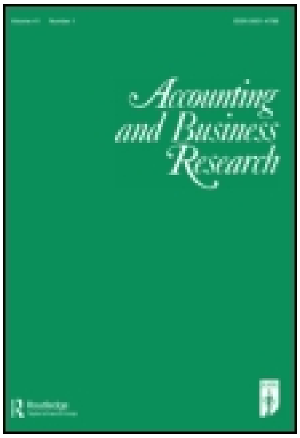

Accounting and Business Research

Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/rabr20

The importance of being fair: An analysis of IFRS regulation and practice - a Comment

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Published online: 04 Jan 2011.

Accounting and Business Research, Vol. 39. No. 4, pp. 415–427, 2009

The importance of being fair: an analysis of IFRS regulation and practice – a Comment

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Editorial note: This paper is published as a Comment to encourage researchers to incorporate the nuances of the requirement for fair presentation in their research design and to consider the implications of jurisdictional differences when interpreting accounting practices.

Abstract — This paper examines the 'present fairly' (PF) requirement in IFRS. There were eight relevant developments from 2005 to 2008, and these are mostly not yet considered in the academic literature. The paper synthesises the resulting regulatory position, especially for UK companies. Contrary to official guidance, it is suggested here that the PF requirement and the conditions for using it as an override in IFRS are not the same as for a true and fair view. Examples of the use of the PF override in practice are critically examined, as is a recent Opinion on PF by legal Counsel. Developments in US regulation make US opposition to a PF override clearer. The implications for financial reporting and for research into it are examined.
Keywords: fair presentation; IFRS

Introduction

The purpose of this paper is to investigate the implications of various requirements in law and accounting standards for financial reporting to be fair, in the light of several recent developments in regulations and practice. In order to make the focus clear, I concentrate on reporting under International Financial Reporting Standards (IFRS) by UK companies. However, many of the issues raised here are relevant to companies reporting under UK standards or to IFRS reporters in countries other than the UK.

For UK-based IFRS reporters, the following eight[1] developments from 2005 to 2008 are of relevance. The revised IAS 1 ('Presentation of Financial Statements') that came into force in 2005 introduced a new version of the 'present fairly' (PF) requirement that apparently can work differently in different countries; and this is retained in the further revision of IAS 1 of 2007. The IASB (2008) has also issued an exposure draft of the chapter on qualitative characteristics to be included in a revised *Conceptual Framework*, and unlike the current *Framework*[2] it does not include PF or 'give a true and fair view' (GTFV) at all.

In the UK, there has also been guidance from the FRC (2005) on whether PF is the same as GTFV. The UK's *Companies Act 2006* (CA 2006) did not merely retain the GTFV requirements of the 1985 Act but added to them. The Financial Reporting Review Panel had taken legal advice on GTFV in the context of international standards (Freshfields, 2005) but this has been overtaken by events, so the Financial Reporting Council (FRC) has obtained and published a new Counsel's Opinion on the TFV that updates the 'almost iconic' (Moore, 2008: para. 7) Opinions of Hoffman and Arden. The UK adopted International Standards on Auditing, which affects the wording of the audit opinion on GTFV. In the field of practice, there have been both UK (National Express) and French (*Société Générale*) examples of the use of IAS 1's override.

In the US, the Financial Accounting Standards Board (FASB) has issued a new hierarchy of the components of GAAP (FASB, 2008). This makes no mention of PF and, for the first time, specifically excludes any override of standards. As explained later, American voices on the IASB have suggested that the override should be removed from IAS 1. Given IASB/FASB convergence, these factors are potentially relevant beyond the US.

The topic of this paper is clearly important, as demonstrated by: the FRC's decision to seek and

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This paper was accepted for publication in March 2009.

[1] These are listed in the next eight sentences, respectively.
[2] See the section below on 'True, fair, presentation and view'.

publish guidance on PF; the controversy surrounding whether to include an override in IAS 1 (see below); the publicity given to the use of the override by *Société Générale*; and the mass of academic literature (see below). The contribution of this paper is to analyse in a critical manner the eight recent developments.

After a note on literature, the paper proceeds as follows. First, there is a synthesis of the current regulatory position for UK-based IFRS reporters. Then, I ask whether 'present fairly' is the same thing as 'give a true and fair view'. This leads to a consideration of the current status of the 'override', followed by examination of the use of the override in IFRS practice. Next, I critique the recent Counsel's Opinion. This is followed by a note on US developments related to PF, and whether they are relevant outside the US. Then, there are conclusions and a note on implications. Finally, the relevance of all this for research in financial reporting is examined.

