

Bond University

# Bond Law Review

---

Volume 34

Issue 2

---

2022

Purpose, Values and Governance in Big Tech Companies

Blanaid Clarke  
Trinity College Dublin

---

Follow this and additional works at: <https://blr.scholasticahq.com/>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 Licence](https://creativecommons.org/licenses/by-nc-nd/4.0/).

# Purpose, Values and Governance in Big Tech Companies

BLANAID CLARKE\*

---

## I Introduction

The term ‘Big Tech’ (‘BT’) is generally used in reference to the five major technology companies, namely Meta Platforms Inc. (previously Facebook), Apple Inc., Alphabet Inc. (owner of Google), Amazon.com Inc. and Microsoft Corp. (‘the BT companies’).<sup>1</sup> Below them, a second tier of companies include Twitter Inc, Netflix Inc., Tesla Inc. and Spotify Ltd. BT companies dominate their respective sectors. These companies grew in size and importance during the Pandemic and at the end of 2021 constituted 23% of the S&P 500 index.<sup>2</sup> Apple became the first company to hit a \$3 trillion market capitalisation in early January 2022. Since then, despite market volatility caused by global tensions, inflation, rising interest rates, supply chain problems and regulatory intervention risks, these companies remain amongst the largest global companies in terms of market capitalisation and revenues.

The private decisions of BT companies have very public results as they play a significant role in social, economic and political life. They contribute to digital value creation facilitating new business ventures and connections. During the Pandemic, they helped ‘to keep the economy afloat and society connected’.<sup>3</sup> Online platforms introduced misinformation warning systems; removed an increased amount of content; and co-operated on COVID-19 tracking apps to work on a range of mobile devices. On the other hand, online platforms have been disruptive forces leading to significant changes in market conditions, business practices and labour relations and creating new strategic dependencies. It has been said that the internet has ‘fundamentally

---

\* McCann FitzGerald Chair of Corporate Law, Trinity College Dublin  
The author wishes to acknowledge the editorial assistance (and perseverance) of Olivia Wilson particularly in respect of the AGLC4 citation formatting.

<sup>1</sup> The large Chinese tech firms including Baidu, Alibaba, Tencent and Xiaomi fall beyond the scope of this review.

<sup>2</sup> Ryan Vlastelica, ‘Big Tech Adds \$2.5 Trillion in Value on Robust 2021 Gains’, *Bloomberg* (online, 31 December 2021) <<https://www.bloomberg.com/news/articles/2021-12-31/big-tech-adds-2-5-trillion-in-market-value-on-robust-2021-gains>>.

<sup>3</sup> Chris Meserole, ‘COVID-19 and the Future of ‘Techlash’’, *Brookings* (online, 27 April 2020) <<https://www.brookings.edu/techstream/covid-and-the-future-of-techlash/>>.

changed the way we do just about everything'.<sup>4</sup> The business model of the large online platforms has been criticised as unorthodox and exploitative for its reliance on harvesting consumer data to optimize consumer engagement.<sup>5</sup> A number of these platforms have been accused of complicity in: subverting democratic processes; anti-competitive practices; breaching privacy rights; monetising human experiences; manipulating vulnerable users; cornering artificial intelligence; and failing to take pre-emptive action against misinformation and on-line bullying.<sup>6</sup> The storming of the Capitol buildings in Washington on 6 January 2021 exemplified both the power of BT companies and the attendant risks. While there is a growing awareness of the need for more responsible behaviour by BT companies, the means by which this is achieved remains the focus of much debate.<sup>7</sup>

It is not of course the case that BT companies are unregulated. Meta's 2021 Annual Report lists an impressive array of laws and regulations in the U.S. and abroad to which the company is subject. It refers to laws and regulations involving:

matters including privacy, data use, data protection and personal information, biometrics, encryption, rights of publicity, content, intellectual property, advertising, marketing, distribution, data security, data retention and deletion, data localization and storage, data disclosure, artificial intelligence, electronic contracts and other communications, competition, protection of minors, consumer protection, civil rights, telecommunications, product liability, e-commerce, taxation, economic or other trade controls including sanctions, anti-corruption and political law compliance, securities law compliance, and online payment services. In particular, we are subject to federal, state, and foreign laws regarding privacy and protection of people's data.<sup>8</sup>

<sup>4</sup> Paul Fletcher, *Governing in the Internet Age in the National Interest* (Monash University Publishing, 2021).

<sup>5</sup> See Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* 3 (Cambridge University Press, 2015); Tim Wu, *The Attention Merchants: The Epic Scramble to Get Inside Our Heads* (Knopf, 2016) 211; P.M. Vasudev, *Beyond Shareholder Value: A Framework for Stakeholder Governance Corporations* (Elgar, 2021) 296.

<sup>6</sup> See, eg, R. Forroohar, *Don't be Evil* (Currency, 2019); S. Zuboff, *The Age of Surveillance Capitalism* (Penguin, 2019); Fletcher (n 4); Bhaskar Chakravorti 'Biden's 'Antitrust Revolution' Overlooks AI—at Americans' Peril', *WIRED* (online, 27 July 2021) <<https://www.wired.com/story/opinion-bidens-antitrust-revolution-overlooks-ai-at-americans-peril/>>; Trautman, Lawrence J., Governance of the Facebook Privacy Crisis (2020) 20(1) *Pittsburgh Journal of Technology Law & Policy* <https://doi.org/10.5195/tlp.2020.234>.

<sup>7</sup> For example, while a bipartisan subcommittee of the US House Judiciary Committee in 2020 in its report on competition in digital markets found that Amazon, Apple, Facebook, and Google had stifled competition unfairly in different ways, its final report demonstrates partisan division over its recommendations and the role of regulation. See <[https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf?utm\\_campaign=4493-519](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519)>.

<sup>8</sup> Meta Platforms, *Meta Platforms, Inc Annual Report for the Fiscal Year Ended December 31, 2021 (Form 10-K)* (Report, 2021) 8.

The Report warns that many of these regulations are still evolving and could be interpreted and applied inconsistently in different countries and inconsistently with its current policies and practices. It cited as an example that regulatory or legislative actions affecting the manner in which it displays content to users or obtains consent to various practices ‘could adversely affect our financial results’.<sup>9</sup> Whilst this is undoubtedly true and represents a legal risk of which all investors should be aware, it does set up a narrative in which the commercial interests of the company are portrayed as potentially inconsistent with the objectives of the regulators and legislators – objectives which we might assume relate to protecting the economy or sectors of the public.

This article explores the purpose of BT companies in the context of the current debate about corporate purpose in order to understand their role in society and to explore how best to manage or regulate them. The concept of ‘purpose’ has a number of meanings depending on the different contexts and the different disciplines involved in the study.<sup>10</sup> Part II of the article examines the notion of corporate purpose which forms part of a wide-ranging and topical debate as to the interests which should be taken into account by boards in making operational decisions. Often the choice in managing or overseeing the management of the company is framed as a binary choice between acting in the interests of shareholders or acting in the interests of broader stakeholder constituents. In reality, the issue is more nuanced and complex and the quest for an answer extends into a discussion of company law obligations and directors’ duties. The positioning of BT companies in relation to this understanding of purpose is then reviewed. Part III of the article examines what may be viewed as a managerial corporate purpose concept. This constitutes a tool to guide management and to signal what Holger Fleischer describes as ‘the direction and the reason for the company’s existence’.<sup>11</sup> The use by BT companies of this tool is explored and its usefulness evaluated. Part IV of the article next considers various policy proposals which might be considered in the area of corporate governance: the application of board suitability requirements; the introduction of a public benefit purpose and the use of public interest directors.

---

<sup>9</sup> Ibid 9.

<sup>10</sup> Edward Rock argues that the debate over corporate purpose involves a blurring of four separate questions: “what is the best theory of the legal form we call “the corporation”? how should academic finance understand the properties of the legal form when building models or engaging in empirical research? what are good management strategies for building valuable firms? “what are the social roles and obligations of large publicly traded firms?”. See Edward Rock, *For Whom is the Corporation Managed in 2020?: The Debate Over Corporate Purpose* (Law Working Paper No. 515/2020, European Corporate Governance Institute, 1 May 2020) <<https://ssrn.com/abstract=3589951>>.

<sup>11</sup> Holger Fleischer, *Corporate Purpose: A Management Concept and its Implications for Company Law* (Law Working Paper No. 561/2021, European Corporate Governance Institute, 21 January 2021) 8 <<https://ssrn.com/abstract=3770656>>.

## II Corporate Purpose – In Whose Interests Should the Company Be Run?

In a very fundamental sense our understanding of the concept of corporate purpose is related to a question which has dominated corporate governance for over 90 years - in whose interests should companies be run? Adolf Berle and Gardiner Means envisaged a modern corporation which served not only its owners or controllers but all society – ‘a purely neutral technocracy, balancing a variety of claims by various groups in the community’.<sup>12</sup> This stakeholder approach was countered in the mid-1970s by a shareholder primacy norm generally linked to Milton Friedman who described ‘the social responsibility of business’ as being to increase its profits.<sup>13</sup> The norm is generally regarded as applying in relation to companies based in Anglo-Saxon jurisdictions including the U.S., the U.K., Australia, Canada and New Zealand.<sup>14</sup> Indeed Henry Hansmann and Reiner Kraakman went so far as proclaiming twenty years ago that there was ‘no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value’.<sup>15</sup> The main criticism levelled against shareholder primacy is that it forces management to adopt a short time horizon in response to the demands of the financial markets leading to share buybacks to sustain share prices, excessive dividends and a reduction in research and development.<sup>16</sup> It has also been described as the greatest barrier to progress on the promotion of environmental sustainability in company law.<sup>17</sup> There has been strong push-back against these views however<sup>18</sup> and Jesper Lau Hansen set out a contrary response on the short-termism argument as follows:

In respect of shares, their value is determined at any given point in time by assessing their long-term value and return at that point in time. There is no

---

<sup>12</sup> Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Transaction Publishers, 1991; first published 1932) 312.

<sup>13</sup> Milton Friedman, ‘The Social Responsibility of Business is to Increase its Profits’, *New York Times* (online, 13 September 1970) <<https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>>.

<sup>14</sup> Andrew Keay ‘Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom’s ‘Enlightened Shareholder Value Approach’ (2011) 29 *Sydney Law Review* 577, 578.

<sup>15</sup> Henry Hansmann and Reiner Kraakman, ‘The End of History for Corporate Law’ (2001) 89 *Georgetown Law Journal* 439, 439.

<sup>16</sup> Ernst & Young, *Study on Directors’ Duties and Sustainable Corporate Governance* (Final Report, European Commission, July 2020) <<https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en>>. Cf Jesse Fried and Charles Wang, *Short-Termism and Capital Flows* (Law Working Paper No. 342/2017, European Corporate Governance Institute, 14 November 2018) <<https://ssrn.com/abstract=2895161>>.

<sup>17</sup> Beate Sjøfjell et al, ‘Shareholder Primacy: The Main Barrier to Sustainable Companies’ in Beate Sjøfjell and Benjamin Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities*, (Cambridge University Press, 2015) 79.

