

ECONOMIC EFFICIENCY AND THE PROCEDURALISATION OF
COMPANY LAW

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Simon Deakin
ESRC Centre for Business Research
University of Cambridge
Austin Robinson Building
Sidgwick Avenue
Cambridge
CB3 9DE

Alan Hughes
ESRC Centre for Business Research
University of Cambridge
Austin Robinson Building
Sidgwick Avenue
Cambridge
CB3 9DE

Phone: 01223 335243
Fax: 01223 335768
E-Mail: sfd20@econ.cam.ac.uk

Phone: 01223 335248
Fax: 01223 335768
E-Mail: ah13@econ.cam.ac.uk

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Abstract

This paper extends the analysis carried out by the authors for the UK Law Commissions and published as Part 3 of the Consultation Paper on *Directors, Duties* (September 1998). After considering some of the potential uses of economics in company law, the paper develops a theoretical framework which relates company law to a wider set of corporate governance mechanisms which operate to mitigate risk and uncertainty in contractual relations. This framework is then applied to provisions relating to self-dealing and conflicts of interests under Part X of the Companies Act 1985. It is argued that in this and related contexts, the economic role of company law should be seen as promoting cooperation and the sharing of information and risk between corporate actors, a function described in terms of the 'proceduralisation' of company law.

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ECONOMIC EFFICIENCY AND THE PROCEDURALISATION OF COMPANY LAW

1. Introduction

The Law Commissions' Consultation Paper on *Company Directors* (Law Commissions, 1998) marked an important step in the use of economics to inform the process of law reform in the United Kingdom. It is appropriate that company law should have provided the occasion for this experiment in policy making. In the United States, company (or corporate) law has proved to be fertile ground for the application of economic ideas to law since at least the early 1980s, and this branch of law and economics scholarship has long since spread to many other jurisdictions including the United Kingdom. Until recently, however, this outpouring of scholarship was largely neglected by bodies charged with law reform. In a surprisingly short space of time, all that has changed. In the wake of the Law Commissions' initiative, the Department of Trade and Industry's Company Law Review Steering Group identified as its 'predominant objective' the pursuit of 'policies to facilitate productive and creative activity in the economy in the most competitive and efficient way possible for the benefit of everyone' (DTI, 1999: para. 2.4).

How is this goal of 'modern company law for a competitive economy' to be achieved, and what does it portend for more traditional conceptions of the role of law in this area? If a new language, based on competitiveness and efficiency, is to enter legal discourse, these terms need to be clarified and their implications debated. More generally, the idea that the law has a role in promoting these economic goals deserves close scrutiny, since it raises far-reaching questions about the relationship between law and the economy and to the possibilities for effective economic regulation.

In the present paper we seek to address some of these issues in the context of the proposed reforms to the law governing directors' duties. We firstly consider some of the potential uses of economic

reasoning within company law. The next section then develops a theoretical framework which sees company law as part of a wider set of corporate governance mechanisms which operate to mitigate the effects of risk and uncertainty in contractual relations. We then apply this framework to issues arising in the context of Part X of the Companies Act 1985.¹ Here we seek to amplify and extend our analysis in Part 3 of the Law Commissions' Consultation Paper. In doing so, we argue that the role of company law in this area is largely to be understood as promoting cooperation and the sharing of risk and information between corporate actors, a function we describe in terms of the 'proceduralisation' of company law.

2. The Uses of Economic Analysis in Company Law

2.1. 'Positive' and 'normative' analysis

Law and economics scholars draw a distinction between two forms of economic analysis which are relevant to the assessment of legal reform. *Positive analysis* deals with the description and explanation of economic phenomena and in the context of law and economics seeks to understand or explicate the economic nature of existing rules and to predict the social and economic effects of legal change. *Normative analysis* is concerned with the application of positive analysis most often in connection with the provision of public policy advice. In the context of law and economics it evaluates legal measures in terms of their contribution to the 'welfare' or well being of society (see Ogus, 1995). In line with the approach taken generally within welfare economics, overall welfare is thought of as synonymous with the total of the net welfare or well being of all those individuals who are affected, directly or indirectly, by the law in question.

Positive analysis can help us to understand how *effective* a given legal measure is in achieving the goals which have been identified for it. Normative analysis tells us whether the law is economically and socially efficient, in the narrow sense of promoting efficient production and exchange, and in the wider sense of promoting the well being of

society. In principle, then, the *effectiveness* of a law and its *efficiency* are two different things. Economic analysis can be used to tell us something about both of them. A law may well have objectives other than those of promoting efficient in production and exchange. The choice of objectives, and the trade-offs between them, are in one sense outside the scope of economic analysis. The question of whether there are values which society ranks more highly than maximising aggregate wealth through efficient economic organisation is not necessarily one which economics can settle.² What is generally accepted is that economic techniques can provide some guidance on the nature and extent of the trade-offs which are involved. It may be useful to know, for example, that certain rights or values which lay claim to the protection of the law can only be pursued by diminishing the wealth or well-being of society as a whole or of some part of it.

2.2. Corporate regulation and the Coase theorem

The term 'efficiency' itself is capable of bearing multiple meanings in the context of law and regulation, but the most common meaning relates to resource allocation and emphasises efficient exchange. Thus the term *allocative efficiency* is used widely in welfare economics to indicate the allocation of resources to their most highly valued uses. In most presentations of this idea, the first-best mechanism for allocation is generally thought to be market competition based on freedom of contract. Under conditions of pure competition and freely-bargained, consensual exchange, the 'fundamental theorems' of welfare economics predict that the price mechanism will operate to ensure that a 'Pareto-optimal' allocation of resources is achieved. Technically, this is a distribution which cannot be altered except by making at least one of the parties worse off than they were before. The relationship between market exchange and allocative efficiency follows necessarily (and tautologically) from the behavioural and institutional assumptions used to set up the model of pure competition, namely that economic agents act with perfect 'rationality' to maximise their utility under conditions of costless contracting, where information and resources are able to flow freely in response to changes in prices.

It is clear that the model of pure competition does not purport to offer a realistic account of the process of market-based exchange. It is not our intention here to enter into the methodological debate about whether the use of assumptions such as these which are patently unrealistic can *ever* be justified within economics. It is sufficient for present purposes to note that the definition of allocative efficiency just outlined does not in any sense prejudge the issue of the efficiency of economic regulation. On the contrary: only slight departures from the preconditions of competitive equilibrium are needed in order for the predictions of the 'fundamental theorems' of welfare economics to fail (see Stiglitz, 1994). Market failure may arise from imperfections of various kinds: these include transaction costs (the costs of negotiating, monitoring and enforcing contracts), barriers to contractual cooperation (such as 'opportunism' or self-seeking behaviour on the part of contracting parties), and externalities (which arise where various costs and benefits of activities are not fully captured by market prices, with the result that third parties incur losses or make gains which are not fully contracted for). The central question for law and economics is whether, and if so how, legal intervention in the process of exchange can lead to improvements in efficiency. This involves both positive and normative analysis in the senses used above.

In the context of company law, as elsewhere in law and economics, a starting point is provided by the proposition known as the 'Coase theorem'. The 'positive' or predictive version of the Coase theorem holds that where transaction costs are zero (or close to zero), the determination by the law of rights and liabilities makes no difference to the efficiency of outcomes. This is because the rights in question will be re-allocated through exchange until they reach their most efficient use (Cooter, 1990). In other words, in a world where contracting is costless and there are no barriers to exchange, bargaining between the parties will bring about a Pareto-optimal outcome.