The academic literature on GTFV/PF is so extensive that it would be cumbersome to make reference to it all. As well as a large number of papers, the literature includes monographs (e.g. Chastney, 1975; Walton, 1991) and compendia of papers (e.g. Parker and Nobes, 1994; Parker et al., 1996). In each section that follows, the relevant literature is reviewed. None of it takes account of developments from 2005 onwards.

Current regulatory position

This section outlines the current position (e.g. for annual reports of 2009) for UK companies reporting under IFRS, which is compulsory for the consolidated statements of listed companies and optional for other purposes (CA 2006, s. 395). Strictly speaking, the IAS Regulation 1606/2002 requires (or allows) IFRS 'as adopted by the EU' (hereafter, EU-endorsed IFRS) rather than IFRS as issued by the IASB (ARC, 2005; FEE, 2005). However, the requirements relating to PF are the same despite non-endorsement of parts of IAS 39 and lags caused by endorsement for all IASB output, including IAS 1.[3]

IFRS reporting by UK companies is carried out in the context of the Companies Act. However, IFRS statements are not covered by the traditional requirements (CA 1985, s. 226; now CA 2006, s. 396), derived from the Fourth and Seventh Directives, that they must give a TFV and that the detailed provisions of the Act must be set aside if that would be necessary for a TFV to be given. This is because the IAS Regulation relieves companies from most of the law derived from the Directives (e.g. what was formerly Schedule 4 to the 1985 Act).

However, a new clause was inserted into the Companies Bill in 2005, and is now s. 393 of the 2006 Act. It applies to companies reporting under either IFRS or UK GAAP, and provides that:

> 'The directors of a company must not approve accounts for the purposes of this Chapter unless they are satisfied that they give a true and fair view of the assets, liabilities, financial position and profit or loss . . . '

As Counsel notes (Moore, 2008: para. 55), this is expressed as a negative obligation. Presumably, it will serve to continue the traditional approach to TFV in British law, despite the lack of an overt mention in law of the override for IFRS reporting (see below).

A question arises here about the legal position of IFRS reporting in the UK before CA 2006 came into force,[4] such as annual reports for calendar years 2005–2008. In that period, there was no requirement (either positive or negative) for directors to ensure that financial statements gave a TFV when reporting under IFRS. So, directors were required to ensure a fair presentation (because the IAS Regulation imposed IAS 1), whereas auditors were required to give an opinion on TFV (under the Act). The ministerial statement[5] relating to the insertion of s. 393 in the 2006 Act notes the potential confusion and seeks to avoid this and to give directors and auditors a common objective. The profession had wanted[6] to avoid any possibility that a court might hold that the decision to implement[7] the IAS Regulation in 2004 without a GTFV requirement implied that there had been a change of substance.

The requirement for *auditors* to give an opinion on TFV remains unchanged from the 1985 Act, as s. 495 of the 2006 Act. However, UK auditing standards have been replaced by 'International Standards on Auditing (UK and Ireland)',[8] and this involves a move from a two-part opinion (on TFV *and* on compliance with rules) to a one-part opinion (on TFV *in accordance with* rules).

[3] I use here the version of IAS 1 issued by the IASB in 2007, which was endorsed by the EU in December 2008.

[4] The Act came into force at various dates, but the relevant sections came into force for accounting periods beginning on or after 6 April 2008.

[5] See Moore (2008: para. 55).

[6] Interview on 8 February 2009 with Kathryn Cearns, chairperson of the Financial Reporting Committee of the ICAEW. See also a press release from the ICAEW of 19 May 2008: 'Institute welcomes revised opinion on true and fair'.

[7] By SI 2004/2947.

[8] This oxymoronic title fits well with an oxymoronic set of 'EU-International Financial Reporting Standards'.

The TFV is particularly relevant when interpreting or applying an accounting standard, when choosing between permitted accounting policies,[9] when selecting policies on issues not covered by standards, and when considering whether extra disclosures are necessary. The need to give a TFV may also lead to a departure from the detail of a regulation.

Obviously, the use of the TFV override to depart from details of the *law* in order to comply with the requirements of UK standards (e.g. SSAP 19 on accounting for investment properties; see *Company Reporting*, 1997) is not relevant for IFRS reporters. First, as noted above, the IAS Regulation removes the relevance of most of the detailed accounting rules of the Act. Second, UK standards are not relevant for IFRS reporters.

However, the new negatively-written GTFV obligation in law applies to IFRS reporters. In addition, they must comply with IAS 1, which has an analogous requirement (paras. 15 and 19) to that in FRS 18 (paras. 14 and 15) concerning both the need for PF/GTFV and the occasional resulting necessity to depart from the detailed requirements of the standards.

