

Short-Termism in Business Law: A Global Approach

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About the author: Professor Lécia Vicente teaches business law and comparative law courses at LSU Law Center. Before joining LSU Law, she was an affiliate with the Fordham Corporate Law Center at Fordham University School of Law. She earned her Ph.D. and Master of Laws in Comparative, European, and International Laws from the European University Institute and her BA in Law from the Catholic University of Portugal. She carried on her postdoctoral training as a postdoctoral research associate and lecturer at the Gies College of Business at the University of Illinois at Urbana-Champaign. Professor Vicente has held visiting research positions at the Commercial Law Department of the Faculty of Law of the Universidad Autónoma de Madrid, the University of Illinois College of Law, the Fordham University Law School, the Institute of International Economic Law at the Faculty of Law of the University of Helsinki, and the Institute of Social Sciences of the University of Lisbon. She has given academic lectures in comparative corporate law, governance, and contracts at the Munich Center on Governance, Communication, Public Policy, and Law at the Ludwig Maximilians-Universität, Munich, and the European University Institute. Professor Vicente has presented and participated in multiple conferences, namely at the Annual Meeting of the American Society of Comparative Law, the Kent Center for European and Comparative Law, the National Business Law Scholars Conference, the University of Michigan's Stephen M. Ross School of Business, the European Association of Law and Economics, the Copenhagen Business School, the Harvard Business School, and Yale Law School. Her research has been published in several journals and edited books.

On July 29, 2021, I moderated a workshop on business law at the Southeastern Association of Law Schools (SEALS). Gathering scholars from the United States, Germany, Brazil and Portugal, the workshop was called *First Things First: Is Short-Termism the Problem*. Our discussion focused on Ernst and Young's "Study on Directors' Duties and Sustainable Corporate Governance" for the European Commission (EY Study on Directors' Duties).

Based on evidence collected from 1992 to 2018, Ernst and Young argued that the boards of directors of publicly held companies within the EU tended to focus on the short-term benefits of shareholders to the detriment of the company's long-term interests. The study lent itself to numerous criticisms and ignited a conversation about the methodology used and the corporation's purpose.

We discussed the EY Study on Directors' Duties and its empirical findings in the context of a new political, economic, and social order. Some topics included the EU's reframing itself after the Brexit shock, US's social justice claims, climate change, natural disasters worldwide, and the COVID-19 pandemic. We discussed what that study meant to corporate law and corporate governance in Europe, the United States and the world. At some point, Mariana Pargendler commented, "rather than buybacks, we're concerned about tunneling in Brazil." We discussed what "short-termism" means if it exists, and, if it does, whether it is as harmful as it sounds.

Almost six months later, Larry Fink, BlackRock's CEO, has published his 2022 letter to CEOs, *The Power of Capitalism*. Therein, he takes a long-term approach to the financial security his company purports to offer to its clients. He recognizes that their clients care about the environment and society beyond the maximization of their shareholder value. Of course, there is a certain amount of self-interest when shareholders live longer and acknowledge that the companies they invest in have shared responsibility in contributing to positive solutions.

Fink touches upon hot topics, such as the decarbonization of the economy, the democratization of the corporation through technology, shareholders' empowerment when it comes to voting on environmental, social and governance (ESG) issues, the disruption of the market through new sources of capitalization of start-ups, and the new landscape of employment.

Given the divisive world we are living in, Fink states the corporation's purpose should be CEOs' guiding star in sorting out conflicts between different stakeholders. He says directors ought to care about the interests of shareholders and other key stakeholders' interests (e.g., employees, customers, communities, regulators) because they are fiduciaries and stewards of the corporation. He considers that such an approach is crucial to the corporation's long-term success.

In an earlier discussion on the concept of "short-termism," I maintained that it is pressing to define the concept and that obtaining empirical evidence to infer causation is important for policy advice. I asserted that the discussion around short-termism was puzzling. I posited: "there is a vehement academic debate whether there even exists short-termism or whether it is as harmful as it sounds. For example, in their paper, *Long-Term Bias*, Michal Barzuza & Eric Talley explain how corporate managers can become hostages of long-term bias, which can be as damaging for investors as short-termism."

The contributions below inform the concept of short-termism from several perspectives: the corporate managers' role (Professor Megan W. Shaner), sustainability (Professor Florian Möslin), fiduciary duties (Professor Joan MacLeod Heminway), and the human capital movement in the US (Professor George S. Georgiev).

In summarizing these unique, yet overlapping perspectives, I dare to take a page from Saskia Sassen's *The Global City* to refer to the "Global Corporation" as a representation of economic development and a hub for discussing issues that concern academics in the four corners of the world. Spanning corporation governance and corporate finance, they represent four analytical components important to understanding the present and providing responsibly for the future from a legal perspective. Their observations yield a variety of potential approaches to short-termism: focusing more intently on the role of corporate officers in decision-making, using nudging approaches to legal change to foster sustainability, emphasizing the potential impact of legal advice to corporate management, and improving corporate disclosure and accounting systems. To borrow again from Sassen, these four short essays illustrate that the Global Corporation "is one of the nexi where the formation of new claims, by both the powerful and the disadvantaged, materializes and assumes concrete forms."

The author thanks all the participants in the workshop on business law, *First Things First: Is Short-Termism the Problem?* She also thanks Joan Heminway for her comments.

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