

2018

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Recommended Citation

Lee, Joseph (2018) "THE CORPORATE GOVERNANCE OFFICER AS A TRANSFORMED ROLE OF THE COMPANY SECRETARY: AN INTERNATIONAL COMPARISON," *South Carolina Journal of International Law and Business*: Vol. 14 : Iss. 2 , Article 7.

Available at: <https://scholarcommons.sc.edu/scjilb/vol14/iss2/7>

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THE CORPORATE GOVERNANCE OFFICER AS A TRANSFORMED ROLE OF THE COMPANY SECRETARY: AN INTERNATIONAL COMPARISON

*Joseph Lee**

INTRODUCTION

Corporate scandals around the global markets have prompted regulatory agencies to rethink the role of governance professionals and their relationship with the companies. Emerging markets in Asia, including China, the world's second largest economy, have also recognized that corporate governance professionals can not only reinforce regulatory norms to sustain their capital markets but also bring value to their companies. Listed companies need to have a corporate governance officer to increase the level of corporate governance enforcement. In this article, the author will discuss how the English company secretary can be transformed into a corporate governance officer and how this new role and the proposed way in which it may operate, if adopted by other jurisdictions, can also create transnational governance synergies.

The company secretary is an English corporate invention and the office has continued to enhance transparency and facilitate board independence. The removal of the requirement to appoint a company secretary to a private company by the Companies Act 2006 creates an opportunity to have a sharper focus on this 108-year-old corporate

* PhD (London), Senior Lecturer in Law, University of Exeter (U.K.); I would like to thank Professor Wanruu Tseng of National Taiwan University, Professor Ciyun Zhu of Tsinghua University China, Professor Christopher Chen of Singapore Management University, and Mr. Simon Osborne at the Institute of Chartered Secretaries and Administrators (ICSA) for their invaluable feedback on this paper. All errors remain my own.

position with increased corporate governance duties.¹ This English invention has at first only been exported to other common law jurisdictions such as Hong Kong and Singapore. However, China, as a civil law country, transplanted such a statutory officer into its company structure since 1993.² In 2016, Taiwan also introduced a law requiring all listed companies to have a company secretary.³ Despite the legal installation of this office, the company secretary's function as a corporate gatekeeper has not been discussed as extensively as that of other gatekeepers such as auditors, compliance officers, and lawyers,^{4, 5} either in the U.K. or at any transnational level such as in

¹ See Companies Act 2006, c. 46, § 270 (U.K.) (although the background thinking is under the motto of "think small first" to reduce red tape for small companies, it has the effect of placing more emphasis on the public companies' governance); see Dep't of Trade and Industry, Company Law Reform, § 4, at 29-55 (Mar. 2005) (U.K.).

² See Zhonghua Renmin Gongheguo Gongsifa (公司法) [The People's Republic of China's Company Law] (promulgated by the STANDING COMM. NAT'L PEOPLE'S CONG. Dec. 29, 1993) (China).

³ See Executive Yuan, *Encouraging new businesses and accelerating investment with amendments to the Company Act* (Jan. 2, 2018), https://english.ey.gov.tw/News_Hot_Topic.aspx?n=1C42D5D2493FC43F&ms=BC35F9E560578584.

⁴ See John Coffee, GATEKEEPERS: THE ROLE OF THE PROFESSIONS IN CORPORATE GOVERNANCE (Oxford U. Press, 2006); see also Reinier Kraakman, Gatekeepers: The Anatomy of a Third-party Enforcement Strategy, 2 J. L. ECON., & ORG. 53-104 (1986); see also Dalvinder Singh, Role of External Auditors in Bank Supervision: A Supervisory Gatekeeper, 47 INT'L L. 65-98 (2013).

⁵ In the same countries, public regulators also perform a significant role as corporate gatekeeper. In this sense, corporate professionals are the private corporate gatekeepers. See David Freeman Engstrom, *Agencies as Litigation Gatekeepers* 123 YALE L. J. 616 (2013); see also Julia Black, *Enrolling Actors in Regulatory Systems: Examples from U.K. Financial Services Regulation* PUB. L. 63-91 (2003).

the EU or OECD.⁶ The aim of this paper is to explore how a company secretary, as a corporate professional and a corporate governance officer, can perform an oversight function to increase the quality of governance.

This paper argues a company secretary can act as a corporate gatekeeper in charge of facilitating investor-led corporate governance built on transparency and board independence. Independence is an important quality that must be regulated. This role can be fulfilled by professional services firms that have been providing corporate gatekeeper services since the advent of capital markets. Thus, the issue of whether a company secretary should be classified as an internal person or an outsider is not important. As the U.K., U.S., and many Asian countries, especially China, have all introduced the position of company secretary, some common ground can be identified to create governance space and synergies.⁷ Therefore, at the transnational level, company secretaries of multinational companies have the potential to shape new transnational governance since they manage increasing numbers of joint law enforcement actions. The EU and other transnational regulators should not overlook the ability of this corporate governance officer to close gaps in governance by acting as a corporate gatekeeper along with regulators and other corporate professionals.

Section I examines the evolving role of the company secretary from a mere servant to a corporate governance officer and how this office, parallel with other governance professionals such as auditors and lawyers, continues to evolve in an investor-led corporate ecosystem where transparency and board independence are the main factors for investment decisions. Section II considers whether company secretaries should also be the independent officer's equivalent to auditors, lawyers, and compliance officers and if so, how

⁶ Individual nation states have such a role, such as Ireland. Many U.S. (i.e. Delaware and New York) and Australian states also require companies to have a company secretary.

⁷ See Terry McNulty & Abigail Stewart, *Developing the Governance Space: A Study of the Role and Potential of the Company Secretary in and around the Board of Directors*, 36 ORGANISATIONAL STUD. 513 (2015).

such independence can be regulated to best promote corporate values. Section III discusses how professional services firms who are outsiders to the companies can play a role in adding value to the internal governance and discuss how independence can be maintained in the face of market competition, especially for those firms who provide multiple corporate services. Section III will also discuss the rarely explored area of firms' attributed liability—the way in which a company secretary's liability as an internal corporate officer may be attributable to the professional services firms and will also identify any areas that need particular legislative attention in order to avoid any confusion in the interpretation of the current law. The discussion will also provide a model for other countries. Section IV uses multinational companies as a case study to explore the role of the company secretary in the transnational context, and how governance synergies may result.

SECTION I: THE EVOLVING ROLE OF THE COMPANY SECRETARY

A. HISTORICAL DEVELOPMENT

How has the role of the company secretary, although an internal corporate officer, evolved with investor-led governance? The role is now comparable to other corporate professionals in charge of corporate gatekeeping, but the company secretary was initially an officer of the company who served an important role in the administration and management of the company's affairs.⁸ The role has changed from being a mere servant of the company to a statutory officer who takes on managerial functions such as chief of staff to the chairman or adviser to the board. The role of company secretary has a shorter history than that of corporate auditor—another corporate gatekeeper. The U.K. did not include the company secretary in the Companies Act of 1855 where the principle of limited liability was

⁸ See *Panorama Developments (Guildford) Ltd v. Fidelis Furnishing Fabrics Ltd* (1971) 2 QB 711 (CA) (U.K.).

first introduced.⁹ In *Barnnett, Hoares & Co v. South London Tramways Co.*, immediately after the principle of limited liability was introduced in that Act, Lord Esher M.R. said “A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all.”¹⁰ While Lord Esher was dealing with an issue of corporate authority, it is important to note that there was no legal requirement in 1887 to have a company secretary which is why Lord Esher thought that this non-statutory role was a mere servant. The company secretary did not receive an official title until the early 1900s when British stock exchanges were becoming more international and offered British companies’ shares abroad.¹¹ The Companies Act 1908¹² then required each company to appoint a company secretary, while the Companies Act 1929¹³ subsequently prescribed the duties and responsibilities of the office. The creation of such a statutory corporate officer has eventually led to judicial recognition of the company secretary with the authority to bind the company with third parties, which is usually only conferred on directors. In *Panorama Developments (Guildford) Ltd v. Fidelis Furnishing Fabrics Ltd*, the court recognized the company secretary as an officer of the company who had authority to bind the company with third parties.¹⁴ In the opinion, Salmon LJ described a company secretary as the chief administrative officer of the company but left open the question whether the company secretary would have any authority in relation to the commercial management

⁹ See An Act for Limiting the Liability of Members of Certain Joint Stock Companies, 1855, 18 & 19 Vict., c. 133 (U.K.).