The Coase theorem is often taken to have demonstrated that the role of the law in shaping economic activity is marginal or peripheral. Whether or not this is the case in practice, it seems that it was no part

of Coase's argument to advance this particular point of view. In 'The problem of social cost' Coase uses the heuristic device of the zero transaction cost world to set up a framework for analysing how and why the law *does* matter in the real world of positive transaction costs. He wrote:

'Of course, if market transactions were costless, all that matters (questions of equity apart) is that the rights of the various parties should be well defined and the results of legal actions easy to forecast. But... the situation is quite different when market transactions are so costly as to make it difficult to change the arrangements of rights established by law. In such cases the courts directly influence economic activity. It would therefore seem desirable that the courts should understand the economic consequence of their decisions and should, wherever possible without creating too much uncertainty about the legal position itself, take these consequences into account when making their decisions.' (Coase, 1960: 19)

The normative implications of the Coase theorem depend on the nature of transaction costs and related barriers to exchange in particular market contexts. In 'The problem of social cost', Coase identified a previously neglected role for private law in offering solutions to market imperfections. Hence the legal allocation of property rights or the imposition of liability rules could alter incentives for private behaviour; 'from these considerations it follows that direct governmental regulations will not necessarily give better results than leaving the problem to be solved by the market or the firm'. But at the same time, Coase also took the view that 'there is no reason why, on occasion, such governmental administrative action should not lead to an improvement in economic efficiency' (ibid., 18).

In conditions of high transaction costs, the response of policy-makers could take one of a number of forms, depending on the nature of those costs. One possibility is that since the efficiency of resource allocation

depends on economic agents being able to contract at low cost, the law should seek to reduce barriers to exchange and to give as wide an ambit as possible to property rights and to freedom of contract. This would imply a legal regime of minimal regulation, since any constraint on freedom of disposition and freedom of contract can be read as reducing competitive intensity and introducing market distortions. However, an equally valid interpretation of the Coase theorem in our view is that unregulated markets are necessarily characterised by high transaction costs, arising from limits on the availability of information and other barriers to exchange. Under these circumstances, the role of the law is not to promote market competition *as such*, since this would run up against these limits to purely private ordering, but instead to underpin complementary, non-market institutions in order to ensure the more effective coordination of economic resources. This implies a focus on the efficiency-enhancing properties of liability rules and regulations, among other forms of economic governance.

Equally, it should be accepted that the existence of a market failure does not, in and of itself, justify regulatory intervention. Legislative interference may be a source of distortions and inefficiencies in its own right.³ Nevertheless, legislative design may in principle be used to promote 'market' solutions and private contractual orderings which may provide means of overcoming or neutralising market failures without the need for narrowly prescriptive legal control. This point of view is completely compatible with the Coase theorem,⁴ and, indeed, could be said to be one of the principal (if more neglected) messages of Coasean analysis.

2.3. Technical or 'X' efficiency, dynamic efficiency, and competitiveness

Much of the conventional economic analysis of law focuses on allocative efficiency. As we have seen, the concept of allocative efficiency involves making the assessment and comparison of particular states of affairs; a given combination or allocation of resources is measured against alternative states in order to ascertain whether there

has been an increase in the welfare or well-being of particular individuals or of society as a whole. However, there are other conceptions of efficiency which establish criteria for measuring increases (or decreases) in welfare which do not necessarily depend on there being a reallocation of resources. Thus Leibenstein and others have emphasised the possibility of gains in 'X' efficiency, a version of 'technical efficiency' in which gains arise not from the reallocation of resources between firms and/or economic agents but from the improved use of resources in existing allocations (see Leibenstein, 1966; Frantz, 1987). This is a particularly relevant concept from the point of view of company law which may bear directly on processes of motivation and control *within* organisations. In a different but related vein, the concept of dynamic efficiency, which is widely used in the analysis of economic organisation, refers to the capacity of a given system (a company or, at a higher level, a sector or industry) to innovate and survive in a changing and uncertain environment. This also has particular relevance to company law. The emphasis in the analysis of both technical and dynamic efficiency is on mechanisms for the efficient production of information, the management of risk and uncertainty, and incentives to change existing products, methods of production and forms of business organisation which affect the rate of change of efficiency.

These concepts of efficiency can be linked, in turn, to the notion of competitiveness which has influenced the DTI's Company Law Review. The term 'competitiveness' can be defined in various ways according to the level of analysis. According to the DTI's 1994 White Paper on Competitiveness, a *firm or organisation* is competitive if it can meet 'customers' demands more efficiently and more effectively than other firms' (DTI, 1994: 9). This implies that a competitive firm is one which gains an advantage over its rivals through its superior capacity to adapt to a changing environment. Competitive strategies, therefore, involve a search for innovation in the use of technologies and in the design of processes and products, through which firms seek to meet previously unsatisfied demands of consumers. The emphasis is on competition as a 'process of discovery' through which firms and

organisations seek to capture supra-competitive 'rents' which last until such time as the practices or products which form the basis for their market advantage become more widely imitated or adopted by their rivals. In short, what may be called 'competitiveness policy' (see Hughes, 1978, 1990; Deakin, Goodwin and Hughes, 1997; Pratten and Deakin, 1999) is linked to technical and dynamic efficiency through its concern for how far firms can survive and compete under rapidly changing environmental conditions. It is therefore particularly appropriate for the analysis of contracting under conditions of radical uncertainty caused by rapid technological change and shifts in the pattern of demand for goods, conditions which the DTI Company Law Review (DTI, 1999), together with the DTI White Paper on *Competitiveness* of November 1998 (DTI, 1998) identify as highly relevant to current policy debates.

The idea of competition as a process, rather than an end-state or particular distribution of resources, offers a distinctive perspective on the role of regulation in fostering the conditions for efficiency. It implies that the existence of imperfections in the market cannot on its own provide a justification for legal intervention, since, paradoxically, it is only through certain imperfections that opportunities exist for competitive advantage to be exploited (see Richardson, 1972; Kirzner, 1997). In the world of pure competition, in which information was perfectly and instantaneously disseminated, any supra-competitive rents would instantly be competed away. Intervention aimed at correcting for market failure by 'perfecting' the market, or seeking to reproduce hypothetically optimal allocations of resources, even assuming that these could be identified, could therefore have the effect of nullifying rather than enhancing the competitive process.

But, this does not mean that the law has no part in the promotion of conditions for technical and dynamic efficiency. On the contrary, a process perspective suggests that the law has a significant role to play in fostering the conditions under which risk and uncertainty can be effectively managed. This may even take the form of interventions

which limit the scope of free exchange and hence give rise to short-run inefficiencies from the point of view of resource allocation, which must be traded off against longer-term gains from the viewpoint of technical or dynamic efficiency. An example of legal intervention which promotes dynamic efficiency while limiting allocative efficiency in the short term is the patent system, which provides an incentive to innovate by protecting the patent holder from competition for a certain period. Equally, as we shall see below, many company law rules can be understood as operating in a similar way to promote the sharing of risk and information in the context of intra-corporate relations, and hence promoting technical efficiency through the better use of information and resources within organisations.

