ISBN 978-99949-949-6-0

An analysis of the effectiveness of the soft law approach in the context of corporate governance in multinational companies ('MNCs') in the UK and in the EU.

Introduction

Ever since the introduction of the Cadbury Code in 1992, corporate governance in the United Kingdom ('UK') has gradually evolved into a UK Corporate Governance Code ('Code')[1] which has recently been revised in July 2018 into a shorter and sharper Corporate Governance Code[2]. The UK Listing Rules, as provided for within the Financial Conduct Authority Handbook, require multinational corporations ('MNCs') listed on an exchange to comply with the Code.[3] One of the foundations of the code is the 'comply or explain' approach it provides for, so that MNCs are authorised to provide explanations for instances where they have failed to comply with the Code's principles.[4] While jurisdictions such as the United States have imposed corporate governance on MNCs through legislation, the UK has maintained a 'soft law' approach to corporate governance which caters for potentially acceptable instances of non-compliance with the Code.[5]

Soft law approach

Corporate governance primarily aims to ensure that MNCs respond to the need of their respective shareholders[6], who in turn contribute with their investment on a perennial term for the MNCs to experience healthy business growth[7]. The soft law approach of comply or explain, as provided by the Code, should not be interpreted as a non-requirement, since it is

[1] Iris H-Y Chiu, 'The role of a company's constitution in corporate governance' (2009) 7 Journal of Business Law 697
[2] 'A UK Corporate Governance Code that is fit for the future'< https://www.frc.org.uk/news/july-2018/a-uk-corporate-governance-code-that-is-fit-for-the > accessed on 01 September 2018
[3] The Listing Rules, para 12.43(j) < https://www.fca.org.uk/publication/ukla/listing-rules-april-2002.pdf > accessed on 05 June 2018
[4] Financial Reporting Council, 'The UK Corporate Governance Code' (April 2016) < https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-April-2016.pdf > accessed on 06 June 2018
[5] Brian R Cheffins, 'The Rise of Corporate Governance in the UK: When and Why' (2015) 68(1) Current Legal Problems 387
[6] Christine A.Mallin, *Corporate Governance* (4th edition, Oxford University Press 2013) ch 1
[7] Andrel Shleifer, Robert W.Vishny, 'A Survey of Corporate Governance' (1997)52(2) Journal of Finance 737

an approach that is extensively accommodating to innovative measures of corporations.[8] Ultimately, the comply or explain concept is ultimately aimed at achieving good corporate governance in MNCs.[9] A rigid rule-based corporate governance model is bound to have a profound impact on businesses and the benefits of shareholders, given that a one-size-fits-all approach to corporate governance cannot reasonably be expected to cater for the individual size, complexity and nature of business of every MNC.[10] A soft-law approach on the other hand enables the shareholders of a MNC to consider the explanations provided by the Board for non-compliance to the Code and give the same shareholders an opportunity to subjectively evaluate whether such departures from the Code are in their interests and that of the company.[11] It is in the interests of the economy to ensure that businesses maintain a competitive edge through innovative methods and the soft law approach of the comply or explain approach. [12]

Another key advantage of a soft-law approach is that non-compliance with the Code is not automatically presumed to be a breach of a legal or regulatory requirement, given that the same Code requires the MNCs to provide an explanation that forces companies to communicate their strategies for improving corporate governance standards where non-compliance has been disclosed and commented.[13] Stakeholders, in particular shareholders, derive maximum benefit from the comply or explain approach when investors trust companies to believe and implement a corporate governance culture where explanations lead to shareholder and board dialogue, where the shareholders are then given an insight of the MNC's vision and governance model.[14] Such opportunities for dialogue may also grant

