qualitative Research* (Sage 1998). [↑](#footnote-ref-1510)
1511. F Kaefer, J Roper and P Sinha, ‘A Software-Assisted Qualitative Content Analysis of News Articles: Example and Reflections’ (2015) 16 Forum Qualitative Sozialforschung / Forum: Qualitative Social Research Art. 8 <http://www.qualitative-research.net/index.php/fqs/article/view/2123/3815>. [↑](#footnote-ref-1511)
1512. R Neumann and K Coe, ‘Using a Mixed Approach to Content Analysis’ in A Valdivia (ed), *The International Encyclopedia of Media Studies Vol . VII* (Wiley-Blackwell 2012). [↑](#footnote-ref-1512)
1513. C Robins and K Eisen, ‘Strategies for the Effective Use of NVivo in a Large-Scale Study: Qualitative Analysis and the Repeal of Don’t Ask, Don’t Tell’ (2017) 23 Qualitative Inquiry 768. [↑](#footnote-ref-1513)
1514. See also: M Roller and P Lavrakas, *Applied Qualitative Research Design: A Total Quality Framework* (Guilford Press 2015) 252. [↑](#footnote-ref-1514)
1515. R Yin, *Case Study Research: Design and Methods* (5th edn, Sage 2014) 205. [↑](#footnote-ref-1515)
1516. Bryman (n 4) 305. [↑](#footnote-ref-1516)
1517. B Berg, *Qualitative Research Methods* (5th edn, Pearson 2004) 269. [↑](#footnote-ref-1517)
1518. Forster (n 11) 151–152. [↑](#footnote-ref-1518)
1519. B Berelson, *Content Analysis in Communication Research* (Free Press 1952) 18. [↑](#footnote-ref-1519)
1520. D Silverman, *Interpreting Qualitative Data* (Sage 1993) 59. [↑](#footnote-ref-1520)
1521. M Abrahamson, *Social Research Methods* (Prentice-Hall 1983) 286. [↑](#footnote-ref-1521)
1522. Berg (n 35) 268. [↑](#footnote-ref-1522)
1523. Bryman (n 4) 297. [↑](#footnote-ref-1523)
1524. Berg (n 35) 285. [↑](#footnote-ref-1524)
1525. In reality there is some movement ‘to and fro’ between the phases thus the coding process might better be described as a movement between the two stages in a process whereby grounded categories are being identified, subdivided or revised in relation to the data itself. [↑](#footnote-ref-1525)
1526. Berg (n 35) 281. [↑](#footnote-ref-1526)
1527. A Strauss, *Qualitative Analysis for Social Scientists* (Cambridge University Press 1987) 32. [↑](#footnote-ref-1527)
1528. Berg (n 35) 279. [↑](#footnote-ref-1528)
1529. Abrahamson (n 39) 286. [↑](#footnote-ref-1529)
1530. C Silver and A Lewins, *Using Software in Qualitative Research: A Step-by-Step Guide* (2nd edn, Sage 2014) 163–164. [↑](#footnote-ref-1530)
1531. I Dey, *Qualitative Data Analysis: A User-Friendly Guide for Social Scientists* (Routledge 1993). [↑](#footnote-ref-1531)
1532. S54(5) of the Modern Slavery Act 2015 provides that: An organisation’s slavery and human trafficking statement may include information about— (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. [↑](#footnote-ref-1532)
1533. The Statutory Guidance is published in line with Modern Slavery Act 2015 Section 54(9). See: The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2015)’ <https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/471996/Transparency\_in\_Supply\_Chains\_etc\_\_A\_practical\_guide\_\_final\_.pdf>. [↑](#footnote-ref-1533)
1534. ibid Annex F: Useful Information and Resources. [↑](#footnote-ref-1534)
1535. ibid 32. [↑](#footnote-ref-1535)
1536. Organisation for Economic Cooperation and Development, ‘OECD Guidelines for Multinational Enterprises’ <http://www.oecd.org/daf/inv/mne/48004323.pdf>. [↑](#footnote-ref-1536)
1537. Ethical Trading Initiative, ‘ETI Base Code Guidance: Modern Slavery’ <https://www.ethicaltrade.org/resources/base-code-guidance-modern-slavery>. [↑](#footnote-ref-1537)
1538. Verité, ‘Fair Hiring Toolkit: Help Wanted. Hiring, Human Trafficking, and Modern-Day Slavery’ <http://helpwanted.verite.org/helpwanted/toolkit>. [↑](#footnote-ref-1538)
1539. The Walk Free Foundation, ‘Tackling Modern Slavery in Supply Chains: A Guide 1.0’ <https://business.walkfreefoundation.org/>. [↑](#footnote-ref-1539)
1540. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2015)’ (n 51) 17. [↑](#footnote-ref-1540)
1541. ibid 9. [↑](#footnote-ref-1541)
1542. Strauss (n 45) 28. [↑](#footnote-ref-1542)
1543. The statutory guidance states: “The direction and focus of particular performance incentives (such as that Sourcing Directors should buy the lowest cost products which can be shipped in the fastest time) may influence and create a modern slavery risk if not managed carefully. This should be considered when improving internal management performance indicators and should be linked to the organisation’s risk assessment. Focusing on KPIs to increase production or shipment “turn-around” time speed, for example, may unintentionally increase pressure on those who are producing the goods on production lines. This could create environments where modern slavery (particularly in the shape of bonded labour) may become a way a supplier or production site tries to deal with unrealistic short time pressure and related expectations on their operations or supplying partnership.” The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2015)’ (n 51) 36. [↑](#footnote-ref-1543)
1544. P Bohdanowicz and P Zientara, ‘Corporate Social Responsibility: Issues and Implications: A Case Study of Scandic’ (2008) 8 Scandinavian Journal of Hospitality & Tourism 271; M Porter and M Kramer, ‘Strategy & Society: The Link between Competitive Advantage and Corporate Social Responsibility’ (2006) 84 Harvard Business Review 78. [↑](#footnote-ref-1544)
1545. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2015)’ (n 51) 13. [↑](#footnote-ref-1545)
1546. ibid 11 at paras 5.1 and 5.2. [↑](#footnote-ref-1546)
1547. The Home Office, ‘Modern Slavery and Supply Chains Government Response: Summary of Consultation Responses and next Steps’ para 5.1. [↑](#footnote-ref-1547)
1548. ibid 11. [↑](#footnote-ref-1548)
1549. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2015)’ (n 51) 28. [↑](#footnote-ref-1549)
1550. ibid 30. [↑](#footnote-ref-1550)
1551. Ethical Trading Initiative (n 55) 39. [↑](#footnote-ref-1551)
1552. Ethical Trading Initiative (n 55); Verité (n 56); The Walk Free Foundation (n 57). [↑](#footnote-ref-1552)
1553. Ethical Trading Initiative (n 55) 39. [↑](#footnote-ref-1553)
1554. ibid; The Walk Free Foundation (n 57) 20. [↑](#footnote-ref-1554)
1555. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2015)’ (n 51) 34. [↑](#footnote-ref-1555)
1556. Organisation for Economic Cooperation and Development (n 54) 24. [↑](#footnote-ref-1556)
1557. The Walk Free Foundation (n 57) 18. [↑](#footnote-ref-1557)
1558. ibid 19. [↑](#footnote-ref-1558)
1559. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2015)’ (n 51) 33. [↑](#footnote-ref-1559)
1560. ibid. Also see: Ethical Trading Initiative (n 55) 27. [↑](#footnote-ref-1560)
1561. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2015)’ (n 51) 31. [↑](#footnote-ref-1561)
1562. The Walk Free Foundation (n 57) 29. [↑](#footnote-ref-1562)
1563. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2015)’ (n 51) 33. [↑](#footnote-ref-1563)
1564. ibid. [↑](#footnote-ref-1564)
1565. ibid 30. [↑](#footnote-ref-1565)
1566. On this point the statutory guidance references an ITP study. See: ibid 10. [↑](#footnote-ref-1566)
1567. ibid 17. [↑](#footnote-ref-1567)
1568. The Walk Free Foundation (n 57) 39. [↑](#footnote-ref-1568)
1569. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2015)’ (n 51) 27. [↑](#footnote-ref-1569)
1570. Ethical Trading Initiative (n 55) 22. [↑](#footnote-ref-1570)
1571. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2015)’ (n 51) 16. [↑](#footnote-ref-1571)
1572. It is acknowledged that trade unions are involved in certain MSIs such as the ETI. [↑](#footnote-ref-1572)
1573. The Trades Union Congress (TUC) and Ethical Trading Initiative (ETI) have since called for this to be required of suppliers. See: Joint Committee on Human Rights (n 23) 47. [↑](#footnote-ref-1573)
1574. Ethical Trading Initiative (n 55) 3; Verité (n 56) 18. [↑](#footnote-ref-1574)