<sup>18</sup> Mark Roe, *Missing the Target: Why Stock-Market Short-Termism Is Not the Problem* (Oxford University Press, 2022).

short-termism behind investing as it is always done with a view to the long run.<sup>19</sup>

It is important to recognise that there is no definite consensus as to the extent to which the interests of only shareholders may be considered and the need to distinguish between share price maximisation and long term shareholder value.<sup>20</sup>

The UK's Company Law Review Steering Group, an independent expert body established in 1998 by the UK Government to look into company reform, considered and consulted upon the correct approach to adopt. While it concluded that the ultimate objective of companies is to generate maximum wealth for their shareholders, it advocated an 'enlightened shareholder value' approach which rejected an 'exclusive focus on the short-term financial bottom line'.<sup>21</sup> It proposed that the basic goal for directors should be the success of the company for the benefit of its shareholders as a whole and that to reach this goal, directors would need to take a properly balanced view of the implications of decisions over time and foster effective relationships with employees, customers and suppliers, and in the community more widely. The Government accepted that this approach was 'most likely to drive long-term company performance and maximise overall competitiveness and wealth and welfare for all'<sup>22</sup> and section 172(1) of the Companies Act 2006 was thus introduced. It provides:

A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

- (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,

<sup>19</sup> Jesper Lau Hansen et al, *Response to the Study on Directors' Duties and Sustainable Corporate Governance by Nordic Company Law Scholars* (Law Research Paper No. 100, University of Copenhagen, 13 October 2020) <<https://ssrn.com/abstract=3709762>>.

<sup>20</sup> See, eg, Dorothy Lund and Elizabeth Pollman, 'The Corporate Governance Machine' (2021) 121 *Columbia Law Review* 2563; Tim Connor and Andrew O'Beid, 'Clarifying Terms in the Debate Regarding "Shareholder Primacy"' (2020) 35 *Australian Journal of Corporate Law* 276.

<sup>21</sup> The Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: The Strategic Framework* (Department of Trade and Industry, 1999) 37.

<sup>22</sup> *Company Law Reform* (White Paper, 2005) 20 <<https://webarchive.nationalarchives.gov.uk/ukgwa/20100104204431/http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006/clr-review/page22794.html>>.

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.

During the UK Parliamentary debates, Minister Margaret Hodge explained that the words ‘have regard to’ are not about ticking boxes and that they mean ‘give proper consideration to’.<sup>23</sup> Although section 172 lists the key stakeholders, the phrase ‘for the benefit of its members’ does the heavy lifting and is key to understanding the approach. In order to benefit shareholders, the other constituent groups should be considered.<sup>23</sup> In other words, enlightened shareholder value ‘is still about shareholders and treats their benefit as supreme’.<sup>24</sup> A more pluralist stakeholder perspective might have omitted this phrase and allowed the focus to be ‘the success of the company’ balancing all the different stakeholders interests equally. In order to ensure directors paid more than lip service to the mandated consideration of the various interests set out in section 172(1)(a)-(f), the Companies (Miscellaneous Reporting) Regulations 2018 was introduced. It requires directors to explain how they have had regard to these various matters in performing their duty to promote the success of the company in this section.

Two of the most influential scholars in the field at present, UK academics Colin Mayer and Alex Edmans, have called for companies to simultaneously seek to benefit stakeholders and to generate profit.<sup>25</sup> Edmans explains ‘purpose’ as something which defines ‘who the enterprise is for and why it exists.’<sup>26</sup> He advocates ‘pieconomics’ as an approach to business that ‘seeks to create profits only through creating value for society.’<sup>27</sup> Mayer and his colleagues in the British Academy’s Future of the Corporation project advocate requiring companies to identify and commit to a corporate purpose beyond profit or in addition to profit. He describes this idea of corporate purpose as one involving ‘a normative notion to it, in terms of the role of business in society and the obligations of business to future generations as well’.<sup>28</sup> Mayer proposes introducing a legal requirement for companies to incorporate their corporate purpose in their articles of association and to then demonstrate how their conduct and their corporate structures promote this purpose. These are not lone voices. For example, Jaap Winter, the Dutch scholar and previously chairman of the High Level Group of

<sup>23</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 17 October 2006, 788-789 (Margaret Hodge).

<sup>24</sup> P.M. Vasudev, *Beyond Shareholder Value: A Framework for Stakeholder Governance Corporations* (Elgar, 2021) 32.

<sup>25</sup> Colin Mayer, *Prosperity: Better Business Makes the Greater Good* (2018, Oxford University Press); Alex Edmans, *Grow the Pie: How Great Companies Deliver Both Purpose and Profit* (Cambridge University Press, 2020).

<sup>26</sup> *Ibid* 223.

<sup>27</sup> *Ibid* 27.

<sup>28</sup> James Rivington, ‘Interview with Colin Mayer’ (2017) 30 *British Academy Review* 24, 29.

Company Law Experts (set up by the European Commission in 2001 to advise it on a modern regulatory framework for company law in Europe), opined that:

If corporations want to reconnect with society, they will have to be explicit about their ultimate objective, what value they will add to society. Generating shareholder value should not be the objective of this process, but a consequence.<sup>29</sup>

Outside academia too, there have been calls for a move to a more pluralistic purposive approach. In 2018, Larry Fink the influential CEO of Blackrock, the world's largest asset manager, titled his annual letter to CEOs *A Sense of Purpose* and in it he emphasised:

Without a sense of purpose, no company, either public or private, can achieve its full potential. It will ultimately lose the license to operate from key stakeholders. It will succumb to short-term pressures to distribute earnings, and, in the process, sacrifice investments in employee development, innovation, and capital expenditures that are necessary for long-term growth. It will remain exposed to activist campaigns that articulate a clearer goal, even if that goal serves only the shortest and narrowest of objectives. And ultimately, that company will provide subpar returns to the investors who depend on it to finance their retirement, home purchases, or higher education.<sup>30</sup>

In 2019, Martin Lipton describing capitalism as 'at an inflection point' sought the support of companies, asset managers, and institutional investors for a 'New Paradigm'. This invited boards and senior managers to identify and articulate their companies purposes 'ensuring that the company pursues sustainable long-term value creation'.<sup>31</sup> It described their purposes as 'their objectives and contributions to societal and public interests' claiming, like Winter, that 'profits are not the raison d'être of a company, but rather are a product of its pursuit of its corporate purposes.'<sup>32</sup> The same year, the Business Roundtable ('BRT'), an association of CEOs of the largest US companies, published a *Statement on the Purpose of a Corporation* signed by 181 CEOs committing to 'lead their companies to the benefit of all stakeholders.'<sup>33</sup> This achieved significant attention and was described in the New York

<sup>29</sup> Jaap Winter, 'Dehumanisation of the Large Corporation' (2020) <<https://ssrn.com/abstract=3517492>>.

<sup>30</sup> Available at <<https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter>>.

<sup>31</sup> Martin Lipton et al, 'It's Time to Adopt the New Paradigm' (2019) 9 <<https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.26357.19.pdf>>. The original version was published in 2016.

<sup>32</sup> Ibid 16.

<sup>33</sup> 'Statement on the Purpose of a Corporation', *Business Roundtable* (Web Page, 19 August 2019) <<https://opportunity.businessroundtable.org/ourcommitment/>>. As of July 2021, the statement had 243 signatories. See, <<https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationJuly2021.pdf>>.



Times as ‘an explicit rebuke’ of Friedman’s doctrine of shareholder primacy and a commitment to a more stakeholder oriented approach.<sup>34</sup> Forbes described it as a ‘revolutionary corporate governance pact’.<sup>35</sup> Edward Rock has attributed this paradigm shift to a recognition of political dysfunction stemming from both the Global Financial Crisis and governmental failures to address societal issues such as climate change, poverty and inequality.<sup>36</sup> Leo Strine described the BRT statement not as the ‘start of something’ but rather ‘a recognition that an economic system that is so skewed toward the few will not continue to be tolerated by the many.’<sup>37</sup> Indeed Fink’s letter itself referred to ‘many governments failing to prepare for the future’ and that ‘society increasingly is turning to the private sector and asking that companies respond to broader societal challenges’. Fink’s subsequent annual letters to CEOs have continued to focus on stakeholders, proclaiming in 2021 ‘The more your company can show its purpose in delivering value to its customers, its employees, and its communities, the better able you will be to compete and deliver long-term, durable profits for shareholders.’<sup>38</sup> In 2022, Fink described as the foundation of stakeholder capitalism, companies which ‘have a clear sense of purpose; consistent values; and, crucially, they recognize the importance of engaging with and delivering for their key stakeholders’.<sup>39</sup> This change of mood in the market resonates with the sentiments expressed in the *Davos Manifesto 2020* at the World Economic Forum promising ‘a better kind of capitalism’.<sup>40</sup> This Manifesto described the purpose of a company as being ‘to engage all its stakeholders in shared and sustained value creation.’ Companies, especially multinationals, were asked to take responsibility to work with governments and civil society to address big global challenges.

<sup>34</sup> David Gelles and David Yaffe-Bellany, ‘Shareholder Value Is No Longer Everything, Top C.E.O.s Say’, *New York Times* (online, 19 August 2019) <<https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html>>.

<sup>35</sup> Carmille Nicita, ‘Are Companies Rising to the Occasion? Why 181 CEOs Signed a Revolutionary Corporate Governance Pact’, *Forbes* (online, 17 October 2019) <<https://www.forbes.com/sites/forbesagencycouncil/2019/10/17/are-companies-rising-to-the-occasion-why-181-ceos-signed-a-revolutionary-corporate-governance-pact/?sh=77ea728e51db>>.

<sup>36</sup> Rock (n 10).

<sup>37</sup> Leo Strine, *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy - A Reply to Professor Rock* (Law and Economics Working Paper No. 637, Columbia Law School, 15 December 2020) 28 <<https://ssrn.com/abstract=3749654>>.

<sup>38</sup> Available at <<https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>>.

<sup>39</sup> Ibid.

<sup>40</sup> Klaus Schwab, ‘Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution’, *World Economic Forum* (online, 2 December 2019) <<https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution>>.

