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# The Impact of Enlightened Shareholder Value

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*This paper documents and analyses the findings of a study conducted in relation to selected reports of all of the retail companies that are listed on the FTSE 100 in order to ascertain the impact of enlightened shareholder value on UK corporate governance. The findings are also analysed in light of other studies and commentary.*

## I Introduction

When the provisions that subsequently formed the Companies Act 2006 (“the Act”) were being considered in Parliament, most debate centred round what is now s.172(1) of the Act. The reason for this was probably that this section sets out what might be seen as the most controversial and challenging duty imposed on directors by the Act, and the one that had given companies and their directors more pause for thought than any other duty or obligation.<sup>1</sup> It is also one that appears to be wide-ranging in scope. Importantly, the section is the main element of what was referred to as *enlightened shareholder value* (“ESV”) by the Company Law Review Steering Group (“CLRSG”), the body which was engaged to conduct a comprehensive review of UK company law at the end of the 1990s and the beginning of this century. The other component of ESV that was introduced in the Act was the requirement in s.417 (now repealed) to explain in a Business Review how the directors had addressed their obligations under s.172(1).

With the passing of the tenth anniversary of the putting into force of ESV into law,<sup>2</sup> and because there has been a lot of interest in the concept of ESV not only in the UK but around the world,<sup>3</sup> it is an opportune time to take stock. The aim of this paper is to ascertain and then evaluate the impact of ESV. The concept was seen by many as ground-breaking. Has it lived up to that billing? What effect or influence has ESV had on company life? The ways in which one can ascertain the impact of a provision are limited. In order to determine impact we decided to engage in an empirical study of some large listed companies. There have been

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<sup>1</sup> Institute of Chartered Secretaries and Administrators (ICSA), *Guidance on Directors’ General Duties* – January 2008, para 3.2.3.

<sup>2</sup> This was 1 October 2007. See, Companies Act 2006 (Commencement No. 3, Consequential Amendments, Transitional Provisions and Savings) Order (SI 2007/2194), art. 2(1)(d) and art. 2(1)(g).

<sup>3</sup> For example, see Commonwealth of Australia, Joint Parliamentary Committee on Corporations and Financial Services in a report titled, *Corporate Responsibility : Managing Risk and Creating Value* June 2006 at para 4.46 and accessible at : [https://www.aph.gov.au/binaries/senate/committee/corporations\\_ctte/completed\\_inquiries/2004-07/corporate\\_responsibility/report/report.pdf](https://www.aph.gov.au/binaries/senate/committee/corporations_ctte/completed_inquiries/2004-07/corporate_responsibility/report/report.pdf) > last accessed 17 November 2017; J. Ho, “Directors’ duty to promote the success of the company – Should Hong Kong implement a similar provision” (2010) 10 *Journal of Corporate Law Studies* 17; V. Ho, “‘Enlightened Shareholder Value’ : Corporate Governance Beyond the Shareholder-Stakeholder Divide” (2010) 36 *Journal of Corporation Law* 59.

several empirical studies conducted over the past 10 years relating to ESV.<sup>4</sup> They have generally sought to ascertain the views of directors and other company officers about ESV and what was happening as far as its application. In our study we endeavoured to chart the impact of ESV over the past 10 years and up to more recent times. The paper develops as follows. First, we explain ESV and the aims behind it as that is a critical factor in determining impact. Secondly, the paper explains the nature of the empirical study including the methodology, the sample and the coding used. Thirdly, we describe the findings of the study and analyse them as far as impact goes. Fourthly, we note the limitations of the study. Fifthly, we compare our findings with other studies and commentary. Finally, there is a conclusion.

## II The Elements of Enlightened Shareholder Value

Section 172 is comprised of three sub-sections. The paper will only deal with the first for it is this that is the essential component of ESV. To assist in exposition it is helpful to set out s. 172(1). It states that :

“A director of a company must act in a way that 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 –

- (a) The likely consequences of any decision in the long term
- (b) the interests of the company’s employees
- (c) the need to foster the company’s business relationships with suppliers, customers and others
- (d) the impact of the company’s operations on the community and the environment
- (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- (f) the need to act fairly between the members of the company.”

It is not intended in this paper to embark on either an exposition or exegesis of the provision; that has been done elsewhere in the academic literature.<sup>5</sup> Before going any further it is important to observe that there are two requirements contained in the sub-section. First, directors are to act in a way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members. Second, they are to do this while

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<sup>4</sup> For example, see P. Taylor, “Enlightened Shareholder Value and the Companies Act 2006” (unpublished PhD thesis, May 2010), Birkbeck College, University of London; S. Fettiplace and R. Addis, “Evaluation of the Companies Act 2006,” 2 August 2010 and accessible at : <http://webarchive.nationalarchives.gov.uk/20121205013304/http://www.bis.gov.uk/assets/BISCore/business-law/docs/E/10-1360-evaluation-companies-act-2006-volume-1.pdf> > last accessed 3 December 2017; D. Collison et al, “Shareholder Primacy in UK Corporate Law : An Exploration of the Rationale and Evidence,” Research Report 125, Certified Accountants Educational Trust (London), 2011.

<sup>5</sup> For instance, see A. Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Abingdon, Routledge, 2013), Chapter 4; S. Kiarie, “At Crossroads : Shareholder Value, Stakeholder Value and Enlightened Shareholder Value : Which Road Should the United Kingdom Take?” (2006) 17 I.C.C.L.R. 329; D. Fisher “The Enlightened Shareholder – Leaving Stakeholders in the Dark: Will Section 172(1) of the Companies Act 2006 Make Directors Consider the Impact of Their Decisions on Third Parties?” (2009) 20 I.C.C.L.R. 10; A. Alcock, “An Accidental Change to Directors' Duties?” (2009) 30 *Company Lawyer* 362; J. Yap, “Considering the Enlightened Shareholders Value Principle” (2010) 31 *Company Lawyer* 36.

having regard for the factors set out in (a)-(f). How these two requirements fit together and what they actually entail has caused no little uncertainty.

When ESV was first introduced s.417 of the Act required companies that were not subject to the small companies exemption to provide a Business Review in the directors' report, the purpose of which was to inform members of the company and help them assess how the directors have performed their duty under s.172. Subsequently the need to prepare a Business Review was replaced by an obligation to publish a Strategic Report.<sup>6</sup> According to s.414C(1) of the Act, The Report is to contain, inter alia, in the case of a quoted company, to the extent necessary for an understanding of the development, performance or position of the company's business—

- “(a) the main trends and factors likely to affect the future development, performance and position of the company's business, and
- (b) information about—
  - (i) environmental matters (including the impact of the company's business on the environment),
  - (ii) the company's employees, and
  - (iii) social, community and human rights issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies.”<sup>7</sup>

Under the heading of “Enlightened Shareholder Value,” the CLRSG stated that the ultimate objective of companies as currently enshrined in law was to generate maximum value for shareholders,<sup>8</sup> that is providing for a shareholder value approach. It was noted that many who adopt a shareholder value approach argue that maximum value for shareholders cannot be achieved without companies building long-term relationships.<sup>9</sup> Yet, the CLRSG concluded: “the law as currently expressed and understood fails to deliver the necessary inclusive approach.”<sup>10</sup> To redress this, the CLRSG advocated the introduction of ESV which was to embrace consideration of wider interests. It said that employing an ESV approach would have the advantage of being able to retain the fundamentals of directors' duties and to correct the approach taken by some directors on only managing for the short term and the narrow interests of members at the expense of a broader and longer-term approach.<sup>11</sup> The CLRSG was of the view that in many situations directors should adopt a broader and longer-term approach (which it referred to as “inclusive”) to their role, and that they could do so as there was nothing compelling them to focus on the short term.<sup>12</sup> The CLRSG was concerned that the law was misunderstood and that there was a good case for making its true character

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<sup>6</sup> Section 414A.

<sup>7</sup> Section 414C(7).

<sup>8</sup> Company Law Review, *Modern Company Law for a Competitive Economy* : Strategic Framework, 1999, London, DTI, para 5.1.12.

<sup>9</sup> Company Law Review, *Modern Company Law for a Competitive Economy* : Strategic Framework, 1999, London, DTI, para 5.1.12.

<sup>10</sup> Company Law Review, *Modern Company Law for a Competitive Economy* : Strategic Framework, 1999, London, DTI, para 5.1.12.

<sup>11</sup> Company Law Review, *Modern Company Law for a Competitive Economy* : Strategic Framework, 1999, London, DTI, para 5.1.17.

<sup>12</sup> Company Law Review, *Modern Company Law for a Competitive Economy* : Strategic Framework, 1999, London, DTI, para 5.1.19.

explicit.<sup>13</sup> It wanted to ensure that directors recognised the fact that they have, in appropriate cases, an obligation “to have regard to the need to build long-term and trusting relationships with employees, suppliers, customers and others in order to secure the success of the enterprise over time.”<sup>14</sup> Importantly, the CLRS did not envisage the ultimate objective of the company being changed from shareholder value, ESV simply ensured that stakeholder interests were to be considered in achieving the ultimate objective. That is, in discharging their s.172 duty the directors were to act in an enlightened manner, namely taking into account wider interests,<sup>15</sup> something now enumerated in s.172(1)(a)-(f). This ESV approach, while clearly based on shareholder value, was said to eschew “exclusive focus on the short-term financial bottom line” and seeks a more inclusive approach that values the building of long-term relationships.”<sup>16</sup>

In a White Paper in 2005 the government stated unequivocally that it agreed with the ESV approach and it wanted to:

“embed in statute the concept of Enlightened Shareholder Value by making clear that shareholders must promote the success of the company for the benefit of its shareholders, and this can only be achieved by taking due account of both the long-term and short-term, and wider factors such as employees, effects on the environment, suppliers and customers.”<sup>17</sup>

One of the concerns over s.172(1) was the fact that the government of the day emitted mixed messages in relation to the section. At one time the provision was seen simply as a successor to the duty to act bona fide in the best interests of the company and at others it was seen as quite radical as it was said to introduce a totally fresh duty for directors. This ambiguity also was manifested at the time of enactment in the publications of several of the UK’s large commercial law firms.<sup>18</sup> As far as the effect of ESV on practice, the views of practitioners given before the provision came into force varied from the notion that the duty would be a “damp squib” which would not introduce any new liabilities or responsibilities for directors,<sup>19</sup> to the duty would lead to “radical change”<sup>20</sup> and a real prospect of increased litigation against directors.<sup>21</sup> One study found that most lawyers were agnostic about whether the advent of ESV would alter the outcome of directors’ decisions in the ordinary course of business.<sup>22</sup>

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<sup>13</sup> Company Law Review, *Modern Company Law for a Competitive Economy* : Strategic Framework, 1999, London, DTI, paras 5.1.20, 5.1.22.