The implication of this discussion is that the positive economic analysis of law must include a careful consideration of impact of law upon the internal structure and process of organisations, and hence upon both technical or 'X' efficiency and dynamic efficiency. It cannot be solely or principally concerned with issues of allocation and reallocation of resources between firms or agents. The economic analysis of company law, then, is important for the insight it gives into the impact of the legal framework upon the effort, commitment and interaction of individuals and groups within the context of corporate relations.

2.4. Economic efficiency and procedural regulation

The need to study economic relationships in concrete contextual settings should lie at the heart of *positive* economic analysis and its use to predict the effects of legal change. This often rests on a consideration of 'second-order effects' which occur as the parties to transactions adapt to a new legal environment. As Ogus puts it (1994: 417), 'in designing solutions to legal problems, law reformers should not overlook behavioural responses which may vitally affect the efficacy of those solutions and which economics, in particular, can be used to predict'.

One, negative, implication of second-order effects is that they may frustrate the redistributive intention of a rule. The example is often given of landlords who respond to rigid rent controls by withdrawing their properties from the market, leaving tenants, as a group, worse off (ibid., 418). However, a less noticed but equally relevant implication of this type of analysis is that a rule may be designed with the aim of *inducing* certain desired second-order effects. For example, minimum wage legislation may be supported on the grounds that employers will respond to controls over wages by investing in training and other means of raising the productivity of labour (see Low Pay Commission, 1998; Deakin and Wilkinson, 1999).

The use of regulatory intervention to induce certain desired ends through second-order effects is characteristic of 'reflexive' or 'procedural' regulation, which aims to achieve its intended effects by encouraging self-regulation at the level of the practices and processes operated by the parties themselves. The task of reflexive regulation is no less complex or difficult than that implied by so-called 'command and control' regulation of the more traditionally prescriptive type. Indeed, reflexive intervention is arguably much more difficult to achieve since it depends on the legal system 'recognising' particular aspects of the system of self-regulation which it is attempting to 'steer' or direct (see Teubner, 1993; Rogowski and Wilthagen, 1994). However, it will be apparent that there is a link between regulation which possesses this 'procedural' orientation and measures aimed at the promotion of both technical and dynamic efficiency in the sense described above. This can be seen from a closer examination of the relationship between company law and the wider processes of 'corporate governance'.

3. The Company as a Nexus of *Incomplete* Contracts

The economic concept of the company as a 'nexus of contracts' captures the idea that bargaining between the various stakeholder groups determines the division of property rights and income streams between them. These 'contracts' establish frameworks for exchange,

or incentive structures, which serve to aid coordination and cooperation between the parties. In particular, contracting can help to offset imperfections which arise because of the separation of ownership and control within the company.

In the corporate governance literature, much emphasis is given to 'agency costs' which arise from the separation of ownership and control between shareholders and managers. Agency costs can be thought as a subset of transaction costs: they include the costs of drafting appropriate contractual mechanisms for aligning the interests of the parties, and the costs of observing, verifying and enforcing contractual performance. The essence of a 'principal-agent' relationship lies in the asymmetry of information between the parties: the agent possesses information to which the principal cannot costlessly gain access. The existence of informational imbalances of this kind means that market-based exchange can no longer function to ensure allocative efficiency, as it would do under circumstances where there were complete markets for information (or for the diversification of risk in the absence of information) of the kind postulated by the fundamental theorems of welfare economics.

In long-term economic relations, the value of the parties' investments (whether of physical or human capital) is often tied up with the maintenance of the relationship in question, giving rise to an element of bilateral monopoly or 'asset specificity'. This means that the relationship is capable of generating an economic surplus or 'quasi rent' over and above what the parties could achieve through decentralised exchange under market conditions. The existence of quasi-rents gives rise not just to informational problems but also to issues of 'strategic action' over the terms on which the surplus is to be divided. 'Strategic action' essentially refers to opportunistic behaviour by one or other of the parties, aimed at seeking an advantage for themselves at the cost of the other; since no overall gain is made in the joint welfare of the parties, the result is a net social cost. The essential point is that the market cannot operate to solve these bargaining problems which arise 'ex post' the making of the agreement: a specialised governance

structure to regulate the continuing exchange is therefore required (Zingales, 1998: 495).

Most intra-corporate relations, and not just those between shareholders and managers, give rise to the problems just referred to. Informational asymmetries and the threat of strategic behaviour can also arise between senior managers and employees, and between non-equity investors (banks and other sources of corporate finance) and management. Even in a single-owner company with no external debt, informational asymmetries may arise at the level of relations between the management of the company and its creditors.

To speak of the company in this way – to see it in ‘contractarian’ terms – does not, in itself, rule out a role for company law. However, the view taken of the scope of legitimate legal intervention depends on how the process of private ordering through contract is seen. The tradition of thought associated with the early formalisation of the nexus of contracts model by Jensen and Meckling (1976) sees contracts as more or less ‘complete’ in the sense of being able to provide for all future contingencies. The result is a contractual equilibrium which mirrors the equilibrium achieved through market allocation under conditions of decentralised exchange.

In this schema, the basic rationale for the law is that it ‘completes open-ended contracts’ (Easterbrook and Fischel, 1991: 35). The law provides a set of standard terms which save on the costs of contracting, in the sense that they constitute those terms which the parties would have bargained for had they been able to do so at low cost. However, these terms are normally ‘enabling’ terms in the sense that they allow the parties to customise or vary them if they choose to do so. In other words:

‘Corporate law is a set of terms available off-the-rack so that participants in corporate ventures can save the cost of contracting. There are lots of terms, such as rules for voting, establishing quorums, and so on, that almost everyone will

want to adopt. Corporate codes and existing judicial decisions supply these terms ‘for free’ to every corporation, enabling the venturers to concentrate on matters that are specific to their undertaking. Even when they work through all the issues they expect to arise, they are apt to miss something. Corporate law – and in particular the fiduciary principle enforced by courts – fills in the blanks and oversights with the terms that people would have bargained for had they anticipated the problems and been able to transact costlessly in advance. On this view corporate law supplements but never displaces actual bargains, save in situations of third-party effects or latecomer terms.’ (ibid., 34.)⁵

The essential message here is that bargaining, though costly, is likely to be efficient, and that the role of the law is confined to oiling the wheels of corporate self-regulation by avoiding unnecessary costs.

In the long-running debate over the validity of the ‘contractarian’ model, a good deal of attention has been devoted to debating the accuracy of the predictive or positive claim that company law ‘almost always conforms to this model’ (ibid., 15). Less attention has been focused on some of the contradictions which operate at the level of model’s methodological foundations. The difficulty lies in the assumption that complete or perfect contracts are possible through purely private ordering (Deakin and Michie, 1997; Lenoble, 1999). Contracts, as distinct from market-based exchanges, are understood to be necessary because of informational asymmetries arising from the division of labour between principals and agents; but what if the informational imperfections limit the capacity of the parties to design contracts which can deal fully with all future contingencies? The model is not simply highly unrealistic in the assumptions it makes about economic behaviour – a problem which not everyone is prepared to sweep under the carpet in the manner of Posnerian law and economics⁶ – but it also suffers from an internal contradiction which makes its application deeply problematic even for those who do not

regard the lack of realism of economic models as a relevant consideration.

In some recent analyses, this problem has been tackled head-on by accepting that contracts are incomplete in the sense of being 'silent about the parties' obligations in some states of the world and [specifying] these obligations only coarsely or ambiguously in other states of the world' (Hart, 1995: 23). The full implications of contractual incompleteness for the economic theory of company law, and for corporate governance more generally are, however, only gradually becoming clear.