This apparent epiphany has not been without its sceptics. In an article entitled ‘The New Elite’s Phoney Crusade to Save the World – Without Changing Anything’,<sup>41</sup> the Guardian newspaper published an extract from Anand Giridharadas’ book *Winners Take All: The Elite Charade of Changing the World*.<sup>42</sup> In the book, he is scathing in his criticism for these attempts at social change as reflecting:

a highly influential view that the winners of an unjust status quo – and the tools and mentalities and values that helped them win – are the secret to redressing the injustices. Those at greatest risk of being resented in an age of inequality are thereby recast as our saviours from an age of inequality.<sup>43</sup>

Somewhat surprisingly perhaps in this context, the 2022 Edelman Trust survey of over 36,000 people in 28 countries found that at 61% business is the most trusted institution ahead of NGOs (59%) and Government (52%).<sup>44</sup> Respondents wanted businesses to provide societal leadership and to engage more on all issues with 52% saying business was not doing enough on climate change and only 9% saying it was overstepping. That said, the motivation of business leaders and the likelihood of change has also been questioned. Jesse Fried voiced the view of many that the signatories to the BRT Statement were ‘merely paying lip service to broader social concerns’ and would not affect how they run their companies.’<sup>45</sup> Andrew Winston, an international expert on green business strategy, opined that it was hard to take some of the signatures to the BRT Statement seriously, which he said somewhat ‘undermines the whole effort’. He cited ExxonMobil as an example noting it ‘has spent decades questioning climate science and slowing global action ...How much could a company like that care about ‘stakeholders’?’<sup>46</sup> Other critics were concerned that the additional discretion given to directors to engage in stakeholder protection measures might be abused and might diminish their accountability to shareholders by allowing them to justify any action on the basis that they were merely acting in the interests of stakeholders. Stephen Bainbridge opined that ‘Directors who are responsible to everyone are

<sup>41</sup> Anand Giridharadas, *Guardian* (online, 22 January 2019) <<https://www.theguardian.com/news/2019/jan/22/the-new-elites-phoney-crusade-to-save-the-world-without-changing-anything>>.

<sup>42</sup> (Penguin Random House UK, 2019).

<sup>43</sup> Ibid 5-6.

<sup>44</sup> Available at <<https://www.edelman.com/trust/2022-trust-barometer>>.

<sup>45</sup> Fried expressed the view that this was actually a good thing because “shareholder primacy is what keeps managers accountable and allows capital to flow where it is needed in the economy” and is also “hard-wired” into these companies’ corporate charters. See Jesse Fried, ‘Shareholders Always Come First and That’s a Good Thing’ *Financial Times* (online, 7 October 2019) <<https://www.ft.com/content/ff170a0-e5e0-11e9-b8e0-026e07cbe5b4>>.

<sup>46</sup> Andrew Winston, Is the Business Roundtable Statement Just Empty Rhetoric? *Harvard Business Review* (online, 30 August 2019) <<https://hbr.org/2019/08/is-the-business-roundtable-statement-just-empty-rhetoric>>.

accountable to no one.<sup>47</sup> There were also fears that, in promising more than they deliver, these types of voluntary initiatives might reduce demand for ‘meaningful legal and regulatory reforms that could effectively protect stakeholders’.<sup>48</sup>

To test the sincerity and meaningfulness of the BRT Statement, Lucian Bebchuk and Roberto Tallarita undertook a study of corporate documents including corporate governance guidelines from 136 U.S. public companies whose CEOs signed the statement.<sup>49</sup> On the positive side, they found that 120 companies had specific language concerning the purposes and objectives that could guide their boards in making their decisions and serving their constituencies. However, they found little evidence that these companies ‘overturned their endorsement of shareholder primacy and embraced a stakeholderist purpose’ or indeed that they expected to bring about any material changes in how stakeholders would be treated. In fact, a majority of companies did not include any mention of stakeholders in their discussion of corporate purpose and a majority reflected a shareholder-centered view. The authors concluded that:

rather than produce material benefits to stakeholders, the main impact of such pledges might be to insulate corporate leaders from shareholders and to deflect outside pressures to adopt governmental measures that would truly serve stakeholders.<sup>50</sup>

This supports the view that the BRT Statement was more of a public relations exercise than a real commitment to change. It should be noted that the methodology used in the survey has been the subject of criticism for its focus on corporate documents. Martin Lipton argued that evidence of stakeholder commitment and engagement is unlikely to be found in these documents and policies and he refers to stakeholder-facing initiatives such as Dell Technologies and HP Inc.’s commitment to benchmark their performance against standardized stakeholder capitalism metrics.<sup>51</sup> He notes that ‘absence of proof is not proof of absence—especially when one is looking for proof in the wrong place.’ While it is of course important to examine whether companies are ‘walking the walk’, it is important that they are ‘talking the talk’ and, as will be discussed below, signalling their intentions to

---

<sup>47</sup> Stephen Bainbridge, ‘Much Ado About Little? Directors’ Fiduciary Duties in the Vicinity of Insolvency’ (2007) 1 *Journal of Business & Technology Law* 336, 355.

<sup>48</sup> Lucian Bebchuk and Roberto Tallarita, ‘The Illusory Promise of Stakeholder Governance’ (2020) 106 *Cornell Law Review* 91, 114 <<https://ssrn.com/abstract=3544978>>.

<sup>49</sup> Lucian Bebchuk and Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?* (Law Working Paper No. 645/2022, European Corporate Governance Institute, 4 August 2021) <<https://ssrn.com/abstract=3899421>>.

<sup>50</sup> *Ibid* 53.

<sup>51</sup> Martin Lipton, ‘More Myths from Lucian Bebchuk’, *Harvard Law School Forum on Corporate Governance* (online, 24 August 2021) <<https://corpgov.law.harvard.edu/2021/08/24/more-myths-from-lucian-bebchuk/>>.

potential investors, investors, customers and other stakeholders. The whole idea of a purpose statement is to articulate the company's purpose clearly so that everyone might understand the company's priorities and the manner in which it makes its decisions. For this reason, it has been argued convincingly 'purpose and values hold management to account to a degree that enlightened long-term shareholder value cannot'.<sup>52</sup> On this basis, the role of the board and its relationship with all its stakeholders should have been set out clearly in the documentation reviewed by Bebchuk and Tallarita.

An interesting initiative based on the need for clarity and measurability of corporate purpose is set out in a report entitled *Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation*.<sup>53</sup> With support from 140 CEOs of the world's largest companies and in collaboration with Deloitte, EY, KPMG and PwC, the World Economic Forum is seeking to translate principles and aspirations into tangible and measurable goals. Examining a theme of 'Governing Purpose' under the core Environmental, Social and Governance ('ESG') metrics, the report cites Mayer and the British Academy. It explains that oversight of a company's ESG priorities requires a clear understanding and articulation of the company's purpose providing 'a useful baseline for whether firms are pursuing purpose or not'.<sup>54</sup> The report defines the company's stated purpose as 'the expression of the means by which a business proposes solutions to economic, environmental and social issues' whilst ensuring that 'it is not profiting from creating problems in these domains'.<sup>55</sup> It states that this corporate purpose should 'create value for all stakeholders, including shareholders' maintaining that 'the more that firms can link their purpose and core business, the better they can deliver long-term value for all stakeholders, including shareholders'.<sup>56</sup> The report also cites emerging evidence that 'purpose-led firms outperform their peers in terms of shareholder value and are better positioned to account for and deliver economic, environmental and social value'.<sup>57</sup>

---

<sup>52</sup> Colin Mayer, 'Shareholderism Versus Stakeholderism - A Misconceived Contradiction: A Comment on "The Illusory Promise of Stakeholder Governance" by Lucian Bebchuk and Roberto Tallarita' (2021) 106 *Cornell Law Review* 1859.

<sup>53</sup> *Measuring Stakeholder Capitalism Towards Common Metrics and Consistent Reporting of Sustainable Value Creation* (White Paper, World Economic Forum, September 2020) <[https://www3.weforum.org/docs/WEF\\_IBC\\_Measuring\\_Stakeholder\\_Capitalism\\_Report\\_2020.pdf](https://www3.weforum.org/docs/WEF_IBC_Measuring_Stakeholder_Capitalism_Report_2020.pdf)>.

<sup>54</sup> Ibid 49.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid citing Michael Porter, George Serafeim and Mark Kramer, 'Where ESG Fails', *Institutional Investor* (online, October 2019) <<https://www.institutionalinvestor.com/article/b1hm5ghqtxj9s7/Where-ESG-Fails>>.

This debate on corporate purpose has continued and even grown in intensity in the last two years including interventions from the European Commission<sup>58</sup> and the European Parliament on *Sustainable Corporate Governance*<sup>59</sup> focussing on long-term value creation and the alignment of corporate and societal objectives. The European Commission's initiative was based on a study by EY into the root causes of 'short termism' in corporate governance which includes proposals for EU wide solutions.<sup>60</sup> The study identified an overly narrow interpretation of directors' duties and company's interests across the EU tending to favour the short term maximisation of shareholder value together with growing pressures from investors with a short-term horizon.<sup>61</sup> The study encouraged inter alia intervention at an EU level to strengthen the role of directors in pursuing their company's long-term interests and to dispel current misconceptions and errors in relation to the purpose of the company and the duties of directors. Its authors opined that 'Without action, the shareholder primacy norm will persist in current regulatory frameworks, and continue being an obstacle to change towards more sustainable, long-term oriented business practices'.<sup>62</sup> The most efficient option it identified would require directors to: 'properly balance the following interests, alongside the interest of shareholders, when acting in the interest of the company: long-term interests of the company (beyond 5-10 years); interests of employees; interest of customers; interest of local and global environment; interest of society at large.' The study was heavily criticised in the academic community for perceived methodological flaws as well as its assumption that shareholder value creation is a short-term phenomenon.<sup>63</sup> The European Commission and the study were criticised in particular for: conflating companies' horizons and their objectives; suggesting that shareholders are only concerned with short-term value; and opining that

<sup>58</sup> 'Sustainable Corporate Governance Initiative', *EU Commission* (Web Page) <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en)>.

<sup>59</sup> *European Parliament Resolution of 17 December 2020 on Sustainable Corporate Governance (2020/2137(INI))* [2021] OJ C 445 E/94 <[https://www.europarl.europa.eu/doceo/document/TA-9-2020-0372\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0372_EN.html)>.

<sup>60</sup> *Study on Directors' Duties and Sustainable Corporate Governance* (Final Report, European Commission, July 2020) <<https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en>>.

<sup>61</sup> The EY Study cites Sjäfjell et al (n 17).

<sup>62</sup> Ibid 61.

<sup>63</sup> See, eg, *Feedback on the Sustainable Corporate Governance Initiative Consultation* (Sustainable Corporate Governance Initiative, European Company Law Experts, September 2020) <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F555384\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F555384_en)>; 'European Commission Initiative on Directors' Duties and Sustainable Corporate Governance Series', *Oxford Business Law Blog* (online, 8 October 2020 et seq) <<https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/announcing-new-series-european-commission-initiative-directors-duties>>. Cf Beate Sjäfjell and Jukka Mähönen, *Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy* (Research Paper No. 2022-43, University of Oslo Faculty of Law, February 2022) <<https://ssrn.com/abstract=4039565>>.

the pursuit of shareholders' interests must come at the expense of other stakeholders' interests.<sup>64</sup> In February 2022, the European Commission followed up by publishing a proposed Directive on Corporate Sustainability Due Diligence<sup>65</sup> with a reduced focus on directors' duties and a narrower scope of companies.<sup>66</sup> Article 25(1) requires directors to ensure that, when fulfilling their duty to act in the best interest of the company, they 'take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term'.<sup>67</sup> This resembles more the enlightened shareholder value described above and its impact clearly depends on how the term 'the interests of the company' is interpreted. Whether one views this amendment as a genuine attempt to balance interests or as indication of defeat to pressure from lobbyists,<sup>68</sup> it is the case that the prescribed timelines are vague and the manner of its interpretation and enforcement would be a matter of national law. Concerns have been expressed too that it would lead to the entrenchment of management and a diminution in accountability to shareholders.<sup>69</sup> It is clear that the differences in viewpoints which existed at the outset of this debate still remain and at the time of writing, it seems likely that this provision will be dropped from the final draft.