¹⁰ *Barnnett, Hoares & Co v. South London Tramways Co* (1887) 18 Q.E.D. 815 (U.K.).

¹¹ See Ranald C. Michie, *THE LONDON STOCK EXCHANGE: A HISTORY* 70-142 (Oxford U. Press 1999).

¹² See Companies (Consolidation) Act 1908, 8 Edw. 7 c. 69 (U.K.).

¹³ See Companies Act 1929, 19 & 20 Geo. 5 c. 23 (U.K.).

¹⁴ See *Panorama*, *supra* note 8.

of the company.¹⁵ Since then, the emphasis on the function of the company secretary has shifted to legal compliance.

*B. MODERN FUNCTION TO MAINTAIN CORPORATE TRANSPARENCY
AND BOARD INDEPENDENCE*

Nowadays, capital markets require two critical confidence-building measures for financial participation of the investor: transparency¹⁶ and board independence.¹⁷ The demand for transparency has led to the development of laws and regulations requiring disclosure through filing with various agencies and timely announcements through recognized channels.¹⁸ Board independence has called for increasing numbers of non-executive directors on a board to act as checks and balances in corporate administration. The traditional role of the company secretary to act as the company's chief administrative officer for filing documents with the Registrar of

¹⁵ See *id.*

¹⁶ See Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1361-62 (1996); see also Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); see also Rafael La Porta et al., *Investor Protection and Corporate Valuation*, 62 J. FIN. 1147 (2002).

¹⁷ See Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON., 305 (1976); see also Derek Higgs, *Review of the Role and Effectiveness of Non-executive Directors*, DEP'T OF TRADE & INDUSTRY (2003); see also Kevin Corley, *Examining the Non-executive Director's Role from a Non-agency Theory Perspective: Implications Arising from the Higgs Report*, 16 BRITISH J. MGMT., 1-4 (2005); see also EU Commission on the Role of Non-executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) Board, Commission Recommendation, 2005/162/EC; see also Jeffrey Gordon *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV., 1465 (2007).

¹⁸ See Regulatory News Service (RNS) of the London Stock Exchange, <http://www.londonstockexchange.com/products-and-services/rns/about/rns-remove.htm> (last visited Mar. 12, 2018).

Companies House continues today. The increasing requirement to disclose corporate information through document filings and timely announcements has made this administrative office indispensable for a company's operations in a rule-based market economy.¹⁹ The role of the company secretary in the U.K. has thus gained greater importance than was originally intended, especially in listed companies which need to comply with law and policy to mitigate exposure to legal and reputational risk. This increased responsibility was not a result of the direct duties imposed on the office by the law or by providing it with more direct legal powers to be exercised against other officers of the company. The driving force for the increased importance of the company secretary has been the developments in the law requiring greater transparency and more precise governance through internal checks and balances. These include splitting the roles of chairman and CEO, increased number of non-executive directors, and the demand for greater corporate social responsibility that is now required by law and policy compliance throughout corporate groups.²⁰

¹⁹ See Modern Slavery Act, 2015, c. 30 (U.K.) (requires certain larger organizations (wherever incorporated) supplying goods or services and carrying on business in the U.K. to publish a slavery and human trafficking statement ('MSA statement') each year, describing steps taken (if any) during the previous year to ensure that slavery and human trafficking are not occurring in its global supply chain). Also, in the EU certain large companies are required to disclose information on policies, risks, and outcomes as regards environmental matters, social and employee aspects, respect for human rights, anti-corruption and bribery issues, and diversity in their board of directors. See Council Directive 14/95, 2014 O.J. (L 330).

²⁰ See Samuel Idowu, *Corporate Social Responsibility from the Perspective of Corporate Secretaries* in PROFESSIONALS' PERSPECTIVES OF CORPORATE SOCIAL RESPONSIBILITY 49-70 (S. Idowu & W. Filho eds., Springer-Verlage Berlin Heidelberg 2009).

C. THE COMPANY SECRETARY AND BOARD INDEPENDENCE

The U.K. Corporate Governance Code, a soft law operating on the basis of “comply or explain,”²¹ epitomizes a delegalized approach that enhances the role of the company secretary in the facilitation of board independence.²² Since independent directors play a constantly increasing role in corporate governance,²³ through his close involvement with the board by attending board and other committee meetings, the company secretary is able to act as an interface between the board and shareholder meetings between, for example, a senior independent director and the minority shareholders. In an increasingly devolved governance system where independent committees carry out functions with the primary aim of removing directors’ conflicts of interest, the company secretary can deliver confidence to investors by acting as an interface between the committee and the chairman (an independent role). For instance, risks identified in committee meetings can be fed to the chairman through the company secretary who normally prepares the committee meetings.²⁴

²¹ UK Corporate Governance Code, 2016, FIN. REPORTING COUNCIL, (however, it is binding on the premium listed companies on the London Stock of Exchange).

²² See Kevin Keasey et al., *The Development of Corporate Governance Codes in the U.K.*, CORPORATE GOVERNANCE: ACCOUNTABILITY, ENTERPRISE AND INTERNATIONAL COMPARISONS 21-42 (K. Keasey, S. Thompson, & M. Wright eds., John Wiley & Sons: Chichester 2005) (noting that Hong Kong, Singapore, Taiwan, and Japan all adopt a similar non-statutory code of corporate governance).

²³ See Higgs, *supra* note 17, at 31.

²⁴ The secretary tends to serve a longer term than the board directors and can thus offer a historical view in the tradition of the company to both the board and investors.

Services provided by company secretaries can enhance the effectiveness of independent directors in the governance system.²⁵ Assisting the non-executive chairman in the selection and appointment of non-executive directors and providing an induction and training programme to new directors,²⁶ giving advice to non-executive directors, and assisting the non-executive chairman in conducting board evaluation (a regulatory requirement under the Corporate Governance Code for listed companies) brings confidence to the investors, especially retail investors.²⁷ These responsibilities may increase investor confidence, which reduces the cost of raising capital.²⁸ The reduction of cost of capital results in value-creation to companies.^{29, 30} These examples show how the non-statutory Code can act as a catalyst for providing valuable corporate secretarial services

²⁵ UK Corporate Governance Code, 2016, *supra* note 21, at 14 (Principle A.5.3 of the Corporate Governance Code states that a company secretary should be “responsible to the board for ensuring that board procedures are complied with.”).

²⁶ See ICSA, ICSA GUIDANCE ON INDUCTION OF DIRECTORS, 4 (2012), <https://www.icsa.org.uk/assets/files/pdfs/guidance/Guidance%20notes%202012/Induction%20of%20directors.pdf>.