1575. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2015)’ (n 51) 32. [↑](#footnote-ref-1575)
1576. ibid 29. [↑](#footnote-ref-1576)
1577. Verité (n 56) 38. [↑](#footnote-ref-1577)
1578. ibid. [↑](#footnote-ref-1578)
1579. Section 54(5)(e) of the Modern Slavery Act 2015 states that effectiveness may be measured against such performance indicators as the disclosing organisation considers appropriate. [↑](#footnote-ref-1579)
1580. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2015)’ (n 51) 36. [↑](#footnote-ref-1580)
1581. ibid. [↑](#footnote-ref-1581)
1582. ibid 3. [↑](#footnote-ref-1582)
1583. ibid. [↑](#footnote-ref-1583)
1584. See for example: P Bloomer, ‘New Human Rights Ranking Shows Most Firms Have Barely Left the Starting Line’ (*Ethical Corp*, 2018) <http://ethicalcorp.com/new-human-rights-ranking-shows-most-firms-have-barely-left-starting-line> accessed 15 November 2018. [↑](#footnote-ref-1584)
1585. Although the CTSCA does not require an of effectiveness, restricts disclosure to the first tier of suppliers, and requires a single statement rather than an annual report, the Californian Act has stricter reporting requirements than the MSA as regards both the categories of disclosure, and in relation to the independence of audits and whether such audits are announced or unannounced. This is considered in more detail within chapter 5. [↑](#footnote-ref-1585)
1586. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2015)’ (n 51) 9. [↑](#footnote-ref-1586)
1587. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2017)’ 2. [↑](#footnote-ref-1587)
1588. Guidance associated with the CTSCA was eventually published five years after its enactment, and over three years after it came into effect. See: Attorney General California Department of Justice, ‘The California Transparency in Supply Chains Act: A Resource Guide’. [↑](#footnote-ref-1588)
1589. Joint Committee on Human Rights (n 23) 6. [↑](#footnote-ref-1589)
1590. The Home Office, ‘Transparency in Supply Chains Etc. A Practical Guide (2017)’ (n 105) 2. [↑](#footnote-ref-1590)
1591. Business and Human Rights Resource Centre, ‘First Year of FTSE100 Reports under the UK Modern Slavery Act: Towards Elimination?’ (2017) <https://www.business-humanrights.org/sites/default/files/FTSE 100 Report FINAL %28002%291Dec2017.pdf>. [↑](#footnote-ref-1591)
1592. Joint Committee on Human Rights (n 23). [↑](#footnote-ref-1592)
1593. M Finnemore and K Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 International Organisation 887. [↑](#footnote-ref-1593)
1594. Joint Committee on Human Rights, ‘Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability. Sixth Report of Session 2016–17’ 59. [↑](#footnote-ref-1594)
1595. Such proposals may be seen in Switzerland, Germany, Norway, Sweden, Spain, Italy, and Luxembourg. As reported in: W Meade, ‘Recent Decisions in the UK on Parent Company Liability Cases Show the Need for Law Reform’ (*Business and Human Rights Resource Centre*, 2018). [↑](#footnote-ref-1595)
1596. As of December 2017 it was estimated that the law is applicable to an estimated 150 firms. As reported in: J Moyo, ‘France Adopts New Corporate “Duty of Care” Law’ (*Ethical Trading Initiative*, 2017) <https://www.ethicaltrade.org/blog/france-adopts-new-corporate-duty-care-law> accessed 10 December 2017. [↑](#footnote-ref-1596)
1597. Although the term ‘vigilance’ is used it appears that this is understood to correspond to the notion of due diligence more commonly used elsewhere as it was stated within the Parliamentary debates that the French law attempts to “implement the legal principle of due diligence, recommended by the UN Guiding Principles [on Business and Human Rights].” See: ‘Assemblée Nationale XIVe Législature Session Ordinaire de 2014-2015’ <http://www.assemblee-nationale.fr/14/cri/2014-2015/20150193.asp>. [↑](#footnote-ref-1597)
1598. French Law No. 2017-399 of March 27, 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre. An English translation of the Act is available at: European Coalition of Corporate Justice, ‘The French Duty of Vigilance Law - Frequently Asked Questions’ <http://corporatejustice.org/news/405-french-corporate-duty-of-vigilance-law-frequently-asked-questions>. [↑](#footnote-ref-1598)
1599. This appears at odds with their apparent exclusion by those UK companies disclosing under the MSA 2015 as observed within chapter 8. [↑](#footnote-ref-1599)
1600. The study of modern slavery statements in chapter 8 found that disclosure on the monitoring and evaluation of due diligence processes was significantly under-reported by UK companies. [↑](#footnote-ref-1600)
1601. French Commercial Code C. com. art. L. 225-102-4, I. [↑](#footnote-ref-1601)
1602. Article 31 of the Code of Civil Procedure provides that law suit is admissible only if the plaintiff has standing and an interest to act. A claimant has to justify an "interest conferring locus standi", which is direct, certain, and current (CE, 21 Décembre, 1906, Union des propriétaires et des contribuables du district de la Croix - Seguey - Tivoli, Recueil Lebon, page 962 - CE, December 21, 1906, Union of owners and taxpayers of the district of Cross-Seguey - Tivoli, Recueil Lebon page 962). A number of criteria are relevant for a CSO to be recognised under the law including that it be in existence for a minimum of three years. It is also significant to note that to be deemed as an interested party, the legal objective of the NGO must fit with the issue before the courts. For further information see: Umvelt Bundesampt, ‘The Legal Debate on Access to Justice for Environmental NGOs’ (2017) 39–41 <https://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/UBA\_Legal\_debate\_A2J\_for\_\_EnvNGOs\_EN\_Summary.pdf>. [↑](#footnote-ref-1602)
1603. Power imbalance may form a justification for regulatory intervention - S Breyer, ‘Typical Justifications for Regulation’ in R Baldwin, C Scott and C Hood (eds), *A reader on Regulation* (Oxford University Press 1998). [↑](#footnote-ref-1603)
1604. As reported in: S Cossart, J Chaplier and T Beau De Lomenie, ‘The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All’ (2017) 2 Business and Human Rights Journal 317. [↑](#footnote-ref-1604)
1605. For further discussion see: S Brabant, C Michon and E Savourey, ‘The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance’ [2017] Revue Internationale de la Compliance et de L’Éthique des Affaires: Supplément à la Semaine Juridique Enterprise et Affaires No 50 du Jeudi 14 Décembre 2017 <http://www.bhrinlaw.org/frenchcorporatedutylaw\_articles.pdf>. [↑](#footnote-ref-1605)
1606. European Commission, ‘A Renewed EU Strategy 2011-14 for Corporate Social Responsibility’. [↑](#footnote-ref-1606)
1607. See for example: European Commission, ‘Promoting a European Framework for Corporate Social Responsibility’ (2001). [↑](#footnote-ref-1607)
1608. An established commercial relationship has previously been defined under the French Commercial Code as a stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last. See: French Commercial Code C. com. art L. 442-6-I-5., and Cour de cassation, Chambre Commerciale, 18 December 2007. [↑](#footnote-ref-1608)
1609. Most civil law systems allocate costs to the losing party on the basis of a tariff system based on the amount in dispute providing a high level of predictability for the parties involved. The French system, however, does not. For further detail and a comparative analysis of the costs and funding of civil litigation see: C Hodges, S Vogenauer and M Tulibacka, ‘Costs and Funding of Civil Litigation: A Comparative Study’ (2009) Paper No 55/2009. [↑](#footnote-ref-1609)
1610. AN, report no. 2628, p. 30 [↑](#footnote-ref-1610)
1611. A Evans, ‘Hope for Reform: Strengthening Corporate Accountability in Global Supply Chains’, *ECPR: Regulation and Governance* (2018). [↑](#footnote-ref-1611)