Turning now to the purpose of BT companies, one can see that many BT companies have publicly expressed a commitment to stakeholders. Apple, Amazon and Microsoft are all signatories of the BRT Statement. However, if we review the Corporate Governance Guidelines of the five BT companies in Table 1 below, they suggest a shareholder centric approach.

<sup>64</sup> Alex Edmans et al, 'Call for Reflection on Sustainable Corporate Governance', *The European Corporate Governance Institute* (online, 7 April 2021) <<https://ecgi.global/news/call-reflection-sustainable-corporate-governance>>.

<sup>65</sup> *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive*, (Proposal, European Commission, 23 February 2022) <[https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF)>.

<sup>66</sup> Article 2(1).

<sup>67</sup> Article 26 also imposes a duty on directors of EU companies to set up and oversee the implementation of corporate sustainability due diligence processes and measures and to adapt the corporate strategy to due diligence.

<sup>68</sup> Pablo Grandjean, 'Commission Bends to Lobby Pressure on Sustainable Corporate Governance', *Finance Watch* (online, 23 February 2022) <<https://www.finance-watch.org/press-release/eu-commission-bends-to-lobby-pressure-watering-down-proposals-on-directors-duties-and-remuneration-mandatory-corporate-sustainability-due-diligence-is-welcome-but-too-limited-in-scope/>>.

<sup>69</sup> Erik Lidman, 'The Role of Corporate Governance in Sustainability and Why the Commission's CSDDD Proposal Might Do More Harm Than Good', *Oxford Business Law Blog* (online, 27 April 2022) <<https://www.law.ox.ac.uk/business-law-blog/blog/2022/04/role-corporate-governance-sustainability-and-why-commissions-csddd>>.

Table 1  
Role of BT Boards

Company	Corporate Governance Guidelines: Role of the Board
Amazon	‘The Board’s primary purpose is to build long-term shareowner value’ <sup>70</sup>
Meta	‘[The Board has adopted these Guidelines] to reflect the Board’s strong commitment to sound corporate governance practices and to encourage effective policy and decision making at both the Board and management level, with a view to enhancing long-term value for Meta shareholders.’ <sup>71</sup>
Apple	‘[The Board] assures that the long-term interests of the shareholders are being served’. <sup>72</sup>
Alphabet (Google)	‘The fundamental responsibility of the directors is to exercise their business judgment to act in what they reasonably believe to be the best interests of Alphabet and its stockholders. It is the duty of the Board to oversee management’s performance to ensure that Alphabet operates in an effective, efficient and ethical manner in order to produce value for Alphabet’s stockholders.’ <sup>73</sup>
Microsoft	‘Shareholders elect the Board to oversee management and to assure that shareholder long-term interests are served’ <sup>74</sup>

It might be the case of course that these references to the long-term interests of shareholders reflect a commitment to enlightened shareholder value rather than shareholder primacy and in this way, they promote the wellbeing of both investors and stakeholders. However, with the exception of Microsoft, this is not expressly stated in the Corporate Governance Guidelines and there is no express reference therein to other stakeholder’s interests in this context. Microsoft’s Corporate Governance Guidelines clearly explain that:

The Board recognizes that the long-term interests of shareholders are advanced by responsibly addressing the concerns of other stakeholders including employees, customers, suppliers, government, and the public.

<sup>70</sup> ‘Guidelines on Significant Corporate Governance Issues’, *Amazon Inc* (Web Page) <<https://ir.aboutamazon.com/corporate-governance/documents-and-charters/guidelines-on-significant-corporate-governance-issues/default.aspx>>.

<sup>71</sup> ‘Corporate Governance Guidelines’, *Meta* (Web Page, 3 April 2022) <<https://investor.fb.com/leadership-and-governance/corporate-governance-guidelines/default.aspx>>.

<sup>72</sup> ‘Corporate Governance Guidelines’, *Apple* (Web Page, 19 August 2020) <[https://s2.q4cdn.com/470004039/files/doc\\_downloads/2020/20200819-Corporate-Governance-Guidelines.pdf](https://s2.q4cdn.com/470004039/files/doc_downloads/2020/20200819-Corporate-Governance-Guidelines.pdf)>.

<sup>73</sup> ‘Corporate Governance Guidelines’, *Alphabet* (Web Page, 20 April 2022) <<https://abc.xyz/investor/other/corporate-governance-guidelines/>>.

<sup>74</sup> Corporate Governance Guidelines, *Microsoft* (Web Page, 16 August 2022) <<https://www.microsoft.com/en-us/Investor/corporate-governance/policies.aspx>>.

There is no mention in the Corporate Governance Guidelines of any of the companies to the means by which a commitment to shareholders or stakeholders might be measured. P.M. Vasudev argued that shareholder value has allowed companies like Amazon and Tesla to grow in size and power without ‘viable operations as conventionally understood’ and undermining fair competition.<sup>75</sup> He argues convincingly that these developments warrant ‘an appropriate public policy response’.<sup>76</sup> Such a response will be considered further below.

As a condition of their listing, the BT companies must comply with NASDAQ’s corporate governance requirements.<sup>77</sup> Although there is no reference to culture or corporate purpose in these requirements, every company must adopt a code of conduct applicable to all directors, officers and employees. In these codes, there are references to a broader range of stakeholders. These are important commitments. For example, Meta’s Code of Conduct refers to ‘a deep responsibility to each other, to the communities we serve and to the world’ and it sets out the manner in which it expects all personnel to do so.<sup>78</sup> This includes; supporting staff; protecting and empowering customers; competing and collaborating fairly; and building trust with society, governments, regulators and local communities. Compliance with the Codes is monitored by the companies themselves and in this sense is a form of self-regulation. Violations the Codes note may result in disciplinary action, up to and including termination of employment or assignment.

### III Corporate Purpose – Mission-Purpose Statements

The concept of corporate purpose is also used in a slightly different context, outside the normative stakeholderism/shareholder primacy debate discussed above and separate from the question of the legal purpose of the company. It involves the use of a Mission Statement setting a ‘mission purpose’. Bain & Co, the management consultancy firm, describe a Mission Statement as a statement which ‘defines the company’s business, its objectives and its approach to reach those objectives’.<sup>79</sup> It is viewed as a strategic management tool identifying

<sup>75</sup> P.M. Vasudev, *Beyond Shareholder Value: A Framework for Stakeholder Governance Corporations* (Elgar, 2021) 296-297.

<sup>76</sup> Ibid 297.

<sup>77</sup> ‘Listing Rules 5600 Series - Corporate Governance Requirements’, *NASDAQ* (Web Page) <<https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/Nasdaq%205600%20Series>>.

<sup>78</sup> *Keep Building Better: The Facebook Code of Conduct* (Web Page, 2019) 4 <[https://s21.q4cdn.com/399680738/files/doc\\_downloads/governance\\_documents/2021/06/FB-Code-of-Conduct.pdf](https://s21.q4cdn.com/399680738/files/doc_downloads/governance_documents/2021/06/FB-Code-of-Conduct.pdf)>.

<sup>79</sup> ‘Management Tools Mission and Vision Statements’, *Bain & Company* (Web Page, 2 April 2018) <<https://www.bain.com/insights/management-tools-mission-and-vision-statements/>>. It is distinguished from a “vision statement” which sets out “the desired future position of the company”.



the scope of its operations and reflecting its values and priorities.<sup>80</sup> In this context, Grant Thornton, the business advisory firm, explain that:

Purpose is the reason you exist, and/or the impact a company intends to have over a sustained period of time. It sits at the core and drives decision-making clarity, inspires those that work with you and helps guide long-term strategy. A constant purpose is a bedrock to build on and the North Star to guide you.

The *UK Corporate Governance Code 2018* ('the Code') produced by the Financial Reporting Council in the UK ('FRC') adopts a similar approach and highlights the importance of the board identifying a company's purpose and values and ensuring that these are aligned with its culture.<sup>81</sup> Acknowledging that strong governance underpins a healthy corporate culture, the FRC has argued that 'a healthy culture both protects and generates value' and it has focused on the board's role in shaping and steering corporate behaviour to create a culture that will deliver sustainable performance.<sup>82</sup> Although the Code does not define the term 'purpose', the *Guidance on Board Effectiveness*, which accompanies it, describes a company's purpose as 'the reason for which it exists'.<sup>83</sup> It advises that 'a well-defined purpose will help companies to articulate their business model, and develop their strategy, operating practices and approach to risk' and will often facilitate engagement with employees, customers and the wider public.<sup>84</sup> Establishing a company's overall purpose is also said to be 'crucial in supporting the values and driving the correct behaviours'.<sup>85</sup> While the Code itself is not prescriptive in terms of purpose or values, the FRC has noted that 'companies are recognising the value in defining and communicating a broader purpose beyond profit which generates wealth and delivers benefits to society as a whole.'<sup>86</sup> In reference to section 172, discussed above, the FRC notes that while conflicts will arise between the interests of different stakeholders 'where there is a broad alignment between their objectives, a focus on how business is conducted and how stakeholders are treated will create opportunities for value creation that

<sup>80</sup> See James Rajasekar, 'A Comparative Analysis of Mission Statement Content and Readability' (2013) 14 *Journal of Management Policy and Practice* 131.

<sup>81</sup> *UK Corporate Governance Code 2018* (Financial Reporting Council, 2018) 4 <<https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf>> ('UK Code').

<sup>82</sup> *Corporate Culture and the Role of Boards* (Report of Observations, Financial Reporting Council, July 2016) <<https://www.frc.org.uk/getattachment/d246eacb-5774-4912-98e1-c03f1c8f692f/Corporate-Culture-and-the-Role-of-Boards-Report-of-Observations-tagged.pdf>> ('Corporate Culture').

<sup>83</sup> *Guidance on Board Effectiveness* (Financial Reporting Council, July 2018) 3 <<https://www.frc.org.uk/getattachment/61232f60-a338-471b-ba5a-bfed25219147/2018-Guidance-on-Board-Effectiveness-FINAL.PDF>> ('Guidance on Board Effectiveness').

<sup>84</sup> *Ibid.*

<sup>85</sup> *Corporate Culture* (n 82) 2.

