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Shareholder Empowerment, Steps Forward and Steps Back: Comparative Analysis of the US and UK Regulations

Alrayes , S. A. (2019). Shareholder Empowerment, Steps Forward and Steps Back: Comparative Analysis of the US and UK Regulations. *Journal of Financial Regulation and Compliance*, 27 (2), 169-196.
<https://doi.org/10.1108/JFRC-03-2018-0054>

Published in:
Journal of Financial Regulation and Compliance

Document Version:
Peer reviewed version

Queen's University Belfast - Research Portal:
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**Shareholder Empowerment, Steps Forward and Steps Back:
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Journal:	<i>Journal of Financial Regulation and Compliance</i>
Manuscript ID	JFRC-03-2018-0054.R1
Manuscript Type:	Original Article
Keywords:	corporate governance, corporate reform, financial crisis, shareholder empowerment, comparative corporate governance

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Acknowledgements:

For helpful insights, comments, and suggestions, I wish to thank Yue Ang, a Senior Lecturer in Law at Oxford Brooks University and Dieter Pesendorfer, a Senior Lecturer in Law at Queen's University Belfast.

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Table 1

Company	Chief Executive	% of Shareholder Dissent	Details of Reasons for Dissent	Outcome
Central Rand Gold	Johan Du Toit	75	Dissent overpay as company value had dropped from £300m at its flotation in 2007 to just £15m in 2012	Company declined to comment.
AVIVA	Andrew Moss	60	Investor concerns relating to management following the award of a 4.6% pay rise to Moss and the payment of a £2.2m ‘golden hello’ to Trevor Matthews, the UK head of the business.	Moss returned the pay rise and the company committed to reviewing signing on fees. Scott Wheway, chairman of remuneration committee, acknowledged that the company “could and should have done more to engage with shareholders” (Scott, 2012) in its remuneration policies.
Barclays Plc	Bob Diamond	31.5	In a year in which the company’s return on equity was described as being “unacceptable” (Kamal, 2012), Diamond received “200pc of a possible 250pc salary bonus”, a figure of £17million, leading to shareholders to argue that this should have been much lower, particularly when shareholder dividends totaled only £700 million, compared to executive bonuses of only £2.1 billion.	In response, Chairman Marcus Agius commented that “evidently, we have not done a good enough job in articulating our case: on some matters, we should have communicated earlier and more clearly” (Barclays Plc, 2012). The company undertook to pay larger dividends and performance criteria for Diamond’s bonus

				were reviewed and amended.
Xstrata	Mick Davis	40	Investor body ISS highlighted issues of concern over, <i>inter alia</i> , remuneration policies (Alistair, 2012) which were likely to result in Davis being awarded £6 million in shares and options in the event of a successful takeover by Glencore Group Plc.	The company responded that the pay structure was linked to performance and that the company had shown a good performance during 2011 despite challenging markets.
Inmarsat	Rupert Pearce	40	Following shareholder concerns over poor corporate governance, dissent arose over a failure to reduce the pay or bonus awarded to Chairman Andrew Sukawaty when he relinquished dual role which also involved him acting as CEO.	The company justified remuneration on the basis of record performances by the company and the continued commitment of Sukawaty to that company.

Source: Jill Treanor, and Julia Kollwe, 'Aviva rocked by shareholder rebellion over executive pay', *The Guardian* (May 2012) available at <http://www.theguardian.com/business/2012/may/03/aviva-shareholder-rebellion-executive-pay>

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Abstract

The global financial crisis of 2007, 2008 prompted a significant debate on corporate governance and shareholder empowerment. A question arises as to whether shareholders ought to be further empowered to have a greater influence over the companies’ activities. Yet, it is not self-evident that shareholder empowerment ensures better-run companies’ corporate activities. Thus, the aim of the paper is to critically examines, identifies, and explains the corporate regulation forms and control collectively to evaluate the effectiveness of shareholder empowerment fully. To do so, this article sets out a comparative analysis approach between two jurisdictions, the UK and Delaware in the US. The paper further addresses by undertaking three case studies; (i) Barclays Plc which illustrated the *Comply or Explain* role, (ii) AVIVA (2012) that concentrated on the impact of the shareholder revolt, and (iii) the case of *Hills Stores Co. v. Bozic*, (2000), which involved a claim brought by shareholders on the grounds of a breach of fiduciary duty. This article argues that; (i) the shareholder empowerment theoretically provide an effective means through which corporate activities can be regulated. However, to do this, account must be taken of the fact that a distinction should be made between long-term and short-term investors to encourage shareholder engagement by responsible long-term investors. Furthermore, (ii) the shareholders can exercise their powers effectively and influence the Board’s decision to award executive compensation. This paper offered two distinct contributions; assessing whether in times of crisis shareholder empowerment represents a way to regulate corporate activities, and also by assessing the distinction between the perception of shareholder empowerment and the reality in practice.

Keywords: corporate governance, corporate reform, financial crisis, shareholder empowerment, comparative corporate governance

I. Introduction: The Context and Significance

A frequent theme in political and legal circles have been to present the causes of the recent global economic recession 2007, 2008 as being a direct consequence of poor corporate governance structures which has failed to regulate adequately and control the commercial activities of companies, both domestically and internationally (John, 2008). In particular, the 'risky' behaviour of some financial companies has evidenced a need to review and re-evaluate corporate governance frameworks (William and Michael, 2010). As corporate governance and the lack of scrutiny over corporate activities have been cited as issues of concern in leading to the last economic recession, it is now necessary to reconsider the ways in which companies can be more effectively scrutinised in their pursuit of risky activities. However, allowing them to remain free to maintain and sustain their economic viability (Kate, 2010). The question has thus been raised, 'Can shareholder empowerment be considered an effective means to regulate corporate activities?'

In fact, the financial crisis originated in 2007, 2008 has been characterised as the result of (i) 'untrammelled managerial power', (ii) the lack of risky behaviour regulation and undertaking of unsound corporate activities by boards of directors (John, 2008), and (iii) the populist political response to articulate arguments in favour of greater powers for shareholders (Jennifer, 2010). This crisis has stimulated a debate on corporate governance and the primacy of shareholders empowerment value (Jonathan and Mathias, 2014). Indeed, the debate raised issues such as the question whether shareholders ought to be further empowered to have a greater influence over the companies' activities. Thus, the intuitive reason for the topicality of shareholder empowerment is that the latest economic crisis has given momentum to the contention that shareholders empowerment represents the most effective means to scrutinise corporate activities. Consequently, it has emphasised creating a new legal framework for regulating commercial activities which is oriented towards providing shareholders with greater powers of control (William and Michael, 2010).

Hence, Bebchuk (2003, 2005, 2006 and 2007) argued extensively that the shareholders should enjoy the 'power to initiate, and approve by vote, major corporate decisions.' On this basis alone, one is inclined towards the conclusion that arguments for shareholder empowerment are likely to be "convincing" in the wake of the crisis (Claire *et al.*, 2012). However, contrary to Bebchuk's view, some arguments have been put forward against providing shareholders with greater powers. One of the principal arguments expressed against

greater shareholder powers is that strengthening the powers of shareholders is contrary to the entrenched corporate legal frameworks which draw a clear distinction between the owners of a company and the company's management (Stephen, 2006). Thus, a distinction between discussions of shareholder empowerment in theory and practice needs to be made.

In addition, ideally, shareholder empowerment might ensure better monitoring of management and therefore better-run company corporate activities (Jonathan and Mathias, 2014). Yet, it is not self-evident that shareholder empowerment has such a difference in corporate outcomes and such a positive effect. It is prudent at this point to consider the developments of arguments in favour of shareholder empowerment in some depth. Subsequently, a critical analysis of shareholder empowerment is therefore essential. In particular, Bebchuk's academic work concerning empowering the shareholders will be critically analysed.

On this basis, while shareholders empowerment is capable of controlling management behaviour (Reinier *et al.*, 2009), an unexplored area is whether shareholders empowerment is capable of regulating corporate activities. Therefore, the purpose of this paper is to go further than existing research by assessing whether shareholders empowerment can be considered an effective means to regulate corporate activities. Accordingly, it must be noted that the assessment of effectiveness will be inevitably involved by considering the difference between the theory of shareholders empowerment and the practical realities of shareholders empowerment.