One of the implications of contractual incompleteness is an expanded conception of the corporate governance system and of the role of company law within it. Zingales usefully defines a *governance system* 'as the complex set of constraints that shape the ex post bargaining over the quasi-rents generated in the course of a relationship', and *corporate governance* as that set of constraints which deal with bargaining within the framework of the firm which, for this purpose, is 'a network of specialised investments that cannot be replicated by the market' (Zingales, 1998: 498). As he argues, the institutional framework supplied by the legal system as well as by norms deriving from self-regulation is central to the process of governance. The function of the legal system is no longer confined to 'completing' the terms of open-ended contracts. Rather, it operates alongside other elements in the governance system to define the framework within which ex-post bargaining over rents take place; this cannot be reduced to completing the terms of hypothetical contracts whose contents, by definition, cannot be known in advance.

The key difference in the 'incomplete contract' approach, then, lies in the view it takes, firstly, of the rationality of economic actors, and, secondly, of governance structures and the institutional framework. In place of the 'substantive rationality' of agents who agree contracts which are perfectly efficient for all future states of the world, there is 'procedural' rationality in which economic agents aim to bargain

towards cooperative outcomes but cannot, *ex ante*, predict the results of the bargaining process. At the level of governance structures, the notion of 'contract-perfecting' rules of law is replaced by the idea of a regulatory framework which is aimed at guiding and enhancing the bargaining process. The economic function of rules, then, is not so much to act as a schedule of incentives which induce calculated responses from the parties in given (anticipated) situations, but to provide a *cognitive resource* on which the parties may rely to aid them in bargaining. Hence rationality becomes not simply procedural but also contextual – behaviour is guided by norms and rules operating at the level of the particular 'contractual environment' in which the parties operate. Rules may operate not simply as signals or surrogate prices, as in the world of complete contracting, but rather as *models or standards for action*. The result is a notion of rationality which sees economic behaviour as shaped by environmental or contextual factors, in the sense that rules and practices provide a form of common knowledge which makes interaction possible; this form of rationality 'presupposes a certain collective cognitive capital (at the level of the group in question), in the form of a community of experience, which might be cultural or historical' (Boyer and Orléan, 1991: 236).

To this we may add: the legal system itself may be a source of reference points and standards for contracting behaviour. However, this should not be taken as implying that legal norms are *self-enforcing* in the manner assumed by certain positions within the economic analysis of law. The idea that laws operate as surrogate prices, altering incentives for behaviour, permeates the modern law and economics literature, if only at the level of being considered so obvious as to be taken for granted. What is not so obvious, though, is that norms have a clear (let alone objective) meaning on which economic agents can act. This does not matter in models of economic behaviour which are based on substantive rationality: agents are simply assumed to possess the calculative and computational power needed to internalise and act upon the signals they receive from the contractual environment, so that laws, like prices are to that extent self-enforcing. If, however, we take the approach that agents tend to act in a procedurally rational way, at least

under conditions of radical uncertainty, then we can no longer view the reception and implementation of legal norms as a straightforward process. On the contrary: a better working assumption would be that without some basis in the 'community of experience' of economic agents, the reception of the rules of positive law would be imperfect at best.⁷

This perspective reinforces our view that a procedural orientation can throw light on the relationship between legal norms and economic behaviour. The way in which external norms of the legal system are received and (re)-interpreted by the parties needs to be studied at the level of the processes and procedures through which commercial relationships and procedures are sustained. Legal norms will tend to take effect through the medium of less formal norms and processes (Deakin, Lane and Wilkinson, 1997). In terms, then, of the effectiveness of legal intervention, a crucial issue is the nature of the links between the rules of positive law, on the one hand, and the social norms and procedures which operate at the micro level, on the other.

4. Analysing Part X of the Companies Act 1985

4.1. Types of mandatory and default rules: limits to the hypothetical bargaining model

The implications of an 'incomplete contracting' framework may be applied to one of the central questions in the economics of company law, namely the balance between 'mandatory' and 'default' rules. *Default rules* apply in the absence of contrary agreement between the parties, in contrast to *mandatory* or *immutable rules* which have a more strictly binding character. While there are different theories concerning default rules, one influential approach would set default rules by reference to the perfect 'hypothetical' contract which the parties would have arrived at, through bargaining, in the absence of barriers to contracting: 'applying the hypothetical bargaining model involves thinking about what rational transactors would contract for if they had perfect information, did not face significant transaction costs, and could

be fully confident that the agreements reached would be performed as arranged' (Cheffins, 1997: 264).

Rules of this kind may be characterised as *straightforward default rules*. As we have seen, their purpose is two-fold: to save the parties the time and trouble of negotiating over all points of detail, and to allow them to customise or vary particular terms as they seek fit. The model set of articles of association contained in Table A of the Companies Act 1985 is the classic example, in the context of UK company law, of a set of straightforward or waivable default rules.⁸

The hypothetical bargaining model is undoubtedly a powerful tool for analysing the efficiency of legal rules in a wide range of situations. However, there are problems in applying this approach in situations where there are third party effects (externalities) or where contracts are incomplete, so giving rise to ex post bargaining over rents. Here, courts and policy-makers may have difficulty in determining the contents of the perfect 'hypothetical bargain' in situations where the court or policy maker has limited evidence on the preferences of parties who are affected by a rule. In theory, in a world of perfect, costless contracting, all externalities would be anticipated and bargained for; through bargaining, the subjective preferences of the parties would then be revealed. In the real world, there are many situations in which the costs of bargaining over third party effects clearly outweigh the benefits, for example where there are significant costs to reaching agreement between large numbers of parties who are potentially affected by a particular activity.

The hypothetical bargaining model could be applied, here, by including the interests of third party victims (or beneficiaries) in the calculus of efficiency. However, a court or policy-maker attempting to apply the model under these circumstances would be faced with severe difficulties in determining the respective values or utilities which third parties, outside the contract, place on the activities in question. Limited information, then, may prevent the court from identifying and applying the rule which, in theory, would be most conducive to efficiency. Under

such circumstances, one policy option (which is often found in situations of externalities) is to impose a mandatory rule which aims to protect the third party. A number of rules under Part X of the Companies Act 1985 which serve to protect creditors' interests fall into this category, such as the set of provisions prohibiting loans to directors (sections 330-342).

The application of the hypothetical bargaining model may also be problematic in two-party situations where *ex-post* bargaining over the rents or surplus from exchange gives rise to the possibility of strategic action, or self-interested behaviour which benefits one party at the expense of the other, so diminishing their aggregate wealth or well being. For example, where information is unevenly or 'asymmetrically' distributed between the parties to a transaction, it may not be in the self-interest of the better-informed party to share that information with the other, even where this would lead to an increase in their *aggregate* wealth. This would be the case where the better informed party either calculated or assumed that he or she could get a better deal by keeping the information to themselves: 'revealing information might simultaneously increase the total size of the pie and decrease the share of the pie that the relatively informed party receives. If the 'share of the pie effect' dominates the 'size of the pie effect', informed parties might rationally choose to withhold information' (Ayres and Gertner, 1989: 99). For example, it might be in the private interests of a senior manager to withhold information about a particular corporate opportunity which, if it were shared with the company, would produce greater aggregate wealth, but reduce gains for the manager.