<sup>14</sup> Company Law Review, *Modern Company Law for a Competitive Economy* : Strategic Framework, 1999, London, DTI, para 5.1.22.

<sup>15</sup> Company Law Review, *Modern Company Law for a Competitive Economy*, : Developing the Framework, 2000, London, DTI, para 2.21.

<sup>16</sup> Company Law Review, *Modern Company Law for a Competitive Economy*, : Developing the Framework, 2000, London, DTI, para 2.21.

<sup>17</sup> Cm 6456, DTI, March 2005, p5.

<sup>18</sup> See, J. Loughrey, A. Keay and L. Cerioni, “Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance” (2008) 8 *Journal of Corporate Law Studies* 79.

<sup>19</sup> Bruce Hanton of Ashursts, quoted in *Financial Director* 26 November 2006 and referred to in J. Loughrey, A. Keay and L. Cerioni, “Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance” (2008) 8 *Journal of Corporate Law Studies* 79.

<sup>20</sup> J. Gauntlett and R. Dattani (Norton Rose) *Directors Duties Codified* and referred to in J. Loughrey, A. Keay and L. Cerioni, “Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance” (2008) 8 *Journal of Corporate Law Studies* 79.

<sup>21</sup> G. Milner Moore and R. Lewis (Herbert Smith) *In the Line of Fire-Directors Duties under the*

A leading concern with ESV was and is that neither s.172 itself nor any document really provides significant guidance to directors as to what they should be doing and how they should be acting. There have been few cases that have dealt with matters involving s.172(1), and in what cases we have there has been little said, either in cases that have been decided on claims for breaches of s.172(1) or those where s.172 has been an important issue, such as in applications for permission to continue derivative proceedings.<sup>23</sup> In general the judges have been content to see s.172(1) as a natural successor to the duty to act in the best interests of the company. This is manifest in cases such as *Re West Coast Capital (LIOS) Ltd*<sup>24</sup> and *Cobden Investments Ltd v RWM Langport Ltd*.<sup>25</sup> In the latter case Warren J said that: “They [the previous duty and s.172] come to the same thing with the modern formulation giving a more readily understood definition of the scope of the duty.”<sup>26</sup> The lack of comment on, and explanation of, the elements of s.172(1) in the courts has been replicated by government. At the time of the debate on s.172(1) in Parliament, the Government promised to publish a plain English guidance explaining what directors must do to comply with the general duties. It has never done so, though it did in June 2007 publish a document that included a very glib statement, in an introduction by the relevant minister, of what directors should do and that was followed by some quotations made by ministers in the parliamentary debates.<sup>27</sup> While of some assistance, particularly for commentators, it is wholly inadequate for directors themselves. The only guidance that has been provided has come from professional associations, primarily the Institute of Chartered Secretaries and Administrators (“ICSA”)<sup>28</sup> and the GC 100,<sup>29</sup> and this was limited, and, of course, not authoritative. The ICSA has recently drafted a further guidance,<sup>30</sup> but with respect it does not seem to add much to the guidance previously provided.

The fact that there are relatively few cases that have been concerned with ESV cannot be seen as, certainly on its own, an indicator of impact. Proceedings might have been made under s.172 and been settled prior to a hearing, although after over 10 years of operation one might think that the section would have been the subject of more cases. The relative dearth of case

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*Companies Act 2006*, 4 and referred to in J. Loughrey, A. Keay and L. Cerioni, “Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance” (2008) 8 *Journal of Corporate Law Studies* 79.

<sup>22</sup> J. Loughrey, A. Keay and L. Cerioni, “Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance” (2008) 8 *Journal of Corporate Law Studies* 79, 90 and referring to Cameron McKenna “Companies Act 2006: Deferred Reform” *Law-Now* 29 November 2006, at 4-5; Freshfields Bruckhaus Deringer, *Companies Act 2006: Directors Duties* (November 2006), 4.

<sup>23</sup> See, *Companies Act 2006*, s.263(2)(a) and s.263(3)(b) (England and Wales and Northern Ireland) and s.268(1)(a) and s.268(2)(b) (Scotland).

<sup>24</sup> [2008] CSOH 72; 2008 Scot (D) 16/5.

<sup>25</sup> [2008] EWHC 2810 (Ch).

<sup>26</sup> [2008] EWHC 2810 (Ch).

<sup>27</sup> “Duties of Company Directors,” DTI, June 2007, Introduction and Statement of Rt Hon Margaret Hodge, and available at

<http://webarchive.nationalarchives.gov.uk/20070628230000/http://www.dti.gov.uk/files/file40139.pdf> > last accessed 9 December 2017.

<sup>28</sup> *Guidance on Directors’ General Duties* – January 2008.

<sup>29</sup> “Companies Act (2006) – Directors’ duties,” 7 February 2007. The GC 100 is a group of the general counsel and company secretaries of the FTSE 100 companies (Association of General Counsel and Company Secretaries of the FTSE 100 companies)

<sup>30</sup> ICSA, *General Guidance note on Directors’ General Duties*, June 2015 and accessible at:

[https://www.icsa.org.uk/assets/files/free-guidance-notes/directors-general-duties\(1\).pdf](https://www.icsa.org.uk/assets/files/free-guidance-notes/directors-general-duties(1).pdf) > last accessed, 9 December 2017.

law suggests that the section might be used infrequently as the basis for challenging the actions of directors. Another conclusion that could be drawn from the dearth of cases is that directors are complying with the duty. A further conclusion that might be made is that many potential claimants are unsure about how the duty is to be fulfilled and what the courts will say about it, and this is making potential claimants reluctant to take action. Of course, all of these conclusions could be correct and all have contributed to the state of affairs that exists.

In the past year or so there has been renewed consideration of ESV. In a Green Paper published by the Department of Business Energy and Industrial Strategy (“BEIS”) and titled “Corporate Governance Reform,” BEIS proposed four options to enable reform to take place that would strengthen the voice of wider interests in the company and it indicated that these options might help ESV to be properly understood and applied,<sup>31</sup> suggesting that the concept has not been, and is not, understood and applied properly. In turn one might be able to infer from this that BEIS believes that ESV has not made the impact hoped for. We discuss the responses to the Green Paper briefly later in the paper when we consider them in the context of our findings.

### **III The Empirical Study of Large Listed Companies**

#### **A. Introduction**

The paper now discusses a study that we have undertaken in relation to the impact of ESV on some large listed UK companies. To ascertain impact we decided to examine the public documents of a sample of companies that are listed on the FTSE 100 index of the London Stock Exchange. In our opinion one significant way of determining impact is to see if and how companies have changed in the way that they operate and communicate. We felt that we would obtain more helpful and extensive data by considering large publicly listed companies, as they are required to provide a Strategic Report (or its precursor) and they would provide both more publicly available documents and more details about their activities. We determined that it would be best to consider companies that are engaged in the same sector as it would be likely to generate better results and the comparison of the data would be more coherent and more helpful. The benefit of limiting the study to one industry is arguably that while the companies will obviously be different in relation to various aspects of carrying on business, there was no need to take into account the fact that the companies considered might have wildly different concerns and considerations, and this would mean that there would be fewer variables. We decided to focus on companies engaged in the retail industry. Those large companies engaged in retail arguably have to consider all of the factors mentioned in s.172(1)(a)-(f). There are eight retail companies that are listed on the FTSE 100 and we have explored the public documents of all of these companies for five specific years in the period from 2006 to 2015. Our aim was to determine whether, and if so to what extent, ESV has had any impact on the companies through examination of material that is included in reports. The discussion commences with an explanation of the methodology of the study which includes justification for taking certain approaches.

#### **1. Methodology**

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<sup>31</sup> Department of Business, Energy and Industrial Strategy, “Corporate Governance Reform,” Green Paper, November 2016, para 2.14.

To address the aim of the research it was determined that a form of content analysis should be employed in relation to relevant company documents. Content analysis is a very flexible methodology<sup>32</sup> which covers a number of different strategies.<sup>33</sup> It has been used by scholars in various disciplines within the social sciences and humanities to analyse communications of different kinds. It is the research method that is employed frequently in order to assess organisations' disclosures<sup>34</sup> and it has been used several times to address corporate reports.<sup>35</sup> Content analysis is a tool that enables researchers objectively and systematically to identify the characteristics and constituents of textual information so as to enable them to be able to draw inferences.<sup>36</sup> Hsieh and Shannon define it as "a research method for the subjective interpretation of the content of text data through the systematic classification process of coding and identifying themes or patterns."<sup>37</sup> A leading scholar in relation to this method, Klaus Krippendorff, has said that it aims to reduce the raw data into manageable amounts to enable analysis and stated that it was : "a research technique for making replicable and valid inferences from texts...to the contexts of their use."<sup>38</sup> The research enables inferences to be drawn about the sender of the communication, the communication itself or the audience viewing the communication.<sup>39</sup>

We decided that we would undertake a qualitative kind of content analysis, namely a deductive content analysis. This involved the a priori identification of categories as codes against which the company documents (the unit of analysis) were reviewed.<sup>40</sup> This strategy was chosen as it was reasoned that this approach to coding would enable results to be more reliable. Having said that, we were prepared, in accord with many scholars, to add to or amend our classifications in light of our study of the data and so we were open to an inductive element to the study.<sup>41</sup> The deductive approach has been used by Morgan et al<sup>42</sup> to examine the embeddedness of corporate citizenship in 25 companies that were at the time of the study in the Fortune 500 list and by Klettner et al<sup>43</sup> in relation to the exploration of how

<sup>32</sup> M. White and E. Marsh, "Content Analysis : A Flexible Methodology" (2006) 55 *Library Trends* 22; S. Elo and H. Kyngas, "The qualitative content analysis process" (2007) 62 *Journal of Advanced Nursing* 107.