<sup>86</sup> *Guidance on Board Effectiveness* (n 83) 9.

have mutually reinforcing benefits for all'.<sup>87</sup> The Code has also described the role of the board as to promote 'the long-term sustainable success of the company, generating value for shareholders and contributing to wider society'.<sup>88</sup> David Kershaw and Edmund Schuster suggest that the meaning of the term 'purpose' in the Code need not be interpreted to have the identical meaning to the way it is deployed in section 172 of the Companies Act 2006 although they accept that it cannot be interpreted in such a way as to give rise to conflicts between it and company law.<sup>89</sup> They view the Code's 'mission purpose' as less far-reaching describing it 'an animated version of what it does; a corporate and societal mission which levitates out of what it prosaically does and around which the actions of its directors, managers and employees can coalesce.'<sup>90</sup> Elizabeth Pollman also describes how notions of corporate purpose have proliferated over time 'untethered to legal expression through the corporate charter' as 'corporations found novel ways of communicating with stakeholders and shareholders about their values, purposes, and missions'.<sup>91</sup>

Mission-Purpose Statements are utilised in a number of ways. Jill Fisch and Steven Solomon recognise that a cynical perspective would characterize them as 'virtue-signalling, designed either as marketing tools or to reduce the firm's political exposure or vulnerability to regulation'.<sup>92</sup> They describe them as 'something akin to a corporate New Year's resolution – identifying an area in which the corporation hopes to do better' and unless they are legally enforceable, they opine that the commitment, like a New Year's resolution, is 'easily made, but also easily broken'.<sup>93</sup> However, Mission Purpose Statements may be used in a positive way to create a connection with customers, suppliers and the general public. They may also be used to enable stakeholders to select companies with which they wish to be associated and 'to navigate the terms of that association through contract or regulation'.<sup>94</sup> To be effective, Fisch and Solomon claim that they need to be clearly articulated and enforceable.<sup>95</sup> Holger too advocates for purpose statements which are 'authentic, offer measurable added value for the

---

<sup>87</sup> *Corporate Culture* (n 82) 8.

<sup>88</sup> *UK Code* (n 81) 4.

<sup>89</sup> David Kershaw and Edmund-Philipp Schuster, *The Purposive Transformation of Company Law* (Society and Economy Working Papers 4/2019, LSE Legal Studies, 31 March 2019) 5 <<http://ssrn.com/abstract=3363267>>.

<sup>90</sup> *Ibid* 8.

<sup>91</sup> Elizabeth Pollman, 'The History and Revival of the Corporate Purpose Clause' (2021) 99 *Texas Law Review* 1423, 1447.

<sup>92</sup> Jill Fisch and Steven Solomon, 'Should Corporations Have a Purpose?' (2021) 99 *Texas Law Review* 1309, 1338.

<sup>93</sup> *Ibid*.

<sup>94</sup> *Ibid* 104.

<sup>95</sup> *Ibid* 135-136.

company and [are] seriously implemented'.<sup>96</sup> However, he adds to this the requirement that a purpose 'should make a meaningful contribution to an unmet social need'<sup>97</sup> which introduces a normative dimension to the concept. As a management tool, Bain & Company identify the role of the Mission Purpose Statement in guiding management's thinking on strategic issues, helping to benchmark performance and providing common goals to inspire employees to work more productively.<sup>98</sup> Perhaps one of the most important roles of purpose statements is that identified by the *G30 Banking Conduct and Culture Report* which suggests that they will also be used to guide employees navigate the most challenging areas of behaviour – 'the grey zones in which adherence to conduct and values principles is a matter of judgment and not of clear-cut legal requirements'.<sup>99</sup> Depending on the values of course, this should lead to more ethical decision-making. In this context too, it is essential that the purpose and values be clear and understandable. Kershaw and Schuster sum it up well when they state that the Mission Purpose Statement must be 'both precise and instructive enough to be meaningful and to connect to everyday business activity and decision-making, but also sufficiently abstract and aspirational enough to inspire.'<sup>100</sup>

The idea of a purpose which is measurable is important. The task of assessing and monitoring culture and adherence to purpose is assigned by the Code to the board. The Code states that if the board is not satisfied that 'policy, practices or behaviour throughout the business are aligned with the company's purpose, values and strategy', it should demand corrective action from management and report in the annual report the board's activities and any action taken.<sup>101</sup> An analysis of the annual reports of FTSE 350 companies revealed that while 82% clearly articulate the reason for their existence beyond profit (up from 50% the previous year), in a large number of the companies, 'the purpose reads like an extended mission statement – drafted to tick the section 172 box of 'wider purpose', but lacking a convincing articulation of what purpose means for how the business is run and makes decisions,

<sup>96</sup> Fleischer (n 11) 8, citing Annette Bruce and Christoph Jeromin, *Corporate Purpose - das Erfolgskonzept der Zukunft* (Springer Gabler Wiesbaden, 2020) 14 et seq.

<sup>97</sup> Ibid.

<sup>98</sup> 'Mission and Vision Statements', *Bain & Company* (Web Page, 2 April 2018) <<https://www.bain.com/insights/management-tools-mission-and-vision-statements/>>.

<sup>99</sup> *Banking Conduct and Culture: A Permanent Mindset Change* (G30 Banking Conduct and Culture Report, G30 Steering Committee and Working Group on Banking Conduct and Culture, November 2018) <[https://group30.org/images/uploads/publications/G30\\_Culture2018\\_FNL3lo-compressed.pdf](https://group30.org/images/uploads/publications/G30_Culture2018_FNL3lo-compressed.pdf)>. See also R. Duane Ireland and Michael Hirc, 'Mission Statements: Importance, Challenge, and Recommendations for Development' (1992) 35 *Business Horizons* 34.

<sup>100</sup> Kershaw and Schuster (n 89) 490.

<sup>101</sup> *UK Code* (n 81) 4.

offering little insight on measuring success’.<sup>102</sup> Only 6% of the companies measured progress against their corporate purpose.

Turning now to the BT companies, the Mission Statements of each is set out in Table 2.

Table 2  
Mission Statements for BT Companies

Company	Mission Statement
Amazon	‘to offer our customers the lowest possible prices, the best available selection, and the utmost convenience.’
Meta	‘to give people the power to build community and bring the world closer together’
Apple	‘to bring the best user experience to its customers through its innovative computer hardware, computer software, and services.’
Alphabet (Google)	‘to organize the world's information and make it universally accessible and useful’
Microsoft	‘to empower every person and every organization on the planet to achieve more’

While all five statements express a commendable commitment to external stakeholders, all but the Apple and the Amazon<sup>103</sup> statements seem more like fuzzy marketing slogans than governance tools. They resonate with the aforementioned description by Fisch and Solomon of a New Year's resolution. They do not provide much insight into the companies' values and they are not obviously measurable. It is hard to imagine for example how the Alphabet Statement could be actualised and embedded in its corporate strategies, policies, standards and in its board processes. None of these statements would provide sufficiently clear guidance to employees or managers dealing with complex decisions. The issue of lack of enforceability does not even arise given the amorphous nature of the statements. This finding is not unexpected as research suggests that mission statements often contain platitudes and where goals are stated, they are rarely measurable.<sup>104</sup>

<sup>102</sup> Grant Thornton, *Corporate Governance Review 2020* (Report, 2020) 6 <<https://www.grantthornton.global/globalassets/1.-member-firms/global/insights/article-pdfs/2020/uk-corporate-governance-review-2020.pdf>>.

<sup>103</sup> Amazon's vision statement “to be the earth's most customer-centric company, the earth's best employer and earth's safest place to work” could be said to fall into this fuzzy marketing slogan category.

<sup>104</sup> Lance Leuthesser and Chiranjeev Kohli, ‘Corporate Identity: The Role of Mission Statements’ (1997) 40 *Business Horizons* 59.

#### IV Corporate Governance Proposals for BT Companies and Boards

It is clear that directors should play a key role in establishing purpose, exerting cultural leadership and embedding values. It is also the case that they may choose to view their roles as maximising shareholder value in a narrow sense or in respecting the interests of a wider group of stakeholders. In the case of BT companies as we have seen, the public statements on the role of the boards in the Corporate Governance Guidelines do not clearly articulate a clear or enforceable commitment to stakeholders. Nor do the Mission Purpose Statements provide further illumination or provide insight into management's thinking on its purpose or values. Is more needed?

Before considering three specific policy ideas, we might first consider whether BT companies should be treated differently in respect of their governance structures. The large online platforms have variously been described as digital gatekeepers, public utilities and even regulators. It is submitted that they also share a number of common features with banks and other credit institutions which themselves are heavily regulated and which might justify additional regulation. Both play a very significant role in our economies. This has led to legislative intervention in the case of the banking sector with the stated aim of securing financial stability, economic growth, and customer protection. A distinctive feature of retail banks is that their debtors include a significant group of dispersed and uninformed small depositors. One might also compare the users of online platforms to deposit holders both in their obvious dependence and in the information asymmetries which exist. Retail banks are considered to be systemically important. The key factors contributing to the classification of systemic importance are size and interconnectedness followed by concentration risk and leverage.<sup>105</sup> This leads to systemic risk which is defined as 'the potential for a threat or hazard to propagate disruptions or losses to multiple nested or otherwise connected parts of a complex system'.<sup>106</sup> A number of the BT companies might also be considered now to be systemically important institutions in the sense that they are so deeply ingrained in the economy that their failure would be disastrous to it. Having identified the bad incentives and moral hazards recognised in banking law which are created when essential intermediating entities are allowed to compete

---

<sup>105</sup> *Guidance to Assess the Systemic Importance of Financial Institutions, Markets and Instruments. Initial Considerations - Background Paper* (Report to the G-20 Finance Ministers and Central Bank Governors, International Monetary Fund and Bank for International Settlements and the Financial Stability Board, 28 October 2009) 5, <[https://www.fsb.org/wp-content/uploads/r\\_091107d.pdf](https://www.fsb.org/wp-content/uploads/r_091107d.pdf)>.

<sup>106</sup> Sebastian Poledna, 'Systemic Risk Emerging from Interconnections: The Case of Financial Systems' in Hynes, W, M Lees and J Müller (eds), *Systemic Thinking for Policy Making - The Potential of Systems Analysis for Addressing Global Policy Challenges in the 21st Century* (OECD, 2020) 123.

with the companies that depend on them, Lina Khan, the legal scholar and current chair of the U.S. Federal Trade Commission complained that similar to banking entities:

Amazon - along with a few other dominant platforms - now play a crucial role in intermediating swaths of economic activity. Amazon itself effectively controls the infrastructure of the internet economy.<sup>107</sup>

Focusing on the role of technology in the financial services sector, the potential systemic risk of BT companies becomes more obvious. Although at present, financial services represent a relatively small part of the overall activities of BT companies, they could quickly become systemically important – or ‘too big to fail’ in this context.<sup>108</sup> Dirk Zetzsche et al noted that ‘as financial technology (‘FinTech’) and market infrastructure have grown in size, scope, and influence, the consequences of their failures have increased commensurately’ and they have warned of our exposure to an dependence upon ‘massive, unseen, and largely unregulated financial technology platforms’.<sup>109</sup> Agustín Carstens, General Manager of the Bank for International Settlements too has suggested that the growth of BT companies in finance is rapidly changing markets and poses challenges from the perspective of the public policy objectives of: efficiency and fair competition; financial stability; market integrity; and consumer protection.<sup>110</sup> Experts have called for a new policy approach which accommodates ‘the unique features of big techs—such as their vast scale, ample customer base, and access to large amounts of data—and captures the risks from the significant interconnection among different entities within a big tech group and the broader financial system’.<sup>111</sup> This is clearly a growing concern for public policy makers. The EU’s Internal Market Commissioner, Thierry Breton, in an address to the European Parliament in 2020, referred to the role and the systemic character of certain platforms arguing that they often behave as if they were ‘too big to care about legitimate concerns about their roles’.<sup>112</sup>

<sup>107</sup> L. Khan, ‘Amazon’s Antitrust Paradox’ (2016) 126 *Yale Law Journal* 710.