Here, a default rule which attempted to reproduce the terms of the contract which the parties 'would have wanted' in a world of asymmetric information but free of transaction costs would not maximise aggregate welfare.⁹ Some analyses argue that, instead, a *penalty default rule* should be set here, in such a way as actively to induce the better-informed party to reveal the information which he or she has at their disposal, as a preliminary to further bargaining: 'penalty default rules are purposefully set at what the parties would not want - in

order to encourage the parties to reveal information to each other or to third parties (especially the courts)' (Ayres and Gertner, 1989: 91).

In other words, a penalty default rule operates in such a way as to impose a liability on the better-informed party in a case where he or she fails to share the information in question. A penalty default rule of this kind may have the effect of encouraging the production and communication of information; this 'preference-revealing' or 'cooperation-inducing' effect assists both the parties themselves and the court or policy-maker which is faced with the task of discovering the rule which will induce efficient bargaining.

It has been argued that the fiduciary duty of loyalty itself operates, at least in the context of directors' duties, as a penalty default rule. The law imposes upon directors and other senior manager a potentially onerous liability to account for profits made as a result of a conflict of interests (that is to say, a conflict between their own interests and those of the company which they are required to further). However, this liability can be avoided through the mechanism of prior disclosure of the interest to the board or, in some circumstances, the shareholders, or through subsequent approval, release or ratification by the shareholders. The purpose of the rule, viewed in this light, is to promote disclosure and bargaining over the terms of transactions, rather than placing a blanket prohibition on conflicts of interests. In this way, the fiduciary principle has an 'information-inducing' effect which helps to offset asymmetric information between shareholders and managers (Cooter and Freedman, 1991; Easterbrook and Fischel, 1993).

In addition, many of the rules under Part X of the Companies Act 1985 can be characterised as penalty default rules in the sense just identified. For example, under section 317, a director may incur criminal liability if he or she has an interest in a contract entered into by the company, unless he or she makes disclosure of that interest to the board. The purpose of the 'penalty' here is not necessarily to bar self-dealing, but rather to encourage the disclosure of information by the more

knowledgeable party. The rule therefore has an economically beneficial 'information-inducing' or 'cooperation inducing' effect.

A further type of default rule may be characterised as a *strong default rule*. In the case of a penalty default, contracting around the rule is meant to be possible at low cost for those parties who wish to take this route – this enables them to avoid being locked into an inefficient allocation of resources. In the case of a strong default rule, by contrast, the court or legislator sets a high-cost barrier to contracting out. Strong default rules are therefore close to being immutable or mandatory rules. They may be based on the assumption that certain transactions are potentially highly disadvantageous to one party, and should therefore require a high degree of formality to be surmounted in order to be legally effective. Another purpose of a strong default may be to avoid a negative externality, or unbargained for effect, arising from the contract. Strong default rules nevertheless allow for the possibility of contracting-out by parties who perceive the high costs of doing so to be outweighed by significant benefits to them. The form of the rule then allows their interests to override the negative effect which their contract or arrangement may impose on the third party, on the grounds that, in this case, the aggregate wealth or well being of society would be enhanced.¹⁰

In the context of Part X of the Companies Act 1985, sections 320-322, which govern substantial property transactions between directors and their companies, offer an example of a strong default rule. With transactions of this type, there is a risk of depletion of the company's assets which may detrimentally affect both shareholders and creditors. Such transactions are accordingly voidable at the instance of the company, unless one of a number of conditions apply, one of which is that the transaction was affirmed within a reasonable period of time by a general meeting of the shareholders (section 322(2)(c)). Requiring a vote in general meeting amounts to imposing a costly and inconvenient precondition of the validity of the transaction. Shareholders are thereby given a high degree of protection against a form of self-dealing. Creditors, on the other hand, may potentially be exposed to risk if

shareholders take the step of voting to approve transactions of this kind, since this may lead to a depletion of corporate assets. In that regard, sections 320-322 may be contrasted with the set of provisions which prohibit a company from providing a loan to a director (sections 330-42); as we have seen, this is a *mandatory* scheme which operates principally for the protection of third parties.

So far our discussion has mainly considered allocative or static efficiency. However, technical and dynamic efficiency, with their emphasis on norms and processes which promote innovation and adaptation, may be more relevant criteria for assessing the rules of company law, particularly from the point of view of policies which aim to support improved competitiveness in the sense identified earlier in our discussion. Thus the hypothetical bargaining model, given its emphasis on recreating the 'perfect' allocation of a world in which costless contracting is possible and in which all alternative uses and outcomes are fully accounted for, is ill-suited to the analysis of dynamic efficiency under conditions of uncertainty and where the nature of competition is such as to change the nature of existing products and processes. In particular, mandatory rules and strong default rules whose purpose is to induce cooperation and improve information flows may be important mechanisms for raising product quality and productivity in the long run even if, on a short-term or static analysis, they limit the scope for bargaining over the status quo (Jorde and Teece, 1992; Deakin, Goodwin and Hughes, 1997).

This point can be illustrated in the following way. Consider a market for a product whose quality cannot be accurately observed prior to sale. If, in ignorance of the quality of a *particular* good, buyers assume that all goods on offer attain only an average level of quality, high-quality sellers may then have an incentive to withdraw from the market, leading to a 'race to the bottom' in terms of the quality of goods. In extreme cases, the market disappears altogether as only the very lowest quality producers have any incentive to continue trading. This problem, known in the economic literature as the 'market for lemons',¹¹ can be avoided if high-quality sellers can find a way to 'signal' the superiority

of their products by incurring a cost (such as advertising) which lower-quality sellers cannot incur; in this way, quality can be raised and efficiency restored through private ordering.

However, another option is for a rule regulating quality to restore efficiency by enabling buyers to have confidence in the nature of the goods on offer. This may have the advantage, over private 'signalling', of ensuring greater predictability and stability in the relevant market. A similar rationale may provide some justification for the existence of legal rules against self-dealing and conflicts of interests on the part of directors (Coffee, 1988).

This works as follows. In the case of the 'market for lemons', standards which serve to exclude low-quality producers from the market can maintain consumers' trust in the general quality of products. Although some low-quality producers may be deterred from entering the market by such rules, the same rules may induce both consumers and high quality producers to stay. In this way, both the quality of production and the intensity of competition may be increased by rules and standards which appear to set up a barrier to entry and over which, by their nature, there may be little scope for bargaining.

In the same way, the rules and standards relating to directors' fiduciary duties can be seen as underpinning the general confidence of investors in the corporate form. Without rules of this kind, there is a danger that, under conditions of asymmetric information where investors cannot costlessly observe the quality and honesty of potential directors, the 'lemons problem' will take hold, leading to a withdrawal from the market by both directors and investors. It may not be necessary for the legal rules in question to be mandatory.¹² Default rules may work equally well in practice if they give rise to a *social norm* or *convention* of compliance. Hence it may be sufficient for the vast majority of company directors to adhere to the fiduciary principle in practice, notwithstanding the possibility of gaining shareholder approval for transactions involving a conflict of interest. However, if the rule were framed as a straightforward or waivable default rule which could be

easily avoided (such as the 'default' articles of association in Table A), it is less likely, in principle, that a generalised social norm of compliance would emerge. For this reason, we would expect rules relating to quality more often to take the form of 'strong default rules' which could only be avoided at high cost.