<sup>33</sup> M. Vaismoradi and T. Bondas, "Content analysis and thematic analysis : Implications for conducting a qualitative descriptive study" (2013) 15 *Nursing and Health Sciences* 398.

<sup>34</sup> M. Milne and R. Adler, "Exploring the reliability of social and environmental disclosures content analysis" (1999) 12 *Accounting Auditing and Accountability Journal* 237, 237.

<sup>35</sup> F. Li, "Textual Analysis of Corporate Disclosures : A Survey of the Literature" (2010) 29 *Journal of Accounting Literature*, 143, 145.

<sup>36</sup> O. Holsti, *Content Analysis for the Social sciences and Humanities*, (Addison-Wesley, Reading MA, 1969); A. Beck, D. Campbell and P. Shrivess, "Content analysis in environmental reporting research : Enrichment and rehearsal of the method in a British-German context" (2010) 42 *The British Accounting Review* 207.

<sup>37</sup> H. Hsieh and S. Shannon, "Three Approaches to Qualitative Content Analysis (2005) 15 *Qualitative Health Research* 1277, 1278.

<sup>38</sup> P. Krippendorff, *Content analysis : An introduction to the methodology*, 2<sup>nd</sup> ed, (Thousand Oaks, Sage, 2004), 18.

<sup>39</sup> B. Prasad, "Content Analysis : A method in Social Science Research" in D. K. Lal Das, and V. Bhaskaran, (eds.), *Research Methods for Social Work* (New Delhi, Rawat, 2008), 173.

<sup>40</sup> H. Kyngas, and L. Vanhanen, *Content analysis as a research method*, (1999) 11 *Hoitoteide* 3.

<sup>41</sup> For example, see M. White and E. Marsh, "Content Analysis : A Flexible Methodology" (2006) 55 *Library Trends* 22, 39; S. Aureli, "A comparison of content analysis usage and text mining in CSR corporate disclosure" (2017) 17 *The International Journal of Digital Accounting Research* 1.

<sup>42</sup> G. Morgan, A. Lindgren, and V. Swann, "Leading corporate citizenship : Governance, structure, systems" (2009) 9 *Corporate Governance* 39.

<sup>43</sup> A. Klettner, T. Clarke and M. Boersma, "The Governance of Corporate Sustainability : Empirical Insights into the Development, Leadership and Implementation of Responsible Business Strategy" (2014) 122 *Journal of Business Ethics* 145.



corporate governance processes and structures were being employed in 50 large Australian companies respectively.

The categories for the deductive study were derived from a study of the academic and practitioner literature dealing with ESV. The categories that we identified were those which we believed were the most relevant and valid.<sup>44</sup> We analysed the data that is described in the next section of the paper and placed it in the various pre-determined categories, in line with the approach adopted in many studies and argued for by Gray et al.<sup>45</sup> This process relied partly on subjective judgment.

The study aimed to describe the position taken by companies in relation to ESV and related issues and then to provide an interpretive analysis of the data examined in order to gain greater understanding of the impact that ESV has had on the companies.

## **B. The Unit of Analysis**

The FTSE 100 index is a share index composed of the 100 largest companies that are listed on the London Stock Exchange according to market capitalisation.<sup>46</sup> The following, in order of ranking on the FTSE 100, are the eight retail companies that were included in the FTSE 100 at the time of the study and which were considered: Associated British Foods plc (parent company of Primark), J Sainsbury plc, Tesco plc, Morrisons Supermarkets plc, Kingfisher plc, Marks and Spencer group plc, Next plc and Travis Perkins plc. The data analysed was text data gathered from company documents and websites that are generated by the companies to express their position on relevant issues. The documents examined, subject to availability, were Annual Reports, which included the Business Review and, later the Strategic Report, and Corporate Social Responsibility (CSR) and/or Sustainability Reports. Mission statements were also taken into account.

Usually public companies produce annual reports due to mandatory requirements that exist in a majority of Western economies.<sup>47</sup> The annual report is an integral method for financial communication among shareholders, management and others.<sup>48</sup> It is even claimed to be the most important mechanism used for corporate communication.<sup>49</sup> It is considered to have credibility as a communication tool because it includes legally required and audited financial statements.<sup>50</sup> This study was based predominantly on annual reports because, together with being the most publicised document, it also appears to be the most inclusive document that is

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<sup>44</sup> M. White and E. Marsh, "Content Analysis : A Flexible Methodology" (2006) 55 *Library Trends* 22.

<sup>45</sup> R. Gray, R. Kouhy and S. Lavers, "Methodological themes : Constructing a research database of social and environmental reporting by UK companies" (1995) 8 *Accounting Auditing and Accountability Journal* 78.

<sup>46</sup> LSE, 'FTSE 100 constituents shares prices' (2017) and available at: <http://www.londonstockexchange.com/exchange/prices-and-markets/stocks/indices/summary/summary-indices-constituents.html?index=UKX> > last accessed 22 February 2017

<sup>47</sup> P. A. Stanton and J. Stanton, "Researching corporate annual reports: an analysis of perspectives used" available at : <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.196.9076&rep=rep1&type=pdf>> last accessed 15 November 2016.

<sup>48</sup> S. A. Bartlett and R. A. Chandler, "The Corporate Report and the Private Shareholder: Lee & Tweedie Twenty Years On"(1997) 29 *British Accounting Review* 245.

<sup>49</sup> C. A. Adams, A. Coutts and G. Harte, "Corporate Equal Opportunities (Non-) Disclosure" (1995) 28 *British Accounting Review* 87, 92

<sup>50</sup> R.D. Hines, "The Usefulness of Annual Reports: the Anomaly between the Efficient Markets Hypothesis and Shareholder Surveys" (1982) 12 *Accounting and Business Research* 296.

generated by mandate,<sup>51</sup> and in recent years has included the Strategic Report. Furthermore, the aspects of the companies' management and affairs that we wished to examine are generally dealt with by the companies in the annual reports. The CSR and/or Sustainability reports were analysed because these reports are usually entirely focused on stakeholders.<sup>52</sup> Hence, any information on the stakeholder factors listed in s.172(1) is likely to be included in CSR/Sustainability reports as well as the annual reports.

The comments made by companies on their websites are sometimes dismissed as mere rhetoric and thus as meaningless speech.<sup>53</sup> Nonetheless, it has also been claimed that the kind of material studied might have intrinsic value and normative implications.<sup>54</sup> However, clearly such data has certain limitations but given that it is publically available and therefore it is likely to have reasonable probity, it can be of value and, we believe it is a valuable source to enable the assessment of the impact, if any, of ESV. Also, many aspects of company reports are now verified by independent bodies, such as the large accounting firms. Certainly several studies have relied upon reports and they have been deemed a valid source of investigation using a content analysis approach.<sup>55</sup> The value of the reports for a study was that it enabled us to see if companies have changed their approach over a time frame of some 10 years and during the period when ESV became part of the law.

The examination of company reports occurred during the period of May to July 2016 and October to November 2016. It was decided that the documents for the following years should be considered: 2006, 2008, 2010, 2012, and 2015. We chose these years to enable us to obtain a broad appreciation of whether ESV has made an impact over time. Studying the aforementioned years would allow us to evaluate the approach adopted by a company: immediately before the enactment of ESV (2006),<sup>56</sup> immediately after its enactment (2008), a little while after its implementation (2010 and 2012) and lastly, the most up to date situation (2015).

Concentrating on analysing the data collected from reports produced during the periods made it possible to not only assess the impact of ESV but also to monitor whether its effect altered over time. A comparison of the data gathered from the years both immediately prior to and after it was put into force was necessary to discern if it made any or substantial difference in how companies behaved.

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<sup>51</sup> A. Keay and R. Adamopoulou, "Shareholder Value and UK Companies: A Positivist Inquiry" (2012) 13 *European Business Organization Law Review* 1.

<sup>52</sup> The requirements for the preparation, distribution and filing of accounts and reports are set out in Part 15, sections 380 to 474, of the Companies Act 2006.

<sup>53</sup> L. M. Fairfax, "Easier said than done? A corporate law theory for actualising social responsibility rhetoric" (2007) 59 *Florida Law Review* 771, 771

<sup>54</sup> L. M. Fairfax, "The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms" (2006) 31 *The Journal of Corporation Law* 675, 677 and 678

<sup>55</sup> For example, see A. Klettner, T. Clarke and M. Boersma, "The Governance of Corporate Sustainability: Empirical Insights into the Development, Leadership and Implementation of Responsible Business Strategy" (2014) 122 *Journal of Business Ethics* 145.

<sup>56</sup> It might be thought that as there was a Companies Bill in existence in 2005-2006 that included what is now s.172, companies might have been affected by it and this could have influenced the companies' documentation. We had considered examining documents prior to 2006 but we were of the opinion that companies would only likely to make changes when legislation was passed, especially when it came to s.172, the content of which had been the subject of substantial debate and changed from the time that it was first proposed.

In order to fulfil the aim of analysing and evaluating the impact of ESV, everything mentioned in the reports that related to ESV, s.172, the Strategic Report (and its precursor) and the duty provided by s.172, both directly and indirectly, was identified and assessed in light of the categories identified and discussed shortly. Primarily, there was a focus on the following aspects in the documents: the company's statement of purpose or mission statement, any information on corporate governance, any indication of whether the concept of ESV was incorporated, and if so, how, any material published about the various stakeholders listed in s.172(1) and finally, any information on how the directors had performed their duty pursuant to s.172(1).

### **C. Categories**

The following categories were used for coding:

#### **1. Corporate aims and whether this changed after the implementation of section 172**

It will be recalled that s.172(1) states what is to be the aim of the company, namely to benefit the members. The company's statement of purpose and mission statement were considered in order to ascertain what the company said its aim was, and whether this aim modified or was qualified over time, especially in light of ESV. In order to determine the company's ultimate aim, a distinction had to be made between what seemed to be the company's operational goal and what came across as its ultimate goal. This was achieved through analysing the emphasis company placed on each constituent of the company. Furthermore, if the ultimate aim of the company modified substantially after the advent of ESV, it may mean that this advent has had a significant effect.