<sup>108</sup> Juan Carlos Crisanto, Johannes Ehrentraudsee and Marcos Fabian, *Big Techs in Finance: Regulatory Approaches and Policy Options* (Financial Stability Institute Briefs No 12, Bank for International Settlements, 16 March 2021) <<https://www.bis.org/fsi/fsibriefs12.htm>>. See also Carl Öhman and Nikita Aggarwal, ‘What If Facebook Goes Down? Ethical and Legal Considerations for the Demise of Big Tech’ (2020) 9 *Internet Policy Review* 1.

<sup>109</sup> Dirk Zetzsche et al, *Digital Finance Platforms: Toward a New Regulatory Paradigm* (Working Paper Series No. 58/2020, European Banking Institute, 3 March 2020) 5, <<https://ssrn.com/abstract=3532975>>.

<sup>110</sup> Agustín Carstens, ‘Public Policy for Big Techs in Finance’ (Speech, Asia School of Business, Conversations on Central Banking, Finance as Information, 21 January 2021) <<https://www.bis.org/speeches/sp210121.pdf>>.

<sup>111</sup> Juan Carlos Crisanto and Johannes Ehrentraudsee, ‘The Big Tech Risk In Finance’, *International Monetary Fund* (online, May 2021) <<https://www.imf.org/external/pubs/ft/fandd/2021/05/big-tech-fintech-and-financial-regulation-crisanto-ehrentraud.htm>>.

<sup>112</sup> See also Öhman & Nikita (n 108).

There have been calls to consider bringing those BT companies which can be viewed as ‘digital public utilities’ into democratic public ownership.<sup>113</sup> This seems unlikely to happen as it would involve overriding the property rights of shareholders with a consequential significant negative effect on global markets. There is also the risk that it could lead to substantial adverse effects on political and economic freedoms in the case of those companies in the media sector.<sup>114</sup> It could also prove to be ineffective if it led to the off-shoring of such enterprises to less regulated jurisdictions. Another option would be to regulate the acquisition of ownership interests in BT companies as is done in the financial services or broadcasting sectors.<sup>115</sup> This would involve an examination of the suitability of controlling shareholders.<sup>116</sup> It would require an agreement on specified and clear criteria to be applied by competent authorities in the assessment process. In the financial services area for example, the criteria applied are strictly of a prudential nature but this would not of course address the issue at hand in the case of BT companies. A related but less draconian proposal discussed below focuses on the suitability not of the owners but of those charged with operating these companies.

### A. *Suitability Requirements*

The first possible policy proposal thus to explore, drawing upon the banking analogy, is the introduction of suitability requirements for directors and senior managers. It might be considered that more appropriate corporate purposes would be adopted by directors and more appropriate value systems embedded within their organisations if directors of BT companies were subject to the type of suitability requirements that are currently imposed on directors and senior managers in European banks. Rana Foroohar in *Don’t Be Evil* criticised the lack of diversity, the existence of toxic cultures and the public relations blunders in many BT companies attributing these in part to a ‘solutions-minded mentality’ which leads to a ‘kind of tunnel vision and

<sup>113</sup> Thomas Hanna, Mathew Lawrence and Nils Peters, ‘A Common Platform: Reimagining Data and Platforms’, *Common Wealth* (online, 2 December 2020) <<https://www.common-wealth.co.uk/reports/common-platform-tech-utility-antitrust>>.

<sup>114</sup> Simeon Djankov et al, *Who Owns the Media?* (Harvard Institute of Economic Research Paper No. 1919, Harvard, 19 April 2001) <<https://ssrn.com/abstract=267386>>.

<sup>115</sup> See, eg, ‘Joint Guidelines on the Prudential Assessment of Acquisitions and Increases of Qualifying Holdings in the Banking, Insurance and Securities Sectors’, *EBA, EIOPA and ESMA* (Web Page, December 2016) <[https://esas-joint-committee.europa.eu/Publications/Guidelines/JC\\_QH\\_GLS\\_EN.pdf](https://esas-joint-committee.europa.eu/Publications/Guidelines/JC_QH_GLS_EN.pdf)>. The issue of media ownership Johanna Dunaway “Media Ownership and Story Tone in Campaign News” 41 *American Politics Research* 24 (2013).

<sup>116</sup> Blanaid Clarke, ‘Board Governance in Big Tech Companies’ (Discussion Paper and Presentation, University of Minnesota, Works-In-Progress (FWIP) Lecture Series, 8 October 2020). See also Editorial Board, ‘Musk, Twitter and the Need to Vet New Media Owners’, *Financial Times* (online, 28 April 2022) <<https://www.ft.com/content/df901141-ef0b-4902-b745-34a3ecc85189>>.

cognitive blindness'.<sup>117</sup> In the wake of the Global Financial Crisis, directors of credit institutions across the globe were blamed for their poor risk management<sup>118</sup> and the same criticism might be levelled at many of the BT companies in the sense of failing to appreciate or manage the risks associated with their decision-making as set out in Part I above. For example, in the aftermath of the 2016 U.S. presidential election, Mark Zuckerberg described the idea that fake news on Facebook influenced the election in any way as 'a pretty crazy idea.'<sup>119</sup> The Chairman of the Digital, Culture, Media and Sport Commons Committee's investigation into fake news in the U.K., which found that Facebook deliberately broke UK competition and privacy laws, criticised Zuckerberg on the basis he 'continually fails to show the levels of leadership and personal responsibility that should be expected from someone who sits at the top of one of the world's biggest companies'.<sup>120</sup> One of the Committee's recommendations was that a compulsory Code of Ethics should be established and overseen by an independent regulator with statutory powers to monitor relevant technology companies.<sup>121</sup>

The EU response to poor management in the banks was to introduce a new statutory supervisory framework which included the imposition of corporate governance provisions in banks relating to the role and composition of the board, board diversity and risk management.<sup>122</sup> As

<sup>117</sup> Rana Foroohar, *Don't Be Evil* (2019, NY, Currency) 41.

<sup>118</sup> Grant Kirkpatrick, 'The Corporate Governance Lessons from the Financial Crisis' (2009) 2009/1 *OECD Journal: Financial Market Trends* 61; Lord Adair Turner, *The Turner Review: A Regulatory Response to the Global Banking Crisis* (FSA, 2009); Jacques de Larosière et al, *The High-Level Group on Financial Supervision in the EU* (EU Commission 2009).

<sup>119</sup> Interview with Mark Zuckerberg (David Kirkpatrick, Techonomy Conference, 17 November 2016) <<https://techonomy.com/conf/te16/videos-conversations-with-2/in-conversation-with-mark-zuckerberg/>>.

<sup>120</sup> Damian Collins, as reported in 'Facebook Censured by House of Commons Digital Committee', *Irish Times* (online, 18 February 2019) <<https://www.irishtimes.com/news/politics/facebook-censured-by-house-of-commons-digital-committee-1.3797982>>.

<sup>121</sup> *Disinformation and 'Fake News': Final Report* (Report, UK Parliamentary Committee on Culture, Media and Sport, 18 February 2019) <<https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1791/179102.htm>>.

<sup>122</sup> See *Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on Access to the Activity of Credit Institutions and the Prudential Supervision of Credit Institutions and Investment Firms, Amending Directive 2002/87/EC and Repealing Directives 2006/48/EC and 2006/49/EC* [2013] OJ L 176 E/338 ('CRD IV'). Cf *Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 Amending Directive 2013/36/EU as Regards Exempted Entities, Financial Holding Companies, Mixed Financial Holding Companies, Remuneration, Supervisory Measures and Powers and Capital Conservation Measures* [2019] OJ L 150 E/253. See also *Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on Prudential Requirements for Credit Institutions and Investment Firms and Amending Regulation (EU) No 648/2012* [2013] OJ L 176 E/1 ('CRR'). Cf *Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 Amending Regulation (EU) No 575/2013 as Regards the Leverage Ratio, the Net Stable Funding Ratio, Requirements for Own Funds and Eligible Liabilities, Counterparty Credit Risk, Market Risk, Exposures to Central Counterparties, Exposures to*



a collective, the board is now required to possess ‘adequate collective knowledge, skills and experience to be able to understand the institution's activities, including the main risks’.<sup>123</sup> Individual directors must ‘at all times be of sufficiently good repute’ and ‘possess sufficient knowledge, skills and experience to perform their duties’.<sup>124</sup> Furthermore, they must ‘act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the senior management where necessary and to effectively oversee and monitor management decision-making’.<sup>125</sup> Suitability Guidelines published by two EU supervisory authorities, the European Banking Authority and the European Securities and Markets Authority, provide further granularity setting out the process, criteria and minimum requirements regarding the determination of a director’s suitability.<sup>126</sup> It is worth emphasising too that different supervisory arrangements are imposed on banks classified as ‘significant institutions’<sup>127</sup> under the framework including more onerous governance arrangements. For example significant institutions must have Risk Committees comprised of non-executive directors with appropriate knowledge, skills and expertise to fully understand and monitor risk strategies and appetite.<sup>128</sup> Banks are prohibiting from permitting individuals to act as directors unless satisfied that they meet these criteria and have agreed to comply with the relevant Suitability Standards set by the supervisory authorities and unless the supervisory authorities have given their approval to their appointment. In a recent Consultation Paper, the EU Commission has explored the idea of extending the assessment of a director’s competence to include their ability to define and articulate their institutions desired values.<sup>129</sup>

If suitability standards were applied to BT companies, the requisite characteristics and skills would have to be agreed and an interesting question would be whether they should differ in any respects from those currently applying to bank appointments. Could one, for example, accept that a director of a BT company should meet the same standard

---

*Collective Investment Undertakings, Large Exposures, Reporting and Disclosure Requirements, and Regulation (EU) No 648/2012* [2019] OJ L 150 E/1.

<sup>123</sup> CRD IV (n 122) art 91(7).

<sup>124</sup> Ibid art 91(1).

<sup>125</sup> Ibid art 91(8).

<sup>126</sup> ‘Joint ESMA and EBA Guidelines on the Assessment of Suitability of Members of the Management Body and Key Function Holders’, EBA (Web Page, 2017) <<https://www.esma.europa.eu/regulation-and-policy/internal-governance/joint-esma-and-eba-guidelines-on-the-assessment-of-the-suitability-of-members-of-the-management-body>>.