4.2. Rationalising Part X of the Companies Act 1985: factors governing the choice of default rule

Very few of the rules contained in Part X of the Companies Act 1985 establish *absolute prohibitions*: the provisions concerning loans to directors (sections 330-342) are the main example. The other prohibitions contained in this Part of the Act may be avoided through various procedures involving disclosure and/or consent. Table 1 summarises the relevant rules (the Table is adapted from a similar Table in Part 3 of the Law Commissions' Consultation Paper on *Company Directors*). In some cases disclosure must be made prior to, and in other cases within a period following, the transaction. Disclosure must sometimes be made to the board (sections 317, 322B), in other situations it must involve the shareholders either in general meeting, or via the company accounts or through a register (sections 311, 314, 318, 324, 325, 328). In addition, some rules allow for exemption from liability if there is disclosure to the Stock Exchange (section 329). Finally, there is a set of rules which consist of prohibitions which may only be avoided by consent (through either approval, in advance, or ratification or release, after the event), in all cases of the shareholders (sections 312-313, 315, 319, 320, 322, 322A, 337).

This description of Part X demonstrates that it already has what may be called a procedural orientation – very few rules are completely mandatory in the sense of *formally* allowing no scope for averting the effect of the rule in question through contracts or procedures at the level of the company itself. Part X, can be understood then, as a body of rules which far from outlawing self-dealing and conflicts of interest, creates the possibility of legitimising them by providing a set of mechanisms for disclosure and approval of transactions. But closer inspection also

suggests that there seems to be no single overarching principle to inform the choice of types of default rules in particular contexts. This is not surprising since it is well known that the relevant legislation has been added to incrementally over a period of seventy years, with statutory interventions responding to particular types of abuses as they arose. Given that the opportunity to revise Part X has now arisen, what approach should guide policy makers in the light of the considerations we have put forward in the earlier section of this paper?

In the Consultation Paper, it was suggested that the guiding principle should be one of systematic and meaningful disclosure to shareholders of transactions affected by self-dealing or a conflict of interest, rather than a general rule requiring shareholder approval (Law Commissions, 1998: para. 3.72). This is in line with what we have argued is the underlying procedural orientation of the existing Part X. Disclosure provides a basis upon which shareholders can exercise powers which they have under general company law to call directors to account. Approval rules go a step further in requiring a potentially heavy burden of compliance for companies, and it is not clear that a universal rule of approval would be compatible with the notion of a delegation of powers from the shareholders to the board.

Having said that, there could be an economic case for exceptions to the general disclosure rule, running in both directions. The disclosure rule could be narrowed, if the need to require confidentiality would make disclosure to shareholders infeasible. This might provide a justification for limiting disclosure of most self-dealing transactions to the board (as is currently the case under section 317), although this does not rule out the publication of such disclosures after the event in a register or in the annual report. In the other direction, the disclosure rule could be transmuted into one of approval in two sets of circumstances: firstly, where certain transactions pose a particularly heavy risk to shareholders' interests (as is currently the case with substantial property transactions under section 322) and, secondly, where an approval rule is needed to maintain the agreed division of powers between the different organs of the company (as in the present section 322A, which requires

the shareholders to approve transactions entered into by the board in excess of its powers under the articles of association).

Establishing these guiding principles does not, however, complete the task of deciding the precise form which particular default rules should take. As Table 1 indicates, even within the general categories there are many possible forms of disclosure and approval. The essential point here is that in setting a particular type of default rule, policy makers are in effect imposing certain types of procedural costs or obstacles to parties wishing to contract around the rule. To appreciate how a particular rule might work, then, requires some assessment to be made of the costs and benefits for particular parties of contracting around, *and not contracting around*, particular defaults. Some parties will consider it worth their while to contract around, or to modify, a default rule. Where this occurs, a wide variation of practices will result. This resulting situation is known as a *separating equilibrium*. By contrast, in a *pooling equilibrium*, the costs of contracting out or around a rule are so considerable that they deter a large number of contracting parties from customising the default rule to their particular circumstances, when they might otherwise have done so.

The point can be illustrated by reference to the rules concerning the length of directors' contracts in section 319 of the Act. A term which has the effect that a director must be employed by the company for a period of more than five years, where the contract cannot be terminated by notice or can be so terminated only in specified circumstances, is only valid if given the prior approval of the shareholders in general meeting. A leading authority on company law has suggested that prior to the recommendations of the Cadbury and Greenbury Reports which recommended a shorter period still for service contracts, this provision of the Act had 'largely eradicated long-term service agreements not determinable by the company until the directors reach retirement age' (Davies, 1997: 631), at least in the case of public companies. However, the Act did not outlaw the use of 'five year roller' contracts which can have the effect of guaranteeing that notice of at least five years is nearly always required if the company wishes to terminate the contract. The

effect of section 319, then, appears to have been to create a 'pooling equilibrium': for whatever reason, 'directors of public companies have a rooted antipathy to exposing their service agreement to debate and possible rejection by the general meeting of the members' (ibid.); so the default rule became in effect a general standard. However, account must also be taken of the use of 'five year rollers'. Where companies considered it worthwhile to adopt such devices, a degree of 'separation' or variation in practice between companies was introduced.

It can be seen from this analysis that the setting of a default rule has effects on both distribution and economic efficiency. Where there are high costs to recontracting or contracting around a rule, or where there are externalities, the allocation of liabilities under a default rule will tend to lock the parties in. Thus it will affect the private wealth of the parties concerned. The choice of rule will also have efficiency effects: these depend upon the incentives for information-sharing and for contractual cooperation which these rules create.

A crucial factor in any policy judgement must also be how far procedures and processes exist beyond the law through which default rules might be customised or adjusted, and an assessment of the costs of the various routes by which rules of different kinds may be contracted around. This involves empirical research into the type of internal corporate governance processes which operate in different types of companies. A working hypothesis here might be that the incidence of internal processes differs according to the perceived costs and benefits of introducing them. These will differ according to the nature of the agency costs facing particular companies, and their capacity to deal with them through internal processes which may be costly to establish and maintain. The nature of monitoring and the costs of collective action may be expected to be very different in the cases of a large listed company with a dispersed shareholding, on the one hand, and, on the other, closely-held companies such as venture capital buy-outs and small owner-managed businesses. Where internal processes exist, they may provide important links between company-level practices and the general law. Equally, in companies reliant on direct shareholder

monitoring, policy makers cannot rely to the same extent on the law being translated into action through internal processes; it is in these situations that the proposed restatement of directors' duties, and the use of soft-law guides and pamphlets summarising the law, may be of the greatest benefit. But we would reiterate here that until we have a better understanding of how the existing law operates in practice in conjunction with other, extra-legal elements of corporate governance systems, many of these conjectures will remain just that. This is why the Consultation Paper envisaged a further stage of empirical research which would inform the Law Commissions' final policy recommendations.

Empirical analysis is needed, in particular, to throw light on a question which has been addressed in the theoretical literature but to which, so far, no satisfactory answer has been given: how far do rules which are *formally* default rules, in the sense that they can be waived by procedures and transactions adopted by the parties themselves, in practice turn into mandatory rules? This could happen either because the costs of amending default rules are excessive, or because these rules come to embody a norm of 'accepted behaviour' which serves as a common point of reference in contracting. We noted above that the fiduciary duty of loyalty could operate in this way to support and underpin a *social* norm of good behaviour by directors which, if it was widely observed, would reduce agency costs associated with a lack of information concerning quality. What is not clear here is how far a corporate culture which has economically beneficial effects is independent of the legal form in which a given rule may take. As Black (1990: 574) puts it:

We can't measure how much corporate culture affects managers' behaviour, nor how much that culture depends on having nonwaivable rules. But if some effect exists, then market mimicking rules can strengthen a corporate culture in which most managers don't abuse the large measure of discretion entrusted to them. Similarly, writing an avoidable rule into law has benefits if most people don't try to avoid it.