The present article has the objectives of filling a gap in the literature and conceptualising more coherently the question of shareholders' empowerment primacy value. As shareholder empowerment represents one of an array of controls that can influence management decisions within a company the hypothesis to be explored is whether shareholder empowerment can represent a way to go further than simply influencing management decisions to regulate and control corporate activities. In doing so, this article conducts a basic comparative analysis approach between two jurisdictions, the UK and Delaware in the US, to provide a critical analytical insight of the similarities and differences. This can form the basis for assessing the effectiveness of the use of shareholder empowerment as a means of controlling and regulating the corporate activities. For instance, to test whether there is a distinction in the way shareholder rights have been fostered in the proposed jurisdictions, and to identify in theory whether it matters if legal frameworks embrace shareholder empowerment.

A comparative analysis approach between two jurisdictions, the UK and Delaware in the US, and Case-based approaches have been used to address the research question. It is contended that two distinct contributions to knowledge will be offered in this paper; (a) it contributes to the existing knowledge by assessing whether in times of crisis shareholder empowerment represents a way to regulate corporate activities. (b) by assessing the distinction between the perception of shareholder empowerment and the reality in practice.

This paper is structured as follows: after the introduction, the first Part explores shareholders empowerment shifts. The second Part introduces the research question. The third part illustrates the research methodology. The fourth Part critically compares the shareholders' positions in the US and UK. The Final Part examines the case studies of shareholder revolts.

II. Shareholders Empowerment Shifts

There are widely held beliefs in the legal and financial circles that the recent global financial crisis is attributed to failures in corporate governance (William, 2014). In particular, the contribution of Burgess (2010), who claims that the consequence of corporate governance structures or shareholders' empowerment has failed to regulate and control the commercial activities of companies adequately, and it has been cited as issues of concern in leading to the recent economic recession. Similarly, Coffee (2008) states that 'risky' behaviour of some financial companies with poor shareholders empowerment has been evidenced as issues leading to the recent economic recession. Others, however, believe that the mortgages law issues are the sole cause of the global financial crisis. For example, Scott (2007) notes that wrong decisions made by the American Government at that time that allowed for dual mortgages led to the financial crisis.

On this basis, there has been considerable debate in the literature on the use of shareholder empowerment as a method to regulate and control the corporate activities of companies over the past two decades (Hal, 2007). For example, Bebchuk (2003) argued extensively that company shareholders should be given greater powers of control over the 'arbitrary' decision making powers exercised by company boards of management, which the company management must operate in addition to new rules relating to the election of directors in companies (Lucian, 2003). The strength of shareholders empowerment is premised upon the

belief that the division of interest between shareholders and management is not best served by individuals who exercise short, medium and long-term decisions which affect the ultimate success or failure of individual companies (Lucian, 2003). Rather, Bebchuk's logic (2003) argues that shareholders should directly influence the ultimate direction of a company. He also asserted that the shareholders' empowerment issue should be seriously considered to improve the legal arrangements and contractual governing companies and also to counter the tendency of management to favour continuation of the corporations (Lucian, 2003). Shareholders also play such a prominent role in overseeing issues of corporate governance, such as ensuring a company adheres to the principles relevant to responsible investing, including the bringing of a collective or derivative action against a company if required (Lucian, 2003). Nonetheless, it is noteworthy that the argument in favour of greater shareholder involvement in companies cannot be considered radical as through corporate history there are many different arguments have been made in favour of more enhanced shareholder rights (Richard, 1985).

In addition, the merit of Bebchuk's argument in favour of greater shareholder powers has been met with considerable opposition. For example, Bainbridge (2006) has argued that increasing shareholder power can be considered contrary to the established corporate legal frameworks which separate the ownership of a company from a company's management to ensure the effective functioning of companies as commercial enterprises. Furthermore, Strine (2005) has questioned the validity of allowing shareholders greater powers in influencing the direction of companies and ultimately questions the viability of creating a framework where shareholders are provided with greater powers of control.

However, a central weakness in this dichotomy between shareholder empowerment versus ultimate management control is that it denies a broader more empirical assessment of the ways companies can be regulated and controlled to protect the short, medium and long-term economic viability of companies (Leo, 2005). There is broad support in the literature for the reform of the role of shareholders in companies, and substantial attention should be given to the possibility of increasing shareholders powers to approve and to initiate some significant corporate decisions (Lucian, 2003, 2005, 2006 and 2007). For example, some studies have indicated a positive influence on a company's performance where shareholders are given greater levels of power (Marco *et al.*, 2009). However, the literature ultimately fails to identify a clear and coherent role for shareholders and fails to pinpoint the role of shareholder

empowerment in furthering and strengthening corporate governance structures. (Iman, 2006, Martin and William, 2007 and Robert, 2006).

In effect, since the economic meltdown of 2008 has emphasised creating a new legal framework for regulating commercial activities which is oriented towards providing shareholders with greater powers of control (Stuart and Laura, 2007). Additionally, governmental investigations on the subject of corporate law reform more recently appear in favour of shareholder empowerment (CCMR, 2006 and Directive 2007/36/EC, 2007). For example, the EU's Green Paper on Corporate Governance has identified that corporate governance structures throughout the EU require greater levels of shareholder rights as a means to regulate and control the activities of companies (Green Paper, 2011). It is also important to note that to some degree the EU may be considered to be somewhat contradictory in that while the Green Paper ultimately recommends greater levels of rights for shareholders, it identifies shareholder empowerment more generally as being a contributory cause in the recent economic meltdown (Green Paper, 2011).

The issue of empowering shareholders has been debated and discussed in an array of different legal contexts (Marco *et al.*, 2009). However, much of the debate on shareholder empowerment is concentrated upon a preconceived ideology that concentrates on assessing the ability of shareholder empowerment to influence company management. For example, Bebchuk's arguments in favour of shareholder empowerment have largely rested upon an efficiency contention where shareholder empowerment could save money rather than empowering shareholders by a 'democracy rationale' (James, 2007). Other arguments in favour of shareholder empowerment throughout the US has largely rested upon a political desire to increase the 'accountability' in key company decision-making processes by seeking to use the shareholders as a means of scrutiny (Hal, 2007). However, the resort to using shareholder empowerment has largely been a political response to the economic meltdown which can be considered fundamentally different from the previous arguments in favour of shareholder empowerment.

Furthermore, various academic arguments have been put forward in support of a new model of regulation on the activities of a company which provides shareholders with greater powers of control coupled with new fiduciary duties on the activities of company directors (Robert, 2008, Joseph, 2010 and Stephen, 2012). This new framework concentrates on empowering shareholders with new capabilities of regulating and controlling key company activities

(Robert, 2008 and Joseph, 2010). However, the basis of this new regulatory framework appears entirely to be as a result of the ENRON scandal in the US and the current economic meltdown (Robert, 2008 and Joseph, 2010). The deficiency in the literature rests upon a failure to identify, explain and evaluate all forms of corporate regulation and control collectively to evaluate the effectiveness of shareholder empowerment fully (Luca and Paolo, 2007).

As experts believe that the problem of the economic crisis is still on-going (Kate, 2010) the literature has failed to pinpoint the role of shareholder empowerment in furthering and strengthening corporate governance structures. Therefore, the paucity of empirical research from previous studies calls for in-depth research and the needs to further study the effectiveness of shareholder empowerment. The hypothesis advanced is whether the empowerment of shareholders can effectively shift from one where they simply have an influence over the decisions of the company's management, as is currently the case, to one whereby shareholders can effectively regulate and control the activities of corporate entities.

III. The Research Question

The primary question of the dissertation has therefore been raised whether shareholder empowerment be considered an effective means to regulate corporate activities?

This question is explored in two ways. Firstly, the exploration of the question involves a micro critical assessment of how the idea of shareholder empowerment is perceived and implemented differently in the comparator jurisdictions. Secondly, a macro-critical assessment of whether shareholders ought to be further empowered to have a greater influence over the companies' activities will also be involved.

Hence, the effectiveness of regulating and controlling the corporate activities by specifically concentrating on the use of shareholders empowerment will be examined and tested. However, the effectiveness of shareholder empowerment, in this context, means it must not only be provided for in the formal construction of corporate law but, more importantly, the distinction between the theory of corporate law and the reality of corporate law in practice must be sufficient to regulate corporate activities. It is important to emphasise that while shareholders empowerment includes a broad array of powers, the purposes of this paper is intended to concentrate on analysing only relevant shareholders rights. In particular, it is

contended that the most pertinent shareholders' powers capable of effecting control over a company's management include decision-making rights, voting rights, the power of veto, the power to remove directors from their role and the power to access key company information. Furthermore, the assessment of the effectiveness of shareholders empowerment as a means to regulate corporate activities will be needed to develop an analytical framework to examine the current legal frameworks, which have regulated corporate activities over the past century to examine the inherent weaknesses of the continuation of the *status quo*.