1612. Senat, ‘Séance Du 1er Février 2017 (Compte Rendu Intégral Des Débats)’ <https://www.senat.fr/seances/s201702/s20170201/s20170201005.html>. [↑](#footnote-ref-1612)
1613. For a detailed consideration of the obstacles the French Bill faced see: Evans (n 19). [↑](#footnote-ref-1613)
1614. G LeBaron and A Rühmkorf, ‘The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK Modern Slavery Act’ (2017) 0 Socio-Economic Review 1. [↑](#footnote-ref-1614)
1615. Evans (n 19). [↑](#footnote-ref-1615)
1616. ibid. [↑](#footnote-ref-1616)
1617. M Renault, ‘Comment Les Députés PS Veulent Obliger Les Entreprises à plus de Responsabilité’ *Le Figaro* (Paris, 25 March 2016) <http://www.lefigaro.fr/societes/2016/03/25/20005- 20160325ARTFIG00009-comment-les-deputes-ps-veulent-obliger-les-entreprises-a-plus-deresponsabilite.php?redirect\_premium>. [↑](#footnote-ref-1617)
1618. As reported in: Cossart, Chaplier and Beau De Lomenie (n 12). [↑](#footnote-ref-1618)
1619. S Brabant and E Savourey, ‘France’s Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies’ <https://business-humanrights.org/sites/default/files/documents/French Corporate Duty of Vigilance Law - Penalties - Int%2527l Rev.Compl\_. %26 Bus. Ethics\_.pdf>. [↑](#footnote-ref-1619)
1620. For further consideration see: A Triponel and J Sherman, ‘Legislating Human Rights Due Diligence: Opportunities and Potential Pitfalls to the French Duty of Vigilance Law’ (*International Bar Association*, 2017) <https://www.ibanet.org/Article/Detail.aspx?ArticleUid=E9DD87DE-CFE2-4A5D-9CCC-8240EDB67DE3> accessed 3 January 2018. [↑](#footnote-ref-1620)
1621. Finnemore and Sikkink (n 1). [↑](#footnote-ref-1621)
1622. Evans suggests this is unsurprising given the country’s history of State intervention relative to its economic counterparts. Evans (n 19). [↑](#footnote-ref-1622)
1623. Such proposals may be seen in Switzerland, Germany, Norway, Sweden, Spain, Italy, and Luxembourg. As reported in: Meade (n 3). [↑](#footnote-ref-1623)
1624. For more information on the Swiss system of direct democracy see: A Trechsel and H Kriesi, ‘Switzerland: The Referendum and Initiative as a Centrepiece of the Political System’ in M Gallagher and P Uleri (eds), *The Referendum Experience in Europe* (Palgrave Macmillan 1996). [↑](#footnote-ref-1624)
1625. In terms of size, the counter proposal deems applicable companies as those exceeding two of three thresholds: a.) A balance sheet total of 40 million CHF/ USD b.) A turnover of 80 million CHF/ USD, c.) 500 full-time employees. [↑](#footnote-ref-1625)
1626. The proposed law relates to companies whose registered office, central administration, or principal place of business is in Switzerland. [↑](#footnote-ref-1626)
1627. Both the consent of a majority of the people and the majority of the Swiss cantons is required to amend the country’s constitution by popular initiative. According to Lucchi, since the system was introduced in 1891, over two hundred popular initiatives have been voted, with only 22 being accepted. Moreover, over 63% of Swiss voters rejected a recent green initiative calling for governmental intervention to ensure the sustainable use of natural resources by 2050. See: M Lucchi, ‘This Is How Switzerland’s Direct Democracy Works’ (*World Economic Forum*, 2017) <https://www.weforum.org/agenda/2017/07/switzerland-direct-democracy-explained/> accessed 15 January 2018; D Bechtel, ‘Green Initiative Will Not Leave Footprint on Economy’ (*Swissinfo*, 2016) <https://www.swissinfo.ch/eng/september-25-vote\_footprint-of-green-initiative-on-swiss-economy-/42465734> accessed 15 January 2018. [↑](#footnote-ref-1627)
1628. As reported in: Vigeo Eiris, ‘The Swiss Federal Council Rejects a Responsible Business Initiative Equivalent to the French “Due Diligence” Law Adopted in March 2017’ (2017) <http://www.vigeo-eiris.com/swiss-federal-council-rejects-responsible-business-initiative-equivalent-french-due-diligence-law-adopted-march-2017/> accessed 10 December 2017. [↑](#footnote-ref-1628)
1629. For a comparison of the Swiss Responsible Business Initiative as originally drafted and the revised version put forward by the Swiss National Council see: Swiss Coalition for Corporate Justice, ‘How Does the Parliamentary Counter-Proposal Differ from the Popular Initiative (RBI)?’ <https://corporatejustice.ch/wp-content/uploads/2018/07/Comparision\_RBI\_counter-proposal\_EN-1.pdf> accessed 20 December 2018. [↑](#footnote-ref-1629)
1630. All five of the key international instruments examined in chapter 4 include the supply chain within their expectations of CSP. [↑](#footnote-ref-1630)
1631. As reported in: S Bradley, ‘Swiss Firms Lack “Unified Approach” on Business and Human Rights’ (*swissinfo.ch*, 2018) <https://www.swissinfo.ch/eng/responsible-business\_swiss-firms-lack--unified-approach--on-business-and-human-rights/44192012> accessed 26 December 2018. [↑](#footnote-ref-1631)
1632. MVO Platform, ‘Dutch Government Puts Trade Objectives above Responsible Business Conduct Policies’ (2018) <https://www.mvoplatform.nl/en/dutch-government-puts-trade-objectives-above-responsible-business-conduct-policies/> accessed 27 July 2018. [↑](#footnote-ref-1632)
1633. Eerste Kamer, vergaderjaar 2016–2017, 34 506, A (Wet zorgplicht kinderarbeid). [↑](#footnote-ref-1633)
1634. The law was adopted with by 39 votes to 36. For further detail see: MVO Platform, ‘Frequently Asked Questions about the New Dutch Child Labour Due Diligence Law’ (2019) <https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/> accessed 21 June 2019. [↑](#footnote-ref-1634)
1635. The meaning of child labour in the Bill is based upon the definitions used in: ILO Convention No. 138 on the minimum age for admission to employment and work; ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. [↑](#footnote-ref-1635)
1636. The fine is currently drafted as being 4100 Euros. See: MVO Platform (n 42). [↑](#footnote-ref-1636)
1637. According to a prominent CSO observer, this is likely to be the Dutch Consumer and Market Authority (ACM). See: ibid. [↑](#footnote-ref-1637)
1638. See: ibid. [↑](#footnote-ref-1638)
1639. Subject to the requirement for any complaint to be first submitted to the company itself. If the company’s reaction is deemed ‘inadequate’ by the complainant, it may then be escalated to the regulatory authority. [↑](#footnote-ref-1639)
1640. If the regulatory authorities determine that the company has not conducted due diligence in accordance with the legislation, the company is provided with legally-binding instructions and a time frame for their execution. If the company does not comply with either, a fine may be imposed. If a company is fined twice within five years, any further violation may lead to the imprisonment of the responsible director. At its most extreme, failing to follow the law can lead to both imprisonment and fines of € 750,000 or 10% of the company’s annual turnover. [↑](#footnote-ref-1640)
1641. Detailed rules for both the investigation and plan of action would be determined by secondary legislation. The ILO suggest that this could include reference to the use of the ILO Child Labour Guidance Tool for Business. See: International Labour Organization (ILO), ‘How to Do Business with Respect for Childrens Right to Be Free from Child Labour: ILO-IOE Child Labour Guidance Tool for Business’ <http://www.ilo.org/ipec/Informationresources/WCMS\_IPEC\_PUB\_27555/lang--en/index.htm>. [↑](#footnote-ref-1641)
1642. A Marcelis, ‘Dutch Take the Lead on Child Labour with New Due Diligence Law’ (*Ergon Associates*, 2019) <https://ergonassociates.net/dutch-take-the-lead-on-child-labour-with-new-due-diligence-law/> accessed 21 June 2019. [↑](#footnote-ref-1642)
1643. This would be achieved through the use of a General Administrative Order or GAO. Although GAOs are an executive responsibility of the government, for this particular law they would have to be approved by both Chambers of the Dutch Parliament. MVO Platform (n 42). [↑](#footnote-ref-1643)