In other words, rules which operate as straightforward default terms may enhance efficiency for reasons which are quite separate from the usual explanation that they operate as a set of standard terms, to be customised as appropriate. Their usefulness depends, though, upon very few companies taking steps to avoid them; if they are commonly avoided or waived, a general culture of respect for the fiduciary principle (for example) may not take hold. As Black suggests, testing this hypothesis may be problematic since reliable measurements may be difficult to achieve. A first step, though, would be to gather information on how far companies avoid or customise default rules in practice. Surprisingly, hardly anything, beyond some intelligent guesswork, is known about this; it is, however, one of the objectives of the empirical stage of our research for the Law Commissions is to investigate this very issue.

5. Conclusion: Towards a Reflexive Company Law

In this paper we have laid out a theoretical framework for assessing and informing the process of company law reform which was begun in the UK by the work of the Law Commissions on shareholders' remedies and on directors' duties, and has been carried on by the DTI's Company Law Review. From the point of view of positive analysis, our aim was to show that much of the existing body of company law can be understood as having a procedural orientation, by which we mean that it operates to underpin and encourage self-regulatory practices within companies. This is not the same as saying that company law is principally 'enabling' as opposed to being 'mandatory', since the promotion of self-regulation may be a property of default rules and general standards which, in practice, have a near-mandatory character.

As we have seen, many rules of company law, even those in Part X of the Companies Act which complement the fiduciary duty of loyalty, formally operate as default rules. However, we also saw that these default rules have a complex relationship to corporate practice. In addition to creating incentives for cooperation in the manner of penalty

default rules, they can assist in establishing shared values and common understandings which are an important pre-condition for interaction between the parties to the corporate 'nexus of contracts'. In practice, this may mean that default rules end up possessing a near-mandatory character. At this level, the conventional distinction between 'mandatory' and 'enabling' rules in company law ceases to have much meaning.

It also follows that, from a normative perspective, we should not conclude from the near-mandatory character in practice of many default rules that the rules in question are necessarily inefficient and therefore undesirable. They may play an important role, together with other, extra-legal components of corporate governance systems, in providing a basis for technical efficiency and dynamic efficiency, which depend on the capacity of organisations to use their resources efficiently and to adapt and survive under rapidly changing environmental conditions. An essential issue in considering the competitiveness of organisations relates to the quality of the relationships between the different corporate actors (or 'stakeholders'¹³), and the extent to which the corporate form allows them to pool risks and exchange information. This perspective emphasises the need for positive analysis of the operation of law in practice which will feed into and refine normative prescriptions. Normative analysis, in turn, points the way towards a more systematic consideration by policy makers of the techniques through which company law can facilitate interactions of this kind – in other words, towards a *reflexive* company law.

Notes

1. For a full account of Part X of the Companies Act and its background, the reader is referred to the Consultation Paper on *Directors' Duties* (Law Commissions, 1998).
2. It is probably right to say that the view that economics alone can settle this question (see Posner, 1982) is a minority one within law and economics; it is certainly a minority view within economics, see for example Mueller (1989) on the positive theory of social choice; and see also Deakin and Hughes (1999).
3. According to the public choice critique, this is particularly likely where statutory rules are the result of compromises or bargains within the political process which reflect the influence of powerful interest groups. See Ogus, 1994, for an analysis of public choice in the context of regulatory law.
4. For an extended defence of the view stated in the text, see Deakin and Michie, 1997; Deakin, 1999.
5. 'Latecomer' terms deal with the position of parties joining the corporate 'nexus of contracts' after it is first formed.
6. See Posner, 1992. For discussions of Posner's methodology see Deakin and Hughes, 1999, and Deakin, 1999.
7. The argument advanced in the text draws upon a number of related elements in both economic and legal theory. The role of norms and conventions in supporting economic exchange is found both in Leibenstein's theory of 'X' efficiency (see Leibenstein, 1987) as well as in variants of convention theory which stress the importance of norms as a cognitive resource for organisational learning (see Orléan (ed.), 1994; Lorenz, 1999). Within legal theory, it is related to developments in the theory of reflexive law including the hypothesis of the 'contextual

proceduralisation' of law advanced by the Louvain school of the Centre for the Philosophy of Law, Catholic University of Louvain (see Lenoble, 1994, 1999).

8. Table A (1985) is the 'default' set of articles in the sense that it applies where a company fails to register separate articles of its own. See Companies Act 1985, s 8(2); Companies (Tables A-F) Regulations 1985, SI 1985/805.
9. The 'hypothetical bargaining model' can only be applied here if we imagine the parties contracting behind a 'veil of ignorance' which prevents them from knowing which one of them it is who has the superior access to information. Then, the parties would contract for the penalty default rule which would maximise their joint product. See Ayres and Gertner, 1989: 106, n 91. Since this is tantamount to saying that the efficient rule is not one which the parties in question would have chosen in the context of the particular contractual environment in which they found themselves, it is not clear what if anything would be gained by describing the outcome as the result of a hypothetical bargain between them.
10. In other words, here the gain to the contracting parties would outweigh the loss to the third party.
11. The leading article on this problem (Akerlof, 1970) used the example of the market in second-hand cars or 'lemons'.
12. It is sometimes argued that rules relating to quality should be mandatory, since this will prevent 'wasteful' signalling: see Aghion and Hermalin, 1990. If the argument in the text is correct, the same effect may be achieved by social norms or conventions which are very widely observed and which rest on legal rules taking the form of defaults.

13. We do not consider here the implications of our analysis for the wider stakeholder issue, but on this theme see Slinger and Deakin, 1999.

TABLE

Table 1: Rules Governing Disclosure and Consent through Approval, Release and Ratification under Part X, Companies Act 1985

	Disclosure		Consent	
	Before	After	Before (Approval)	After (Release, Affirmation, Ratification)
Board	<i>Certain forms of self-dealing</i> ss.317(1), (2)(a), (3),(4), (8)	<i>Certain forms of self-dealing</i> s. 317(2)(b)), s. 322B		
Shareholders	<i>Certain payments to directors</i> ss. 312*, 313(1)* 314(2)** <i>Resolution to approve directors' service contracts beyond 5 years</i> s. 319(5)***** <i>Certain loans to directors</i> s. 337(3)(a)*	<i>Terms of directors' service contracts</i> s. 318***** <i>Certain share dealings by directors</i> s. 324 and Sch. 13, Part II****, s. 325 and Sch. 13, Part IV*****, s. 328(3)*****, Sch. 6, Part II*****, ss. 343-344*****	<i>Certain payments to directors</i> s. 312, s. 313(1), s. 315(1)(b) <i>Directors' service contracts beyond 5 years</i> s. 319(3)-(4) <i>Substantial property transactions</i> s. 320(1)(b) <i>Certain loans to directors</i> s. 337(3)	<i>Certain substantial property transactions</i> s. 322(2)(c) <i>Transactions beyond the directors' powers</i> s. 322A(5)(d)
Stock Exchange		<i>Certain share dealings by directors</i> s. 329		