[8] Cheffins,'The Rise of Corporate Governance in the UK' (n4)
[9] Financial Reporting Council, 'The UK Approach to Corporate Governance' (November 2006) < https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/The-UK-Approach-to-Corporate-Governance-(1).pdf > accessed on 08 June 2018
[10] Konstantinos Sergakis, 'EU Corporate Governance: A New Supervisory Mechanism for the 'Comply or Explain' Principle?' (2013) 10(3) European Company and Financial Law Review 394
[11] Andrew Keay, 'Comply or explain in corporate governance codes: in need of greater regulatory oversight?' (2014) 34 Legal Studies 279
[12] Konstantinos Sergakis, 'EU Corporate Governance' (n9)
[13] Financial Reporting Council, 'Developments in Corporate Governance and Stewardship' <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Developments-in-Corporate-Governance-and-Stewa-(2).pdf > accessed on 08 June 2017
[14] Financial Reporting Council, 'Developments in Corporate Governance and Stewardship'(n12)

shareholders the chance to communicate their expectations to the Board, thereby enhancing MNCs' financial stability.[15]

The soft law aspect of corporate governance in the UK has brought deep changes in corporate culture. Some MNCs have publicly admitted that non-compliance with the Code impacts on their reputation and consequently on their market performance.[16] They also add that the non-compliance with the principles of the Code discourages them to pursue alternatives that yield similar corporate governance results as the existing principles.[17] There is a direct and strong relationship between investors' confidence and market performance of MNCs, especially in the case of listed MNCs.[18] The pressure from the markets therefore elevate the soft law approach of the Code into becoming an important compliance requirement for MNCs, equipping shareholders with the ability to take stock and appreciate deviations from the Code.[19] A departure from the Code under rule-based approach would have resulted in a breach of the legislation, which would have resulted in potential enforcement action from regulators and subsequently a seriously reputational hit for any listed MNC.[20]

The soft-law aspect of the Code compels MNCs to provide explanations in areas of non-compliance with the Code's principles and over the years, this obligation has resulted in profound changes in corporate culture[21] and in the way MNCs take a 'substance over form' approach to corporate governance. [22]If corporate governance principles were to be rule-based, MNCs would have been forced to adopt a box-ticking approach to such compulsory

[15] Demetra Arsalidou, 'Shareholders and Corporate Scrutiny: The Role of UK Stewardship Code' (2012) 9(2) European Company and Financial Law Review 342
[16] David Walker, 'A Review of Corporate Governance in UK Banks and Other Financial Industry Entities-Final Recommendation' (26 November 2009) < http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/walker_review_261109.pdf > accessed on 09 June 2018
[17] Walker, 'A Review of Corporate Governance' (n15)
[18] B Cheffins, 'The Stewardship Code's Achilles' heel' (2010) 73 MLR 1004
[19] Financial Reporting Council, 'The UK Corporate Governance Code'(n3)
[20] Keay, 'Comply or explain in corporate governance codes' (n 10)
[21] ibid
[22] Mallin, *Corporate Governance* (n 5)245

requirements, so as to avoid fines for breaches of the law.[23] With the soft law approach, MNCs are forced to adopt corporate governance for their purpose, thereby yielding greater results for the shareholders and the long-term good of MNCs and the markets. While aiming to comply with the Code's principles, many MNCs even begin to adopt higher standards of corporate governance that are more suited to their rapidly evolving business models and that result in greater board-shareholder engagement.[24] It is more than likely that a prescriptive and rule-based Code would hamper a MNC's ability to depart from the provisions of a Code in favour of higher standards to achieve better results.[25] Notwithstanding the fact that a rule-based approach would turn corporate governance into a pure compliance exercise, MNCs would be discouraged from developing improved models of governance since it could expose them to legal and regulatory breaches resulting in financial penalties.[26]

The UK's soft-law approach to corporate governance always aimed at empowering shareholders and giving them a greater say in the way the companies they had invested in were being run.[27] The Code therefore created an expectation on shareholders and MNCs to engage in greater dialogue, ensuring that shareholders were allowed to undertake a 'stewardship' role with the use of explanations provided in contexts of non-compliance with the Code's principles.[28] The Code's evolution through the Financial Reporting Council's ('FRC') Stewardship Code[29] also focussed on empowering shareholders in conducting their stewardship roles by challenging the MNCs' explanations where they are dissatisfied.[30] The Stewardship Code outlined how the need for qualitative explanations in annual reports