<sup>127</sup> Article 76(3) of CRD IV refers to “institutions that are significant in terms of their size, internal organisation and the nature, scope and complexity of their activities”. Institutions considered “significant institutions” under the SSM Regulation and the SSM Framework Regulation would fall within this definition.

<sup>128</sup> CRD IV (n 122) art 76(3).

<sup>129</sup> *Implementing the Final Basel III Reforms in The EU* (Public Consultation Document, European Commission, 2019).

of competence but need not have to meet as high a standard of integrity and honesty? In light of the preceding discussion of the role of such companies in our society, surely it would be hard to make such an argument. What of existing directors? Would they all pass such a test? Another question would be who would undertake this assessment and enforce the requirements? Researchers in the Brookings Institute arguing that ‘new technologies require specialized oversight’ have called for a purpose-built federal Digital Platform Agency ‘to establish public interest expectations that promote fair market practices while being agile enough to deal with the rapid pace of digital technology’.<sup>130</sup> The EU has already demonstrated leadership in the regulation of this sector in its General Data Protection Regulation.<sup>131</sup> Although the BT companies are headquartered in the U.S., they have subsidiaries across the globe and all five have their European headquarters in Ireland. In 2022, the Digital Services Act (DSA) and the Digital Markets Act (DMA)<sup>132</sup> were approved leading to the EU being described as ‘the most assertive regulator’ of BT companies and negative comparisons being drawn with the US.<sup>133</sup> The DSA will impose obligations on all online intermediaries providing services in the EU with very large digital platforms and services being required to analyse the systemic risks they create and to carry out risk reduction analysis. The European Commission will have exclusive power to supervise very large online platforms and very large online search engines. Responding to the War in Ukraine and the manipulation of online information, a new article has been added to the proposed text introducing a crisis response mechanism. The European Council stated that ‘in terms of ambition, the nature of the actors regulated and the innovative aspect of the supervision involved’, the DSA would be ‘a world first in the field of digital regulation.’<sup>134</sup> The DMA will introduce clear rules for large

<sup>130</sup> Tom Wheeler, Phil Verveer, and Gene Kimmelman, ‘The Need for Regulation of Big Tech Beyond Antitrust’, *Techtank* (online, 23 September 2020) <<https://www.brookings.edu/blog/techtank/2020/09/23/the-need-for-regulation-of-big-tech-beyond-antitrust/>>.

<sup>131</sup> *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 119 E/1.

<sup>132</sup> *Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and Amending Directive 2000/31/EC* (European Commission, COM/2020/825 final, 15 December 2020) was approved by Parliament in July 2022 and Council in October 2022 and is expected to apply in early 2024; Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) will enter into force in November 2022.

<sup>133</sup> Adam Satariano, ‘E.U. Takes Aim at Big Tech’s Power with Landmark Digital Act’, *New York Times* (online, 24 March 2022) <<https://www.nytimes.com/2022/03/24/technology/eu-regulation-apple-meta-google.html>>.

<sup>134</sup> Council of the EU, ‘Digital Services Act: Council and European Parliament Provisional Agreement for Making the Internet a Safer Space for European Citizens’ (Press Release, 23 April 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/04/23/digital-services-act-council-and-european-parliament-reach-deal-on-a-safer-online-space/>>.

online platforms who act as a ‘gatekeeper’ for a large number of users to ensure they do not abuse their positions. This will prevent them for example giving preferential treatment to their own products or services or reusing private data collected during one service for the purposes of another service. The European Commission will be the sole enforcer of the DMA and the enforcement mechanisms will include fines, directions to remedy serious and even temporary suspension of service. It is worthwhile exploring whether this package of measures could provide an appropriate form to introduce suitability measures for the European subsidiaries of the very large online platforms.

### **B. Public Benefit Purpose**

A second possibility is the introduction of a public benefit purpose on a voluntary or mandatory basis. Vasudev argues that the notion of shareholder primacy is incompatible with the public interest in corporations and argues for explicit statutory recognition of the stakeholder principle.<sup>135</sup> Different versions of public benefit companies exist in different jurisdictions.<sup>136</sup> In the U.S., a number of public benefit corporations already exist as well as certified B corporations (‘B. corps’) which pursue a ‘general public benefit.’ The latter term is defined in the U.S. model benefit corporation legislation<sup>137</sup> as ‘a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard.’<sup>138</sup> The certification process provides clear evidence that the companies meet the highest standards of verified social and environmental performance, public transparency, and legal accountability to balance profit and purpose. B. corps include Patagonia Works, Ben & Jerry’s, Danone and Australian Ethical Investment. Over 4,000 of these companies in more than 70 countries have built this benefit into their legal structures through their articles of incorporation or charters. For example B. corps in the U.K. in addition to confirming their section 172 obligations in their governing documents state that ‘shareholder value is not the supreme consideration but is one factor amongst the many stakeholder interests which board members need to take into account when running the business.’<sup>139</sup> This certification model has been attributed with encouraging a statutory movement to

<sup>135</sup> P.M. Vasudev, *Beyond Shareholder Value: A Framework for Stakeholder Governance Corporations* (Elgar, 2021).

<sup>136</sup> See Fleischer (n 11) Part III.

<sup>137</sup> Benefit Corporation, *The Need and Rationale for the Benefit Corporation: Why it is a Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors and Ultimately, the Public* (White Paper, Benefit Corporation, 18 January 2013) appendix A.

<sup>138</sup> *A Legislative Guide to Benefit Corporations* (Report, Patagonia Inc, Vermont Law School and the Yale Environmental Law Association, 2018) 2 <<https://d18m0p25nwr6d.cloudfront.net/CIK-0000320193/1e8cf761-1736-43bb-81b0-4e8fe94bd0c8.pdf>> (‘Legislative Guide’).

<sup>139</sup> ‘The Legal Requirement for Certified B Corporations’, *Certified B Corporation* (Web Page) <<https://bcorporation.net/certification/legal-requirements>>.

introduce benefit corporation legislation in 39 U.S. states including Delaware.<sup>140</sup> In Delaware, such a benefit corporation must identify a specific public benefit in its charter. In other states that have adopted the model benefit corporation statute, the benefit corporation is required to pursue a broader general public benefit to society, but may also choose to identify a specific public benefit to be included in its charter. This provides directors with greater legal protection to pursue a business model that ‘places social and environmental values on equal footing with profits’.<sup>141</sup> Benefit corporations other than those incorporated in Delaware must then publish an annual benefit report evaluating their performance with respect to the public benefit benchmarked against an independent third party standard.<sup>142</sup> Some states, not including Delaware, also require an independent benefit director to be appointed to prepare the compliance portions of the annual benefit report and to evaluate whether they have achieved its objectives to pursue a public benefit.<sup>143</sup> Fisch and Solomon argue that the use of benefit corporations still preserves the shareholder primacy norm as shareholders retain the ultimate power and control over the company and the implementation of its purpose.<sup>144</sup> They argue that benefit corporations should be required to specifically designate a formal purpose which is capable of assessment and implementation. This possibility could be considered for BT companies. The precise nature of such a mandatory public benefit would need to be explored but would certainly involve consideration of the nature of the public interest in such companies as discussed below.

Apple shareholders were asked to support a resolution at the AGM in March 2022, opposed by the Board, that Apple would become a social purpose corporation and adopt in its Articles of Incorporation specific social purposes such as:

(A) benefitting (1) the corporation’s employees, suppliers, customers, and creditors; (2) the community and society; and (3) the environment and (B) exercising reasonable care to ensure that the Company’s operations do not impose social and environmental costs that materially contribute to the degradation or destruction of important social and environmental systems.

The existing statement sought to be replaced was a very typical boilerplate statement that ‘The purpose of this corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of California.’ This was described

<sup>140</sup> Certified B Corporation, *Board Playbook: The Case and Process for Adopting Benefit Governance as a Requirement for B Corp Certification*, 10 <[https://downloads.ctfassets.net/1575jm7617lt/1i0ad0301eoa4DuFIbhyNb/461c19b6c958b8e8b6ebac92dc871bb5/Board\\_Playbook\\_Feb2021.pdf](https://downloads.ctfassets.net/1575jm7617lt/1i0ad0301eoa4DuFIbhyNb/461c19b6c958b8e8b6ebac92dc871bb5/Board_Playbook_Feb2021.pdf)>.

<sup>141</sup> *Legislative Guide* (n 138) 2.

<sup>142</sup> *Ibid* 3.

<sup>143</sup> *Ibid* 4.

<sup>144</sup> Fisch and Solomon (n 92) 126.

as ‘uninspiring’ in the resolution’s supporting statement which reminded shareholders that Apple’s CEO, Tim Cook was a signatory of the aforementioned BRT Statement. It argued that ‘rechartering around deeper social purposes’ would allow Apple to align its actions around common goals and to motivate shareholders, employees, and other stakeholders ‘through a mission that is more inspiring than profit maximization.’ In a nod to the cynical use of purpose statements referred to above, the statement concluded by stating clearly:

Those social purposes would not be seen as public relations statements that can be changed according to the latest fad. Our social purposes will be our North Star, guiding and engaging stakeholders on a path to a better future.

Unfortunately, not everyone shared this viewpoint and the resolution was defeated with only 297 million shares in favour but a significant 9.29 billion shares against.<sup>145</sup> This suggests the task of encouraging shareholders in BT companies to voluntarily accept a significant change in the purpose of their companies would be a herculean one.

A related and less intrusive proposition would be the adoption in BT companies of Edman’s proposed advisory say-on-purpose vote for investors.<sup>146</sup> This idea is similar to the now familiar say-on-pay vote and would ensure that investors approve the corporate purpose and agree to any conflicting objectives in its pursuit. He proposes that the vote could constitute a forward-looking policy vote on the purpose statement itself and a backward-looking implementation vote on whether it was put into practice. Fleischer suggests that to allow shareholders a meaningful vote, a more meaningful purpose report would be needed integrating mandatory purpose reporting into non-financial reporting pursuant to the proposed Corporate Sustainability Reporting Directive<sup>147</sup> and its national implementing laws.<sup>148</sup> Given the unclear purpose clauses which we have seen in BT companies, it is apparent that this alone would not enable shareholders to make an informed decision and some further reporting would indeed be required in line with Fleischer’s proposal. A further problem in requiring a say-on-purpose vote in the context of BT companies is that the votes would need to receive the support of shareholders and/or founders. Reliance on the former, as in the case of any listed company, opens up the thorny debate as to the short-termist preference of investors. In technology

<sup>145</sup> Apple Inc, *FORM 8-K Current Report* (Report filed with the United States Securities and Exchange Commission, 4 March 2022) <<https://d18m0p25nwr6d.cloudfront.net/CIK-0000320193/1e8cf761-1736-43bb-81b0-4e8fe94bd0c8.pdf>>.

<sup>146</sup> Alex Edmans, *Grow the Pie: How Great Companies Deliver Both Purpose and Profit* (Cambridge University Press, 2020) 206.