Questions remain whether a distinction should be made between long-term and short-term investors to encourage shareholder engagement by responsible long-term investors and whether voting rights can and does act as an effective control regarding regulating the activities of corporate entities are the right answers. In the context of the last global economic crisis and shareholder empowerment, views are diverse in regards to whether to increase the shareholders' power or not. Although a central position will be developed, while there might be a need to improve shareholder empowerment, the view that any increase in shareholder rights is the right way forward will not be taken; alternatively, such reforms should aim to encourage shareholder engagement by responsible long-term investors. This paper also critically examines the relationship between the encouragement of shareholder engagement, short and long-term investors, and law reform.

IV. Methodology

A comparative analysis approach between two jurisdictions, the UK and Delaware in the US, and Case-based approaches have been used to address the research question. The three case studies are; (i) Barclays Plc case study discusses the position faced by companies when they wish to appoint a chief executive as a chairman of the same company and highlights how the 'comply or explain' approach works in practice and, moreover, how a company can fail to comply with the Code by merely providing a proper explanation for its reasons, (ii) AVIVA Company (2012) case study concentrates on the impact of the shareholder revolt. And finally, (iii) the case of *Hills Stores Co. v. Bozic* (2000) involved a claim brought by shareholders on the grounds of a breach of fiduciary duty concerning an issue of the payment of severance pay to former executives following a winning slate in a proxy contest. Additionally, existing quantitative data of figures compiled relating to incidents of shareholder dissention in 2012 have been analysed.

The need for these approaches has been explicitly specified to improve the quality and utility of the research, develop a complementary picture, compare, validate or triangulate results, and finally examine the hypothesis along with outcomes (Vicki, 2010). Furthermore, the intentional collection and conducting of a comparative analysis and case study analysis involves, and the combination of the strengths of each is to discern whether or not shareholder can play an effective role in regulating the activities of a company. As a result, the research will gain in breadth, consistency and depth of corroboration and understanding that it needs.

The reason for the selection of these jurisdictions is that the Anglo-American corporate governance model had inspired a global convergence towards this model as the world's prevailing corporate ideology (Henry and Reinier, 2000). These scholars equated dominance, as proof of convergence as additionally confirmed by the comparative failure of all other governance models. The Hansmann and Kraakman corporate governance convergence arguments noted are particularly relevant in this context. Notwithstanding the fact that Hansmann and Kraakman's Anglo-American-based theory has been strongly challenged, their assertion that '... a high degree of uniformity of corporate law and governance had occurred across most jurisdictions towards the Anglo-American model, and would continue to converge' prompts the following important observation (Henry and Reinier, 2000).

Moreover, some similarities and differences exist between the UK and US corporate governance systems. For instance, the similarities include common law system, strong investor protection, unitary board system and developed capital markets in both countries. These similarities may suggest the international equity market participants and well-resourced institutional investors preferred strong shareholder protection, as ways of mitigating risk. Such investment system participants naturally gravitated towards the Anglo-American model. While rules-based and principles-based approaches in these two jurisdictions also provides a rational justification for exploring more similarities and differences, the corporate governance rules applicable in the US are more extensive than those adopted in the UK. The rules set out in the US policies do adequately cover the requisite areas to empower shareholders sufficiently to place them in a position whereby they can influence a corporation's board of directors. Additionally, there is sufficient information available on companies within these two jurisdictions and therefore form a good basis to conduct a comparative review. In particular, it is anticipated this comparison provides a way to analyse the role played by shareholder empowerment within two different jurisdictions so

that the analysis from both can form a way to test whether shareholder empowerment can regulate and control corporate activities. The ultimate goal of this comparison also is to recommend practical, incremental modifications to the UK legal system so that the assessment of the US legal system can become a source of inspiration for legal reform within the UK.

Hence, two comparator jurisdictions will be employed in a particular concentration on comparing the UK and the US. It is contended that these countries represent a sound basis for comparison as corporate governance structures in the US has traditionally favoured a firm separation of interests between company ownership and company management (Martin, 1991). Alternatively, the UK has been more amenable to allowing greater shareholder powers of control in the legal frameworks (Andrew and Gavin, 2001).

Initial research may indicate that the legal frameworks and laws arguably provide shareholders in the UK with greater powers of control in comparison to equivalent laws and legal frameworks in the US. Nonetheless, the original aspect will be gleaned from the analysis of the case law and the way shareholder rights have been enforced. An examination of the shareholder litigation may demonstrate that there are little differences between those jurisdictions that provide legal frameworks advocating greater levels of shareholder powers such as the UK, against those jurisdictions which fail to provide substantial levels of shareholder powers such as the US. This is a key test for the paper to be made in assessing the effectiveness of shareholder empowerment and the way it can be constructed in law, as shareholders may have little or no difference in the way their rights are applied in practice between the two jurisdictions. If this contention is proved, then it may provide a basis to argue that legal frameworks which advance greater shareholder empowerment are defective in being able to quantify that power in practice beyond the theoretical.

V. Shareholders Positions: Comparative Analysis

To give context to the discussion, this section of the paper aims to provide a comparative analysis of the position of shareholders in two jurisdictions, the UK and US to discern whether shareholders take an effective role in regulating the activities of a company or not.

A. The UK and US Regulatory Approaches: Impact and Model

It may be observed that “as a general rule, the management of a company’s affairs is under the overall responsibility of its board” (Eilis and Look, 2014, p.105) the implication being that the role of the shareholder is limited in this respect. Such a position may be viewed, at least in the UK, as stemming from the displacement of the notion that a few individual shareholders with a vested interest in a company could determine the direction of companies, throughout the 19th Century (Renginee, 2015). Indeed, it should also be observed that although the advent of the Joint Stock Companies Act of 1856 led to a growth in the number of individuals who formed companies, the Act also created the position where such individuals were “external” (Renginee, 2015, p.36) to these companies, rather than being the companies themselves (Susan, 2015). This position was heightened by the fact that the Act contained a provision for limited-liability for shareholders of companies created under it, whereby a group of seven individuals was entitled to register a limited liability company (Trevor, 2000). This replaced the earlier statutory provision for limited liability contained in the Limited Liability Act of 1855 and should be seen as developing the position whereby shareholders were seen as separate, at least in terms of liability, from the company itself. Indeed, as one commentators notes, the effect of these two legislations was to a creating the position that limited liability of shareholders was the “default” (Susan, 2015, p.124) position, which allowed shareholders to take advantage of the fact that they as individuals would not be held liable for the debts of the companies which they owned. This is clear from the “seminal” (Adam, 2014) ruling in *Salomon v Salomon & Co Ltd*, which established the position, still considered one of the “cornerstones” (CHY, 2014) of company law today, that the company has a separate legal personality to that of its shareholders.

It should be observed that in reality, such shareholders did maintain effective control of the activities of such companies (CHY, 2014), the relevant point being a separation of *liability* rather than a divorcing of *control*, which is, of course, the issue to be considered within this work. The position in the UK during the Victorian era may be contrasted with the general position in the US, whereby towards the end of the 19th Century, shareholders taking advantage of limited liability were beginning to relinquish control over their companies so that day-to-day management was undertaken by a board of directors, rather than shareholders themselves (Susan, 2015). In this sense, company ownership developed as a means of investment, rather than shareholding simply being a way to control the activities of a company with the protection afforded by limited liability (Susan, 2015). This was later echoed in the UK, with a growth in the number of companies being floated on the stock

market being considered synonymous with the relinquishment of control by shareholders (Brian, 2010). It has been suggested that the underlying reasons for this centred on a need to maintain economic pace with big business in the US, whereby corporate activities were managed by a board of directors, rather than shareholders; (Brian, 2010) and a belief that extensive shareholder powers would limit the economic potential of such corporate activities (Brian, 2010). This paper will ask whether, despite this early contention, empowering, or indeed re-empowering shareholders (Daniel, 2013) can be considered an effective means to regulate company activity.