[23] S Arcot, V Bruno and A F Grimaud, 'Corporate Governance in the UK:Is the Comply-or-Explain Approach Working?' (Corporate Governance at LSE Discussion, November 2005) < http://www2.lse.ac.uk/fmg/documents/events/seminars/corporateGovernance/496_1st%20Dec%20paper.pdf >
[24] Sergakis,' EU Corporate Governance' (n9)
[25] H-Y Chiu, 'The role of a company's constitution in corporate governance' (n1)
[26] ibid
[27] Keay, 'Comply or explain in corporate governance codes' (n 10)
[28] Arsalidou, 'Shareholders and Corporate Scrutiny' (n14)
[29] The Stewardship Code was produced by the Financial Reporting Council in response to the Walker Report in 2009 which was prepared as a result of the global financial crisis < http://wearchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/walker_review_261109.pdf > accessed on 09 June 2018
[30] Arsalidou, 'Shareholders and Corporate Scrutiny' (n14)

represented an obligation owed by the MNCs to their shareholders, and not to regulators.[31] In some instances, the FRC has noted that some MNCs were merely repeating provisions of the Code without disclosing any valid explanations.[32] The same Code also required MNCs to identify mitigating factors and discouraged MNCs from resorting to boilerplate statements as part of their explanations for non-compliance with the Code's principles.[33] Boilerplate statements are generic and non-specific statements which provide little information for any non-compliance. In its 2017 report, the FRC noted that some MNCs were still providing boilerplate statements.[34] As opposed to a rule-based approach's prescriptive approach, the Stewardship Code intervenes to influence corporate culture and force change in Boards' behaviours and attitudes towards shareholder engagement.[35] The soft-law approach avoided the Board-shareholder engagement being turned into a mere compliance requirement and instead focussed on the building of key bridges for the dialogue to take effect.[36]

In spite of the Stewardship Code's efforts to boost shareholder-board engagement, some MNCs have previously complained that shareholders adopted a box-ticking approach to the Code and failed to consider the worthiness of the explanations provided for the MNCs' departure.[37] The Walker Report had also noted observations where useful explanations for non-compliance had been provided by MNCs but were poorly assessed by shareholders.[38] It has been widely presumed that the inattention of shareholders to explanations in corporate governance reports in annual reports has contributed to many MNCs knowing they could afford to either provide poor explanations or no explanations at all, without some

[31] Financial Reporting Council, 'The UK Stewardship Code' (September 2012) < https://www.frc.org.uk/getattachment/e2db042e-120b-4e4e-bdc7-d540923533a6/UK-Stewardship-Code-September-2012.aspx > accessed on 10 June 2018
[32] Financial Reporting Council, 'Developments in Corporate Governance and Stewardship' (January 2017) <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Developments-in-Corporate-Governance-and-Stewa-(2).pdf > accessed on 11 June 2017
[33] Financial Reporting Council, 'The UK Corporate Governance Code'(n3)
[34] Financial Reporting Council, 'Developments in Corporate Governance and Stewardship' (n31)
[35] Cheffins, 'The stewardship code's Achilles' heel'(n 17)
[36] Sergakis,' EU Corporate Governance' (n9)
[37] J Plender, ' Many Fund Managers Remain Reticent' *Financial Times* (London, 28 March 2011) 3
[38] Walker, 'A Review of Corporate Governance' (n15)

shareholders paying notice.[39] In this context, a soft law approach remains sufficiently effective, given that the same soft law approach requires shareholders to act responsibly, reap the benefits from the explanations and engage with the Boards accordingly. Shareholders remain the best judges for MNCs market performance since they would be in a better position to gauge the significance of departures from the code for their respective MNCs' business models.[40]