#### **2. Any indication of whether the company had embraced the concept of ESV**

The documents were interrogated to ascertain if the company explicitly mentioned that it embraced the concept of ESV or the specific requirements of s.172(1). It is submitted that an explicit mention of the ESV principle or s.172 would arguably suggest that the directors recognised ESV and the new duty, and were dedicated to fulfilling the requirements of ESV. The acknowledgement would suggest awareness among the directors and an active interest in communicating that awareness.

#### **3. Information relating to the decision-making process of directors and how the directors have performed their duty under section 172**

The documents were also examined to see if there was any information on the performance of the directors as far as the duty under s.172 was concerned. It was contended that even if ESV or s.172 were not mentioned explicitly in a report, but there were details about how the directors had promoted the success of the company, and there was evidence of more focus on the interests of the various stakeholders mentioned in s.172 after its implementation, then that modification in the attitude of the company could be credited to the enactment of ESV.

#### **4. Reporting on the stakeholders mentioned in section 172 and whether the amount and quality of reporting changed after implementation of section 172**

The documents were also reviewed to assess the material published on the various stakeholders listed in s.172(1). It was anticipated that if there was a significant change in the way the various companies reported on the stakeholders or in the degree of focus on the stakeholders after the enactment of the section, then perhaps the change could be attributed to the enactment of ESV. It should be noted that in the next part of the paper the findings related to both categories 3 and 4 are discussed together as it was difficult to distinguish some of the aspects of each category.

## **D. Findings and Analysis**

### **1. Corporate Aims and Possible Changes Over Time**

The results of the study are based on an examination of what was published in the annual reports, CSR reports, Sustainability reports and other documents on websites. If a company did not mention a clear aim, it was classified based on an overall analysis of its operational goals and strategies. It is important to note that we used our own judgment in order to determine the ultimate aim of the company. Sometimes, this was based on examination of all of the reports as some of the companies did not mention an ultimate aim or goal.

Out of all the companies, only one, Next plc, seemed to state clearly that it had the enhancing of shareholder value as its ultimate aim. It is stated in its Annual Report and Accounts published in January 2015 that “the primary financial objective of the Group is to deliver long term return to shareholders through a combination of sustainable growth in earnings per share (‘EPS’) and payment of cash dividends”.<sup>57</sup> Furthermore, it is also mentioned in the Chairman’s statement that “our strategy will remain the same, focused on our products, our profitability and returning cash to our shareholders.”<sup>58</sup> Additionally, the operating goals of the company, which includes development of the Next brand, investment in online growth, investment in profitable new space, improvement of service and controlling costs, appear to be mostly inclined towards promoting shareholder value.<sup>59</sup>

The study revealed that the other seven companies appeared to have aims or goals that are directly or indirectly consistent with a wider approach that seems to have more focus on stakeholders, although no company specifically stated that the company’s affairs were run for the benefit of all, or most, of their stakeholders. What the documents suggest is that there is some focus on all the leading stakeholders of the company or, at least, the key stakeholders, which can include the customers, the employees, the suppliers, the environment, the community, etc. It could still be said that these companies were engaged in practising shareholder value as shareholder value theory does permit companies to take into account the interests of non-shareholder stakeholders, but the emphasis that the companies do place on some non-shareholder stakeholders is noteworthy.

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<sup>57</sup> Annual Report and Accounts January 2015, p.22, available at: [http://www.annualreports.com/HostedData/AnnualReportArchive/n/LSE\\_NXT\\_2015.pdf](http://www.annualreports.com/HostedData/AnnualReportArchive/n/LSE_NXT_2015.pdf) > last accessed 29 November 2017.

<sup>58</sup> Annual Report and Accounts January 2015, p.2, available at: [http://www.annualreports.com/HostedData/AnnualReportArchive/n/LSE\\_NXT\\_2015.pdf](http://www.annualreports.com/HostedData/AnnualReportArchive/n/LSE_NXT_2015.pdf) > last accessed 29 November 2017.

<sup>59</sup> Annual Report and Accounts January 2015, p.4, available at: [http://www.annualreports.com/HostedData/AnnualReports/PDF/LSE\\_NXT\\_2015.pdf](http://www.annualreports.com/HostedData/AnnualReports/PDF/LSE_NXT_2015.pdf) > last accessed 29 November 2017.

J Sainsbury's plc is a classic example of a company with apparently some significant emphasis on certain stakeholders. It states that its aim is "to make all our customers' lives easier every day by offering great quality and service at fair prices" and its vision is to "to be the most trusted retailer where people love to work and shop".<sup>60</sup> Hence, customers and employees are a clear focus. In the same way, Tesco plc's primary purpose is "serving Britain's shoppers a little every day".<sup>61</sup> It also mentions that the following values facilitate the implementation of this core purpose into practice: "No one tries harder for customers," "we treat people how they want to be treated," and "every little help makes a big difference."<sup>62</sup> Its focus appears to be on customers and employees as they are dedicated to serving their customers in the best way possible and are keen on treating their employees properly.<sup>63</sup>

An example of a company where the ultimate aim is different from the other companies is Associated British Foods plc. It mentions in its Annual Report 2012 that its goal is "to achieve strong, sustainable positions in markets that offer potential for profitable growth, and deliver quality products and services that are central to people's lives."<sup>64</sup> Therefore, along with attaining sustainable positions in markets, its primary aim, which may be seen as an operational aim, is also to deliver quality products and services for its customers. Finally, Marks and Spencer states that its "business is built upon strong values of Innovation, Inspiration, Integrity and In Touch" and "these values have been at the heart of how we do business since starting out as a Penny Bazaar at Leeds Kirkgate Market in 1884".<sup>65</sup> It claims that these values have an influence on its actions and run through everything that it does. By improving lives every day through the products and services it offers to its customers everywhere, these values make the Marks and Spencer difference.<sup>66</sup>

Next plc, which is the only company among the eight that appears from its documents to have a discernible shareholder approach, also acknowledges the significance of stakeholders. All the stakeholders are addressed in great detail in its annual reports as well as CSR reports. For example, the following was stated in the Annual Report 2015:

"NEXT is committed to the principles of responsible business. This means addressing key business related social, ethical and environmental matters in a way that aims to bring value to all of its stakeholders, including customers and shareholders. Continuous improvement lies at the heart of NEXT's approach and is achieved by acting in an ethical manner, developing positive relationships with

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<sup>60</sup> Annual Report and Financial Statements 2015, p.2 available at: <[http://www.annualreports.com/HostedData/AnnualReportArchive/j/LSE\\_GB0767628\\_2015.pdf](http://www.annualreports.com/HostedData/AnnualReportArchive/j/LSE_GB0767628_2015.pdf)> last accessed 29 November 2017.

<sup>61</sup> Available at: <<https://www.tescopl.com/about-us/core-purpose-and-values/>> last accessed 15 November 2016.

<sup>62</sup> Available at: <<https://www.tescopl.com/about-us/core-purpose-and-values/>> last accessed 15 November 2016.

<sup>63</sup> Available at: <<https://www.tescopl.com/about-us/core-purpose-and-values/>> last accessed 15 November 2016.

<sup>64</sup> Annual Report 2012, p. 1, available at: <<http://www.abf.co.uk/documents/pdfs/ar2012/abf-annual-report-2012.pdf>> last accessed 15 November 2016.

<sup>65</sup> Available at: <<https://corporate.marksandspencer.com/aboutus/our-heritage>> last accessed 15 November 2016.

<sup>66</sup> Annual Report and Financial Statements 2015, p.6, available at: <<http://corporate.marksandspencer.com/investors/153855a7b7b24038920758283d6986fa>> last accessed 15 November 2016.

suppliers, recruiting and retaining successful and responsible employees, taking responsibility for our impact on the environment and through contributions to charities and community organisations.<sup>67</sup>

So, Next plc claims to consider the interests of all of its stakeholders even though it is focused on shareholder value. As mentioned earlier, many who hold to shareholder value theory accept that the interests of other stakeholders may or should be taken into account by directors. With the above statement by Next, it is almost as if those preparing it were ticking off the factors in s.172(1) point by point.<sup>68</sup> Promoting the success of the company for the benefit of the shareholders, while considering the interests of the stakeholders, seems to be consistent with the ESV principle as embodied in s.172(1). Claiming that the interests of the stakeholders are being considered might contribute to demonstrating that ESV is being fulfilled.

On the other hand, all the companies that have disclosed a greater emphasis on stakeholder interests, either directly or indirectly, also have regard to shareholder interests. Even though these companies are eager to promote shareholder interests and recognise their importance, the companies do not state the maximisation of shareholder interests as the primary aim. The shareholders are included as one of a number of stakeholders in whose interests the company is run.

To truly understand whether ESV has made an impact it is important to consider how the companies operated both before and after the implementation of the principle. We did this after analysing the aims, goals, mission statements, and strategies of all the companies for the years 2006, 2008, 2010, 2012 and 2015.

A study of the reports of Next demonstrates that the aim of the company did not change much over the years. Its main financial aim, which also seemed to be its primary goal, continued to be to deliver sustainable long term growth in earnings per share in 2008<sup>69</sup>, 2010<sup>70</sup>, 2012<sup>71</sup> and 2015<sup>72</sup>. In 2006 the chairman mentioned how its sales had doubled which was accompanied by the doubling of profits and increase in earnings per share.<sup>73</sup> Hence, as far as the ultimate goal of the company is concerned, ESV made no difference in practice. Similarly, the six out

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<sup>67</sup> Annual Report and Accounts 2015, p. 28, available at: <[http://www.annualreports.com/HostedData/AnnualReportArchive/n/LSE\\_NXT\\_2015.pdf](http://www.annualreports.com/HostedData/AnnualReportArchive/n/LSE_NXT_2015.pdf)> last accessed 29 November 2017.

<sup>68</sup> This is not intended to be critical of such an approach.