In this sense, it is important to note that despite the development of the law in the late 19th and early 20th Century operating to place control of activities in the hands of directors, with limited control over corporate activities ostensibly being retained by shareholders (Daniel, 2013) the modern law *does* consider shareholder interests to be important. It is clear that both the US and the UK embrace the so-called “Anglo-American model” (Gerard, 2008) which is a model of corporate governance that places an “unequalled importance” (Franklin, 2014) to shareholder interests within a structuring based the premise that the board of directors shall govern the company’s activities (Franklin, 2014). Further evidence of this can be found in theories of corporate social responsibility (CSR), which hold that the ultimate aim of companies should be to provide value to shareholders (indeed other stakeholders) that providing such value should be clear in all board decisions and corporate activities (Andrew and Rodoula, 2012). Whilst it may indeed be true that the law in both the UK and the US takes such an approach, it is important to note that the importance of shareholder value cannot be considered synonymous with empowerment of shareholders to influence the corporate activities of companies, and that in any case, there is some evidence to suggest that shareholder value is not in practice as important as has been suggested in company law theory (Andrew and Rodoula, 2012).

B. Shareholder Empowerment: Development and Theories

The global financial crisis which began in 2007 gave rise to a new “debate on corporate governance and shareholder protection” (Jonathan and Mathias, 2014, p. 51–72). Extensive discussion of the causes of the crisis is beyond the scope of this work, but it should be observed that repeated lowering of the federal interest rate after the Dot.com bust resulted in excessive liquidity in the markets (Howard, 2011). This subsequently led to a growth in the subprime mortgage market, whereby such loans were converted into Collateralized Debt

Obligations (CDOs), which generated high profits (Howard, 2011). Keen to increase these profits, the banks undertook a number of irresponsible lending practices which ultimately led to an unprecedented number of defaults on mortgages (Howard, 2011). Unable to meet their financial obligations on their leverages (Howard, 2011) many banks were forced either into collapse or were nationalised. The first evidence of the crisis in the UK was seen with Northern Rock, which was nationalised in 2008 by the Banking (Special Provisions) Act following an initial pay-out of public funds being allocated to the bank in 2007 (Roman, 2008). It should be observed that part of the reason for the collapse of Northern Rock, in particular, was due to the business model adopted under its CEO, Adam Applegarth, which involving funding lending activities from global wholesale markets, rather than the safer, albeit less profitable, national retail market (Roman, 2008). Again, discussion of this strategy is beyond the scope of this paper, except in the respect that shareholders had almost no control over the corporate activities of Northern Rock (Roman, 2009) and this strategy was pursued by Applegarth and the board, alone. It is therefore clear that during the crisis shareholders were in a weak position to influence the corporate activities of companies and one is thus inclined to wonder whether empowerment of shareholders to take an increased role in the regulation of such activities will serve to prevent mismanagement of companies (Roman, 2009) in the manner seen in the case of Northern Rock.

In terms of the development of shareholder empowerment theory, the starting point is to observe that in the aftermath of the global financial crisis of 2007, questions were raised about whether the corporate governance structures in the US and UK, and indeed other jurisdictions worldwide, were capable of preventing a repeat of the crisis, the largest since the depression in the 1930s (Janine, 2014), following the Wall Street Crash of 1929, from occurring (William *et al.*, 2011). As observed above, the wider causes of the crisis are beyond the scope of this work but, as shown in the case of Northern Rock, for example, it was clear that ineffective corporate governance structures led to shareholders and indeed regulators being incapable of adequately regulating and controlling the activities of corporate entities (William *et al.*, 2011). On this basis alone, one is inclined towards the conclusion that arguments for shareholder empowerment are likely to be “convincing” (Jennifer, 2010, p.60) in the wake of the crisis. However, one should be careful to ensure that fears over the potential for a repeat of the crisis do not lead to shareholder empowerment as a knee-jerk reaction. A preferred approach would be a comprehensive assessment of current and developing corporate governance rules and how those might most effectively be developed to

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3 ensure that shareholders are able to control and regulate corporate activities adequately.
4 Therefore, it is prudent at this point to consider the developments of arguments in favour of
5 shareholder empowerment in some depth.
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9 Commentators, such as Bebchuk (2005) have argued in favour of strengthening the decision-
10 making powers of shareholders which are currently primarily holding by the company's
11 board, with shareholders currently precluded from initiating corporate activities, in favour of
12 initiation being taken solely by the board. Indeed, Bebchuk observes that this is a relatively
13 settled principle of corporate law, in the US in particular (Lucian, 2005), and it would appear
14 to this author that a similar position may be evidenced in the UK, as shown for example
15 regarding the Northern Rock scandal, above. In this respect, one would suggest a note of
16 caution in Bebchuk's approach to the extent that it suggests that shareholders could be
17 empowered in the US by the granting of increased voting rights and a power to amend the
18 Memorandum of Association, in line with a similar provision in UK law (Lucian, 2005).
19 Such powers in the UK are contained in the Companies Act 2006, although the specific
20 operation of such powers is not of concern here. What should be noted, however, is that those
21 powers, which although were relatively new concerning their provision in the Companies Act
22 2006 at the time of the financial crisis, already existed both at common law and to a limiting
23 extent under the Companies Act 1985 (Richard, 2006). Despite this prior existence of powers,
24 it has already been shown that shareholders were still unable to influence corporate activities
25 of the banks during the financial crisis. It is therefore submitted that Bebchuk's assertions
26 that UK shareholders have an influence over directors, or at least a greater influence than
27 their US counterparts (Lucian, 2005) is too simplistic an analysis and that something more
28 will be required in both jurisdictions if shareholder empowerment is to be used as a tool to
29 ensure regulation of corporate activities.
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44 This something may be found in later work, in which Bebchuk suggests that "making it
45 easier" (Lucian, 2006, p.1784) for shareholders to replace incumbent directors where they are
46 unhappy with corporate activities may act both as an impetus for directors to act with the
47 wishes of shareholders in mind (Lucian, 2006, p.1784), and empower shareholders to take an
48 active role, albeit an indirect one, in corporate activities. Nonetheless, as Bebchuk himself
49 observes, shareholders may be unlikely to take action to replace the board even where they
50 are unhappy with corporate activities which the board has undertaken (Lucian, 2006) due to
51 associated risks to the economic strength of the company which may result from such an
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arrangement. He, therefore, observes that empowering shareholders in such a way is an “imperfect mechanism” (Lucian, 2006, p.1784). One would be inclined to agree; as Strine observes, shareholders may not be best placed (Lorraine, 2013) to hold directors to account (Leo, 2005) for their involvement in corporate activities which are perceived to be undesirable, and thus suggests that shareholder empowerment in this way is not the optimum means of ensuring regulation of corporate activities (Leo, 2005). It is argued that this be particularly true of short-term shareholders (Wai, 2013) keen to quickly maximise their investment (Daniel, 2007) rather than taking a long-term, business-oriented interest in the corporate activities of the company.

The Strine’s arguments, whilst clearly correct in this respect, may not be relevant in practice. As discussed above, shareholders may be unlikely to use power to replace the board due to the risks such an action would create, yet the existence of the possibility that shareholders may take such an action may lead the board to be more prudent in its decision making related to the corporate activity. This serves to defeat the assertions of Bainbridge, who argues that empowering shareholders in the manner Bebchuk suggests would be undesirable as it would be unlikely that shareholders would use such powers (Stephen, 2006). Of course, affording shareholders with powers that they are unlikely to use, should be considered far from being an ideal position. It is indeed the “imperfect mechanism” (Lucian, 2006, p.1784) to which Bebchuk refers; Strine may be correct that shareholders will not always be best placed to make decisions regarding the need to replace a board, but if the mere threat of such action is enough to regulate corporate activity (Lucian, 2006, p.1784) then the arguments of both scholars may, in fact, be able to be reconciled so that shareholders are empowered but their individual, as opposed to company based interests, will not in practice undermine the effective operation of the company. Increased empowerment for shareholders, even only in theory, may, therefore, lead to effective regulation of corporate activities.

Rather unfortunately, it is submitted that this argument is likely to only work in theory. It has already been shown that Bebchuk concedes that it is true that increased powers granted shareholders would be unlikely to be used, but that the threat will be enough to hold directors to account. It must be observed that, particularly in very largely corporations where are “an enormous number of shareholders, each holding only a fraction of the shares, and therefore at best capable of very little influence” (James, 2005, p.35) this threat may be nominal and thus

unlikely, in practice, to restrain the board and provide shareholders with indirect powers to regulate corporate activities.