In summary, UK companies that comply with IFRS (compulsorily or voluntarily) do so in the context of the *Companies Act 2006*. This requires annual accounts to be prepared, to give a TFV, to be audited (including an opinion on TFV) and to be filed. However, most of the accounting requirements of the law and all of the UK standards are replaced by EU-endorsed IFRS, which includes a PF requirement. As a result, UK audit reports on IFRS statements refer to: International Standards on Auditing, the TFV, EU-endorsed IFRS, the Companies Act and the IAS Regulation. In some cases, they also refer to plain IFRS, where a company has requested this, perhaps because the company is listed on a US exchange (see Nobes and Zeff, 2008). Many of these issues are discussed further below.

True, fair, presentation and view

As noted above, IFRS statements must both GTFV and PF, because they must comply with both the Act and IAS 1. Similarly, auditors of such statements must form an opinion on both requirements because, under the Act, they opine on TFV in the context of EU-endorsed IFRS.

This raises the practical question of whether GTFV is identical to PF. This question needs to be asked jurisdiction by jurisdiction, because the legal and linguistic context will affect the answer. That is, for example, it is probably necessary to distinguish a British TFV from other types (Alexander, 1993). The academic literature on the contrast between GTFV and PF mostly concerns PF in its US context because PF only arrived in IFRS in 1997. Cowan (1965) suggested that GTFV (in New Zealand or the UK) and PF (in the US) were much the same but that both expressions were unsatisfactory because of the lack of a clear definition of the objectives of reporting. By contrast, Zeff (1990) argued that there was an important transatlantic difference in audit practice. In particular, PF was dependent on its context of generally accepted accounting principles (GAAP), whereas GTFV was a separate requirement. Elsewhere, Zeff (1992) commented on the development of the one-part opinion in the US, noting however that one audit firm used to give a two-part opinion. Zeff (2007) provides more analysis of the historical developments and argues in favour of a two-part opinion. McEnroe and Martens (1998) found that both UK and US investors perceived GTFV to preclude misleading statements and bias more than PF did. Kirk (2006) found that preparers, auditors and users in New Zealand all perceived TFV differently from PF.

However, for the UK, these conclusions might now have to be modified because, as noted above, auditors have moved to a one-part opinion ('give a true and fair view in accordance with IFRS as adopted by the EU') with the adoption of International Standards on Auditing (APB, 2004). The FRC (2005: 3) concludes that TFV and PF are now 'similar'. Counsel's Opinion is also that the GTFV and PF 'do not describe two different concepts' (Moore, 2008, para. 28). However, Counsel principally relies for this conclusion on a sentence in the IASB's *Framework* which says, concerning GTFV and PF, that:

> 'Although this Framework does not deal directly with such concepts, the application of the principal qualitative characteristics and of appropriate accounting standards normally results in financial statements that convey what is generally understood as a true and fair view of, or as presenting fairly such information.' (para. 46, as quoted directly from the *Framework*, not from Counsel's Opinion which contains errors).[10]

This tangential statement, which is not in a

[9] For example, FRS 18 (paras. 14, 17).

[10] Paragraph 28 of the Opinion has 'this' not 'the' Framework in line 3, and there is an 'a' missing before 'true and fair view' in line 6. Incidentally, para. 25 should not say that the IASB 'prepared' the *Framework*, because its predecessor, the IASC, did.

Standard and has not been endorsed by the EU seems a thin basis for concluding that the concepts are the same. Further, the *Framework* pre-dates the Opinion by 19 years, during which time the meanings of words might have changed (Hoffman and Arden, 1983: para. 13; Arden, 1993: para. 14).

Counsel also reasons (para. 29) that 'present fairly' is 'very similar to' *quadro fedele* or *image fidèle* which are, respectively, the Italian and French translations of TFV in the Directives. If both 'true' and 'fair' are covered in French by '*fidèle*', can Counsel be right that '*fidèle*' can also mean only one of them (i.e. only fair)? The Italian legislators saw the problem (Nobes, 1993: 41), and used two adjectives: '*rappresentare in modo veritiero e corretto*' (*Decreto Legislativo* n.127/1991). Evans (2004) notes that translating technical terms is fraught with difficulty, and uses the translation of TFV as an example (pp. 231–232).

Part of the answer to whether '*fidèle*' can mean both 'fair' and 'true and fair' might lie in whether 'true and fair' is a portmanteau term (a hendiadys) or whether the words should be taken separately. If 'true and fair' is a hendiadys, then it could mean the same as 'fair', and 'true' would be redundant. Parker and Nobes (1991: 353) find that UK auditors discern separate meanings to the two words, but Nobes and Parker (1991: 366) do not find much evidence for this among UK directors. The same applies to Australian auditors (Deegan et al., 1994). The Opinions of Hoffman and Arden also largely dealt with 'true and fair' as a portmanteau term, but Arden (1993: para. 14) says that:

> 'the Court will not in my view seek to find synonyms for the words ''true'' and ''fair'' but will seek to apply the concepts which those words imply.'