<sup>69</sup> Annual Report and Accounts January 2008, p.3, available at: <<http://www.nextplc.co.uk/~media/Files/N/Next-PLC-V2/documents/reports-and-presentations/archive/jan08.pdf>> last accessed 16 November 2016.

<sup>70</sup> Annual Report and Accounts January 2010, p.3, available at: <<http://www.nextplc.co.uk/~media/Files/N/Next-PLC-V2/documents/reports-and-presentations/archive/jan10-c.pdf>> last accessed 16 November 2016.

<sup>71</sup> Annual Report and Accounts January 2012, p.3, available at: <<http://www.nextplc.co.uk/~media/Files/N/Next-PLC-V2/documents/reports-and-presentations/2011/ar2012.pdf>> last accessed 16 November 2016.

<sup>72</sup> Annual Report and Accounts January 2015, p. 22, available at: <[http://www.annualreports.com/HostedData/AnnualReportArchive/n/LSE\\_NXT\\_2015.pdf](http://www.annualreports.com/HostedData/AnnualReportArchive/n/LSE_NXT_2015.pdf)> last accessed 29 November 2017.

<sup>73</sup> Annual Report and Accounts January 2006, p.2, available at: <<http://www.nextplc.co.uk/~media/Files/N/Next-PLC-V2/documents/reports-and-presentations/archive/2006-01-25.pdf>> last accessed 16 November 2016.

of the seven companies that had more emphasis on stakeholder interests continued to do so after ESV was put into force. Even though there might have been slight variations in the wording of the primary goal, the general approach remained almost the same throughout. For instance, the group mission, vision and values of Travis Perkins remained almost identical throughout the years.<sup>74</sup> Likewise, there was no drastic difference in Sainsbury's aims over the years. In 2006, the ultimate goal was not absolutely clear but it seemed to be to make a successful financial recovery but while maintaining an ethical approach and being committed to high business standards. It also mentioned that there are a limited number of business sectors in which customer demands for quality and value have to be continuously balanced with other factors such as their concerns for the environment, health and local community.<sup>75</sup> In 2008, it mentioned its values are "the passion for healthy, safe, fresh and tasty food, our focus on delivering great products at fair prices, a history of innovation and leadership and a strong regard for the social, ethical and environmental effect of our operation."<sup>76</sup> The focus remained on the passion for retailing great food at fair prices and on maintaining an ethical approach in 2010.<sup>77</sup> In elaborating on its goals further, it stated that the company's objectives focused on five areas: "great food at fair prices", "accelerating the growth of complementary non-food ranges and service", "reaching more customers through additional channels", "growing supermarket space" and "active property management".<sup>78</sup> Lastly, in both 2012 and 2015 the goal was "to make all our customers' lives easier."<sup>79</sup> So overall, their main goals seemed to be focused on meeting customers' demands of quality and price while maintaining an ethical approach. Throughout 2006<sup>80</sup>, 2008<sup>81</sup>, 2010<sup>82</sup> and 2012<sup>83</sup>, Marks and Spencer's

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<sup>74</sup> For example see 2006 Annual Reports and Accounts, p. 5 available at: [http://online.hemscottir.com/ir/tpk/pdf/2006\\_annual\\_report.pdf](http://online.hemscottir.com/ir/tpk/pdf/2006_annual_report.pdf) > last accessed 16 November 2016; 2008 Annual Reports and Accounts, available at: <http://hsprod.investis.com/ir/tpk/ar2008/downloads/pdf/ar2008.pdf> > last accessed 16 November 2016 and 2010 Annual Reports and Accounts, p.6 available at: [http://hsprod.investis.com/ir/tpk/ar\\_2010/download/pdf/ar\\_2010.pdf](http://hsprod.investis.com/ir/tpk/ar_2010/download/pdf/ar_2010.pdf) > last accessed 16 November 2016.

<sup>75</sup> Annual Report and Financial Statements 2006, p. 5, available at: [http://www.annualreports.com/HostedData/AnnualReportArchive/j/LSE\\_GB0767628\\_2006.pdf](http://www.annualreports.com/HostedData/AnnualReportArchive/j/LSE_GB0767628_2006.pdf) last accessed 29 November 2017.

<sup>76</sup> Annual Report and Financial Statements 2008, p. 7, available at: <https://www.about.sainsburys.co.uk/~media/Files/S/Sainsburys/documents/reports-and-presentations/annual-reports/annual-report-2008.pdf> last accessed 29 November 2017.

<sup>77</sup> Annual Report and Financial Statements 2010, introduction, available at: [http://www.annualreports.com/HostedData/AnnualReportArchive/j/LSE\\_GB0767628\\_2010.pdf](http://www.annualreports.com/HostedData/AnnualReportArchive/j/LSE_GB0767628_2010.pdf) last accessed 29 November 2017.

<sup>78</sup> Annual Report and Financial Statements 2010, introduction, available at: [http://www.annualreports.com/HostedData/AnnualReportArchive/j/LSE\\_GB0767628\\_2010.pdf](http://www.annualreports.com/HostedData/AnnualReportArchive/j/LSE_GB0767628_2010.pdf) last accessed 29 November 2017.

<sup>79</sup> Annual Report and Financial Statements 2012, introduction, p.3 available at: <https://www.about.sainsburys.co.uk/~media/Files/S/Sainsburys/documents/reports-and-presentations/annual-reports/annual-report-2012.pdf> last accessed 29 November 2017; Annual Report and Financial Statements 2015, introduction, p.2 available at: <https://www.about.sainsburys.co.uk/~media/Files/S/Sainsburys/documents/reports-and-presentations/annual-reports/annual-report-2015.pdf> last accessed 29 November 2017.

<sup>80</sup> Annual Report and Financial Statements 2006, p.6, available at: [http://www.annualreports.com/HostedData/AnnualReportArchive/m/OTC\\_MAKSF\\_2006.pdf](http://www.annualreports.com/HostedData/AnnualReportArchive/m/OTC_MAKSF_2006.pdf) last accessed 29 November 2017.

<sup>81</sup> Annual Report and Financial Statements 2008, p.1, available at: [http://annualreport2008.marksandspencer.com/pdf/m&s\\_annual\\_report\\_2008.pdf](http://annualreport2008.marksandspencer.com/pdf/m&s_annual_report_2008.pdf) last accessed 29 November 2017.

<sup>82</sup> Annual Report and Financial Statements 2010, introduction, available at: [http://annualreport2010.marksandspencer.com/downloads/M&S\\_AR10.pdf](http://annualreport2010.marksandspencer.com/downloads/M&S_AR10.pdf) last accessed 29 November 2017.

core values also remained the same: Quality, Value, Service, Innovation and Trust. The only company in which the primary goal seemed to be considerably different, and this was when comparing statements for 2010<sup>84</sup> and 2006,<sup>85</sup> is Kingfisher. It seemed to shift from a more balanced set of goals in 2006 and which included “sustainable long-term growth and returns for shareholder”, “outstanding value, choice and service for customers”, “rewarding careers and personal development for staff”, “unrivalled growth opportunities for suppliers” and “responsible growth that is socially and environmentally sustainable”<sup>86</sup> to “improving returns to shareholders”<sup>87</sup> in 2010. This might seem counter-intuitive as one might expect greater focus on stakeholders and less on shareholders post-codification of directors’ duties. However, it is very likely that the shift to a stronger focus on profits and improving returns to shareholders happened because the years between 2006 and 2010 represented a challenging period for the company in terms of performance.<sup>88</sup> Also, ESV does provide for the ultimate benefiting of members. Later, in our study period, the focus of the company shifted to customers as it was previously.

Therefore, as the ultimate aims of the various companies were not considerably different before and after the enactment of ESV and the companies continued to portray themselves as adopting, for the most part, the same approach, it is contended that ESV has not made much difference in practice to the companies studied, certainly as far as aims are concerned, and this may, arguably, be because some or all of the companies studied, perhaps compared with other large companies, were already doing at least aspects of what ESV requires on the basis that it made good business sense.

## **2. Indication of adoption of the ESV principle, Explicit mention of section 172 and the Decision-making process of directors**

Interestingly, three companies explicitly mentioned the duty under s.172(1). For example Associated British Foods stated the following in its Annual Report and Accounts for 2010:

“The Companies Act 2006 requires the Company to set out in the Directors’ report a fair review of the business of the Company during the financial year ended 18 September 2010 including an analysis of the position of the business at the end of the financial year and a description of the principal risks and

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<sup>83</sup> Annual Report and Financial Statements 2012, p.7, available at: [http://www.annualreports.com/HostedData/AnnualReportArchive/m/OTC\\_MAKSF\\_2012.pdf](http://www.annualreports.com/HostedData/AnnualReportArchive/m/OTC_MAKSF_2012.pdf) last accessed 29 November 2017.

<sup>84</sup> Annual Report and Accounts 2009/2010, pp.2-5, available at: [https://www.kingfisher.com/files/reports/annual\\_report\\_2010/files/pdf/2010ar.pdf](https://www.kingfisher.com/files/reports/annual_report_2010/files/pdf/2010ar.pdf) last accessed 16 November 2016.

<sup>85</sup> Annual Report and Accounts 2005/2006, p.5, available at: [http://www.kingfisher.com/files/reports/annual\\_report\\_2006/managed\\_content/files/pdf/ar06.pdf](http://www.kingfisher.com/files/reports/annual_report_2006/managed_content/files/pdf/ar06.pdf) last accessed 16 November 2016.

<sup>86</sup> Annual Report and Accounts 2005/2006, p.5, available at: [http://www.kingfisher.com/files/reports/annual\\_report\\_2006/managed\\_content/files/pdf/ar06.pdf](http://www.kingfisher.com/files/reports/annual_report_2006/managed_content/files/pdf/ar06.pdf) last accessed 16 November 2016.

<sup>87</sup> Annual Report and Accounts 2009/2010, pp.2-5, available at: [https://www.kingfisher.com/files/reports/annual\\_report\\_2010/files/pdf/2010ar.pdf](https://www.kingfisher.com/files/reports/annual_report_2010/files/pdf/2010ar.pdf) last accessed 16 November 2016.