²⁷ The Code, as will be recalled, is a soft-law mechanism operating on the basis of “comply or explain.”

²⁸ See Kevin Chen et al., *Legal Protection of Investors, Corporate Governance, and the Cost of Equity Capital*, 15 J. CORP. FIN. 273 (2009); see also Romilda Mazzotta & Stefania Veltri, *The Relationship between Corporate Governance and the Cost of Equity Capital. Evidence from the Italian Stock Exchange*, 18 J. MGMT. GOV. 419 (2014).

²⁹ Hannah Langworth, *In good company*, THE GATEWAY, <http://thegatewayonline.com/corporates/types-of-work/icsa-in-good-company> (last visited Mar. 27 2018) (Regarding one of the causes of the 2007-2009 financial meltdown, it has been stated that “[s]ometimes what the directors of financial institutions were being asked to consider was just so complicated that a lot of the non-execs didn’t understand what was being suggested, and then it became difficult for them to question anything.”).

³⁰ In such situations, the company secretary can act as a filter to review the relevant documents and determine whether the right types of information have been provided to the directors who, by definition, are not involved with the company on a daily basis.

to companies that benefit both investors and stakeholders. Hong Kong and Singapore have adopted similar codes for listed companies.³¹ Taiwan and China also regulate the company secretary but not through statutory company law. There are more practical reasons for developing such an office through non-statutory rules and this will be discussed in later sections of this paper.

D. FOCUS ON LISTED COMPANIES THROUGH CODES OF BEST PRACTICE

While the 2006 Companies Act in the U.K. removed the requirement for private companies to appoint a company secretary and allowed them to decide whether or not the position is required according to their own constitution, public companies are still required to make such an appointment.³² This is similar to the approach adopted in China and Taiwan, which consider a governance officer to be necessary for companies who are raising capital from the public.³³ Hence, their codes of best practice, which are similar to the U.K.'s Corporate Governance Code, play a more important role than statutory company law. Since private companies (and to some extent public companies) do not raise capital from the public, corporate governance

³¹ See H.K. Exchanges & Clearing, Corporate Governance Code and Corporate Governance Report, 2016, http://en-rules.hkex.com.hk/net_file_store/new_rulebooks/h/k/HKEX4476_3828_VER10.pdf, [hereinafter HKEX]; see also Monetary Authority of Sing., Code of Corporate Governance, 2012, http://www.mas.gov.sg/~media/resource/fin_development/corporate_governance/CGCRevisedCodeofCorporateGovernance3May2012.pdf [hereinafter MAS].

³² See Companies Act *supra* note 1 (stating if the company is private, a company secretary is required. If it is public company, a company secretary must be appointed); The Companies Act, § 171 (2012) (Sing.) (In Singapore, a company secretary is required statutorily for both public and private companies.).

³³ See Rules Governing the Listing of Stocks on Shanghai Stock Exchange, 2008; see also Shenzhen Stock Exchange Listing Rules, 2012; Taiwan Stock Exchange Corporate Governance Best Practice Principles, 2016.

for them may have a different objective.³⁴ To discuss the role of the company secretary in other jurisdictions, especially in countries that do not practice common law, and to find common ground for developing codes of best governance practice, it is therefore sensible to focus on listed companies. Board independence is less of an issue for private companies and non-listed public companies; hence, the Corporate Governance Code does not apply to private or non-listed public companies because policy compliance to mitigate exposure to reputational damage primarily concerns listed companies.

Many private companies do not operate in jurisdictions outside their home country through subsidiary operations, so have less concern for subsidiary governance.³⁵ Furthermore, what amounts to a private company or a public company in non-common law jurisdictions such as China and Taiwan may not be comparable to the position in the U.K., Singapore, and Hong Kong. For these reasons, the discussion here focuses on how a company secretary brings value to listed companies and how that role can be transformed into a corporate governance officer.³⁶ As it happens, company regulators do not develop the rules on the role of the company secretary for listed

³⁴ See David Milman, *The regulation of private companies in U.K. law: current policy developments and recent judicial rulings*, 257 SWEET & MAXWELL'S CO. L. NEWSLETTER 1 (2009) (The U.K.'s change in this requirement for private companies was due to the streamlining of private companies' administrative burdens included in the law, resulting in fewer filing and reporting requirements for private companies.).

³⁵ See Bryan Christansen & Harish C. Chandan, *Handbook of Research on Human Factors in Contemporary Workforce Development*, 2001 (stating some private companies are holding companies with subsidiaries operating abroad, however, most large multinational companies are public companies).

³⁶ See, Jill Collis, *Directors' View on Accounting and Auditing Requirements for SMES* (Apr. 2008) (claiming private companies can determine in their own constitutions whether to utilize such an office in delivering its organizational objectives. According to Companies House statistics, the number of companies incorporated without a company secretary has increased greatly since April 6, 2008.).

companies in any of the jurisdictions discussed here. In the U.K., the Financial Reporting Council develops the rules, rather than the Department for Business, Energy and Industrial Strategy (BEIS). In Taiwan, the Securities and Futures Bureau promulgates the rules on the company secretary rather than the Ministry of Economic Affairs.³⁷ In Singapore, it is the Monetary Authority of Singapore rather than the Accounting and Corporate Regulatory Authority (ACRA).³⁸ In China, it is the China Securities and Regulatory Commission (CSRC) rather than the State Administration for Industry and Commerce (SAIC).³⁹ In Hong Kong, it is the Stock Exchange of Hong Kong Limited (SEHK).⁴⁰ These regulators focus on listed companies, hence common approaches can be more easily adopted.

SECTION II: THE COMPANY SECRETARY AS AN INDEPENDENT GATEKEEPER

A. ATTRIBUTE OF INDEPENDENCE

If company secretaries are to fulfill the role of corporate governance officer with responsibility for the requirement for corporate transparency and facilitating board independence, they should retain the critical attribute of independence as do other gatekeepers such as auditors, lawyers, and compliance officers. However, this attribute of independence should be regulated to best realize governance goals. Company secretaries should be independent when exercising their professional judgment, just as lawyers, auditors and other governance professionals do. They should be independent in terms of their relationships with the companies and members of the board, just as an independent director is.

³⁷ See Securities and Futures Bureau, Financial Supervisory Commission, R.O.C., <https://www.sfb.gov.tw/en/> (last visited on Mar. 27, 2018) (Taiwan).

³⁸ See MAS, *supra* note 31.

³⁹ See Chinese Securities and Regulatory Commission, http://www.csrc.gov.cn/pub/csrc_en/.

⁴⁰ See HKEX, *supra* note 31.

*B. COMPLIANCE OFFICER AND COMPANY SECRETARY:
 SIMILAR EXERCISE OF INDEPENDENT JUDGMENT*

As mentioned, transparency is an indispensable element of modern corporate governance, and transparency has been translated into various requirements for filing, reporting of law and policy compliance, and timely announcements. Company directors and company secretaries, as officers of the company, assume filing duties under various laws. These filing, reporting, and announcing requirements involve independent judgment to be exercised. For instance, complying with accounting rules;⁴¹ complying with rules specifically designed to protect the shareholders (i.e. the pre-emptive rights regime);⁴² understanding the operations of nominee companies to identify rightful investors;⁴³ the application of proxy rules to increase shareholder engagement;⁴⁴ and the proactive development of governance protocol to hedge risks stemming from subsidiary operations,^{45, 46} all demand a skilled governance officer. In the future,

⁴¹ See Tamer Elshandidy & Ahmed Hassanein, *Do IFRS and Board of Directors' Independence Affect Accounting Conservatism?*, 24 APPLIED FIN. ECON. 1091 (2014) (stating company secretaries must ensure that companies' account records are prepared in the form required by company law and accounting standards. Corporate governance structures also affect the accounting decisions.).