As noted above, a difficulty with the shareholder empowerment approach is that it ignores the fact shareholders may not be best placed to hold management to account, or indeed make decisions about corporate activity (Leo, 2005) and that there is likely to be a dichotomy between the aims of individual short-term shareholders and the aims of long-term shareholders (Wai, 2013) in promoting the success of the company. It is therefore argued that despite shareholder empowerment being an attractive proposition as an effective means of corporate regulation in *theory*, in practice a workable model may prove elusive, at least without introducing disparities between the powers of short-term and long-term shareholders so that the latter hold greater powers than the former in order to mitigate the above problems. The difficulty here is whether such action would contravening the equal treatment norm (Reinier *et al.*, 2009) whereby to protect minority shareholders, all shareholders must be treated equally with voting rights allocated simply in proportion to the number of votes held (Mike and Samuel, 2007). It seems however that despite this, there has been a move among modern critics which suggests that it may now be permissible to deviate from the equal treatment norm in the interest of the long-term economic success of the company (Andrea, 2011). Therefore, its argued that distinguishing between long-term and short-term shareholders when empowering shareholders may place such shareholders in a better position to control the corporate activities of the company, avoiding the issues associated with providing such powers to short-term minority shareholders and thus going some way to defeating the arguments of Strine (Leo, 2005), discussed above. Hence, it is thus submitting that empowering shareholders in this way may be an effective means of controlling corporate activities.

Based on this premise, it is argued that such a distinction should be made because the latter may have quick returns foremost in their minds, and not the long-term interests of the company. Accordingly, any changes in favour of empowering shareholders further ought to be exclusively targeted towards long-term shareholders only (Leo, 2005). In fact, this view is supported by Mukwiri and Siems (2014) who argued in favour of such a move, when they stated that the powers of long-term shareholders ought to be strengthened.

In any event, it has been argued that the very notion of increasing shareholder power may be viewed as contrary to the entrenched corporate legal frameworks which draw a clear

distinction between the owners of a company and the company’s management, which is said to not only ensure the effective functioning of companies as commercial enterprises, but also to fulfil the aims of corporate law, particularly in the Delaware model, where the law mandates the separation of ownership and control (Stephen, 2006). The development of the law in this sense was discussed earlier and thus does not require repeating here other than to note that it has been shown that the separation of ownership and control largely developed to allow companies to take advantage of economies of scale and big business which were associated with such an approach. Thus, it is arguable that it is not viable to establish a legal framework allowing shareholders to have greater influence over a company’s decision-making (Leo, 2015) at least in the sense that the company should operate to be as economically effective and indeed profitable, as possible (Leo, 2015). Indeed, such a viewpoint would appear to be supported by the fact that one of the key justifications for the maintenance of the separation between ownership and control is that shareholder interests should be equated to the maximisation of profits (James, 2007). However, as shown in the introduction to this work, one of the key causes of the financial crisis of 2007 was the lack of regulation of risky behaviour and the undertaking of unsound corporate activities by boards’ directors. This in itself could undermine the justification for the separation of ownership and control; if it is true that in the distinction between ownership and control, it is “rational for investors in a public company to be apathetic about managerial issues and to leave it to corporate executives to run the business” (James, 2007, p.50) because the latter is more capable of generating the profits, as the justification for the principle; it follows that it must also be true that where engagement in risky corporate behaviour renders such profits unsustainable, the justification for maintaining a distinction between ownership and control does not hold (James, 2007). As such, the Delaware model as discussed above, may not reflect the aims of shareholders and should not be retained in favour of the empowerment of shareholders, which could allow the regulation of corporate activities in line with the desire of shareholders to receive a maximum return on their investment.

It therefore seems that despite problems with Bebchuk’s proposed reforms in terms of whether empowering shareholders to take a role in the management of the company is a means of effective regulation of corporate activities, there is little justification in maintaining the separation between ownership and control, at least where there is the potential for directors to engage in risky behaviour and thus reduce the potential for maximum, sustainable profit generation for shareholders.

C. Shareholders Rights: Codification and Policies

In its most basic form, corporate governance may be understood as being, “the system by which companies are directed and controlled” (Adrian, 1992) and that an inherent part of the system is the distinction between ownership and control (Leo, 2015), as discussed above. It must be noted, however, that this distinction, while clear in theory, is often somewhat blurred in practice as in some companies, major shareholders and management may comprise the same individual or group of individuals. This is not to render the comments made earlier in this discussion regarding the impracticality of shareholder empowerment where there are a large number of shareholders invalid; it simply recognises that in any one company there may be a large number of minority shareholders, with a small number of majority shareholders who in effect, operate as the “controlling mind” (S. Sheikh, 2008, p.348) of the company. This in itself raises another potential problem with the issue of shareholder empowerment, as providing majority shareholders with greater powers may in essence simply be strengthening the powers of those who control the company. Whilst this will still, of course, increase the shareholder’s ability to control the corporate activity of the company, one wonders whether there is any merit in doing this when the reality is that the board will also be strengthened?

To analyse the corporate governance laws, codes and policies pertinent to the rights of shareholders to measure whether the empowerment of shareholders would be an effective means of regulating corporate activities, the following outline of the format of the respective corporate codes adopted by the US and UK are instructive for the analysis which follows.

About the US, it should be noted that as the US is a federal republic, the laws and codes passed at the federal level shall be enforced by states such as Delaware. In the US, the Council of Investors has produced a body of corporate governance best practices which aim, *inter alia*, to “protect and enhance a company’s accountability to its shareowners, and ensure that they are treated equally” (PCGC, 2017, P.4). The issue of equal treatment of shareholders has been discussed above regarding its potential effect on shareholder empowerment. It appears that the rights of shareholders are also important in the UK Code of Corporate Governance (2014) which provides that the board must conduct business in line with the “long-term success of the company”; this being ensuring that corporate activities are undertaken in the best interests of the company as a whole and in line with associated obligations to shareholders, and their statutory duties contained in sections 170-177 Companies Act 2006. Again, this appears to confirm the link between shareholders’ interests

and the duty to act in line with the success of the company in the long-term and therefore it may be that consideration of shareholder rights as contained in the corporate governance codes already provide something of a check of executive power and thus some means of regulating corporate activities. It appears however, that there is currently a divergence between the treatment of shareholder interests as important in the exercise of powers by directors in terms of corporate activities, and the lack of rights such shareholders have to influence directors (Stephen, 2010) to undertake decisions in relation to corporate activities which support shareholder interests (Stephen, 2010). Indeed, as shown above, although the codes to provide for consideration of shareholders and indeed state that actions should be taken in line with the best interests of the company, neither Code prescribes what this constitutes or indeed exactly what the role of the shareholder should be (E Shear *et al.*, 2010), and thus contains flexibility (Brenda, 2011) in decision making. Whilst this certainly has its benefits – the codes apply across a huge variety of companies (Janet, 1994) with a numbers of different aims and operating in different markets – it also means that decisions over corporate activities are largely placed in the hands of the board, with very few inbuilt mechanisms (Iris, 2014) to ensure efficient regulation of corporate activities. It is true that both codes provide that there cannot be unfettered power in the hands of any single individual, but it is submitted that this cannot be considered synonymous with providing effective regulation of corporate activities, so long as the board has acted in accordance with its somewhat vague (Andreas, 2012) obligations under the Code and the relevant statutory provisions. Indeed, the general position appears to be that the “management of a company’s affairs is under the overall responsibility of its board” (Eilís and Look, 2014, p.105) with a limited role for shareholder contributions beyond a small numbers of circumstances, for example in relation to share issues (Eilís and Look, 2014)

The further discussion considers a case from the jurisdiction of Delaware in the US, to demonstrate a practical operation of the Corporate Codes and how strengthening shareholder power under these codes may be an effective means of controlling corporate activities. This case highlights the issue of shareholder powers in the US under the Delaware General Corporation Law (DGCL).

In the case of *Hills Stores Co. v. Bozic*, 769 A.2d 88 (Del. Ch. 2000), the Court of Chancery considered an issue concerning the payment of severance pay to former executives following an unapproved change of board and a winning slate. The payments were made under a series

of employment contracts provided to the directors the previous year (Eilís and Look, 2014) and which contained a provision to the effect that upon an unapproved change of board, the directors would be required to resign but would subsequently receive severance pay (Eilís and Look, 2014). The plaintiffs', the shareholders, filed an action on the basis that the board had breached their fiduciary duty to the company by refusing to approve the board change.