1644. See also the German proposal at: Amnesty International and others, ‘Legislative Proposal: Corporate Responsibility and Human Rights. Legal Text and Questions and Answers on the Human Rights Due Diligence Act Proposed by German NGOs’ <https://germanwatch.org/de/download/18575.pdf>. [↑](#footnote-ref-1644)
1645. Indeed, it should therefore come as no surprise that the differences in the above models have led to calls for the creation of a duty at the EU level. See: J van Seters and K Karaki, ‘EU Leadership to Promote Responsible Business Conduct in Global Value Chains’ (2018) 7 *Great Insights* 37 <https://ecdpm.org/great-insights/leveraging-private-investment-for-sustainable-development/>. [↑](#footnote-ref-1645)
1646. It is also evident that a more restrictive approach has been taken towards standing in the realms of public law for public interest litigation. See: H Samuels, ‘Public Interest Litigation and the Civil Society Factor’ (2018) 38 Legal Studies 515. [↑](#footnote-ref-1646)
1647. For example, see: *Lungowe v Vedanta Resources plc [2019] UKSC 20*. [↑](#footnote-ref-1647)
1648. Hodges, Vogenauer and Tulibacka (n 17). [↑](#footnote-ref-1648)
1649. Joint Committee on Human Rights, ‘Enforcing Human Rights: Tenth Report of Session 2017–19’ (2018) paras 27–30 <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/669.pdf>. The reduction of legal aid has been particularly pronounced since the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Indeed, the extent of those cuts made as part of the UK’s austerity drive under the coalition government led the then Lord Chief Justice, Lord Thomas of Cwmgiedd to report to Parliament that “our justice system has become unaffordable to most. See: Judiciary of England and Wales, ‘The Lord Chief Justice’s Report 2015’ (2016). [↑](#footnote-ref-1649)
1650. Bribery Act 2010. [↑](#footnote-ref-1650)
1651. The offences of s failure to prevent UK and overseas tax evasion are created by Sections 45 and 46 of the Criminal Finances Act 2017. [↑](#footnote-ref-1651)
1652. An ‘associated person’ is broadly defined as a person who performs services for the company as determined by reference to all the relevant circumstances and not merely the employment, parent-subsidiary, or agency relationship between them. Bribery Act 2010 Section 8(4); Criminal Finances Act 2017 Section 44(5). [↑](#footnote-ref-1652)
1653. Bribery Act 2010 Section 7(2). [↑](#footnote-ref-1653)
1654. Criminal Finances Act 2017 Section 45(2). [↑](#footnote-ref-1654)
1655. Walker Morris, ‘Bribery Act Starts to Bite: Deferred Prosecution Agreements’ (*Walker Morris Publications*, 2015) <https://www.walkermorris.co.uk/publications/bribery-act-starts-to-bite-deferred-prosecution-agreements/> accessed 29 March 2018. [↑](#footnote-ref-1655)
1656. The first corporate conviction was secured in 2016 which resulted in a fine of £2.25m. In this case, Sweett Group PLC, a construction and professional services company, was convicted of failing to prevent its subsidiary, as an ‘associated person’, from paying bribes on its behalf in an attempt to secure a contract in the United Arab Emirates. See: Serious Fraud Office (SFO), ‘Sweett Group PLC Sentenced and Ordered to Pay £2.25 Million after Bribery Act Conviction’ <https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/>. [↑](#footnote-ref-1656)
1657. The first DPA was drawn up in 2015 between the Serious Fraud Office (SFO), as the prosecuting agency, and Standard Bank Plc (now known as ICBC Standard Bank Plc.) with the agreement requiring the Bank pay financial orders of $25.2m and a further $7m in compensation. For more details see: Serious Fraud Office (SFO), ‘SFO Agrees First UK DPA with Standard Bank’ <https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>. [↑](#footnote-ref-1657)
1658. G LeBaron and A Rühmkorf, ‘Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance’ (2017) 8 Global Policy 15, 25. [↑](#footnote-ref-1658)
1659. LeBaron and Rühmkorf suggest that the disclosure-based approach of the MSA has not appeared to have significantly changed company practices. LeBaron and Rühmkorf (n 66). This finding is broadly echoed by the largescale empirical study documented in chapter 8. [↑](#footnote-ref-1659)
1660. Prosecutions under the Bribery Act require the consent of one of the three prosecuting bodies: The Director of Public Prosecutions, the Director of the Serious Fraud Office or the Director of Revenue and Customs Prosecutions. The decision to prosecute must be taken in line with the Prosecution Guidance which stipulates that there should be a realistic prospect of success and that a prosecution must be in the general public interest. See: Criminal Prosecution Service (CPS), ‘Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions’ <http://www.cps.gov.uk/legal/a\_to\_c/bribery\_act\_2010/index.html>. [↑](#footnote-ref-1660)
1661. For example, Prime Minister Teresa May wrote an article for the Sunday Telegraph on how her government will lead the way in defeating modern slavery. See: T May, ‘My Government Will Lead the Way in Defeating Modern Slavery’ *The Telegraph (online)* (London, 30 July 2016) <https://www.telegraph.co.uk/news/2016/07/30/we-will-lead-the-way-in-defeating-modern-slavery/> accessed 2 March 2019. [↑](#footnote-ref-1661)
1662. Joint Committee on Human Rights (n 2) 6. [↑](#footnote-ref-1662)
1663. See Kevin Hyland (former Anti-Slavery Commissioner) in: Home Affairs Committee, ‘Home Affairs Committee Oral Evidence: Modern Slavery, HC 1460’ (2018). [↑](#footnote-ref-1663)
1664. In October 2018 it was reported that as many as a quarter of the top 100 suppliers to the UK governments do not comply with the disclosure requirements of the MSA 2015. ibid Question 48. [↑](#footnote-ref-1664)
1665. See Kevin Hyland (former Anti-Slavery Commissioner) in: Home Affairs Committee (n 71). [↑](#footnote-ref-1665)
1666. Modern Slavery Act 2015 Section 54(11). [↑](#footnote-ref-1666)
1667. It is acknowledged that efforts have been made in the written communication of expectations to businesses both by the UK Anti-Slavery Commissioner and by the Californian Attorney General. See: Independent Anti-Slavery Commissioner, ‘Engagement with Business Leaders’ (2018) <http://www.antislaverycommissioner.co.uk/priorities/priority-4-private-sector-engagement/engagement-with-business-leaders/> accessed 19 January 2018; A Chilton and G Safarty, ‘The Limitations of Supply Chain Disclosure Regimes’ (2016) 766. Given that a similar power under the CTSCA has not been used in over seven years, one may wonder whether it will ever be used within the UK. [↑](#footnote-ref-1667)
1668. E Savourey, ‘France’s Law on the Corporate Duty of Vigilance: Process, Pedagogy and Pragmatism as the Way Forward’ (*Business and Human Rights Resource Centre*, 2018) <https://www.business-humanrights.org/en/frances-law-on-the-corporate-duty-of-vigilance-process-pedagogy-and-pragmatism-as-the-way-forward> accessed 20 October 2018. [↑](#footnote-ref-1668)
1669. SHIFT, ‘Human Rights Reporting in France: A Baseline For Assessing The Impact of the Duty of Vigilance Law’ (2018) <https://www.shiftproject.org/media/resources/docs/Human-Rights-Reporting-in-France.pdf>. [↑](#footnote-ref-1669)
1670. 44 of the 68 vigilance plans produced by companies as of September 2018 were less than two pages long. Ernst & Young, ‘Loi Sur Le Devoir de Vigilance : Analyse Des Premiers Plans de Vigilance Par EY’ (2018) <https://www.ey.com/Publication/vwLUAssets/ey-analyse-des-premiers-plans-de-vigilance-du-sbf-120/$File/ey-analyse-des-premiers-plans-de-vigilance-du-sbf-120.pdf>. [↑](#footnote-ref-1670)
1671. ibid. [↑](#footnote-ref-1671)
1672. Entreprises pour les droits de l’homme (EDH), ‘Application of the Law on the Corporate Duty of Vigilance: Analysis of the First Published Plans’ (2018) <https://www.e-dh.org/userfiles/Edh\_2018\_Etude\_EN\_1.pdf>. [↑](#footnote-ref-1672)