Institutional investors are omnipresent within the shareholding patterns of MNCs and the Stewardship Code would not achieve its desired purposes if institutional investors were to fail to properly exercise their voting rights and engage with the boards of their investee companies.[41] The Stewardship Code was issued shortly after the global financial crisis and was particularly aimed at institutional investors and their responsibilities.[42] Approximately two-thirds of the signatories to the Stewardship Code represent asset managers, who hold significant influence and control in the management of their investments.[43] In the case of Blackrock, one of the biggest institutional shareholders in the UK, they have even adopted a corporate governance model which they require their investee companies to adopt and which brings assurance to their involvement in the investee companies as well-informed and responsible investors.[44] Although the Code has been revised in July 2018 with the aim of setting higher standards of corporate governance and promoting transparency and integrity in the economy, the provisions of the 2018 Code will only apply to accounting periods beginning on or after 01st of January 2019[45]. In the meantime, it can be argued that a rule-

[39] Keay, 'Comply or explain in corporate governance codes' (n 10)
[40] ibid
[41] Arsalidou, 'Shareholders and Corporate Scrutiny' (n14)
[42] Walker, 'A Review of Corporate Governance' (n15)
[43] Investment Management Association, 'Adherence to the FRC's Stewardship Code At 30 September 2010' < https://www.theinvestmentassociation.org/assets/files/surveys/20110525-stewardshipcode.pdf> accessed on 11 June 2017
[44] Blackrock, ' Corporate Governance and Responsible Investment at BlackRock' (2011) <https://www.blackrock.com/corporate/en-lm/literature/fact-sheet/blk-responsible-investment-report-2011.pdf > accessed on 12 June 2018
[45] 'A UK Corporate Governance Code that is fit for the future' (n2)

based approach would likely have led to a compliance exercise for the purposes of annual reports and not led to voluntary and more productive initiatives.[46]

Soft law approach within the European Union

The soft-law approach of 'comply-or-explain' was eventually adopted by the European Commission through the Fourth Company Law Directive on annual accounts[47], whereby the Directive adopted the 'apply-or-depart and explain' principle. This represented a soft-law approach formally implemented through an EU Directive, which can be interpreted as a hard-law. Ultimately, the EU Directive imposes so a soft law approach with the 'apply or depart and explain' to be effectively applied across all EU jurisdictions and given due importance, now that this principle has been provided for by the Directive 2006/46/EC[48] (the 'Directive'). The Directive also requires all listed companies trading their shares on regulated exchanges within the EU to include a mandatory corporate governance statement within their annual reports.[49]Additionally, the aforementioned statement ought to mention to which code of corporate governance it is subject to or alternatively the one it had decided to apply and all relevant information about corporate governance practices applied beyond the scope of domestic legislation. The Directive also makes it compulsory to explain departures from provisions of the Code.

[46] Keay, 'Comply or explain in corporate governance codes' (n 10)
[47] Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies [1978] L 222/11
[48] Council Directive 2006/46/EC of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings [2006] L 224/1
[49] Council Directive 2006/46/EC (n46)

While the quality of explanations for non-compliance with the Code were often highlighted[50] as being poor and observations had been made about some shareholders not paying due attention to valid explanations, there has been proposals of having a monitoring body or regulator to analyse the quality of explanations provided by MNCs in their annual reports for non-compliance with the Code. [51]The imposition of a regulatory or monitoring body would represent a quasi rule-based approach, since the aforementioned body will inevitably be empowered to take enforcement action.[52] It has been observed by the European Commission that in Spain, the Comision Nacional del Mercado de Valores (CNMV) has been monitoring the compliance with corporate governance by Spanish MNCs and has also imposed sanctions for infringements.[53] Such an approach would be against the Code's soft law approach since the direction that the Code has endorsed through the Stewardship Code is for shareholder engagement in the way MNCs were run and for shareholders to appropriately query the board for instances of non-compliance with the Code[54] where dissatisfied of explanations.[55] While a regulatory or monitoring body would potentially benefit a passive shareholder, it would undeniably deprive active shareholders from their rights and ability to communicate their subjective views to Boards of their investee companies.[56] All shareholders and all MNCs are not alike and a regulatory or monitoring body would never place itself in the shoes of each shareholder and be unable to cope with the individualities of each and every company.[57]