⁴² See Companies Act 2006 *supra* note 1, pt. 17, ch. 3(U.K.) (explaining shareholders' rights on preemption).

⁴³ See Richard Nolan, *Indirect Investors: A Greater Say in the Company?*, 3 J. CORP. L. STUD. 73 (2003) (discussing the policy on indirect investors' enforcement of corporate governance).

⁴⁴ See Tsjalle van der Burg & Aloys Prinz, *Empowering Small Shareholders: a Comparison of Three Instruments*, 14 CORP. GOVERNANCE 406 (2006); see also Paolo Santella et al., *Legal Obstacles to Institutional Investor Activism in the EU and in the U.S.*, 23 EUR. BUS. L. REV. 257 (2012).

⁴⁵ See Geoffrey Kiel et al., *Corporate Governance Options for the Local Subsidiaries of Multinational Enterprises*, 14 CORP. GOVERNANCE 568 (2006).

⁴⁶ In March 2017, the OECD also released "Responsible Business Conduct for Institutional Investors" to help institutional investors implement

companies may be required to make disclosures under the Freedom of Information Law if they carry out work that is categorised as public service.⁴⁷ Hence, independent judgment would be needed to determine issues concerning disclosure requirements.

Furthermore, there are other regulations aiming at removing directors' conflicts of interest and preventing directors' self-dealing. The duty of enforcing these regulations internally falls on the company secretary who shields the company from insider misconduct. Under the U.K. Financial Services and Markets Act 2000,⁴⁸ the company secretary also has a role in implementing and communicating procedures for listed company directors to comply with the Model Code on share dealing. To prevent insider dealing by directors,⁴⁹ prior reporting and obtaining clearance from a non-executive director should pass through the company secretary so that a record can be kept of any communication.

In some companies, company secretaries also act as gatekeepers to prevent illegal political donations.⁵⁰ The U.K. Companies Act 2006 prohibits political donations by U.K. registered companies and subsidiaries of ultimate U.K. holding companies, unless they are authorized by shareholder resolutions in a general meeting.⁵¹ The

the due diligence recommendations of the OECD Guidelines for Multinational Enterprises to prevent or address adverse impacts related to human and labour rights, the environment, and corruption in their investment portfolios.

⁴⁷ See Simone Mezzacapo, *The Right of Access to Public Bodies' Records in Italy and UK: Actio Ad Exhibendum and Freedom of Information, Risks and Opportunities for Private Sector Companies*, 17 EUR. BUS. L. REV. 959 (2006).

⁴⁸ See The Financial Services and Markets Act § 96B (2000).

⁴⁹ See Simeon Djankov et al., *The Law and Economics of Self-dealing*, 88 J. FIN. ECON. 430 (2008).

⁵⁰ See Jack Davies, *From Gentlemanly Expectations to Regulatory Principles: a History of Insider Dealing in the U.K.: Part I*, 36 CO. LAW. 132 (2015).

⁵¹ See generally Richard Williams, *Regulating Political Donations by Companies: Challenges and Misconceptions*, 75 MOD. L. REV. 951 (2012).

company secretary needs to be familiar with the operations of subsidiary companies both at home and abroad⁵² to design an effective reporting line so that shareholder resolutions can be obtained in a timely manner⁵³ and meet disclosure requirements.⁵⁴ For example, one large multi-national group requires group companies to return a certificate to the secretary of the holding company each year, stating either that no payment has been made or providing details when a payment has taken place. The company secretary is the “go to” person who oversees reporting duties for subsidiaries. These results are then reported annually to the audit committee of the company as well as in an interim report to the committee of independent directors.⁵⁵ This system can be implemented either through an internal corporate governance protocol or the subsidiary companies’ constitutions.⁵⁶

C. CHIEF OF STAFF TO THE INDEPENDENT CHAIRMAN

For listed companies, investor confidence is increased by the company secretary’s role of enhancing the monitoring and advisory functions of non-executive directors, in a similar way to the greater independence of directors.⁵⁷ To whom a company secretary reports will influence the quality of independence of the company secretary. There is no common approach among the jurisdictions discussed here.

⁵² See Companies Act 2006 *supra* note 1, pt. 14 (a holding company is permitted to seek authorization of donations and expenditure in respect of both the holding company itself and one or more subsidiaries through a single approved resolution).

⁵³ See *id.*

⁵⁴ See Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, sched. 7 (U.K.) (directors’ reports must disclose any relevant political donations or expenditures).

⁵⁵ See *Standards of Business Conduct*, BRITISH AMERICAN TOBACCO (2017), <http://www.bat.com/sobc> (current practice requires any donation to be authorized by the board of the company and fully documented in the company’s books).

⁵⁶ See *id.*

⁵⁷ See Rafel Crespi-Cladera & Bartolomé Pascual-Fuster, *Does the Independence of Independent Directors Matter?*, 28 J. CORP. FIN. 116 (2014).

Hong Kong⁵⁸ and Singapore,⁵⁹ while largely following the U.K. Corporate Governance Code,⁶⁰ are not clear on whether the company secretary acts as chief of staff to the chairman. Neither the Hong Kong nor Singapore code makes recommendations for independent non-executive chairmen. China only requires the company secretary to be attached to the board.⁶¹ Taiwan does not specify whether such an office should be placed under the executive directors or the independent directors.⁶²

In the U.K., the office of the company secretary is often established under the non-executive chairman's office—acting as chief of staff to the chairman.⁶³ This coincides with several oversight functions of the chairman, including the responsibility for conducting board evaluations.⁶⁴ A company secretary's relational independence, when not working under the control of the executive officers, enhances the functions of the non-executive directors whose major role is to remove the conflicts of interest of the executive directors. Since neither the auditor nor the internal or external lawyers necessarily attend board meetings and may not have direct access to the chairman or other non-executive directors, the company secretary has a unique gatekeeping role.

This role has been recognized as long ago as 1993 in the Cadbury Report, which recommended that the company secretary should give guidance to the board on board members' responsibilities.⁶⁵ Board

⁵⁸ See, e.g., HKEX, *supra* note 31.

⁵⁹ See, e.g., MAS, *supra* note 31.

⁶⁰ See UK Corporate Governance Code, *supra* note 21.

⁶¹ See Gongsifa (公司法), *supra* note 2.

⁶² See generally Corporate Governance Roadmap, 2013, (promulgated by the Fin. Supervisory Commission), (Taiwan).

⁶³ See Caroline Newsholme, *FRC Guidance on Board Effectiveness*, 35 CO. SECRETARY'S REV. 14 (2011).

⁶⁴ UK Corporate Governance Code, *supra* note 21, at § B.6.

⁶⁵ See Adrian Cadbury, *The Financial Aspects of Corporate Governance* at 4.25 (Dec. 1992), <https://www.icaew.com/>-

members should have access to the company secretary for such guidance and advice. In particular, the chairman, who is responsible for the functioning of the board, should have strong support from the company secretary. The company secretary's attribute of independence would not have been as necessary if board meetings were simply a management discussion forum without the aim of ensuring that checks and balances are in place to support investors' confidence.