1673. For example, a study of 32 plans found that only 4 companies had completed the mapping of human rights and environmental risk. See: Ernst & Young (n 78). [↑](#footnote-ref-1673)
1674. SHIFT (n 77) 41. [↑](#footnote-ref-1674)
1675. ibid 44. [↑](#footnote-ref-1675)
1676. SHIFT (n 77). [↑](#footnote-ref-1676)
1677. Simpson suggests that perceptions of regulatory risk may play a greater role in shaping corporate behaviour than the objective likelihood of such sanctions. See: S Simpson, *Corporate Crime and Social Control* (Cambridge University Press 2002) 22–42. However, it is suggested that the two are linked with the objective likelihood based on a regulators past performance linked to perceptions relating to the probability of enforcement. [↑](#footnote-ref-1677)
1678. Cossart, Chaplier and Beau De Lomenie (n 12). [↑](#footnote-ref-1678)
1679. The Home Office, ‘Review of the Modern Slavery Act 2015: Terms of Reference’ (2018) <https://www.gov.uk/government/publications/modern-slavery-act-2015-independent-review-terms-of-reference/review-of-the-modern-slavery-act-2015-terms-of-reference#scope-of-the-review> accessed 20 September 2018. [↑](#footnote-ref-1679)
1680. House of Commons, ‘Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability: Government Response to the Committee’s Sixth Report of Session 2016–17’ 7. [↑](#footnote-ref-1680)
1681. It is acknowledged that significant questions arise as regards to the UK’s relationship with the EU following the results of the UK’s EU membership referendum in 2016. However, at the time of writing it is simply impossible to ascertain what the ultimate effects of the non-binding vote to leave the EU will be. This is particularly the case since the original deadline for the UK’s withdrawal from the EU has recently been postponed with all possibilities seemingly on the table. This chapter will thus tentatively proceed on the premise that the UK will continue to be bound by EU law. [↑](#footnote-ref-1681)
1682. As a general principle of EU law, the notion of subsidiarity authorises EU intervention in areas of non-exclusivity, when regulatory objectives can be better achieved at the Union level rather than at the level of the member state. [↑](#footnote-ref-1682)
1683. B Fox, ‘Table Human Rights Due Diligence Law, MEPs Tell Commission’ (*Euractiv*, 2019) <https://www.euractiv.com/section/energy-environment/news/table-human-rights-due-diligence-law-meps-tell-commission/> accessed 20 April 2019. [↑](#footnote-ref-1683)
1684. See generally: J Habermas, *The Postnational Constellation: Political Essays* (MIT Press 2001). [↑](#footnote-ref-1684)
1685. The European Court of Justice has made it clear that EU institutions are able to “act in order to forestall measures which would probably have been taken by the Member States” to prevent disruption of the internal market. The EU is not required to wait until Member States’ divergent laws actually cause disruption. See: *Case C-58/08 Vodafone v Secretary of State for Business, Enterprise and Regulatory Reform, 2010 ECR I4999* paras. 45-46. [↑](#footnote-ref-1685)
1686. The Home Office, ‘Independent Review of the Modern Slavery Act 2015: Final Report’ (2019). [↑](#footnote-ref-1686)
1687. The Home Office, ‘Review of the Modern Slavery Act 2015: Terms of Reference’ (n 1). [↑](#footnote-ref-1687)
1688. The Home Office, ‘Independent Review of the Modern Slavery Act 2015: Final Report’ (n 8) 44–45. [↑](#footnote-ref-1688)
1689. M Carrington, A Chatzidakis and D Shaw, ‘Consuming Modern Slavery’ (2018) <https://www.consumingmodernslavery.com/>. [↑](#footnote-ref-1689)
1690. The Home Office, ‘Independent Review of the Modern Slavery Act 2015: Final Report’ (n 8) 45. [↑](#footnote-ref-1690)
1691. ibid. [↑](#footnote-ref-1691)
1692. Habermas (n 6) 94. [↑](#footnote-ref-1692)
1693. Indeed, modern reliance on the market to solve social problems may be criticised as a savage attack on the principles of citizenship. See: B Turner, ‘Preface’ in B Turner (ed), *Citizenship and Social Theory* (Sage 1993) viii. [↑](#footnote-ref-1693)
1694. The Home Office, ‘Independent Review of the Modern Slavery Act 2015: Final Report’ (n 8) 41. [↑](#footnote-ref-1694)
1695. Carrington, Chatzidakis and Shaw (n 11) 20. [↑](#footnote-ref-1695)
1696. Comprehensibility and comparability have been observed as key criteria in linking enhanced transparency to greater stakeholder pressure. K Dingwerth and M Eichinger, ‘Tamed Transparency: How Information Disclosure under the Global Reporting Initiative Fails to Empower’ (2010) 10 Global Environmental Politics 74. [↑](#footnote-ref-1696)
1697. Centre for Consumer Law of the Katholieke Universiteit Leuven, ‘An Analysis and Evaluati on of Alternative Means of Consumer Redress Other than Re Dress through Ordinary Judicial Proceedings’ 267. [↑](#footnote-ref-1697)
1698. European Convention of Human Rights Articles 6 and 13. [↑](#footnote-ref-1698)
1699. EU Agency for Fundamental Rights, ‘Access to Justice in Europe: An Overview of Challenges and Opportunities’ 37. [↑](#footnote-ref-1699)
1700. A test case regards one or more individuals filing a legal claim. The judgment arising from this claim then forms the basis for other claims within the same interest brought against the same defendant. [↑](#footnote-ref-1700)
1701. Civil Procedure Rules Rule 19.15. [↑](#footnote-ref-1701)
1702. As reported in: ‘The Guardian View on Legal Aid: Cuts Have Caused Chaos and Must Be Reversed (Editorial)’ *Guardian (online)* (London, 12 August 2018). [↑](#footnote-ref-1702)
1703. Institute for Fiscal Studies (IFS), ‘Two Parliaments of Pain: The UK Public Finances 2010 to 2017’ (2017) <https://www.ifs.org.uk/publications/9180> accessed 25 April 2019. [↑](#footnote-ref-1703)
1704. I Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 204. [↑](#footnote-ref-1704)
1705. The additional sum of £6.5 million across all legal areas was described by legal professionals as ‘a drop in the ocean.’ See: O Bowcott and A Hill, ‘Ministers’ £6.5m for Legal Aid a Drop in the Ocean, Say Lawyers’ *Guardian (online)* (London, February 2019). [↑](#footnote-ref-1705)
1706. ibid. [↑](#footnote-ref-1706)
1707. See leaked report available at: E Dugan, ‘This Leaked Report Reveals The Stark Warnings From Judges About Defendants With No Lawyer’ (*Buzzfeed*, 2018). [↑](#footnote-ref-1707)
1708. C Hodges, S Vogenauer and M Tulibacka, *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart 2010) 27. [↑](#footnote-ref-1708)
1709. For example, a recent study of 233 charities reported that 63% believed their core functions were under-resourced. See: G Jones, ‘Nearly Two Thirds of Charities Say Core Functions Are Under-Resourced’ (*Civilsociety.co.uk*, 2018) <https://www.civilsociety.co.uk/news/nearly-two-thirds-of-charities-say-core-functions-are-under-resourced.html> accessed 25 April 2019. [↑](#footnote-ref-1709)
1710. Benöhr (n 26) 207. [↑](#footnote-ref-1710)
1711. Consumer Council (Hong Kong), ‘Consumer Legal Action Fund’ <https://www.consumer.org.hk/ws\_en/legal\_protection/consumer\_legal\_actions\_fund/clafinfo.html> accessed 15 April 2019. [↑](#footnote-ref-1711)
1712. Currently this sum equates to approximately £10 if the case is to be tried in a small claims court or £100 if it is tried in a higher court. See: ibid. [↑](#footnote-ref-1712)
1713. The issue of modern slavery appears to have the potential to raise significant funds in this regard. See for example: Anti-Slavery International, ‘Celebrities Call to End Modern Slavery to Mark Anti-Slavery International’s 175th Anniversary’ (2014) <https://www.antislavery.org/celebrities-call-end-modern-slavery-mark-anti-slavery-internationals-175th-anniversary/> accessed 28 April 2019. [↑](#footnote-ref-1713)