Soft law v Hard law

The effectiveness of corporate governance in the form of soft law can be contrasted with the manner corporate governance is implemented in the United States ('US'), notably through

[50] Commission, 'The EU Corporate Governance Framework' (Green Paper) COM (2011) 164 final
[51] Commission, 'Green Paper-Corporate Governance in Financial Institutions and Remuneration Policies', COM (2010) 284 final
[52] Keay, 'Comply or explain in corporate governance codes' (n 10)
[53] 'Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States' (23 September 2009) < http://ec.europa.eu/internal_market/company/docs/ecgforum/studies/comply-or-explain-090923_en.pdf > accessed on 12 June 2017
[54] Financial Reporting Council, 'Revisions to the UK Stewardship Code Consultation Document' (April 2012) < https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Consultation-Document-Revisions-to-the-UK-Stewards-File.pdf >
[55] Keay, 'Comply or explain in corporate governance codes' (n 10)
[56] ibid
[57] Sergakis,' EU Corporate Governance' (n9)

legislation.[58] The US Securities and Exchange Commission ('SEC') has provided detailed instructions for explanations that must be furnished accurately, completely and in a timely fashion.[59] The advantage of such legal requirements are that shareholders in the US MNCs have greater guarantees for access to information of quality, through the legislative intervention of the SEC and other enactments.[60] Shareholders are therefore more focussed on companies who comply fully with these requirements and are able to make informed decisions with their investments and embrace long-term shareholder value.[61] Additionally, US MNCs are also engaged in discussions on key governance aspects such as remuneration, board compositions and the segregation of Chief Executive Officer and Chairman duties.[62] These are notable benefits of hard-law implementation of corporate governance which in no manner necessarily discount the benefits given by a soft law approach to corporate governance.[63]

Conversely, the shareholders in US MNCs have no governance code to turn to and this has resulted in less engagement between shareholders and boards.[64] The lack of dialogue has resulted in the rise of more aggressive shareholder activism such as the Harvard Law School Shareholder Rights Project which tend to make extensive use of the media to sway votes and force change in US MNCs.[65] The corporate culture of the US and that of the UK are vastly different and significant differences also exist in the structure of MNCs and the regulations that bind them.[66] It is therefore impossible to ascertain whether a soft-law approach would match the agendas of US corporations and produce similar results.[67] US MNCs tend to be

[58] Cheffins, 'The Rise of Corporate Governance in the UK' (n4)
[59] David Rudner, Yuji Sun, Areck Sycz, 'The Securities and Exchange Commission's Pre and Post-Enron Responses to Corporate Financial Fraud: An Analysis and Evaluation'(2005) 80(3) Notre Dame Law Review 1103
[60] Cheffins, 'The Rise of Corporate Governance in the UK' (n4)
[61] ibid
[62] ibid
[63] S Arcot, V Bruno and A F Grimaud, 'Corporate Governance in the UK'(n 22)
[64] Arsalidou, 'Shareholders and Corporate Scrutiny' (n14)
[65] Shareholder Rights Project < http://www.srp.law.harvard.edu/companies-entering-into-agreements.shtml > accessed on 12 June 2017
[66] Cheffins, 'The Rise of Corporate Governance in the UK' (n4)
[67] Valentina Bruno, Stijn Claessens, 'Corporate governance and regulation: can there be too much of a good thing?' (2010) 19(4) Journal of Financial Intermediation 461

more aggressive in their approaches and it is unclear whether a soft law approach would be a perfect match to help curtail poor governance practices. [68]