Combining the roles of law and policy compliance, the company secretary is in a position to detect insider misconduct through an effective reporting system and can whistleblow insider misconduct to the chairman.⁶⁶

ENFORCEMENT OF INDEPENDENCE

A. A STATUTORY DUTY OR A PRINCIPLE-BASED APPROACH?

As a gatekeeper and an officer, what kind of duty of independence should company secretaries assume? Should they have the duty to exercise independent judgment as directors do, and if so, how should the quality of independence be maintained? In the jurisdictions previously discussed, none have imposed a statutory duty to exercise independent judgment on company secretaries as they have done on the directors.

There are practical difficulties with imposing statutory duties of independence on company secretaries. As a general duty, U.K. law requires directors to act independently by exercising unfettered

/media/corporate/files/library/subjects/corporate-governance/financial-aspects-of-corporate-governance.ashx?la=en.

⁶⁶ See Indira Carr & David Lewis, *Combating Corruption through Employment Law and Whistleblower Protection*, 39 INDUS. L. J. 52 (2010); Peter Yeoh, *Whistleblowing: Motivations, Corporate Self-regulation, and the Law*, 56 INT'L J. L. & MGMT. 459 (2014).

judgment.⁶⁷ However, company secretaries do not take business, management, and executive decisions in the way that company directors do. They act, as recommended in some codes of governance, under the direction of the chairman.⁶⁸ It is difficult to define the boundary between exercising independent judgment and acting under the direction of the chairman.

Whether such a duty should be legally imposed on company secretaries depends on their functions vis-à-vis the board (whether they also take executive decisions), the organizational objectives (what kind of responsibilities are delegated to them), and corporate governance agenda (whether they have the task to manage a group's compliance programme). The company secretary may act as the following: chief of staff to the non-executive chairman; adviser to the board; critical appraiser of board members' roles; third person in a chairman-CEO relationship; interface between the board and the shareholders; or a gatekeeper for corporate governance.⁶⁹ If these roles are to remain open for organizational innovation, the duty of independence does not need to be legally prescribed. This approach would allow companies to design the job descriptions freely without being caught out unnecessarily by strict legal rules.⁷⁰

Hence, a code of conduct with a situational approach to the meaning of "independence"—using the negative criteria as the Corporate Governance Code of 2016 does for independent directors—can be issued for defining relational independence.⁷¹ In addition, there can be systems and processes to ensure the quality of independence,

⁶⁷ See Companies Act 2006, *supra* note 1, at § 173, pt. 10.

⁶⁸ See UK Corporate Governance Code, *supra* note 21; *see also* MAS, *supra* note 31.

⁶⁹ See UK Corporate Governance Code, *supra* note 21, at 13.

⁷⁰ See Julia Black et al., *Making a Success of Principles-based Regulation*, 1 L. & FIN. MKT.'S REV. 191, 193 (2007) (explaining that principles-based regulation can be considered).

⁷¹ See UK Corporate Governance Code, 2016, *supra* note 21, at 9.

notably on the appointment to and removal from office.⁷² The professional code can provide guidance and fulfill the independent judgment requirement for lawyers and auditors.⁷³

B. APPOINTMENT AND REMOVAL

If the company secretary is expected to be a corporate gatekeeper in a similar way as an auditor, the appointment and removal of an auditor could offer an equivalent way of proceeding. Thus, since an individual director cannot unilaterally dismiss an appointed auditor, an individual director should also not be able to remove a company secretary, leaving only the board with the power of appointment or removal.⁷⁴ As the law places greater control on the appointment and removal of a company's auditor for greater investor confidence, auditor rotation, control of auditors' remuneration, control procedures for limiting auditors' liabilities to the company, and shareholder participation in appointment and removal processes, all help to ensure auditor independence. Although there is no hard law in the U.K. with the effect of regulating a company secretary's independence, the U.K. Corporate Governance Code recommends that only the board should have the ability to appoint and remove a company secretary; an individual director should not be able to do so unilaterally.⁷⁵ This is also the approach adopted in Hong Kong, Singapore, Taiwan, and China except that there is no clear indication of whether an individual director, acting with delegated powers from the board, can unilaterally dismiss the company secretary.⁷⁶ Taiwan further specifies that the nomination committee should participate in the appointment of the company secretary.

⁷² See Reiner Quick, *EC Green Paper Proposals and Audit Quality*, 9 ACCT. EUR. 17 (2012) (explaining that some lessons can be learned from auditor's appointment and removal to maintain audit independence).

⁷³ See APB Ethical Standard 1 (Revised) Integrity, Objectivity and Independence, FIN. REPORTING COUNCIL, 2008 (U.K.), [https://www.frc.org.uk/getattachment/6dc8ccb6-1b3c-47fc-b09d-0780121fe82b/ES-1-\(Revised\)-Integrity,-objectivity-and-independ.pdf](https://www.frc.org.uk/getattachment/6dc8ccb6-1b3c-47fc-b09d-0780121fe82b/ES-1-(Revised)-Integrity,-objectivity-and-independ.pdf).

⁷⁴ See UK Corporate Governance Code, *supra* note 21, at 14.

⁷⁵ See *id.*

⁷⁶ See HKEX, *supra* note 31; see also MAS, *supra* note 31.

C. SHAREHOLDER APPROVAL

Should the shareholders have a say on the appointment and dismissal of their governance officer? A company secretary can be a permanent employee of a company, unlike an auditor (a contractor) or a company director of a listed company whose term of office is usually based on a service contract of some limited period. Subjecting company secretaries to similar controls could disrupt the administrative operation of companies, including the strict filing and reporting duties required by the law. If the removal and appointment of a company secretary requires shareholder approval at a general meeting, the board will be unable to quickly suspend a company secretary who is found to be in default of compliance with the law or of his or her contractual or other duties to the company.⁷⁷ In an interim period, such a company may need to fulfill its filing duties urgently and convening a meeting to obtain approval of the company's shareholders can cause missed filing deadlines with a consequent contravention of the law for which directors would be liable.⁷⁸

Some lessons may be learned from the auditor's model for regulating the independence of the company secretary. Auditors have the right to make representations to the shareholders who vote on the question of their removal.⁷⁹ A similar arrangement could be set up for the removal of a company secretary. Prior to the authorization of their removal, they should be able to make a written or oral representation to the board. Since their removal is not by ordinary resolution, a representation to the general meeting may not be justified. However, the Corporate Governance Code should require a representation to be included in the company's annual report. This will make the removal process more transparent.

Using a soft law approach to regulate the role of company secretary with the emphasis on disclosing company policy as well as

⁷⁷ See UK Corporate Governance Code, *supra* note 21, at 18 (requiring shareholder approval for a removal of the auditor).

⁷⁸ See Companies Act 2006, *supra* note 1, at § 541 (U.K.).

⁷⁹ See *id.* at § 511.

setting up formal procedures for appointment and removal would allow independence to be enhanced within the board and the company.

SECTION III: THE PROSPECTS AND LEGAL CHALLENGES OF PROVISIONAL SERVICES FIRMS

A. JUSTIFICATION FOR OUTSIDE PROFESSIONAL SERVICES FIRMS TO ACT

It is debatable whether a permanent employee (an internal officer) or a contracted professional firm (an external contractor) would better fulfil the role of gatekeeper. An employee company secretary is closer and more integrated into the board and the company than an external consultant. He is in closer proximity to the shareholders and, hence, is in a better position to act as spokesperson for the board in communicating with shareholders. An employee company secretary may hold a longer tenure than executive directors and, having experienced both good and bad times, is also a better repository of corporate memory, which is invaluable for providing guidance to a board.⁸⁰

On the other hand, an external person may be more independent from the management and can take a more objective view. In fact, many corporate gatekeeping functions are now being taken up by outside professional firms as contractors who can provide company secretarial services. Some listed companies have long been using professional services firms to fulfil their statutory requirements. This includes the appointment of professional services firms to act as company secretary, outsourcing some part of the work to the firms, or

⁸⁰ See ICSA: THE GOVERNANCE INST., *THE COMPANY SECRETARY: BUILDING TRUST THROUGH GOVERNANCE* (2014).

retaining them as back-up support.⁸¹ This is also the case for the countries discussed here, except Taiwan and China.