Key to types of disclosure: General meeting*, Notice to shareholders**, Notification to company***, Company accounts****, Inspection*****

Bibliography

- Akerlof, G. (1970) 'The market for "lemons": qualitative uncertainty and the market mechanism' *Quarterly Journal of Economics*, 84: 488-500.
- Aghion, P. and Hermalin, B. (1990) 'Legal restraints on private contract can enhance efficiency' *Journal of Law, Economics and Organization*, 6: 381-409.
- Ayres, I. and Gertner, R. (1989) 'Filling gaps in incomplete contracts: a theory of default rules' *Yale Law Journal*, 99: 87-130.
- Boyer, R. and Orléan, A. (1991) 'Les transformations salariales entre théorie et histoire' *Revue Economique*, 42, 233-250.
- Black, B. (1990) 'Is corporate law trivial? A political and economic analysis' *Northwestern University Law Review*, 84: 542-597.
- Cheffins, B. (1997) *Company Law: Theory, Structure and Operation* (Oxford: OUP).
- Coase, R.H. (1960) 'The Problem of Social Cost' *Journal of Law and Economics*, 3: 1-44.
- Coase, R.H. (1988) *The Firm, the Market and the Law* (Chicago: University of Chicago Press).
- Coase, R.H. (1996) 'Law, Economics, and A.W. Brian Simpson' *Journal of Legal Studies*, 25: 103-119.
- Coffee, J. (1988) 'No exit? Opting out, the contractual theory of the corporation, and the special case of remedies' *Brooklyn Law Review*, 53: 919-977.

- Cooter, R. (1990) 'The Coase theorem', in J. Eatwell, M. Milgate and P. Newman (eds.) *Information, Allocation and Exchange* (London: Macmillan).
- Cooter, R. and Freedman, B. (1991) 'The fiduciary relationship: its economic character and legal consequences' *New York University Law Review*, 36: 1045-1075.
- Davies, P. (1997) *Gower's Principles of Modern Company Law* 6th ed. (London: Sweet and Maxwell).
- Deakin, S. (1999) 'Law versus Economics? Reflections on the Normative Foundations of Economic Activity', in M. Richardson (ed.) *The Second Wave of Law and Economics* (Melbourne: Federation Press).
- Deakin, S., Goodwin, T. and Hughes, A. (1997) 'Cooperation and trust in inter-firm relations: beyond competition policy?', in S. Deakin and J. Michie (eds.) *Contracts, Cooperation and Competition* (Oxford: OUP).
- Deakin, S. and Hughes, A. (1999) 'Economics and company law reform – a fruitful partnership?' *Company Lawyer*, 20, forthcoming.
- Deakin, S., Lane, C. and Wilkinson, F. (1997) 'Contract Law, Trust Relations, and Incentives for Cooperation: A Comparative Study', in S. Deakin and J. Michie (eds.) *Contracts, Cooperation and Competition* (Oxford: OUP).
- Deakin, S. and Michie, J. (1997) 'The theory and practice of contracting', in S. Deakin and J. Michie (eds.) *Contracts, Cooperation and Competition* (Oxford: OUP).

- Deakin, S. and Wilkinson, F. (1999) 'Minimum wage legislation', in B. Bouckaert and G. De Geest (eds.) *Encyclopedia of Law and Economics* (Cheltenham: Elgar).
- DTI (1994) *Competitiveness: Helping Business to Win* London: HMSO.
- DTI (1998) *Our Competitive Future. Building the Knowledge-Driven Economy*. Cm. 4176 (London: TSO).
- DTI, 1999. *Modern Company Law for a Competitive Economy. The Strategic Framework*. A Consultation Document from the Company Law Review Steering Group (London: Department of Trade and Industry).
- Easterbrook, F. and Fischel, D. (1991) *The Economic Structure of Corporate Law* (Cambridge, Mass.: Harvard University Press).
- Easterbrook, F. and Fischel, D. (1993) 'Contract and fiduciary duty' *Journal of Law and Economics*, 36, 425-451.
- Frantz, R. (1987) *X-Efficiency: Theory, Evidence and Applications* (New York: Kluwer-Nijhoff).
- Hart, O. (1995) *Firms, Contracts and Financial Structure* (Oxford: Clarendon Press).
- Hughes, A. (1978) 'Competition policy and economic performance in the UK', in National Economic Development Office, *Competition Policy* (London: NEDO).
- Hughes, A. (1990) 'Competition policy and the competitive process: Europe in the 1990s' *Metroeconomica*, 43: 1-50.

- Jensen, M. and Meckling, W. (1976) 'Theory of the firm: managerial behaviour, agency costs and ownership structure' *Journal of Financial Economics*, 3: 305-360.
- Jorde, T. and Teece, D. (1992) 'Innovation, cooperation and antitrust', in T. Jorde and D. Teece (eds.) *Antitrust, Innovation and Competitiveness* (New York and Oxford: OUP).
- Kirzner, I. (1997) *How Markets Work: Disequilibrium, Entrepreneurship and Discovery* Hobart Paper No. 133 (London: IEA).
- Law Commissions (1998) *Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties* Law Commission Consultation Paper No. 153, Scottish Law Commission Discussion Paper No. 105 (London: TSO).
- Leibenstein, H. (1966) 'Allocative efficiency vs. "X" efficiency' *American Economic Review*, 56: 392-415.
- Leibenstein, H. (1987) 'X-efficiency', in J. Eatwell, M. Milgate and P. Newman (eds.) *The New Palgrave: A Dictionary of Economics* Vol. 3 (London and Basingstoke: Macmillan).
- Lenoble, J. (1994) *Droit et communication* (Paris: Humanités).
- Lenoble, J. (1999) 'Norm and action. Corporate governance and contextual proceduralisation'. Working paper, Centre for the Philosophy of Law, Catholic University of Louvain.
- Lorenz, E. (1999) 'Trust, contract and economic cooperation' *Cambridge Journal of Economics*, 23:301-315.
- Low Pay Commission (1999) *The National Minimum Wage. First Report of the Low Pay Commission* Cm. 3976 (London: TSO).

- Mueller, D. C. (1989) *Public Choice II* (Cambridge: cup)
- Ogus, A. (1994) *Regulation: Legal Form and Economic Theory* (Oxford: Clarendon Press).
- Ogus, A. (1995) 'Economics and law reform: thirty years of Law Commission endeavour' *Law Quarterly Review*, 111, 407-420.
- Orléan, A. (ed.) (1994) *Analyse économique des conventions* (Paris: PUF).
- Posner, R. (1982) *The Economics of Justice* (Cambridge, Mass.: Harvard University Press).
- Pratten, S. and Deakin, S. (1999) 'Competitiveness policy and economic organisation: the case of the British film industry', ESRC Centre for Business Research Working Paper No. 127.
- Richardson, G. (1972) 'The organisation of industry' *Economic Journal*, 82: 883-896.
- Rogowski, R. and Wilthagen, T. (eds.) (1994) *Reflexive Labour Law* (Deventer: Kluwer).
- Stiglitz, J. 1994. *Whither Socialism?* (Cambridge, Mass.: MIT Press).
- Zingales, L. (1998) 'Corporate governance', in P. Newman (ed.) *The New Palgrave Dictionary of Economics and the Law* Vol. 1 (London and Basingstoke: Macmillan).