1714. J Wood, ‘Consumer Protection: A Case of Successful Regulation’ in P Drahos (ed), *Regulatory Theory: Foundations and applications* (ANU Press 2017) 633. [↑](#footnote-ref-1714)
1715. It is acknowledged that instances of forced labour has been found in the mining of conflict minerals and the production of illegal timber and thus is relevant to the issue at hand. However, the focus of this section is upon the model of regulation utilised by these instruments and the insights they may provide in relation to any potential revision of the Modern Slavery Act. For more information on the link between modern slavery and conflict minerals and illegal timber see: Free the Slaves, ‘The Congo Report: Slavery in Conflict Minerals’ (2015) <https://www.freetheslaves.net/wp-content/uploads/2015/03/The-Congo-Report-English.pdf>; Integrated Action Network to Combat Slavery (RAICE), ‘Underneath the Forests: Pará’s Amazon Plundered by Slave Labour’ (2017) <https://www.cptnacional.org.br/index.php/component/jdownloads/download/25-cartilhas/14037-por-debaixo-da-floresta-amazonia-paraense-saqueada-com-trabalho-escravo>. [↑](#footnote-ref-1715)
1716. Regulation (EU) 2017/821. [↑](#footnote-ref-1716)
1717. The EU Conflict Mineral Regulation will take effect on 1 January 2021. [↑](#footnote-ref-1717)
1718. Regulation (EU) No 995/2010. [↑](#footnote-ref-1718)
1719. This is not the case in relation to the EU Conflict Minerals Regulation, which derives its verifiable standards from authoritative best practice provided by the OECD. See: Organisation for Economic Cooperation and Development, ‘OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (3rd Edition)’ <http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>. [↑](#footnote-ref-1719)
1720. See for example: European Commission Directorate-General for Environment, ‘Environmental NGO Stakeholder Representation in European Standardisation Grant Application Guide’. [↑](#footnote-ref-1720)
1721. Civil society guidance in relation to the duty of vigilance has started to arise but in contrast to, for example, the OECD guidance on due diligence processes for sourcing conflict minerals, it remains rather broad. See for example: Sherpa, ‘Vigilance Plans Reference Guidance: 1st Edition’ <https://www.asso-sherpa.org/wp-content/uploads/2019/02/Sherpa\_VPRG\_EN\_WEB-ilovepdf-compressed.pdf>. [↑](#footnote-ref-1721)
1722. This also means that a reduced resource may be required in the legislative design process. Indeed, the cost of regulation is a key component of the EU’s Better regulation agenda. For critical comment see: A Renda, ‘Cost Benefit Analysis and EU Policy: Limits and Opportunities’ in S Garben and I Govaere (eds), *The EU Better regulation Agenda: A Critical Assessment* (Bloomsbury 2018). [↑](#footnote-ref-1722)
1723. It is acknowledged that a number of differences exist in relation to illegal timber or conflict mineral use and the identification of forced labour within a system of due diligence. Most significantly, information related to the type of mineral or species of tree is pertinent to a risk assessment relating to mineral or timber products. Here, for example, tracking technologies may be used for timber products through the use of genetic marker or stable isotopes. In contrast, the risk of forced labour is typically unrelated to the physical constitution of the product. Nevertheless, considerations of factors geographical location and industrial sector remain pertinent as exemplified by the Global Slavery Index. Moreover, this is precisely where a firm’s knowledge of its own supply chain operations attained through the mandatory design and imposition of a due diligence system may serve to uncover potentially relevant forced labour risks. For the global supply index see: The Walk Free Foundation, ‘Global Slavery Index’ (2019) <http://www.globalslaveryindex.org/>. [↑](#footnote-ref-1723)
1724. It is also arguable that this type of restriction could further incentivise the use of intermediaries within the productive process as a means of reducing a firm’s compliance risk. [↑](#footnote-ref-1724)
1725. Regulation (EU) 995/2010 Article 6(1). [↑](#footnote-ref-1725)
1726. The guidance to the EUTR states: “the length of the supply chain should not be considered as a factor of elevated risk. What matters is the possibility of tracing a product’s timber back to its place of harvest. The level of risk will increase if the complexity of the supply chain makes it difficult to identify the information required … The existence of unidentified steps in the supply chain can lead to the conclusion that the risk is non-negligible.” See: European Commission, ‘Commission Notice of 12.2.2016. Guidance Document for the EU Timber Regulation’ 5. [↑](#footnote-ref-1726)
1727. Regulation (EU) 995/2010 Article 6(1)(b). [↑](#footnote-ref-1727)
1728. ibid Article 6(2)(c). [↑](#footnote-ref-1728)
1729. H Hofmann, M Schleper and C Blome, ‘Conflict Minerals and Supply Chain Due Diligence: An Exploratory Study of Multi-Tier Supply Chains’ (2018) 147 Journal of Business Ethics 115. [↑](#footnote-ref-1729)
1730. This term is used by Fransen and LeBaron to describe the role ascribed to auditors in the imposition of a regulatory expectation for a firm to undertake due diligence. See: L Fransen and G LeBaron, ‘Big Audit Firms as Regulatory Intermediaries in Transnational Labor Governance’ [2018] Regulation and Governance 1. [↑](#footnote-ref-1730)
1731. As quoted in: R Davies, ‘Watchdog Calls for UK’s Big Four Accountancy Firms to Be Split Up’ *The Guardian (online)* (London, 18 April 2019) <https://www.theguardian.com/business/2019/apr/18/watchdog-calls-for-uks-big-four-accountancy-firms-to-be-split-up>. [↑](#footnote-ref-1731)
1732. For the terms of reference of the ‘Brydon Review’ see: Department for Business Energy & Industrial Strategy, ‘The Quality and Effectiveness of Audit: Independent Review’ <https://www.gov.uk/government/publications/the-quality-and-effectiveness-of-audit-independent-review>. [↑](#footnote-ref-1732)
1733. As quoted in: H van Leeuwen, ‘British Review Takes “Year Zero” Approach to Audit’ (*Financial Review*, 2019) <https://www.afr.com/business/legal/british-review-takes-year-zero-approach-to-audit-20190411-p51d2n> accessed 20 May 2019. [↑](#footnote-ref-1733)
1734. Art. 6 the EUCMR (Regulation (EU) 2017/821.) simply stipulates that the due diligence system must be verified by an independent third party. However, the EUTR requires for the EU accreditation of ‘monitoring organisations’ to specifically audit illegal timber due diligence systems. As of 24th May 2018, thirteen Monitoring Organisations had received accreditation by the European Union. European Commission, ‘List of Recognised Monitoring Organisations’ (2018) <http://ec.europa.eu/environment/forests/pdf/List of recognised MOs for web updated 24MAY18.pdf> accessed 24 May 2018. [↑](#footnote-ref-1734)
1735. Regulation (EU) 995/2010 Article 20(1). [↑](#footnote-ref-1735)
1736. The EUTR has suffered from inconsistency of monitoring efforts across member states in the past. See: UNEP-WCMC, ‘Overview of Competent Authority EU Timber Regulation Checks, June-November 2017. Statistics of Checks Performed by EU Member States and EEA Countries to Enforce the Implementation of the EU Timber Regulation’ (2018). For a summary see: ClientEarth, ‘EUTR News: March 2017 to March 2018’ (2018) <https://www.clientearth.org/eutr-news-march-2017-to-march-2018/> accessed 1 August 2018. [↑](#footnote-ref-1736)
1737. This has been recognised by the EU in relation to the EUTR. See: European Commission, ‘Inception Impact Assessment: Amending the Product Scope of Regulation (EU) No 995/2010 Laying down the Obligations of Operators Who Place Timber and Timber Products on the Market (EUTR)’ 1 <http://ec.europa.eu/smart-regulation/roadmaps/docs/2017\_env\_010\_timberscope\_en.pdf>. See also: Y Levashova, ‘How Effective Is the New EU Timber Regulation in the Fight against Illegal Logging?’ (2011) 23 Review of European Community & International Environmental Law 290. [↑](#footnote-ref-1737)