<sup>88</sup> Annual Report and Accounts 2009/2010, pp.1-5, available at: [https://www.kingfisher.com/files/reports/annual\\_report\\_2010/files/pdf/2010ar.pdf](https://www.kingfisher.com/files/reports/annual_report_2010/files/pdf/2010ar.pdf) last accessed 16 November 2016.



uncertainties facing the Company (the ‘Business review’). The purpose of the Business review is to enable shareholders to assess how the directors have performed their duties under section 172 of the Companies Act 2006, being the duty to promote the success of the Company.”<sup>89</sup>

It not only acknowledged the duty but also went on to specifically list the sections and page numbers in the annual report which showed how that the duty has been fulfilled. This displays a very comprehensive approach and one designed to fulfil the requirements of the Business Review<sup>90</sup>, the precursor of the Strategic Report. Similarly, Marks and Spencer plc acknowledged the duty in its Annual Report and Financial Statements 2008 by mentioning that the directors had been briefed on their new statutory duties. It also stated that the central duty for directors is the duty to act in good faith in a way that promotes the success of the company for the benefit of the members as whole. It then proceeded to list the factors to which the directors need to have regard.<sup>91</sup>

Kingfisher acknowledged the duty in a different manner by mentioning the duty in its Corporate Responsibility Summary Report 2007/2008.<sup>92</sup> The Report stated that the Act introduced a requirement for directors to have regard to social and environmental factors when making decisions and it enables its directors to fulfil this requirement through its Corporate Responsibility management processes. It also states that the Act’s requirements on Corporate Responsibility were complied with by including the progress on Corporate Responsibility in the Business Review. It stated the following:

“Kingfisher enables its directors to comply with this requirement through its CR management processes which set out clear lines of responsibility from the Board level down to the individual operating companies...The company also meets the Act’s requirements on CR reporting by including progress on CR within the Business Review section of the Annual Report and Accounts – the Business Review will be further enhanced over the coming year. A new CR risk register was developed in 2007 to ensure a common approach across the Group to the way risks are identified and managed.”<sup>93</sup>

The fact that three of the companies explicitly acknowledged the duty contained in s.172, and tried to show how the duty was being fulfilled constitutes some indication that ESV had made some difference in practice. These acknowledgements reflect that some companies are adopting measures to demonstrate that their directors are aware of the duty to have regard to stakeholder interests and are also communicating that to their shareholders and others. Thus, this aspect of the study has generated a different result than observing whether the aims of the

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<sup>89</sup> Annual Report and Accounts 2010, p.51, available at: [http://www.abf.co.uk/documents/pdfs/2010/2010\\_annual\\_report.pdf](http://www.abf.co.uk/documents/pdfs/2010/2010_annual_report.pdf) last accessed 18 November 2016.

<sup>90</sup> Now replaced by the requirement for a Strategic Report (s.414A)

<sup>91</sup> Annual Report and Financial Statements 2008, p.39, available at: [http://annualreport2008.marksandspencer.com/pdf/m&s\\_annual\\_report\\_2008.pdf](http://annualreport2008.marksandspencer.com/pdf/m&s_annual_report_2008.pdf) last accessed 18 November 2016.

<sup>92</sup> Corporate Responsibility Summary Report 2007/2008, p. 4, available at: [https://www.kingfisher.com/sustainability/files/reports/cr\\_report\\_2008/files/cr\\_report\\_08.pdf](https://www.kingfisher.com/sustainability/files/reports/cr_report_2008/files/cr_report_08.pdf) last accessed 18 November 2016.

<sup>93</sup> Corporate Responsibility Summary Report 2007/2008, p. 4, available at: [https://www.kingfisher.com/sustainability/files/reports/cr\\_report\\_2008/files/cr\\_report\\_08.pdf](https://www.kingfisher.com/sustainability/files/reports/cr_report_2008/files/cr_report_08.pdf) last accessed 18 November 2016.

companies have changed over the years. On the other hand, it should also be noted that the majority of the companies did not explicitly acknowledge the duty. Hence, impact is variable.

### **3. Reporting on the stakeholders mentioned in section 172 and whether the quality of reporting changed after implementation of section 172**

In the next part of the study, the various reports of the companies were analysed to ascertain how the companies reported on stakeholders and whether it changed in any way after ESV came into effect. This involved examining if and how the companies referred to stakeholders in the reports and whether the manner in which the stakeholders were addressed changed after the introduction of ESV. Even though the extent of detail with which each company dealt with the different stakeholders varied, all eight companies reported, directly or indirectly, on the various stakeholders listed in the factors set out in s.172(1) before the provision was implemented. For example, all the companies mentioned that they were focusing on the long term. Similarly, information was provided by the various companies on its employees, customers, suppliers, impact on the community and the environment. For example, the CEO of Travis Perkins discussed the company's impact on the environment in its 2006 Annual Reports and Accounts by stating that it long recognised a responsibility to carry out its operations whilst minimising the impact on the environment.<sup>94</sup> Another example is Associated British Foods' discussion of the relationship of Primark (one of the company's subsidiaries) with its suppliers. It mentioned in its Annual Report 2006 that the special relationship that Primark's buyers have formed over many years with the company's suppliers playing a part in its success.<sup>95</sup> It also discussed its membership of the Ethical Trading Initiative and its commitment to monitor and improve the working conditions in the factories that produce Primark's products.<sup>96</sup>

Marks and Spencer discussed its "look behind the label" campaign which was launched in January 2006. It mentioned that it wanted to make its customers aware of the measures it takes "to give them responsible and ethical choices". It believed that this set it apart from its peers. The campaign focused on the areas such as "animal welfare, Fairtrade, responsible fish sourcing, responsible use of chemicals, free-range eggs, non-GM foods, removing hydrogenated fats from virtually all our foods and leading the industry on salt reduction." Through these statements, it illustrates the focus on customers, reputation, environment and good relations with suppliers.<sup>97</sup>

Sainsbury discussed in 2006 its belief in making a positive difference to the communities in which it operates and asserted that it believes it is a part of the community and not apart from it. Furthermore, it discussed its commitment to provide safe, productive and healthy working environments for its employees. It stated that it wanted its employees to find their time at

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<sup>94</sup> 2006 Annual Reports and Accounts , p. 16, available at [http://online.hemscottir.com/ir/tpk/pdf/2006\\_annual\\_report.pdf](http://online.hemscottir.com/ir/tpk/pdf/2006_annual_report.pdf) last accessed 19 November 2016.

<sup>95</sup> Annual Report 2006, p.14, available at [http://www.abf.co.uk/documents/pdfs/2006/2006\\_annual\\_report.pdf](http://www.abf.co.uk/documents/pdfs/2006/2006_annual_report.pdf) last accessed 19 November 2016.

<sup>96</sup> Annual Report 2006, p.15, available at [http://www.abf.co.uk/documents/pdfs/2006/2006\\_annual\\_report.pdf](http://www.abf.co.uk/documents/pdfs/2006/2006_annual_report.pdf) last accessed 19 November 2016.

<sup>97</sup> Annual Report and Financial Statements 2006, p.18, available at: [http://www.annualreports.com/HostedData/AnnualReportArchive/m/OTC\\_MAKSF\\_2006.pdf](http://www.annualreports.com/HostedData/AnnualReportArchive/m/OTC_MAKSF_2006.pdf) last accessed 28 November 2017.

work beneficial and it achieves this by providing a variety of training and development opportunities for them.<sup>98</sup>

The above examples demonstrate that all the companies addressed the various factors listed in s.172(1) even before it was put in force. An examination of all the reports of the eight companies from all years found that there was no considerable change in how the companies reported after the enactment of ESV.

As mentioned earlier, many large companies have an obligation to prepare a Strategic Report that should explain how the directors have discharged their duty under s.172 and it was supposed to give the shareholders a way to ensure that the directors were managing the company in accordance with the s.172 duty. Prior to the requirement to prepare the Strategic Report, the company had to prepare a Business Review.<sup>99</sup> It is outside of the scope of the paper to discuss the change from the Business Review to the Strategic Report, but it might be argued that the change did not make a lot of difference in substance other than the fact that the Strategic Report was to be presented separately to the Directors' Report.<sup>100</sup> While all the companies studied fulfilled the obligation to prepare a Business Review and, later on, to prepare a Strategic Report, the advent of the latter did not appear to have a significant impact on how companies reported on the operation of the s.172 duty. The fact that there was no significant change in the way the factors listed in s. 172 were reported shows that the reporting element of ESV has not made much of an impact. There was no significant evidence of attempting to link the reporting to the s.172 duty, and no material information was provided on the decision-making process of the directors while attempting to comply with the s.172 duty.

There was no substantial information, if any at all, on how the directors were deciding which stakeholders were relevant and important to their business operations or particular strategy. The reports did not provide any insight on how the directors were balancing the interests of the various stakeholders or the steps that have been taken to strike a balance between the various factors listed in s.172(1).<sup>101</sup> Even the companies that explicitly acknowledged the duty in their reports only provided information on the factors listed in s.172(1) but did not provide information on the actual decision-making process of the directors and how the various factors were balanced by them, if at all. Therefore, the implementation of the ESV principle through s.172 and s. 417/s.414C, did not have much impact on how companies report on the various stakeholders and what the directors have done to discharge their s.172 duty. This lack of change is noteworthy because from the findings discussed above, companies appeared to be claiming to have an inclusive approach which was somewhat in line with ESV. So perhaps, once s.172 was enforced, one might have expected the companies to have gone further in terms of how they were reporting on the listed factors. They could have made more overt statements to demonstrate awareness of s.172(1) and compliance with it. However, as the findings illustrate, there was no significant change in the reporting.

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<sup>98</sup> Annual Report and Financial Statements 2006, p.24, available at: [http://www.annualreports.com/HostedData/AnnualReportArchive/j/LSE\\_GB0767628\\_2006.pdf](http://www.annualreports.com/HostedData/AnnualReportArchive/j/LSE_GB0767628_2006.pdf) last accessed 28 November 2017.

<sup>99</sup> This was the result of the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013.

<sup>100</sup> See previous s.417 of the Companies Act and the current s.414A.