The court found that the directors were entitled to the severance pay and rejected the plaintiff's claims of a breach of fiduciary duty. It held that the employment contracts fell under section 122(5) DGCL, which provides that a corporation established under the DGCL has the power to, *inter alia*, "appoint such officers and agents as the business of the corporation requires and to pay or otherwise provide for them suitable compensation;" and that on this basis the directors had acted reasonably "concluding that the company had contractual duties to the covered executives that required payment of severance if the board could not, in good faith, approve a change in control as benign to the Company and its stockholders" (*Hills Stores Co. v. Bozic*, 769 A.2d 88 (Del. Ch. 2000)). This case study highlights that shareholders in the US do have an influence on the Board's decision to award executive compensation, or that they may at least challenge those decisions before a court, although of course in the instant case, the court rejected the arguments of the plaintiffs.

D. Shareholders Rights: Critical Analysis

As noted above, the UK Code of Corporate Governance and the US Corporate Governance Policies form the basis of the rules relating to the rights of shareholders in key areas, such as shareholders' rights to vote on executive pay and their right to receive communications from the board (Janet, 1994). It is therefore clear that together with statutory duties, these codes embody the rules pertaining to the important role that shareholders can play in regulating the activities of corporate entities; discussion of the codes and the manner in which shareholders may be empowered through those codes may highlight whether such "soft-law" (Angus, 2009) rules are an effective means through which to regulate corporate activities.

In relation to the rights of shareholders to vote on executive pay, it is clear that the UK Corporate Governance Code is not as extensive as the rights of shareowners under the US corporate governance regime; the UK Corporate Governance Code (2014) merely provide that the "chairman of the board should ensure that the company maintains contact as required by its principal shareholders about remuneration". However, the US Code more explicitly states that "pay decisions are one of the most direct ways for shareowners to assess the

performance of the board.” US companies are also required to “provide annually for advisory shareowner votes on the compensation of senior executives.” In the US, companies establish compensation committees to determine the level of remuneration to be given to directors, albeit subject to the Board’s approval. The US policy also states that “current listing standards require shareowner approval of equity-based compensation plans and material amendments to plans, with limited exceptions.” The Corporate Governance Code in the UK also recommends that companies establish a remuneration committee, but its role has largely been limited to making “recommendations to the board rather than itself determining its remuneration policy” (Victoria, 1998, P. 1998). Therefore, the US approach appears to demonstrate a greater commitment to the “primacy” (Ruth, 2006) of shareholders and thus act to regulate the corporate activity of directors. A contrast may be found in the UK whereby shareholders, in general, are encouraged to be “flexible” (Victoria, 1998) in their approach to their powers under the Code. This would suggest that shareholders in the UK are currently limited not necessarily in their abilities, but in the manner in which they exercise those abilities, under the Code. It is suggested that empowering shareholders to exercise their full powers, particularly in terms of remuneration, may provide them with a more effective means of controlling corporate activities (Greenacre and Fergusson, 2011).

In addition to the rights of shareholders in relation to executive pay, shareholders also have clear rights to be communicated to by the board of directors. In particular, section A3 of the UK Corporate Governance Code provides that “the chairman should ensure effective communication with shareholders.” In the US, shareowners ought to have a “meaningful ability to participate in the major fundamental decisions that affect corporate viability, and meaningful opportunities to suggest or nominate director candidates and suggest processes and criteria for director selection and evaluation” (Corporate Governance Policies by the Council of Institutional Investors, 2013, 4, Section 1.5.). Indeed, one may expect the fact that directors may use a variety of means to comply with their obligations under corporate governance Codes, including instant modes of communication such as email to mean that communication is improved and that this and other forms of remote communication will become the preferred means of communication and shareholder involvement (Carolyn, 1996). However, it should be observed that the US corporate governance policy explicitly incorporates a rule which provides that, “companies should hold shareowner meetings by remote communication, so-called virtual meetings, only as a supplement to traditional in-person shareowner meetings, not as a substitute” (Corporate Governance Policies by the

Council of Institutional Investors, 2013, 4, Section 4.7.) This highlights that, in the first instance, boards should make an effort to ensure that they hold meetings with shareowners in-person, rather than making extensive use of virtual options, perhaps due to the fact that even in States such as Delaware, where some virtual meetings are permitted, there may be risks of security breaches in broadcasting meetings over the internet, and in terms of ensuring that only authorised members are able to attend such meetings (Ulrich, 2002), albeit virtually. However, it must be noted that such risks of security are largely able to be mitigated through the employment of appropriate software Raphael (Goldman *et al.*, 2000).

On this basis, it seems indefensible that wider use of the internet has not been made in order to improve shareholder engagement. It is argued that this is particularly the case in the current global economy, whereby many companies have a transnational base (Silvana, 2010) and shareholders may not physically be able to attend meetings where there are held. It is therefore clear that as a purely practical matter the increased use of the internet and virtual attendance technologies would clearly improve shareholder engagement. From this, it is a rather small step to argue that shareholder empowerment through the increased use of technology would be an effective means of managing corporate activities. As one commentator observes, there is a connection between low quality corporate governance and low shareholder engagement (Eva, 2013). It has been shown earlier in this paper that long-term shareholders are likely to have an interest in “good quality governance and risk management regimes” due to their long-term interest in the company, and therefore increased shareholder engagement through the use of internet technologies is likely to be an effective means of regulating corporate activities in this respect.

It is therefore submitted that failing to make effective provisions in corporate governance codes, particularly where “full, direct participation from a distance is currently legally unavailable” (Ulrich, 2002, p.141) should be viewed as shortcomings in those codes; amending the provisions so that increased use of virtual meetings may be made, should increase shareholder participation (Ulrich, 2002) and that this, in turn, will be an effective means of controlling corporate regulation.

1. The ‘Comply or Explain’: Influences and Effectiveness

The comply or explain, the UK preferred approach adopted to corporate governance (FRC, 2012), is referred to as the shareholder-led approach, in recognition of the important role that

shareholders play in influencing a company’s decision to comply fully with the Code and in enforcing the provisions of the Code (Kerrie, 2006). Essentially, the role played by shareholders in enforcing the Code is one of the quasi-regulators; this may suggest that the Code recognises that empowering shareholders may provide an effective means by which the corporate activities of companies can be regulated, in that the shareholders have a degree of “power and influence through company law” and corporate governance codes to hold boards to account for the decisions they take on behalf of a company (UK CGC, 2014, 9, para. 1.3). This is also something that can be seen in the UK Stewardship Code 2012. The Stewardship principles encouraged the effective Stewardship engagement as a purposeful dialogue with companies on issues such as remuneration, performance, risk, capital structure, and corporate governance as well as on matters that are the immediate subject of votes at general meetings. Nevertheless, throughout the discussion, essential questions should continuously be raised how efficient have these dialogue with shareholders principles been and what more might be needed?

Indeed, statistics from the Financial Reporting Council (2006) show that there are no recorded cases whereby a company “failed to comply with a provision of the Code,” without explaining this failure. It is submitted that this demonstrate that shareholder empowerment in this respect may provide for effective self-regulation (Miguel, 2015) and therefore be an effective means of controlling corporate activities. Evidence for this proposition may be taken from the fact that in 2012, 90 percent of FTSE 350 companies “either complied with all or all but one or two, of its provisions”; whilst “50 percent of FTSE 350 companies report full compliance with the UK Corporate Governance Code” (FRC, 2012, p.1-4).

Of course, the self-regulation under the comply or explain rule simply requires the board to disclose their activities, it does not contain any substantive requirements (Miguel, 2015) and one may, therefore, be inclined to argue that this is not, in reality, an example of shareholder empowerment which enables regulation of substantive corporate activities. However, this author argues, that in a similar way to the discussion of Bebchuk’s proposal to make it easier for shareholders to replace boards above (Lucian, 2005), the need to be disclosed actions may create a “mind-set and culture” (FRC, 2012, p.5) which ensures that directors act responsibly in corporate decision making.

Briefly, it should be observed that explanations under ‘the comply or explain’ approach should be “specific to the company’s position, not generic or off the shelf” (FRC, 2012, p.5).

This suggests that there is flexibility built into the approach to ensure that companies, whilst self-regulating, are able to act in a manner which suits their particular aims and indeed the markets in which they operate. This may serve to mitigate arguments made earlier in this paper which asserted that problems with the UK Corporate Governance Code include the fact that obligations are vague and must be adapted for a variety of companies. The approach provides a means whereby companies must remain accountable to empowered shareholders (FRC, 2012, p.5), despite the limitations in the Code.