1738. J Blackman, ‘EU Ban on Illegal Timber: Uneven Enforcement Lets Companies off the Hook’ (*Global Witness*, 2018) <https://www.globalwitness.org/en/blog/eu-ban-illegal-timber-uneven-enforcement-lets-companies-hook/> accessed 1 August 2018. [↑](#footnote-ref-1738)
1739. United Nations Environment Programme - World Conservation Monitoring Centre, ‘Briefing Note to Inform the Implementation of the EU Timber Regulation August 2017 - October 2017’ <http://www.vmd.gov.lv/public/ck/files/Briefing\_note\_August\_17-October\_17.pdf>. [↑](#footnote-ref-1739)
1740. For a consideration of the differing penalties legislated for by various Member States within the EUTR see: C McDermott and M Sotirov, ‘A Political Economy of the European Union’s Timber Regulation: Which Member States Would, Should or Could Support and Implement EU Rules on the Import of Illegal Wood?’ (2018) 90 Forest Policy and Economics 180. [↑](#footnote-ref-1740)
1741. M Faure, ‘Effective, Proportional and Dissuasive Penalties in the Implementation of the Environmental Crime and Shipsource Pollution Directives: Questions and Challenges’ (2010) 19 European Energy and Environmental Law Review 256. [↑](#footnote-ref-1741)
1742. It is acknowledged that this has been resisted in the past following opposition from member states. See: Greenpeace, ‘EU Bans Illegal Timber: Strong Legislation Follows Ten Year Greenpeace Campaign’ (2010) <http://www.greenpeace.org/eu-unit/en/News/2010/eu-bans-illegal-timber/> accessed 1 August 2010. [↑](#footnote-ref-1742)
1743. Ian Ayers and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992). [↑](#footnote-ref-1743)
1744. In contrast to the MSA, whereby the courts have been uninvolved in either its interpretation or enforcement, the courts of EU Member States have had the chance to consider the implications of the EUTR due diligence requirement. The first case of this nature was brought in 2016, arising from a dispute between the Swedish Forest Agency and a timber importer (Almtra Nordic) following an investigation by the Environmental Investigation Agency (EIA) which alleged that teak imported from Myanmar had only been traced to the state-managed exporter (Myanmar Timber Enterprise) and thus lacked information about its exact source location or the identity of its harvester. In accepting the findings of the investigation and finding the importer in breach of the Regulation, the Swedish confirmed that the EUTR’s due diligence requirement cannot be met through solely relying on the official documentation by the exporting state, which in this case was known for its weak forest governance. As reported in: ClientEarth, ‘Swedish Court Rules Teak Importer Is Breaking EU Logging Law’ (2016) <https://www.clientearth.org/swedish-court-rules-teak-importer-is-breaking-eu-logging-law/> accessed 6 July 2018. [↑](#footnote-ref-1744)
1745. M Sotirov, M Stelter and G Winkel, ‘The Emergence of the European Union Timber Regulation: How Baptists, Bootleggers, Devil Shifting and Moral Legitimacy Drive Change in the Environmental Governance of Global Timber Trade’ (2017) 81 Forest Policy and Economics 69. [↑](#footnote-ref-1745)
1746. Fox (n 5). [↑](#footnote-ref-1746)
1747. The Home Office, ‘Explanatory Notes: Modern Slavery Act 2015’ (2015). [↑](#footnote-ref-1747)
1748. Department of Trade and Industry, ‘Modern Company Law for a Competitive Economy: Strategic Framework’ (1999); Company Law Review Steering Group, ‘Modern Company Law For A Competitive Economy: Developing the Framework’. [↑](#footnote-ref-1748)
1749. The potential for civil society representation within large companies operating in higher risk industries is perhaps one avenue to consider but the practical application of such a suggestion remains beyond the scope of this thesis. [↑](#footnote-ref-1749)
1750. See: ‘Women on Boards (the Davies Review)’ (2015) <https://www.gov.uk/government/publications/women-on-boards-5-year-summary-davies-review>; ‘FTSE Women Leaders (Hampton-Alexander Review)’ (2018) <https://www.gov.uk/government/publications/ftse-women-leaders-hampton-alexander-review>; ‘Ethnic Diversity of UK Boards (the Parker Review): Final Report’ (2017) <https://www.gov.uk/government/publications/ethnic-diversity-of-uk-boards-the-parker-review>. [↑](#footnote-ref-1750)
1751. Financial Reporting Council (FRC), ‘Corporate Governance Code 2014’ Preface, para 3 <https://www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code/25th-anniversary-of-the-uk-corporate-governance-co/the-30-club-engaging-for-better-diversity-on-boa>. [↑](#footnote-ref-1751)
1752. In 2018, women held 29% of boardroom positions in FTSE 100 companies. This was an increase from 12.5% in 2011. Slower progress has been made across the wider FTSE350 yet even here, women now comprise 25.5% of the total directors. See: Department for Business Energy & Industrial Strategy, ‘Record Number of Women on FTSE 100 Boards’ (2018) <https://www.gov.uk/government/news/record-number-of-women-on-ftse-100-boards> accessed 1 May 2019. [↑](#footnote-ref-1752)
1753. The final report of the Parker Review found that in contrast to the increase in female board members, there has been little progress as regards increasing the number of black, Asian and minority ethnic (BAME) directors. Only 8% of the directors on FTSE 100 companies may be classed as being from a non-white ethnic group with 40% of these being found on the boards of just seven companies. It is also clear that the international nature of many of these companies masks a further problem given that although 14% of the UK’s population may be classed BAME, only 2% of FTSE 100 directors are non-white UK citizens. See: ‘Ethnic Diversity of UK Boards (the Parker Review): Final Report’ (n 72). [↑](#footnote-ref-1753)
1754. I Janis, *Groupthink* (Houghton Mifflin 1982). [↑](#footnote-ref-1754)
1755. L Dallas, ‘The New Managerialism and Diversity on Corporate Boards of Director’ (2002) 76 Tulane Law Review 1363, 1389. [↑](#footnote-ref-1755)
1756. See generally: D Hambrick and P Mason, ‘Upper Echelons: The Organization as a Reflection of Its Top Managers’ (1984) 193 Academy of Management Review 193. [↑](#footnote-ref-1756)
1757. Dallas (n 77) 1389–1390. [↑](#footnote-ref-1757)
1758. ibid 1392. See also: R Kosnik, ‘Effects of Board Demography and Directors’ Incentives on Corporate Greenmail Decisions’ (1990) 33 Academy of Management Journal 129. [↑](#footnote-ref-1758)
1759. See also: H Kang, M Cheng and S Gray, ‘Corporate Governance and Board Composition: Diversity and Independence of Australian Boards’ (2007) 15 Corporate Governance: An International Review 194‐207. [↑](#footnote-ref-1759)
1760. Dallas (n 77). [↑](#footnote-ref-1760)
1761. See for example: K Kyaw, M Olugbode and B Petracci, ‘Can Board Gender Diversity Promote Corporate Social Performance?’ (2017) 17 The International Journal of Business in Society 789. [↑](#footnote-ref-1761)
1762. See for example: N Sanan, ‘Board Gender Diversity, Financial and Social Performance of Indian Firms’ (2016) 20 Vision: The Journal of Business Perspective 361. [↑](#footnote-ref-1762)
1763. See for example: Dallas (n 77); J Galbreath, ‘Is Board Gender Diversity Linked to Financial Performance? The Mediating Mechanism of CSR’ (2018) 57 Business & Society 863. [↑](#footnote-ref-1763)
1764. It has been observed that relative to men, women possess more communal characteristics such as: kindness, helpfulness, sympathy, interpersonal sensitivity, a propensity to nurture, and a concern for the welfare of others. See: A Eagly, M Johannesen-Schmidt and M van Engen, ‘Transformational, Transactional, and Laissez-Faire Leadership Styles: A Meta-Analysis Comparing Women and Men’ (2003) 129 Psychological Bulletin 569. [↑](#footnote-ref-1764)