Unlike Singapore, China, and Taiwan, neither Hong Kong nor U.K. law requires a company secretary to be a full-time employee or an individual person.⁸²

A body corporate providing secretarial services can be appointed as the company secretary. The benefit of having a corporate company secretary is that it provides flexibility by enabling more than one person to represent the company and gives access to a more extensive knowledge base. Similarly, a professional firm in the form of a partnership or limited liability partnership (LLP) can also provide such services. Professional services firms can have greater expertise and knowledge in particular areas of governance, such as the listing and compliance requirements for stock exchanges. A company does not need to employ a full-time person to hold the office and can contract the service out to a professional firm to be more cost-effective. If a company needs specialised knowledge—in financial law, for example—a law firm can provide the service. A lawyer can be retained by a company to hold the office of company secretary. Such retainers are generally welcomed by law firms because they allow the law firms to become familiar with the company and to forge a good business relationship with it. In such cases, the company is free to design its own job description and the professional services firm can provide tailor-made secretarial services. Market competition between firms allows companies to obtain cost-effective secretarial services.⁸³

⁸¹ This is the case especially at times of peak company secretarial activity, such as the year-end.

⁸² See HKEX, *supra* note 31, at 25 (explaining that Hong Kong also allows a body corporate to act as a company secretary).

⁸³ See Christopher Humphrey et al., *Regulating Audit Beyond the Crisis: A Critical Discussion of the EU Green Paper*, 20 EUR. ACCT. REV. 431 (2011).

B. *QUESTIONS OF INDEPENDENCE AND LIABILITY*

Two major issues arise. As with audit firms, market competition, a driver thought to deliver innovation, can compromise the element of independence that is critical for the gatekeeping service.⁸⁴ The company secretary's independence is fundamental to corporate value creation. However, how can secretarial quality be maintained and enhanced in this respect if the provision of the service is subject to market competition? Also, how should a company secretary's acts and liability be attributed? Does the liability rest with the company or the firm that provides the service, whether a company, an ordinary partnership, or limited liability partnership? Professional services firms, which potentially hold assets,⁸⁵ are more likely to become a source of compensation than an individual employee with limited assets. Since April 2005, U.K. companies can now freely provide indemnities to a secretary as they see fit.⁸⁶ If this can apply to professional services firms, controls should be established to ensure that service quality is not unduly compromised.

C. *MAINTAINING THE ATTRIBUTE OF INDEPENDENCE*

1. LOW-BALLING ISSUE AND DISCLOSURE

Many professional services firms provide a large range of corporate services to companies including audit, management, tax, secretarial, and legal services. The issue of auditor independence has been raised when an auditor, acting as an external gatekeeper, plays

⁸⁴ See Sharad Asthana, et. al, *Fee Competition among Big 4 Auditors and Audit Quality*, 50 REV. OF QUANTITATIVE FIN. & ACCT. (2018), available at <https://doi.org/10.1007/s11156-018-0714-9>.

⁸⁵ Companies can provide indemnities to corporate officers (i.e. company directors). The auditor can also enter into a damage limitation agreement with the audited company to control their financial if not reputational exposure.

⁸⁶ See Companies (Audit, Investigations and Community Enterprise) Act 2004, c. 27 (U.K).

“low ball” to gain other non-audit businesses.⁸⁷ Such market competition is essential to service innovation, but it can also compromise some of the key requirements for maintaining good corporate governance and creating corporate value. When an independent audit is compromised, market competition fails to deliver value not only as an engine for innovation but also as an alternative regulatory tool for quality control. None of the countries investigated here have provided solutions, specifically in the context of the company secretary.

There are many ways to regulate conflicts of interest when a professional services firm is engaged to provide secretarial services. Company secretarial and other management consulting services are more likely to be among the additional business that can be gained from audit low-balling practices. The issue is how to make sure that the secretarial services offered are not “tagged along” with the audit service. Potential conflicts can be controlled by the company disclosing such a tag-along relationship. Once the tag-along relationship has been disclosed, shareholder approval should be required to further examine potential conflicts and the value provided to the company. Such approval may only be needed for services provided by the professional services firms who offer a full range of services. Furthermore, compulsory rotation, if introduced, would be able to maintain a more arms-length relationship between the company and professional services firms. Rotation can also increase independence since the company secretary will be less attached to the management team, hence fostering a more arms-length relationship. In addition, U.K. whistle-blower protection law also applies to contractors.⁸⁸ This law further strengthens professional services firms’ ability to maintain the quality of independence.

⁸⁷ See Patrick Velte & Carl-Christian Freidank, *The Link Between in- and External Rotation of the Auditor and the Quality of Financial Accounting and External Audit*, 40 EUR. J. OF L. & ECON. 225 (2012).

⁸⁸ Public Interest Disclosure Act 1998, c. 23, § 43K.

2. COMPETING CLIENTS AND A CHINESE-WALL

There is a further issue regarding a service firm's liability for conflicts of interest. If, as discussed in the previous section, company secretaries are contracted to provide value-added services such as the appointment of non-executive directors, designing a cost-effective reporting system, or creating a compliance monitoring programme. A professional services firm providing the same secretarial services to competing companies at the same time may give rise to a claim for a conflict of interest. This is because the firms will have access to sensitive commercial information when they attend board meetings and can access information about subsidiaries through the governance protocol or by virtue of the subsidiary's constitution.⁸⁹ For a partnership firm, an internal wall created to absolve potential conflicts may be needed. Such a "Chinese wall" may be more effective for managing the risk of conflicts between the audit and secretarial departments. Whether such a wall can also be effective when raised within the secretarial department is questionable. Would disclosure of the conflicts by the firm and client consent be sufficient to remove the liability? Disclosure by the firm and client consent may remove the conflicts if the secretarial service is purely administrative, but if the work includes more business-oriented services, for instance involvement in the recruitment of non-executive directors, such conflicts are not easily removed. When a law firm is retained to act as company secretary and is tasked with monitoring a corporate compliance programme, this may create a conflict if the firm is also retained by a competing company.

The U.K. is the only country, amongst the discussed jurisdictions, that has dealt with this problem to some extent. Under Section 1214(2) of the Companies Act 2006, the auditor of a company cannot also be the company secretary.⁹⁰ However, this does not completely solve the potential for conflicts of interest. If a company appoints an auditor

⁸⁹ See generally Ben Walther, *Bylaw Governance*, 20 FORDHAM J. OF CORP. & FIN. L. 399 (2015).

⁹⁰ See Companies Act 2006, *supra* note 1, at § 1214(2).

from a particular services firm, this would not prevent another person from the same services firm from acting as company secretary.