The Barclays Plc case study considers the operation of 'the comply or explain' policy which demonstrates that the 'comply or explain approach' may be seen as an example of changing the culture of executive decision making, but that it cannot always be seen as an example of empowering shareholders in order to control corporate behaviour. Whilst it shows to be true that shareholders are important in this regard, it also shows that currently, the consideration of shareholders under this method may be simply one of tick-boxing. Given that it has been shown throughout these paper that shareholder empowerment may be an effective means of regulating corporate activity. The comply or explain policy may mitigate shortcomings in the Code in that directors remain accountable to shareholders for decisions which do not comply with the Code. This may be illustrated in the following example: Section A of the UK Code of Corporate Governance provides that "the board should consult major shareholders in advance and should set out its reasons to shareholders at the time of the appointment and in the next annual report." In 2003, Barclays took actions to appoint Matthew Barrett, the CEO of Barclays, as the Chairman of the company.

The former Chairman, Sir Peter Middleton, provided a statement in the 2003 Barclays' Corporate Governance Report (BBC News, 2003) explaining the reasons and procedure by which Barrett was appointed. Sir Peter Middleton stated that Barclays only made the decision following an 'extensive and rigorous' process and once the board is of the opinion that the appointment of William Barrett was in the best interests of the company. This process involved input from the non-executive directors of the institution in addition to interviewing external candidates and engaging with specialist consultants before making the appointment. The Board's unanimous choice was the former chief executive, William Barrett. However, the Board felt that it was appropriate to inform the shareholders about the decision to appoint the former chief executive as the chairman in the lighting of the Corporate Governance Code stipulating that such an appointment should only be made following engagement with major

shareholders. It is submitting that whilst this demonstrates that the comply or explain policy does require directors to be accountable to shareholders, the fact that Sir Middleton’s letter simply justified action which had already been taken by the board, albeit following a rigorous employment process, does serve to undermine the argument somewhat that through the comply or explain policy, shareholders act as quasi-regulators. Whilst it is true that by explaining the decision, Barclays was able to avoid complying with the Code in arguably justifiable circumstances, the fact that they simply explained their actions, (BBC News, 2003) rather than shareholders having any real influence over those actions might suggest that shareholder views under this policy are not particularly important and that explanations are something of a tick-box exercise. In this respect, this author would submit that although the comply and explain policy in the Barclays case did ensure that the board acted transparently, and thus its corporate activities were regulated, this was not the result of shareholder influence although it does show a mind-set and culture of regulation. Given that shareholder empowerment has been shown throughout this work to be an effective means of regulating corporate activity, it is suggested that strengthening the role of shareholders under the comply or explain approach will be beneficial.

VI. Shareholder Revolts: The Statistics Compiled Analysis

The previous discussion undertook a documentary analysis to assert that shareholder empowerment is an effective means of regulating corporate activities. However, subject to the latter part of the discussion, which presents some statistical information from the FRC, the analysis was largely theoretical. This section, therefore, aims to supplement the previous arguments by providing analysis of figures compiled relating to incidents of shareholder dissention in 2012. The figures have been presented in tabular format below (see Table 1). It is argued that the figures will further demonstrate that empowering shareholders will be an effective means of regulating corporate activity.

A. Findings

The statistics compiled for the analysis related to shareholder revolts which all occurred in 2012, concerning issues concerning remuneration policies (Jill and Julia, 2012). These statistics have been collated for this paper to highlighting the role that shareholders can already play under the existing rules to exert influence on the board of directors to act in the best interests of a company; and whether an extension of such powers is desirable.

Table 1 (file attached)*B. The Statistics Compiled: Discussion and Analysis*

The above figures highlighting that executive remuneration may be a controversial issue for shareholders (Alexandra, 2013), notably when the company has demonstrated poor performance or there are “unjustifiable” (Philip, 2015) discrepancies between executive pay and the distribution of shareholder dividends, as in the case of Barclays Plc. The issue for discussion here, however, is not whether such concerns are justified, but whether the empowerment of shareholders may lead to effective regulation of corporate activities which control the level of remuneration (Euro News, 2004) before a shareholder vote, or pay-out, thus avoiding situations whereby funds must be returned, such as in the case of Aviva, highlighted in the table above. As noted in the previous chapter, the UK Corporate Governance Code merely requires directors to communicate decisions about remuneration to shareholders and indeed, the statistics, particularly in the case of Barclays and Aviva, demonstrate that such communication was not effectively undertaken. It is argued that this confirms the assertions made previously that despite powers relating to executive remuneration is of the ways in which shareholders may be able to hold the board of directors to account (Charlotte, 2010), a lack of communication in practice and therefore a lack of a mechanism by which shareholders are able to exercise these powers, means that the current position is that shareholders are unable to effectively hold the board to account (Brenda, 2011).

In this respect, it is useful to once again return to the arguments put forward by Bebchuk. It was noted, albeit to the replacement of the board by shareholders, that the threat of the exercise of shareholder power may be enough to compel directors to modify their behaviour about corporate activities and it will be shown that this may be applicable concerning executive pay and dividend distribution. As Bebchuk observes, the current position is that “all decisions concerning distributions are in management’s hands” (Lucian, 2005, p.901) despite any duty to communicating to shareholders which, as shown in the statistics above is often lacking. On this basis, he suggested that empowering shareholders to control the payments of dividends, may lead to effective regulation of corporate activity and thus necessarily reduce the payment of excessive executive pay and the circumvention of the current rules of communication (Lucian, 2005), as shown to be the case in the above examples. Such a provision may, arguing Bebchuk, involve shareholders being able to pass

resolutions concerning dividend payments in order to control management activity (Lucian, 2005).

It should be noted that this would not operate to the detriment of creditors where would, of course, be protected by statute and thus directors would not be able to pay dividends where to do so would prejudice creditors, despite any instruction from shareholders. However, such a provision may lead to the situation where, even if the provisions were not executed – shown in the previously to have been conceded by Bebchuk the directors may be compelled to make more reasoned dividend payments which would be more reconcilable with executive pay levels in order to avoid the future exercise of such powers by shareholders (Lucian, 2005). The argument proffered by Strine that “the ingenuity and skill of talented managers is what ultimately produces corporate wealth, and the law should facilitate managers' ability to make good-faith business decisions with the speed and efficiency modern commerce demands” (Leo, 2005, p.1763) may indeed be trued, but it is submitted that the examples above have demonstrated that the reality is that the current position, rather than facilitating the exercise of good faith decision making, seems to facilitate excessive pay-outs to executives at the expense of shareholder dividends. It cannot be accepted that where these excesses are indeed at the expense of shareholder dividends, this can be justified by the need to provide management with incentives (ECRR, 2004) to continue to act in the best interests of the company, as argued in the Inmarsat case above.

Again, as shown in the previously, the purpose of the separation of ownership and control is to ensure the maximisation of profits for the investor; (James, 2007) and it seems clear that in cases such as the Barclays revolt highlighted in the table, shareholder profit through dividends was paid in proportions far smaller than executive remuneration. As such, it cannot be accepted that unpopular executive decisions are simply “good faith [actions which are] in the long-term best interests of stockholders, even if that means forsaking other tactics that might increase stock value in the short term” (Leo, 2005, p.1763) but rather examples of the board being able to act in an almost unfettered manner, at the expense of shareholder value (Andrew, 2011). In this respect, it is therefore clear that empowering shareholders (Marco *et al.*, 2009) in the manner envisaged in the documentary analysis in the previous chapter may serve as an effective means of regulating corporate activity and similarly avoiding shareholder revolts to the cases highlighted in the table.

A further point to note here is that Strine have argued that in order for shareholders to be able to vote on the payment of dividends and influence the board in the manner suggested by Bebchuk above, those shareholders are likely to take advice from professional agencies which are neither bound by fiduciary obligations to the company, as are the board; nor do they bear the risk of poor voting decisions, as do shareholders (Leo, 2005). It may, therefore, be that empowering shareholders in this respect would simply shift power from the board to such advisory bodies without control mechanisms (Leo, 2005). It is clear from the statistics provided above that shareholders do currently have some control over executive pay decisions, as evidenced by the Aviva revolt (Richard, 2012), even if that control is limited and often exercised after board action. This author would concede that such an argument does indeed have merit but would submit that such arguments do not defeat the assertions that there are needs to regulate executive control over matters of remuneration and that shareholder empowerment would be an effective means of doing this. Rather, it is suggested that what would be required in this respect would be the introduction of controls into the exercise of advice by such services, such as fiduciary roles to their clients and transparency (SEI, 2010) in the exercise of such advice.