<sup>147</sup> *Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as Regards Corporate Sustainability Reporting* (European Commission, COM/2021/189 final, 22 April 2021).

<sup>148</sup> Fleischer (n 11) 22.

companies, founders often retain significant controlling interests in their companies. In Meta and Google, the founders retain significant control over the board and the voting rights through the use of dual class stock which is said to insulate them against market forces and short-termism and allow them pursue their own corporate visions.<sup>149</sup> This gives them significantly more influence over company decisions than other shareholders and may aggravate agency costs.<sup>150</sup> For example, Mark Zuckerberg through his dual class structure controls 57.7% of Meta's voting shares.<sup>151</sup> Unsuccessful shareholder proposals at the AGM in 2021 included, for the eighth time since the company went public, a proposal to eliminate the company's dual class structure and a proposal to separate the position of Chair and CEO. In advance of the 2022 AGM, it was also reported that Meta was unsuccessful in its efforts to block certain resolutions being put to shareholders including one which would require Meta to assess the human rights impacts of its targeted advertising.<sup>152</sup> Even if founders are not in control, Kershaw and Schuster argue that a 'zone of insulation' can exist around a CEO considered by investors to be 'vital to the success of the company' allowing them to resist investor pressure over the medium term.<sup>153</sup> This deference is likely to be exacerbated in BT companies where the founders are the technological innovators and entrepreneurs credited with 'superhuman vision and competence that merit deference from lesser mortals' in what Jerry Davis describes as 'the mythology of the founder'.<sup>154</sup>

<sup>149</sup> Zohar Goshen and Assaf Hamdani, 'Corporate Control and Idiosyncratic Vision' (2016) 125 *Yale Law Journal* 560; David J. Berger, Steven Davidoff Solomon and Aaron J. Benjamin 'Tenure Voting and the U.S. Public Company' (2017) 72 *Business Lawyer* 295; Dorothy Shapiro Lund, 'Nonvoting Shares and Efficient Corporate Governance' (2019) 71 *Stanford Law Review* 687; Vittoria Battocletti, Luca Enriques and Alessandro Romano, *Dual Class Shares in the Age of Common Ownership* (Law Working Paper No. 628, European Corporate Governance Institute, April 2022) <<https://ssrn.com/abstract=4046244>>.

<sup>150</sup> Martijn Cremers, Beni Lauterbach and Anete Pajuste, *The Life-Cycle of Dual Class Firm Valuation* (Finance Working Paper No. 550/2018, European Corporate Governance Institute, 30 June 2022) <<https://ssrn.com/abstract=3062895>>.

<sup>151</sup> Facebook Inc, *Notice of Annual Meeting & Proxy Statement* <<https://www.sec.gov/Archives/edgar/data/1326801/000132680121000022/facebook2021definitiveprox.htm>>.

<sup>152</sup> Jan Rydzak, 'Meta Shareholders Push for Better Governance of Human Rights Risks Ahead of May AGM', *Ranking Digital Rights* (online, 11 April 2022) <<https://rankingdigitalrights.org/2022/04/11/meta-shareholders-push-for-better-governance-of-human-rights-risks-ahead-of-may-agm/>>.

<sup>153</sup> Ibid 19.

<sup>154</sup> Jerry Davis, 'Ayn Rand-Inspired 'Myth of the Founder' Puts Tremendous Power in Hands of Big Tech CEOs Like Zuckerberg – Posing Real Risks to Democracy', *The Conversation* (online, 30 March 2021) <<https://theconversation.com/ayn-rand-inspired-myth-of-the-founder-puts-tremendous-power-in-hands-of-big-tech-ceos-like-zuckerberg-posing-real-risks-to-democracy-150830>>.

### C. *Public Interest Directors*

A final possibility which might be considered and which combines aspects of the previous two ideas is ensuring that the directors serve the public interest. This might be done either through the appointment of public interest directors or the imposition of mandatory public interest duties on all directors. Both steps were taken in Ireland in regulating banks following the 2008 Banking Crisis in Ireland. Initially, the Irish Government appointed two ‘public interest directors’ to each of the six banks for which it had provided a blanket deposit guarantee.<sup>155</sup> In an effort to select individuals with ‘a public interest perspective’,<sup>156</sup> the majority of the twelve individuals had extensive experience at a senior level in public service, either as elected representatives or civil servants. These directors were expected to bring ‘a civic mindedness and a sense of what is in the public interest.’<sup>157</sup> It was believed by the Minister for Finance who appointed them that their sense of ‘public interest’ would inform how they would interpret the banks’ best interests and how they should perform their duties on their boards.<sup>158</sup>

The Irish Government subsequently introduced the Credit Institutions (Stabilisation) Act 2010 section 48(1) of which imposed a duty on all bank directors ‘in the performance of their functions ...to have regard to’ a broad range of matters including: the availability of credit in the economy; the State’s interest in respect of the Bank Guarantee; the protection of taxpayers’ interests; the restoration of confidence in the banking sector; Government support measures in the banking sector; and the alignment of the activities of the banks and the duties and responsibilities of their officers and employees with the public interest and the other purposes of that Act. In effect thus, by imbuing all of the banks’ directors with responsibilities in relation to the specified public interest issues, all of them were made public interest directors. A unique feature of the section 48(1) duty is that it was qualified by section 48(2)(b) which provided that the duty ‘takes priority over any other duty of the directors to the extent of any inconsistency.’ This sought to provide a statutory response to the question which frequently arises in the context of the stakeholderism debate – how to balance competing interests. Section 48 was never tested before the courts and the legislation ceased to have effect in 2014. However, the existence of such a statutory duty indicated the

---

<sup>155</sup> Blanaid Clarke and Gail Henderson, ‘Directors as Guardians of the Public Interest: Lessons from the Irish Banking Crisis’ (2016) 16 *Journal of Corporate Law Studies* 187.

<sup>156</sup> Credit Institutions (Financial Support) Bill 2008: Committee Stage (Resumed), *Dáil Éireann Debate* Vol 662, No 2, 1 October 2008.

<sup>157</sup> See ‘Written Answers – Public Interest Directors’ (16 December 2010, Vol 725, No 3) *Dáil Éireann Debate*.

<sup>158</sup> *Ibid*.

willingness of the Irish legislature to impose a potentially overriding duty on directors to act in the public interest.

While we should not underestimate the difficulty of agreeing a public interest purpose for companies outside the financial services sector, it should be possible to mandate public interest objectives at least for those BT firms which involve the greatest risks such as the large online platforms. Where designated public interest directors were being appointed, the nature of their duties, and in particular whether their duties should differ from those of the other directors, would need to be considered. A decision would need to be taken at the design stage for either option as to the extent to which the public interest should be substituted for corporate interests or merely used to restore greater balance in the face of corporate interests where a conflict existed. Would directors be required to prioritise their duty to act in the public interest as section 48 appeared to do or merely to consider it in the sense section 172 of the UK Companies Act 2006 sets out matters to which the board must 'have regard'? Where one or more designated public interest directors are to be appointed to the board, another consideration is whether a small number of directors would be in a strong enough position to make a real impact on board decisions in BT companies with the concentrated ownership and control structures discussed above or whether they would end up as mere token appointments. This would depend to an extent on the calibre of the individuals and on whether they were appointed by the Government, an independent third party or by the company's nominating committee in the usual way. For European subsidiaries, it might be the case for example that they could be appointed at the behest of the European or national supervisors under the aforementioned Digital Services Act. A decision would also have to be taken as to whether the public interest directors would be expected to report to the entity that nominated them. Finally, the appointment of directors charged with one particular function, whether it be public interest or diversity or AI ethics, might suggest that this is not an important issue for all directors. It might in some way be seen to confer permission on the other directors to abdicate responsibility for public interest. This would clearly be undesirable. It would be better for all directors to consider themselves duty bound to act in the interests of the public so that the public interest was embedded in all decision making and, in this way, could become part of their companies purpose.

## V Conclusion

It is not suggested that the policy measures proposed above would constitute a total fix but rather that further thought might be given to determine whether they have a role to play as part of a larger toolbox. It is clear that a holistic approach will be needed to resolve all the



different and complex issues BT raises. It is also the case that not all technology companies would be treated in an equivalent manner and small start-ups for example would not be expected to comply with the same level of governance requirements. However, the BT companies the subject of this article might all be considered to be ‘significant’ in a sense understood in banking regulation and anticipated in the EU Commissions new rules for digital platforms.

From the perspective of the BT companies, the idea of appointing public interest directors might be viewed as the most palatable or least intrusive of the ideas reviewed in this article. It might also be introduced on a voluntary basis. Zuckerberg promised to review whether Facebook needed to change anything structurally ‘to make sure the right groups and voices are at the table - not only when decisions affecting a certain group are being made, but when other decisions that may set precedents are being made as well’<sup>159</sup> and other BT companies might share this view. The Irish experience suggests that public interest directors can play a useful role but that there must be a clear understanding as to what the public interest is. The notion of public interest permeates much of the discussion about the involvement of technology in a wide range of public activities, including journalism, civic engagement, education, and transport and the role it plays ‘in the realization of important public values and policy objectives associated with these activities’.<sup>160</sup> However, in the same way, that section 48 of the Credit Institutions (Stabilisation) Act 2010 defined the meaning of public interest in the context of banking, an agreement as to its meaning in the context of BT would be needed. In addition, the various components of the public interest may be in conflict with each other on occasion and absent an equivalent to section 48(2)(b), the public interest directors would have to be able to determine how they should be balanced. The final report following Facebook’s Civil Rights Audit<sup>161</sup> explained how such a conflict might arise. It criticised *inter alia* Facebook’s failure to remove a number of Donald Trump’s voting-related posts on the basis that this appeared to reflect a statement of values that prioritised protecting free expression over other stated company values. It concluded:

For a 21st century American corporation, and for Facebook, a social media company that has so much influence over our daily lives, the lack of clarity about the relationship between those two values [free expression and non-discrimination] is devastating. It will require hard balancing, but that kind of balancing of rights and interests has been part of the American dialogue

<sup>159</sup> Mark Zuckerberg (Facebook, 5 June 2020) <<https://www.facebook.com/zuck/posts/10111985969467901>>.

<sup>160</sup> Natali Helberger, Jo Pierson and Thomas Poell, ‘Governing Online Platforms: From Contested to Cooperative Responsibility’ (2018) 34 *The Information Society* 1.

<sup>161</sup> *Facebook’s Civil Rights Audit – Final Report* (8 July 2020) <[https://www.relmanlaw.com/media/cases/988\\_Civil-Rights-Audit-Final-Report.pdf](https://www.relmanlaw.com/media/cases/988_Civil-Rights-Audit-Final-Report.pdf)>.

since its founding and there is no reason that Facebook cannot harmonize those values, if it really wants to do so.<sup>162</sup>

This statement is important too in its final reminder that many of the changes sought as to the manner in which BT companies operate and the purposes we wish them to acknowledge do not need legislative change. They merely need genuine buy-in and commitment from the companies themselves and those that control them.

---

<sup>162</sup> Ibid 12.