One notable observation that weighs in favour of the Code is that the Code was introduced approximately 20 years prior to the enactment of the Sarbanes and Oxley Act 2002.[69] The Cadbury report that eventually developed into the Code has undergone numerous stages of supplementation and refinement.[70] Based on observations, the UK has not observed major corporate scandals and failures to the scale of Enron or Worldcom, as experienced in the U.S.[71] The UK and its regulators introduced corporate governance at its nascent stages to MNCs so as to inculcate corporate governance more voluntarily through soft laws. Shareholders with direct interests in their investee companies were then able to directly engage with Boards over a sufficiently long period of time and such an initiative has arguably prevented many failures in compliance that would have undergone a significant snowball effect by now.[72]

Proponents of the hard-law approach to Corporate Governance have been critical of the comply or explain approach's lack of potential for enforcement in contexts of large scale non-compliance.[73] Unlike in the US where large penalties are imposed for non-compliance with good governance provisions, non-compliance to principles of the code by UK MNCs cannot be held against the MNCs if an explanation, albeit of unacceptable quality, has been provided. The European Commission had once highlighted that the absence of penalties and the reliance on voluntary compliance was unlikely to result in full compliance from many MNCs.[74] Providing for a rule-based approach would have also exerted significant pressure on

[68] Stephen Wagner and Lee Dittimar, 'The Unexpected Benefits of Sarbanes-Oxley' *Harvard Business Review* (April 2006)< https://hbr.org/2006/04/the-unexpected-benefits-of-sarbanes-oxley > accessed on 12 June 2017
[69] Cheffins, 'The Rise of Corporate Governance in the UK' (n4)
[70] ibid
[71] Chiu, 'The role of a company's constitution in corporate governance'(n1)
[72] Clara Furse, 'Sox is not to blame-London is just better as a market' *Financial Times* < https://www.ft.com/content/2f7f44ba-4670-11db-ac52-0000779e2340 > accessed on 13 June 2018
[73] Furse, 'Sox is not to blame' (n70)
[74] Commission, 'The EU Corporate Governance Framework'(n48)

the legislature and regulators to force a hard law corporate governance framework to walk hand-in-hand with the rapidly evolving MNC structures, their risk appetites and volatile market conditions. [75]

Despite the absence of enforcement mechanisms under the soft law approach to corporate governance, shareholders still hold some powers under the Companies Act 2006 to use their voting rights or bring a derivative action against the directors of a company in the event of a breach of their duties.[76] It would remain however difficult to use such provisions for departures from the Code where explanations have been provided. Nonetheless, shareholders can use their influence to force change. One example is the nomination of Sir Stuart Rose as both Chief Executive and Chairman at Marks & Spencer, whereby the lack of separation between the powers and the holding of both offices by one and same person was in contradiction against the Code's provisions.[77] The majority shareholders were concerned about the dual role of Sir Stuart Rose and their pressure eventually forced the resignation of Sir Stuart Rose as Chairman.[78] Potentially, a rule-based approach preventing such dual positions by one and same person would have avoided the long and arduous battle the shareholders had had to engage in. This is also balanced by the fact that in another MNC, it would have been possible that both the Board and the shareholders would have had a consensus on such an arrangement and only a soft-law approach would have been accommodating enough to cater for this arrangement.