Concerning Aviva shareholder revolt case study as highlighted previously in the table. It shows that despite seeming irreconcilable with the views of Bebchuk, the case highlights that shareholders may be able to control executive and director action's and that reform is needed to ensure that shareholders are able to exercise their powers effectively in this respect. The shareholders of the insurer AVIVA, a FTSE 100 company, rebelled in 2012 when its remuneration report was voted down following the company's underperformance (Richard, 2012). 54% of shareholders voted against AVIVA's remuneration policies illustrating the power that shareholders wield in terms of influencing the decisions that have been made by a company's board, particularly by the larger companies such as AVIVA (Richard, 2012). Indeed, the shareholder action led Andrew Moss, the CEO, to resign from his post, contending that his position had become untenable (Richard, 2012). One may be inclined to agree with Mr. Moss' assertions, due to the fact that in the aftermath of his resignation, shares rose by 6% almost immediately (Marietta, 2012). This author would submit that the case confirms several arguments throughout the paper. Firstly, it has already been noted that the board's failure to engage with shareholders was problematic and that the board conceded this in the aftermath of the vote (Marietta, 2012). This is rather interesting given that shareholder advice in such consultation is currently non-binding (Chrispas, 2012) and it is therefore

arguable that even if such communication had been undertaken, there is no evidence to suggest the board would have adopted a different remuneration policy (David, 1989). It is thus difficult to analyse the true impact on shareholder powers in this respect.

What is clear however, is that as noted previously in the analysis of the views of Bebchuk, shareholders may be reluctant to use any greater powers afforded to them for fear of economic consequences (Lucian, 2003) and indeed it seems true that shareholders will not wish to displace executives (Marietta, 2012), and thus the refusal to accept remuneration packages may have backfired somewhat. However, what should also be noted is that the Aviva case does in this respect show that shareholders will be prepared to use powers to control the board (Richard, 2012) despite the assertions of Bebchuk above, and thus one may be inclined towards the view that extending shareholder powers in this respect is unnecessarily (Aviva, 2012).

Although section 439 of the Companies Act 2006 does not give shareholders the power to prevent pay-outs made under remuneration policies, simply to state their disapproval, the Aviva case demonstrates that the mere disapproval itself will be enough to prevent the pay-outs and indeed control corporate activities. Whilst this adds further support to the arguments made early in this work concerning the *threat* of action (Lucian, 2003) being enough to ensure boards behave responsibly and suggesting that further empowering shareholders is not necessary, this author would add a word of caution. The Aviva scandal did lead to a reduction in executive pay (Sean, 2015) and it seems that this was as a result of shareholder action, but the fact remains that excessive pay-outs continue to be made (Alistair, 2012), suggesting that Aviva is something of an anomaly and that shareholders may be more likely to simply accepting remunerations policies which in any case are able to be adopted without shareholder approval (Stephen, 2003), thus not being actively involved. This once again, therefore, leads to the conclusion that as shareholder action has been shown to be able to control (Joseph, 2012) the activities of the board, reform is needed so that there is a consistent impetus for shareholders to use those powers.

VII. Further Research

Remain several aspects in which corporate governance system could make a difference in corporate outcomes and more conducive to corporate success. For instance, to explore new framework directions for academic research, it has been suggested that the point of

empowering shareholders warrants further consideration to determine which rights ought to be strengthened and how they should apply in practice. Therefore, further research should be carried out and examine to what extent shareholder should be empowered and in what form should these powers be introduced. Furthermore, it has been additionally suggested that improving minority shareholders engagement should be significantly considered besides their protection, which might provide a significant framework for subsequent research of a possible reallocation of power in publicly traded companies. Thus, further research should be carried out and critically examine whether minority shareholders ought to be further empowered to have a greater influence over the companies' activities.

VIII. Conclusions

This paper has shown that since the financial crisis originated in 2007, 2008, there is broad support in the literature for the reform of the roles of shareholders in companies and substantial attention should be given to the possibility of increasing shareholders' powers to approve some major corporate decisions. On this basis alone, one is inclined towards the conclusion that arguments for shareholder empowerment are likely to be "convincing" in the wake of the crisis. Hence, the question posed by this research was aimed at understanding whether the empowerment of shareholders would amount to an effective method of regulating and governing the activities of corporate entities or not. The paper examined the positions by conducting a comparative analysis approach following two jurisdictions, the UK and Delaware in the US. This approach allowed the creation of an analytical framework to conduct a full assessment of shareholder empowerment.

To conclude, the shareholder empowerment will theoretically provide an effective means through which corporate activities can be regulated. The empowerment of shareholders would allow shareholders to impose further controls on the behaviour of those managing the company. However, merely increasing shareholder powers alone is not likely to be a successful means of regulating corporate activities as it fails to recognise the role of different types of shareholders in a company. Although shareholders did hold some powers during the lead up to the financial crisis, this was largely not utilised. Nevertheless, this paper has found that clearly, amendments to the provisions may increase shareholder power and that this power will be an effective means of regulating corporate activities. For example, long-term shareholders are likely to have an interest in "good quality governance and risk management

regimes” due to their long-term interest in the company, and therefore increased shareholder engagement through the use of internet technologies is likely to be an effective means of regulating corporate activities.

The paper has also drawn a distinction between discussions of shareholder empowerment in theory and practice. Accepting the arguments that in reality, shareholders may be unlikely to use increased powers to hold the board to account, due to associated economic risks; or due to the fact that an increasing number of multinational corporations have an enormous number of shareholders, and may, therefore, not have any real practical prospect of influencing the board, despite an increase in powers.

The analysis of figures compiled relating to incidents of shareholder dissention in 2012, further demonstrates that empowering shareholders will be an effective means of regulating corporate activity. The statistics confirm that strengthening shareholder rights in this regard would provide an effective means through which corporate activities could be controlled. Moreover, shareholders can play under the existing rules to exert influence on the board of directors is to act in the best interests of a company. However, to do this, account must be taken of the fact that serious consideration ought to be given to strengthening the powers of long-term shareholders who could play a more active and meaningful role in regulating corporate activities in a manner which is in the overall best interests of the company. The existing UK Corporate Governance Codes impose a duty on the chairman of the board to maintain effective communication with shareholders regarding the level of executive remuneration to be given to a director, amongst other things. Coupled with the legislative framework, Table 1 highlights the significant role that shareholders can play in ensuring that executive remuneration properly reflects a company’s performance. The implications of a failure by a company to ensure this could result in a shareholder revolt as witnessed in the case studies provided above. Therefore, the recommendation is that a distinction should be made between the shareholder voting rights of long-term and short-term for those who have invested in a company for five years or more ought to be classed as long-term shareholders and given strengthened voting rights on important issues, particularly in respect of executive remuneration. Additionally, the literature has suggested a similar logic to modifying the strength of voting rights according to the duration shares have been held to impose a minimum period in which shares cannot be sold (Jonathan and Mathias, 2014).

By considering case studies from two jurisdictions proposed, shareholders may be able to control executive and director action's, and that reform is needed to ensure that shareholders are able to exercise their powers effectively in this respect and have an influence on the Board's decision to award executive compensation. The corporate governance rules applicable in the US are more extensive than those adopted in the UK. The rules set out in the US policies do adequately cover the requisite areas to empower shareholders sufficiently to place them in a position whereby they can influence a corporation's board of directors. In particular, the US corporate governance regime in respect of institutional investors appears to be more refined and comprehensive than the equivalent regime in the UK. The recommendation is therefore that the UK can adopt some of the US policies to strengthen the rights of institutional shareholders so they can play a more prominent role in regulating the activities of UK companies.

Moreover, it is suggested that strengthening the role of shareholders under 'the comply or explain' approach will be beneficial. Thus, empowering oversight by monitoring bodies has been proposed as a way of gauging the adequacy of company disclosures. Nonetheless, it would have to be ensured that, responsibilities and would instead operate in support of shareholder it would have further promoted of the practice where chairperson introduce corporate governance statements or standardise disclosure forms on company's website, which would significantly improve disclosure quality. It has been additionally suggested that the introduction of an internet 'scorecard scheme' that would identify those who are taking compliance more seriously, and it would also have the significant benefit of allowing shareholders to act as stewards by rating companies on their performance. There is also a valid suggestion toward strengthening the role of shareholders under the 'comply or explain' approach, which is believed that it would be beneficial to empowering shareholder to be an effective means of regulating corporate activity. The suggestion is that introducing a mandatory law instead of 'comply-or-explain' approach. This suggestion would sufficiently improve compliance with Code provisions and would solve the investor apathy problem by making the Stewardship Corporate and Governance Codes legally binding.

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