<sup>101</sup> The judgment of Proudman J in *Shepherd v Williamson* [2010] EWHC 2375 (Ch) suggests that where there might be a conflict of the factors referred to in (a)-(f) of s.172(1) directors are to balance the interests and they are entitled to focus on those interests that they consider will promote the success of the company.

## E. Limitations of the Study

It might be thought that a limitation of this study is the reliance on the data made available by the companies. Therefore, there is always the possibility that the companies are not acting in accordance with what they published in their reports. What a company states about its operations might simply be a reflection of to what it aspires or what it believes the markets expects rather than how it really operates. This is a limitation recognised in other studies when using this kind of data,<sup>102</sup> although it has not been suggested that its used is without merit.

Verification of the data published in these reports was not possible, certainly without being able to access sensitive company documents and other documentation and exchanges with a company's stakeholders. However, aspects of the reports of the companies sampled are not unverified. For instance, Kingfisher's data on their involvement in communities and its waste recycling was assured by KPMG.<sup>103</sup>

Finally, this study was based on the retail industry alone and while it might be representative of the general approach of companies, the results may well be different for companies involved in other industries, either collectively or individually. Hence, there is scope for further research in this area. It would be interesting to compare the results from this study with companies in other industries such as petroleum, mining, banking, etc.

## IV Comparing the Findings with Other Commentary and Studies

It is appropriate to compare our findings with those of earlier empirical studies undertaken in relation to ESV and the responses that were provided quite recently to the BEIS Green Paper, mentioned earlier. Space forbids us from discussing these in any depth, but it is helpful to identify some of the outcomes of these studies. Perhaps the most wide-ranging empirical study that has been conducted was an evaluation of the Act undertaken by Infogroup/ORC International for the Department of Business Innovation and Skills ("ORC study") in 2011,<sup>104</sup> and as part of the study there was a reasonable focus on ESV in the questions asked. In answer to the general unprompted question: "what changes are you aware of regarding the role of directors and related provisions?" only 11 per cent of respondent directors and officers mentioned s.172.<sup>105</sup> Yet when asked more specific prompted questions namely: "And are you aware of the following general duties and requirements of a director...?" "And are you

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<sup>102</sup> For example, see A. Klettner, T. Clarke and M. Boersma, "The Governance of Corporate Sustainability: Empirical Insights into the Development, Leadership and Implementation of Responsible Business Strategy" (2014) 122 *Journal of Business Ethics* 145.

<sup>103</sup> Kingfisher Sustainability Report 2015/2016, pp.18 and 27 : <http://www.insightdiy.co.uk/articles/kingfisher-sustainability-report-201516/825.htm> (last accessed, 9 December 2017).

<sup>104</sup> S Fettiplace and R Addis "Evaluation of the Companies Act 2006," 2 August 2010, p 62 and accessible at: <http://webarchive.nationalarchives.gov.uk/20121205013304/http://www.bis.gov.uk/assets/BISCore/business-law/docs/E/10-1360-evaluation-companies-act-2006-volume-1.pdf> > last accessed 3 December 2017.

<sup>105</sup> S Fettiplace and R Addis "Evaluation of the Companies Act 2006," 2 August 2010, p 64 and accessible at: <http://webarchive.nationalarchives.gov.uk/20121205013304/http://www.bis.gov.uk/assets/BISCore/business-law/docs/E/10-1360-evaluation-companies-act-2006-volume-1.pdf> > last accessed 3 December 2017.

aware of the following changes implemented by the Companies Act 2006...?” 75 per cent of respondents said that they were aware of the effect of s.172.<sup>106</sup> While the attitude and knowledge of individual directors were not considered in our study, the findings seemed to suggest that the directors of the sample companies also were aware of s.172, which would be consistent with the relatively high percentage of directors found by the ORC study to be aware of s.172.

The ORC study found that the enactment of s.172 had not changed behaviour at all amongst the vast majority of directors, with only 17 per cent of directors indicating that the provision had led to a change in their behaviour.<sup>107</sup> Of course, one reason for this could have been that some directors were already doing what the section required,<sup>108</sup> but when directors were asked whether s.172 as a whole had had an impact on the way they discharged their duties, 22 per cent of companies agreed that it had, whilst the majority, 62 per cent, disagreed that it had had the intended effect of having an impact on the way directors discharged their duties.<sup>109</sup> Our study suggested the directors may well have been within the group of directors who had, prior to ESV, some regard for stakeholder interests, although perhaps not to the degree warranted by ESV.

Several of the interviewees in another study in 2011, conducted by the Association of Chartered Certified Accountants (“ACCA study”), were of the view that s.172 had made little or no difference.<sup>110</sup> Despite viewing s.172 as a gesture in the right direction, one respondent in the ACCA study, who was not convinced that it would have the intended impact, said:

“My personal view on this is that ... the way that the particular section is framed is unconvincing in its potential impact, because it uses this phrase “Directors must have regard to specified stakeholder related factors,” nobody really understands exactly what the legal force of that is, and also directors are faced with a situation whereby they are required to have regard to a number of stakeholder factors, some of which are almost by definition mutually exclusive.”<sup>111</sup>

While our study did not provide as bleak a view of companies considering wider interests as this comment, it did suggest that ESV had not made a huge amount of difference.

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<sup>106</sup> S. Fettiplace and R. Addis “Evaluation of the Companies Act 2006,” 2 August 2010, p 65 and accessible at:

<<http://webarchive.nationalarchives.gov.uk/20121205013304/http://www.bis.gov.uk/assets/BISCore/business-law/docs/E/10-1360-evaluation-companies-act-2006-volume-1.pdf>> last accessed 3 December 2017.

<sup>107</sup> S. Fettiplace and R. Addis “Evaluation of the Companies Act 2006,” 2 August 2010, p 72-73 and accessible at:

<<http://webarchive.nationalarchives.gov.uk/20121205013304/http://www.bis.gov.uk/assets/BISCore/business-law/docs/E/10-1360-evaluation-companies-act-2006-volume-1.pdf>> last accessed 3 December 2017.

<sup>108</sup> This was the position taken by one director interviewed in the study : Case Study 4.

<sup>109</sup> S. Fettiplace and R. Addis “Evaluation of the Companies Act 2006,” 2 August 2010, p 66 and accessible at:

<<http://webarchive.nationalarchives.gov.uk/20121205013304/http://www.bis.gov.uk/assets/BISCore/business-law/docs/E/10-1360-evaluation-companies-act-2006-volume-1.pdf>> last accessed 3 December 2017. 16 per cent of directors were not sure.

<sup>110</sup> D. Collison et al “Shareholder Primacy in UK Corporate Law: An Exploration of the Rationale and Evidence,” Research Report 125, Certified Accountants Educational Trust (London), 2011, pp 34, 39, 44.

<sup>111</sup> D. Collison et al “Shareholder Primacy in UK Corporate Law: An Exploration of the Rationale and Evidence,” Research Report 125, Certified Accountants Educational Trust (London), 2011, p.63.

The BEIS Green Paper, which proposed four options to enable reform to take place that would strengthen the voice of wider interests in the company, indicated that these options might help ESV to be properly understood and applied,<sup>112</sup> suggesting that the concept has not been, and is not, understood and applied properly. It might be possible to infer from the Green Paper that BEIS believed that ESV has not made the impact hoped for. It might also be possible to make that same inference from aspects of what we found in our study. For instance, we noted from our study that there was no significant change in the way the factors listed in s. 172(1) were reported following the advent of ESV, nor was there any explanation of the way that directors had fulfilled their s.172 duty.

From our study results we concluded that the reporting element of ESV appears not have made much of an impact in the way that companies reported. This conclusion appears to be in line with the comments made in the government's Green Paper and the responses that were made to it by professional and government bodies. The Green Paper acknowledged that the absence of guidelines often results in a lack of clear and transparent information regarding the steps that directors have taken to fulfil their duty under s.172.<sup>113</sup> Also, companies responding to the ORC study thought that the quality of information that was being provided in the Business Review was not good enough and that businesses are "still confused" about what exactly they need to submit.<sup>114</sup> Perhaps that is an explanation for the shortcomings we found in the reporting of the sample companies in our study.

It was suggested in the Green Paper, and this was supported by several respondents, that stronger reporting requirements should be introduced to raise wider awareness, even outside the boardroom, about the duty that is provided for under s.172 and to provide more assurance that wider stakeholder interests are taken into account when decisions are made.<sup>115</sup> In its response to the Green Paper the City of London Law Society also advocated the notion of strengthening the reporting requirements<sup>116</sup> suggesting that the impact of the provision has been problematic as parties are unsure of what the section means and how it is to be applied. Similarly, the Financial Reporting Council ("FRC") stated that there is a need to compel companies to report more efficiently on how they have fulfilled the duty under s.172. It was mentioned above that the Green Paper seemed to suggest that ESV had not been applied properly and this might be due partially to failings with the Strategic Report as it does not enable shareholders to assess how directors have performed their duty under s.172.<sup>117</sup> The Green Paper stated, in relation to the provision of the information required in the Report, that:

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<sup>112</sup> Department of Business, Energy and Industrial Strategy, Corporate Governance Reform, Green Paper, November 2016, para 2.14.

<sup>113</sup> Department of Business, Energy and Industrial Strategy, Corporate Governance Reform, Green Paper, November 2016, pp. 40-41, paras 2.30

<sup>114</sup> S. Fettiplace and R. Addis, "Evaluation of the Companies Act 2006," 2 August 2010, p77 and accessible at :

<http://webarchive.nationalarchives.gov.uk/20121205013304/http://www.bis.gov.uk/assets/BISCore/business-law/docs/E/10-1360-evaluation-companies-act-2006-volume-1.pdf> last accessed 3 December 2017.

<sup>115</sup> Department of Business, Energy and Industrial Strategy, Corporate Governance Reform, Green Paper, November 2016, p.41, paras 2.31

<sup>116</sup> Response of the Company Law Committee of the City of London Law Society to the Green Paper on Corporate Governance Reform (February 2017), p.10 accessible at : <http://www.citysolicitors.org.uk/attachments/category/114/CLLS%20Response%20to%20the%20Green%20Paper%20on%20Corporate%20Governance%20Reform.pdf> last accessed 15 August 2017).