D. ATTRIBUTION OF PROFESSIONAL FIRMS' LIABILITIES

Clarifying firms' potential liabilities is crucial for assessing the risk to the governance service industry. Since the company secretary is considered to be an officer of the company in all the jurisdictions investigated here, how can their liabilities be attributable to the firms? None of the jurisdictions investigated have a satisfactory model, even for the U.K.'s more advanced service industry. Other than the U.K. and Hong Kong, all the jurisdictions require the company secretary to be an individual person.⁹¹ The U.K. and Hong Kong are the only two jurisdictions that allow a body corporate to act.⁹² This has raised a number of legal uncertainties which have inhibited other countries from following suit.

The U.K. Companies Act 2006 imposes criminal liabilities on the company secretary.⁹³ Therefore, not having a clear approach to identifying the person to be held accountable would defeat the deterrent effect of the criminal sanctions. For civil liability, identifying the right accountable person affects the remedies to be awarded to injured parties.

1. CRIMINAL LIABILITY

Secretarial services can be provided by a professional firm, which can be a body corporate, including a limited liability partnership or a partnership.⁹⁴ The law states that it is possible for an officer of the company to be held civilly and criminally liable.⁹⁵ When a company

⁹¹ *See id.* § 1205.

⁹² *See id.* §§ 254-55; *see also* HKEX, *supra* note 31.

⁹³ *See* Companies Act 2006 *supra* note 1, at §§ 26(3), 32(3), 425, 451.

⁹⁴ *See* Limited Liability Partnerships Act, 2000, c. 12, § 1(2) (U.K.) (explaining that a body corporate includes limited liability partnerships).

⁹⁵ *See generally id.*

engages a partnership firm (i.e. an LLP, which is a separate legal entity from its members) to provide services, who is the person, in fact and in law, appointed to hold the office of company secretary?

In the U.K., a body corporate can be made criminally liable.⁹⁶ Yet, there is some confusion in the wording of the provisions under the Companies Act 2006 (the Act). The Act provides that when a person is an officer of another company, he or she does not commit an offence as an officer in default unless one of the company's officers is in default.⁹⁷ The provision can be taken to mean that the company providing the secretarial services, by holding the office of company secretary, cannot be held criminally liable under the Act unless a director of the professional services firm is identified as an officer in default by authorizing, permitting, participating in, or failing to take all reasonable steps to prevent the contravention. Nevertheless, a director of a professional services firm may not be personally involved in the provision of the service, and in that case, the director's firm will not be held criminally liable. The current provisions of the Act can make the application of the attribution rules confusing.

When the services firm is a partnership or limited liability partnership, an individual member of that firm will serve as the company secretary and, thus, criminal liability is assumed by that individual rather than the firm. However, because a limited liability partnership acquires a separate legal identity, if the company engages the services firm rather than an individual from the firm, a similar question can arise. Neither the Act nor case law has yet considered such a situation. A clear legal framework on attributing individual behaviour or liability to the entity or association of the professional services firms should be introduced.

⁹⁶ See Criminal Justice Act, 1993, c. 36, § 52 (U.K.); *see also* Enterprise Act 2002 c. 40, § 188 (U.K.).

⁹⁷ See Companies Act 2006, *supra* note 1.

2. CIVIL LIABILITY

In terms of civil liability, the company or its shareholders through a derivative claim can pursue compensation claims or a claim to account for profits against the firm or the individual from the firm providing the service.⁹⁸ Assuming the professional services firm is a body corporate such as a company, claims can be made against the company.⁹⁹ If the firm is an entity other than a company, claims in contract or in tort brought to obtain compensation will depend on the organizational form of the firm—whether the individual is liable or all the members of the partnership could be claimed against. If an LLP is retained to act as the company secretary, the contract is between the company and the LLP, which is a body corporate under U.K. law.¹⁰⁰ An action for damages should be brought against the LLP. There can be an indemnity provision in the contract. Yet, an action in tort can be brought against the individual person providing the service.¹⁰¹

Since other countries use different business forms for professional services firms, it may not be easy for develop a common model among them. This also explains why other countries, apart from the U.K., have capacity—natural person only—and residence requirements.¹⁰² These requirements remove the risks of being unable to hold an individual accountable and not being able to make claims against firms with limited liability protection.

⁹⁸ See *id.* § 210.

⁹⁹ See *id.*

¹⁰⁰ See Limited Liabilities Partnership Act, 2000, c.1, § 1 (U.K.).

¹⁰¹ See Companies Act 2006, *supra* note 1, at 563.

¹⁰² See Dezan Shira, *Nationality and Residency Requirements for Directors across ASEAN – Part One*, ASEAN BRIEFING (Nov. 26, 2015), <https://www.aseanbriefing.com/news/2015/11/26/nationality-residency-requirements-directors-across-asean-part-one.html>.

SECTION IV: TRANSNATIONAL GOVERNANCE AND COMBINATION WITH THE OFFICE OF GENERAL COUNSEL

A. TRANSNATIONAL GOVERNANCE AND THE RESULTING SYNERGIES

There are a number of jurisdictions that require companies to appoint a company secretary.¹⁰³ As multinational companies are becoming the main providers of goods and services, company secretaries' tasks are to design an effective subsidiary governance framework to mitigate harms and to create governance synergies. These synergies can be delivered in the case of actual or potential joint law enforcement actions against multinational companies. In actual joint law enforcement, company secretaries are the first contact point for responding to regulatory and enforcement enquiries across many jurisdictions. In potential joint law enforcement actions, their role is to ensure that measures, such as a subsidiary governance framework,¹⁰⁴ are in place to prevent enforcement actions or to defer an enforcement action in the case of a deferred enforcement action agreement.¹⁰⁵

B. GENERAL COUNSEL AND COMPANY SECRETARY

Within a multinational company, if the general counsel also serves as company secretary, the legal office can be organized to include the company secretaries of subsidiaries incorporated in different jurisdictions. Many U.K. companies have combined the offices of

¹⁰³ Ireland, Australia (only for public companies), New Zealand, Taiwan, Hong Kong, Singapore, China, and the U.S.A. (see DEL. CODE ANN. tit. 8, § 142(a) (1998)).

¹⁰⁴ See Federico Mazzacuva, *Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the U.K. and U.S. Systems of Criminal Justice*, 78 J. OF CRIM. L. 249, 249-62 (2014).

¹⁰⁵ The company secretary can also be the designated person to monitor a deferred statement programme.

company secretary and corporate counsel.¹⁰⁶ Under a subsidiary governance framework, the subsidiary company secretaries can provide needed information (e.g. a certificate of political donations) to the general counsel of the parent company and can assist the general counsel with implementing procedures as required by law (e.g. an anti-bribery programme) for the subsidiary companies.¹⁰⁷ A governance structure designed to allow the company secretary of the parent company to supervise, through a reporting line, subsidiary companies' secretaries can effectively ensure improved information-sharing across the group organisation.¹⁰⁸

In increasing joint enforcement by multi-jurisdictional enforcement agencies, a global settlement agreement with a reform programme would be a cost saving strategy for a defaulting company. This combination of the two offices would make it easier for monitored parent companies to conduct due diligence on other group affiliates.¹⁰⁹ However, a general counsel or a legal officer is not required in the U.K.¹¹⁰ and in many other jurisdictions, yet many large companies and multinational companies have general counsel offices or legal departments that manage the company's legal affairs. If a general counsel or legal officer is not a legally required officer within the organization, this person may not have legal access to or the power to obtain corporate information. Legally, the general counsel does not have access to the boardroom,¹¹¹ but such access can be gained through

¹⁰⁶ See, Ian Maurice, *General Counsel and Company Secretary: To Combine or Not to Combine*, EGON ZEHNDER (July 31, 2011), <https://www.egonzehnder.com/functions/human-resources/insights/general-counsel-and-company-secretary-to-combine-or-not-to-combine>.