1765. W Wood and A Eagly, ‘Gender Identity’ in M Leary and R Hoyle (eds), *Handbook of individual differences in social behavior* (Guilford Press 2009). [↑](#footnote-ref-1765)
1766. The Home Office, ‘Review of the Modern Slavery Act 2015: Terms of Reference’ (n 1). [↑](#footnote-ref-1766)
1767. The Home Office, ‘Independent Review of the Modern Slavery Act 2015: Final Report’ (n 8) 42. [↑](#footnote-ref-1767)
1768. ibid. [↑](#footnote-ref-1768)
1769. Where typically it would be the liquidator that would prepare and submit the conduct report to the Disqualification Unit, this would be inappropriate within the context under discussion. As such it is suggested that remit of the Office of the Modern Slavery Commissioner could extended to allow for the body to apply for a director to be disqualified. This would require the Modern Slavery Commissioner to prepare a conduct report in relation to the acts and omissions of the director in question. [↑](#footnote-ref-1769)
1770. Lord Woolf MR *Re Blackspur Group plc, Secretary of State for Trade and Industry v Davies [1998] 1 BCLC 676* at 680. [↑](#footnote-ref-1770)
1771. A person is disqualified from being “a director of a company, act as receiver of a company’s property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company.” The Company Directors Disqualification Act 1986 Section 1(1)(a). [↑](#footnote-ref-1771)
1772. As reported in: R Grant, ‘Director Disqualification: What You Need to Know’ (*The Gazette*) <https://www.thegazette.co.uk/insolvency/content/225> accessed 18 May 2019. [↑](#footnote-ref-1772)
1773. A register of disqualified directors is held by Companies House and is accessible by the public. See: gov.uk, ‘Search for Disqualified Company Directors’ <https://www.gov.uk/search-the-register-of-disqualified-company-directors> accessed 20 May 2019. [↑](#footnote-ref-1773)
1774. Following reforms made to the law via the Small Business, Enterprise and Employment Act 2015, the court, upon application from the Secretary of State, may currently order a disqualified director to pay compensation to a creditor of the company. The Company Directors Disqualification Act 1986 Section 15A. [↑](#footnote-ref-1774)
1775. See for example Felber’s idea of the Economy for the Common Good (ECG) based on corporate governance reforms aligned with reforms to the tax, banking and international tariff systems. C Felber, *Die Gemeinwohl-Ökonomie – Das Wirtschaftsmodell Der Zukunft* (Deuticke 2010). [↑](#footnote-ref-1775)
1776. As quoted in: N Pratley, ‘Theresa May’s Plan to Put Workers in Boardrooms Is Extraordinary’ *The Guardian (online)* (London, 11 July 2016) <https://www.theguardian.com/politics/nils-pratley-on-finance/2016/jul/11/theresa-may-plan-workers-boardroom-reform-extraordinary-tories>. [↑](#footnote-ref-1776)
1777. T Shipman, ‘Jeremy Corbyn at Labour Party Conference: We Will Put Workers on Company Boards’ *The Times (online)* (London, 23 September 2018) <https://www.thetimes.co.uk/article/jeremy-corbyn-at-labour-party-conference-we-will-put-workers-on-company-boards-rp95pjtr6>. [↑](#footnote-ref-1777)
1778. This figure is considerably less than the threshold of 2000 employees envisaged within the Bullock Inquiry and would be significantly wider reaching. According to Davies, only 738 companies met the higher threshold at the time of the inquiry. In contrast, according to business employment statistics released in December 2018, 10743 would meet the lower threshold today. See respectively: P Davies, ‘The Bullock Report and Employee Participation in Corporate Planning in the UK’ (1978) 1 Journal of Comparative Corporate Law and Securities Regulation 245, 249; House of Commons, ‘Briefing Paper Number 06152, 12 December 2018: Business Statistics’ (2018) 5. [↑](#footnote-ref-1778)
1779. L Elliott, ‘Labour Plans to Give Customers of Big Firms Vote on Boardroom Pay’ *Guardian (online)* (London, 27 November 2018) <https://www.theguardian.com/business/2018/nov/27/labour-plan-to-give-customers-of-big-firms-vote-on-boardroom-pay>. [↑](#footnote-ref-1779)
1780. ‘Report of the Committee of Inquiry on Industrial Democracy (the ’Bullock Report’) Cmnd 6706’ (1977). [↑](#footnote-ref-1780)
1781. European Foundation for the Improvement of Living and Working Conditions, ‘Board-Level Employee Representation in Europe’ (1998) <https://www.eurofound.europa.eu/publications/report/1998/board-level-employee-representation-in-europe> accessed 12 May 2019. [↑](#footnote-ref-1781)
1782. For a comprehensive outline of the various approaches taken to employee participation in European jurisdictions see: European Trade Union Institute (ETUI) and Trades Union Congress (TUC), ‘Workers’ Voice in Corporate Governance: A European Perspective’ (2015). [↑](#footnote-ref-1782)
1783. R Munck, ‘Globalization and the Labour Movement: Challenges and Responses’ (2010) 1 Global labour journal 218. [↑](#footnote-ref-1783)
1784. Indeed, the former German chancellor Gerhard Schroder has previously criticized outsourcing efforts by German companies as unpatriotic. As reported in: M Falk and Y Wolfmayr, ‘The Substitutability between Parent Company and Foreign Affiliate Employment in Europe’ (2009) 37 Empirica 87, 88. [↑](#footnote-ref-1784)
1785. U.S. Bureau of Labor Statistics, ‘International Comparisons of Annual Labor Force Statistics, 1970-2012’ (2012) <https://www.bls.gov/fls/flscomparelf/lfcompendium.pdf>. [↑](#footnote-ref-1785)
1786. ibid. [↑](#footnote-ref-1786)
1787. As reported in: M Young, ‘Outsourcing Made in Germany’ (*Deutsche Welle*, 2004) <https://www.dw.com/cda/en/outsourcing-made-in-germany/a-1273178> accessed 15 May 2019. [↑](#footnote-ref-1787)
1788. A Keay, ‘Wider Representation on Company Boards and Directors’ Duties’ (2016) 31 Journal of International Banking and Financial Law 530, 530. [↑](#footnote-ref-1788)
1789. Indeed, The UK’s Co-Operative group have little difficulty identifying their members and allowing them to vote within their particular ownership and governance structure. [↑](#footnote-ref-1789)
1790. See: J Griffith, ‘The Voice of the Consumer’ (1950) 21 Political Quarterly 171. [↑](#footnote-ref-1790)
1791. According to the FDA’s website the incorporation of consumer representatives is designed to “represent the consumer perspective on issues” “serve as a liaison between the committee and interested consumers, associations, coalitions, and consumer organizations” and “facilitate dialogue with the advisory committees on … issues that affect consumers.” U.S. Food and Drug Administration (FDA), ‘Consumer Representatives on FDA Advisory Committees’ (2018) <https://www.fda.gov/advisory-committees/advisory-committee-membership/consumer-representatives-fda-advisory-committees> accessed 28 May 2019. [↑](#footnote-ref-1791)
1792. ibid. [↑](#footnote-ref-1792)
1793. Companies Act 2006 Section 172(1). [↑](#footnote-ref-1793)
1794. T Hammer, S Currall and R Stern, ‘Worker Representation on Boards of Directors: A Study of Competing Roles’ (1991) 44 ILR Review 661, 661. [↑](#footnote-ref-1794)
1795. Sales, J. in *R (on the application of People & Planet) v HM Treasury [2009] EWHC 3020 Admin* at 34. [↑](#footnote-ref-1795)
1796. *Hutton v West Cork Railway Co (1883) 23 Ch D 654*. [↑](#footnote-ref-1796)
1797. As reported in: ‘Shoppers to Be Able to View What Firms Are Doing to End Supply Chain Slavery’ (*Sky News*, 2019) <https://news.sky.com/story/shoppers-to-be-able-to-see-what-firms-are-doing-to-end-supply-chain-slavery-11739444> accessed 21 June 2019. [↑](#footnote-ref-1797)
1798. In the final few days of writing this thesis, it seems likely that committed ‘leaver’ Boris Johnson will become the UK’s Prime Minister. See: M Holden, ‘We Will Leave EU by October 31, Johnson Vows in Pitch to Be PM’ (*Reuters*, 2019) <https://uk.reuters.com/article/uk-britain-eu-leader/we-will-leave-eu-by-october-31-johnson-vows-in-pitch-to-be-pm-idUKKCN1TF0PD> accessed 21 June 2019. [↑](#footnote-ref-1798)