<sup>117</sup> Department of Business, Energy and Industrial Strategy, Corporate Governance Reform, Green Paper, November 2016, para 2.30.

“there are no further details on how this should be done [performance of s.172 duty], which often leads to a lack of clear and transparent information about the steps that companies are taking to fulfil their duties to have regard to workers, suppliers or customers and other requirements under section 172.”<sup>118</sup>

The impact of ESV might be compromised by the fact that there is “no specific reporting requirement on how the matters referred to in section 172 are taken into account by directors in promoting the success of the company.”<sup>119</sup> The FRC takes the view that there is a need to investigate the use of mechanisms that will enable the provision to achieve its purpose more effectively.<sup>120</sup> It believes that there is insufficient communication about issues which are of importance to shareholders and wider stakeholder groups.<sup>121</sup> The Institute of Directors appears to echo such a concern as it advocated the strengthening of the reporting requirements related to stakeholder engagement.<sup>122</sup> The FRC has also said that boards should pay more attention to their responsibilities under s.172 of the Act in relation to both shareholders and wider stakeholders and should report on how they have discharged these responsibilities.

The FRC recommended in its response to the Green Paper that the Strategic Report Regulations should be amended in order to direct boards concerning the linking of the reporting done under s.414C with the duty under s.172.<sup>123</sup> Certainly or findings indicate that this is a matter on which improvement is warranted. Reporting after receiving the abovementioned and other responses, the BEIS Committee of the House of Commons concluded in a report that “more effective measures are required to ensure that directors take seriously their duties to have regard to other stakeholders and the long-term consequences of

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<sup>118</sup> Department of Business, Energy and Industrial Strategy, Corporate Governance Reform, Green Paper, November 2016, para 2.30.

<sup>119</sup> Financial Reporting Council, Response to the Department of Business, Energy and Industrial Strategy Corporate Governance Reform Green Paper, 17 February 2017, p.5 and accessible at : <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/FRC-Response-to-BEIS-Green-Paper-consultation-on-C.pdf> > last accessed, 3 March 2017).

<sup>120</sup> Financial Reporting Council, Response to the Department of Business, Energy and Industrial Strategy Corporate Governance Reform Green Paper, 17 February 2017, p.5 and accessible at : <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/FRC-Response-to-BEIS-Green-Paper-consultation-on-C.pdf> last accessed, 3 March 2017.

<sup>121</sup> Financial Reporting Council, Response to the Department of Business, Energy and Industrial Strategy Corporate Governance Reform Green Paper, 17 February 2017, p.5 and accessible at : <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/FRC-Response-to-BEIS-Green-Paper-consultation-on-C.pdf> last accessed, 3 March 2017.

<sup>122</sup> Response to the Corporate Governance Reform Green Paper, 5 February 2017, p.12 and accessible at : <https://www.iod.com/Portals/0/PDFs/Campaigns%20and%20Reports/Corporate%20Governance/Corporate-Governance-Green-Paper-Consultation.pdf> last accessed 3 March 2017. The Pension and Life Time Savings Association is not so sure this would assist. It believes that appropriate monitoring would be necessary : Green Paper on Corporate Governance Reform : Consultation Response by the Pension and Life Time Savings Association, p.18 and accessible at : [http://www.plsa.co.uk/PolicyandResearch/DocumentLibrary/~/\\_media/Policy/Documents/0618-Green-paper-on-corporate-governance-reform.pdf](http://www.plsa.co.uk/PolicyandResearch/DocumentLibrary/~/_media/Policy/Documents/0618-Green-paper-on-corporate-governance-reform.pdf) last accessed, 3 March 2017.

<sup>123</sup> Financial Reporting Council, Response to the Department of Business, Energy and Industrial Strategy Corporate Governance Reform Green Paper (17 February 2017), p.5 and accessible at : <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/FRC-Response-to-BEIS-Green-Paper-consultation-on-C.pdf> last accessed 15 August 2017.

decisions.”<sup>124</sup> It was accepted in the Report of the BEIS Committee that in the absence of any real disclosure as to how s.172 is working in practice it is difficult to evaluate the section’s operation.<sup>125</sup> Following on from responses to the Green Paper, the government expressed its intention to address the fact that neither the requirements in the Business Review nor the Strategic Report has led to significant changes in the way companies report on wider interests, and this is in line with the findings of our study. The comments of the professional and government bodies confirm studies that were conducted in relation to the Business Review such as the Coalition on Corporate Responsibility’s April 2010 report, titled *The Reporting of Non-Financial Information in Annual Reports by the FTSE100*, in relation to an analysis of the Business Reviews of FTSE100 companies.<sup>126</sup> It also goes some way to confirming the findings of an empirical study undertaken by Olajo Aiyegbayo and Charlotte Villiers,<sup>127</sup> reporting on interviews conducted between July and October 2009 of officers connected to institutional investors, that there had been no considerable improvement in the narrative reporting practices of companies since 2007.

In its response to the comments of those replying to the Green Paper, the government expressed its agreement regarding the need for a formal reporting requirement that will force directors to give consideration as to how they take wider matters into account.<sup>128</sup> The government stated that secondary legislation will be introduced so that all companies of a significant size<sup>129</sup> will be required to provide explanations on how their directors are fulfilling their duty under s.172 to have regard to wider interests.<sup>130</sup> It also stated that it would ask the ICSA (the Governance Institute) and the Investment Association to finish their combined guidance on the ways through which companies can get involved with their stakeholders at board level.<sup>131</sup> This has been published now.<sup>132</sup> However, it does not take the matter very far.

## V Conclusion

As ESV has now been law for more than 10 years some examination of its impact is warranted. This paper describes a study that was undertaken in relation to all of the retail

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<sup>124</sup> Business Energy and Industrial Strategy Committee, Corporate Governance, Third Report of Session 2016-2017, HC 702, 5 April 2017, para 30.

<sup>125</sup> Business Energy and Industrial Strategy Committee, Corporate Governance, Third Report of Session 2016-2017, HC 702, 5 April 2017, para 32 and referring to the submission of Jonathan Chamberlain of the Employment Lawyers’ Association.

<sup>126</sup> At p.9. The report was written by A. Hendriques and it was accessible at : <http://corporate-responsibility.org/wp/wp-content/uploads/2010/04/Reporting-of-Non-Financial-Information-by-the-FTSE1003.pdf> last accessed 5 October 2011).

<sup>127</sup> “The Enhanced Business Review : Has it Made Corporate Governance More Effective?” [2011] *Journal of Business Law* 699.

<sup>128</sup> Department for Business, Energy and Industrial Strategy, Corporate Governance Reform, The Government Response to the Green Paper Consultation, August 2017, p.31, para 2.35

<sup>129</sup> Further considerations will be given to the size of the companies that will be subject to the requirement Department for Business, Energy and Industrial Strategy, Corporate Governance Reform, The Government Response to the Green Paper Consultation, August 2017, at p.32, para 2.37.

<sup>130</sup> Department for Business, Energy and Industrial Strategy, Corporate Governance Reform, The Government Response to the Green Paper Consultation, August 2017, p.32

<sup>131</sup> Department for Business, Energy and Industrial Strategy, Corporate Governance Reform, The Government Response to the Green Paper Consultation, August 2017, at pgs 4-5

<sup>132</sup> See ICSA and IA, ‘The Stakeholder Voice in Board Decision Making: Strengthening the business, promoting long-term success,’ September 2017 and accessible at: <<http://www.wlrk.com/docs/secure.pdf>> last accessed 10 October 2017.



companies that are listed on the FTSE 100. The study involved a content analysis of company documents that were publicly available and consisted of an examination of documents from several years, namely 2006, 2008, 2010, 2012, and 2015 in order to determine the impact of ESV on the companies concerned over a significant period. Overall, it was concluded that ESV has not had much effect on the operations or reporting of the sample companies. It is accepted that the companies might well have been more concerned for wider interests before the advent of ESV compared with companies in other sectors. Nevertheless, our findings in several aspects were broadly in line with other studies and data that were wider than on sector. Importantly, and this accords with what responses to the Green Paper stated, the sample companies, in general, failed to indicate, in their reporting in the Business Reviews and Strategic Reports, what fulfilment of the s.172 duty had taken place, and there was no material information in the reports on the decision-making process of the directors while they were attempting to fulfil the s.172 duty. The reports of the companies demonstrated that there had been no significant change in the way the factors listed in s. 172(1) were reported and this shows that the reporting element of ESV has not made much of an impact.

The very fact that the government has indicated that there needs to be some reform in relation to the operation of ESV is an indication that there is concern over its impact. While it might be harsh to say that ESV has been a damp squid, as some thought that it would be, the evidence from the study described here and the comments of those responding to the Green Paper suggests that ESV has not had a major impact in the sense of making substantial changes to the way that boards and companies operate and/or report. At best the impact of ESV has been limited, and, arguably, more limited than was envisaged by either the CLRSG or the government. It might be argued, as several respondents to the Green Paper seem to do, that the problem is not with ESV itself but with how a company's implementation of it is reported, hence the many calls for changes in the reporting regulations. As mentioned above, this accords with the findings of our study.

Finally, some might say that the impact of ESV was always going to be limited given the fact that non-shareholding stakeholders are denied the power to bring proceedings against directors for a breach of s.172,<sup>133</sup> and no one has any power to take any action with respect to failures of companies in complying with the requirements relating to the Strategic Report. Enforcement of any breaches of s.172, absent any board action in this regard (which is often unlikely), is limited to shareholders who are willing to bring derivative proceedings. This means that the range of people who are able to enforce the provision is narrow, and certainly rules out stakeholders. This undoubtedly limits the impact of ESV, although it must be acknowledged that neither the CLRSG nor the government intended stakeholders to have any power or rights to ensure that ESV was complied with. Some would say that this is a major flaw in ESV.

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<sup>133</sup> For a discussion of the possibility of broadening the enforcement of breaches, see A. Keay, "The Ultimate Objective of the Public Company and the Enforcement of the Entity Maximisation and Sustainability Model" (2010) 10 *Journal of Corporate Law Studies* 35.