In addition to the poor quality of explanations for non-compliance to the Code, the Code's soft law approach has exposed more profound deficiencies that may be difficult to resolve.[79] It would be difficult for shareholders and the Board of a company to agree and compromise

[75] Keay, 'Comply or explain in corporate governance codes' (n 10)
[76] ibid
[77] Jill Treanor, Julia Finch 'Rose promoted in boardroom changes at M&S' *The Guardian* (10 March 2008) < https://www.theguardian.com/business/2008/mar/10/marksspencer.retail > accessed on 12 June 2018
[78] Jill Treanor, Julia Finch, 'Shareholders put pressure on Sir Stuart Rose to quit as M&S chairman' *The Guardian* (07 December 2009) < https://www.theguardian.com/business/2009/dec/27/stuart-rose-mark-spencer-shareholders > accessed on 12 June 2017
[79] Commission, 'The EU Corporate Governance Framework'(n48)

on solutions if there were to be differences of opinion and the differences in opinion may deepen further when there are prior differences of opinion between shareholders.[80] With respect to company law, greater powers are held in the hands of the Board and it would therefore be generally easier for a Board to adjudicate in its own favour in contexts of differences in opinion between shareholders and the Board.[81] In other circumstances, some MNCs may lack the resources or talent on their Boards and management to foster for engagement between the Board and shareholders.

The one-size-fits-all approach of imposing corporate governance through legislation results in a more disadvantageous situation for smaller companies given the cost implication of compliance with extensive legislative provisions.[82] With a soft law approach to corporate governance, it has been observed that the market has been more forgiving to new listings on their departures from the Code.[83]

In 2007, the EU passed the Shareholders' Rights Directive[84] and in 2017, this same Directive has been reviewed in view of further refinement across all EU jurisdictions in the field of corporate governance and shareholders' rights.[85] This new EU Directive ('new Shareholders' Directive') attempts to facilitate the exercise of shareholders' rights, the transmission of information, related party transactions, and the remuneration of directors amongst others. Shareholders will now have a right of vote on the remuneration policy of the directors and the new Shareholders Directive goes on to address the issue of remuneration of directors, which the soft laws failed to properly address. The new Shareholders Directive imposes obligations on intermediaries to facilitate the exercise of rights by shareholders along with disclosure

[80] Keay, 'Comply or explain in corporate governance codes' (n 10)
[81] ibid
[82] Sergakis,' EU Corporate Governance' (n9)
[83] ibid
[84] Council Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies [2007] L 184/ 17
[85] Council, 'Shareholders' rights in EU Companies Council formal adoption' (Press releases & statements 2011) < http://www.consilium.europa.eu/en/press/press-releases/2017/04/03-shareholder-rights-eu-companies/ >accessed on 12 June 2017

obligations for shareholders to access information in the exercise of their rights.[86] Institutional investors and asset managers will also be required to publicly disclose their policies on shareholder engagement or explain why they have chosen not to proceed with engagement.[87]

Conclusion

It can be observed that the majority of jurisdictions around the world have embraced a soft law approach to Corporate Governance, in lieu of a rule-based approach. The European Union has generally adopted a soft law approach in spite of all the supranational legislative powers it holds and this approach ascertains at the level of the EU that the soft law approach remains the better alternative, as compared to a rule-based approach. It has been widely argued that the comply or explain approach has its limitations. To address these shortcomings, the UK and the EU have preferred a step by step developmental approach to tackle specific or pressing issues, with the latest EU Shareholders Directive as the latest major step in the development of the Corporate Governance framework. The Code does not believe in a one-size-fits-all solution and as compared to the U.S., the soft law method has demonstrated greater efficacy in empowering shareholders and encouraging constructive Board-shareholders dialogue.

Bio Profile

Contact Information

Name: Bibi Azna Bholah
Title: Barrister at law
Post: Legal Advisor at the Public Service Commission
Email: bibiazna.b@gmail.com
Tel: 59380875/ 6709705

[86] Council, 'Shareholders' rights in EU Companies Council formal adoption'(n83)
[87] ibid

Ms Azna Bholah is a barrister at law and is presently posted at the Public Service Commission. She has worked as a Judicial Research Officer at the Judiciary for more than three years. Prior to joining the Judiciary she used to work at Benoit Chambers as a corporate lawyer. Ms Azna Bholah is also a qualified Civil and Commercial Mediator and has recently been qualified to become an Associate Member of the Chartered Institute of Arbitrators (CIArb).