¹⁰⁷ See *Subsidiary Governance: An Unappreciated Risk*, PRICEWATERHOUSECOOPERS LLP, (2013), <https://dpe.pwc.com/content/dam/pwc/gx/en/legal/entity-governance-compliance/publications/assets/subsidiary-governance.pdf>.

¹⁰⁸ See *id.*

¹⁰⁹ *Id.*

¹¹⁰ See Companies Act 2006, c. 46, (U.K.).

¹¹¹ See *id.*

becoming the company secretary.¹¹² Thus, the general counsel may request information from a subsidiary company's in house counsel who does not have the legal power to access the company's information. However, a company secretary who is an officer of the company would have such power, and obtaining corporate information such as records or sales data would not need to be authorised by the executive directors—to whom the general counsel is affiliated.¹¹³

U.K. companies are required to implement internal procedures under various acts to protect the stakeholders of the company and safeguard the interests of the general public.¹¹⁴ Companies are required to put in place health and safety procedures to protect employees and to implement an anti-corruption system within the organization, including subsidiary companies incorporated in other jurisdictions.¹¹⁵ Company secretaries involved in the design and implementation of these procedures who work collaboratively with other company secretaries of the same group under the general counsel's office would ensure that the norms of the parent company are effectively diffused through the subsidiary companies. These procedural mechanisms not only create a safe harbour if there is misconduct by an employee or an agent of the company and its subsidiaries, but they may be required by regulators as a condition for a deferred prosecution.¹¹⁶ Since some of the countries investigated here require the company secretary to operate under the chairman, it is questionable whether the office of a parent company's secretary can give direct instructions to the company secretaries of their subsidiary companies.

¹¹² See generally *id.* § 210 (describing the position of secretary as a board position and its duties and authority).

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See Jessica Dijlani, *The British Importation of American Corporate Compliance*, 76 BROOKINGS L. REV. 303, (2011).

THE PROBLEM OF WEARING TWO HATS

When a person serves as both general counsel and company secretary of a single company, it is difficult to make a precise distinction between the functions and roles of the two posts. U.K. law requires a company to appoint a secretary, but it does not require a general counsel.¹¹⁷ Yet, a general counsel acts as an independent legal adviser to a company, and legal advice given to the company receives privileged protection against disclosure.¹¹⁸ A company secretary, however, is an officer of the company rather than an independent legal adviser and any advice given, even if legal, is not protected by the legal privilege rules.¹¹⁹ Legal privilege rules confer protection on companies against the disclosure of internal communications, which would otherwise be required by third parties.¹²⁰ A company secretary may have a duty to report to the regulator and may have to make a public interest disclosure of misconduct by the company, or an insider of the company, to the regulator while receiving protection.¹²¹ Yet, the general counsel does not have such a duty and may not make a public interest disclosure.¹²² So it is understandable why a general counsel may be appointed to hold the office of company secretary, even if not all of the advice given to the board or individual officers of the company in internal communications can be classified as legal advice. There is clearly an advantage for companies to appoint a legally qualified person to act as company secretary. Thus the office can be easily assumed by general counsel of the company. This,

¹¹⁷ See Companies Act 2006, c. 46 (U.K.).

¹¹⁸ See *Three Rivers Dist. Council v. Bank of Eng.* [200] UKHL 48, [2005] 1 AC 610; see also *Three Rivers Dist. Council v. Bank of Eng.* [2003] EWCA Civ 474, [2003] 5 QB 1556.

¹¹⁹ See *Three Rivers Dist. Council*, [200] *supra* note 118.

¹²⁰ See *id.*

¹²¹ See The Public Interest Disclosure Act, 1998, c.1 (U.K.).

¹²² See *Three Rivers Dist. Council*, [200] *supra* note 118.

however, excludes other governance professionals such as auditors who can provide different set of governance skills to the companies.

COMMUNICATION PRIVILEGE AGAINST DISCLOSURE GIVEN TO THE COMPANY SECRETARY

Communication privilege against disclosure should be given to a company secretary who is not a legally qualified person in the U.K. to level the playing field. In other jurisdictions, this protection can also encourage a board to communicate with its corporate governance officer.

The corporate governance codes of the U.K., Hong Kong, Singapore, and Taiwan all specify that a company secretary should be accessible to board members for advice.¹²³ If so, would advice given to individual non-executive directors on their rights and duties constitute legal advice? Such protection may encourage non-executive directors to seek the advice of general counsel or outside counsel on an issue. Based on such advice, non-executive directors can make legally informed decisions. Without such legal privilege protection, members of the board would not only be less willing to use the company secretary for internal governance advice but also less willing to share information with them.

Should privilege protection cover internal communications between a company secretary who is not legally qualified and the company, or the individual directors, to enhance corporate value? In all the work carried out by the company secretary of a listed company, they must put on legal spectacles¹²⁴ when providing their service, be it formulating governance protocols and instituting reporting systems to improve governance standards or evaluating governance strategies and

¹²³ See UK Corporate Governance Code, 2016, *supra* note 21; *see also* MAS, *supra* note 31; *see also* TAIWAN STOCK EXCHANGE, *Taiwan Stock Exchange Corporation Rules Governing the Preparation and Filing of Corporate Social Responsibility Reports by TWSE Listed Companies* (2015), <http://twse-regulation.twse.com.tw/ENG/EN/law/DAT0201.aspx?FLCODE=FL075209>; *see also* HKEX, *supra* note 31.

¹²⁴ *See generally* Three Rivers Dist. Council [200], *supra* note 118 (detailing the test developed by Lord Roger).

best practice. They also act as a liaison between the board and management. Without such protection, officers may be discouraged from seeking advice from a non-lawyer company secretary. If such a company secretary is not used by other officers for internal advice this would reduce the company secretary's ability to give advice on governance issues. In particular, if the company secretary acts as chief of staff to the chairman and also as the executive and non-executive directors' link to the chairman, protection given to their communications would enhance greater information sharing at that level. Such protection would level the playing field for a company secretary without legal qualifications who can provide an enhanced level of governance compared with a general counsel who is normally attached to the CEO's office.

CONCLUSION

Many common law and non-common law countries have recognized the governance value of a company secretary playing the role of corporate governance officer in listed companies. This article has shown that soft law based corporate governance has the potential to enhance the gatekeeping functions of the company secretary in facilitating corporate transparency through law and policy compliance. It may also enhance board independence through assisting oversight by non-executive directors. The attribute of independence of a company secretary—both independence in terms of judgment and in terms of his relationships with the company and members of the board—can benefit from a soft law approach to regulation. Professional codes of conduct can be developed to provide situational guidance on independence. Corporate governance codes can include a regime on the appointment and removal of a company secretary, including the right of representation to the board of a removed company secretary, and on conflicts of interest that may arise when appointing a professional services firm as company secretary. More definite rules on corporate attribution in civil and criminal liabilities should be introduced to increase the utility of professional services firms in the provision of such a gatekeeping service. The U.K., as the leading governance services providing country, has the potential to provide guidance. However, some amendment to the current provisions in the Companies Act 2006 should be made to avoid a confusing reading. At the transnational level, there can be governance

synergies in creating joint subsidiary governance frameworks. Although company secretaries may yield synergies in providing coordinated responses to joint enforcement actions at a cross-border level, a non-legally qualified secretary can also bring a different set of skills to companies in assisting the governance programme. Giving protection to communications between the company secretary and board members can increase the ability of the company secretary to give guidance in matters of governance.