So, there is no clear conclusion on this issue: 'fair' could mean the same as 'true and fair', particularly if the words are placed in different situations.

Given that the 2008 Opinion calls in aid the Italian and French translations of TFV in the Directives, it might be useful to see where this path leads by investigating translations of GTFV and PF in IFRS literature. A caveat is that each language has different 'registers' within it for various professional activities (Evans, 2008). A word may signify different things in different registers. The discussion below needs to be interpreted in this light.

The IASB's *Framework* exists in several official IASB translations, although the *Framework* is not part of EU-endorsed IFRS. The Italian and French versions of para. 46 (reproduced in the original English as an indented quotation above) say, for TFV and fair presentation:

> '*una rappresentazione veritiera e corretta o una presentazione attendibile*'; and
>
> '*une image fidèle ou une présentation fidèle*'.

It is noticeable that '*fedele*' does not appear in either of the two Italian formulations, although strangely it does appear in the heading above para. 46, suggesting that the translators had changed their minds and forgotten to alter the heading. Instead, there is '*attendibile*' which means[11] reliable or trustworthy. As before, in French, the word '*fidèle*' can apparently mean both 'true and fair' and 'fair'. The Italian translators discerned some difference between the signifiers but the French translators did not.

The Italian and French translations of IAS 1's PF requirement (which *are* EU-endorsed) both use the same adjectives as in the *Framework*'*s* translation of PF (i.e. *attendible* and *fidèle*). In both those cases and others,[12] the GTFV expression is translated for the *Framework* as it is in national laws not as in the Directives themselves. It seems that an effort has been made to ensure that the laws' GTFV requirements can be equated to IAS 1's PF requirement. Table 1 records the translations.

As may be seen in Table 1, the German translators have taken this to its logical conclusion. Although the 1974 draft of the Fourth Directive contained '*einen getreuen Einblick*' (a faithful insight), the Directives contain '*ein den tatsächlichen Verhältnissen entsprechendes Bild*' (a factual picture). This latter term is used in German law. The German translation of the *Framework* avoids the 'faithful equals faithful' problem seen in the French translation (above and Table 1) by abbreviating para. 46 and presenting only one phrase: the one in German law. This is repeated in the German translation of IAS 1. Thus, the issue of whether PF and GTFV are the same disappears in German.

In conclusion, on unconvincing grounds, all the recent authorities state that PF is the same thing as GTFV. The argument largely proceeds by assertion, and the citing of previous assertions.[13] The assumption that the phrases are the same is convenient since both are required for IFRS reporters. Also, it must

[11] *Collins Sansoni Italian Dictionary*, third edn, 1991.
[12] I have looked at the German and the Spanish.
[13] There is an assertion in the IASB's *Framework*, which is used as authority by Counsel (Moore, 2008). An assertion of similarity can also be found in FRC (2005).

Table 1
Translations in official documents

	Directive	*Law*	*Framework*	*IAS 1*
English	true and fair	true and fair	true and fair = fair	fair
Italian	*fedele*	*veritiero e corretto*	*veritiera e corretta = attendibile*	*attendibile*
French	*fidèle*	*fidèle*	*fidèle = fidèle*	*fidèle*
German	*getreuen* (1974) *ein den tatsächlichen Verhältnissen entsprechendes Bild* (1978)	*ein den tatsächlichen Verhältnissen entsprechendes Bild*	*ein den tatsächlichen Verhältnissen entsprechendes Bild*	*ein den tatsächlichen Verhältnissen entsprechendes Bild*

be admitted that this author is not aware of any suggestions of how PF and GTFV could or should be different in practice, except for the use of the 'override' (see below), which depends not on the words PF or GTFV but on other words surrounding them.

Other aspects of the terminology should be mentioned in order to be clear about the full context. The British Companies Acts have used the formulation 'accounts must *give* a true and fair *view*', whereas IAS 1 requires that 'financial statements shall *present* fairly' (emphases added). Incidentally, the recent Counsel's Opinion generally[14] refers to 'show' a TFV, but that does not seem different from 'give'. All the terms imply that the directors are required to ensure that the financial statements are engaged in a process of doing something. There seems to be no important distinction between them, but they are clearly less onerous requirements than that the users of the statements should *receive* a sound insight as, for example, in previous Dutch law (Zeff et al., 1992: 365) or in the German version of the 1974 draft of the Fourth Directive (see above).

Also, IAS 1[15] and recent Counsel's Opinion[16] use the terms 'present fairly' (IAS 1's prime instruction) and 'achieve a fair presentation' interchangeably. It might be possible to discern a distinction here, where the former implies 'equitable' and the latter 'clear'.

The IASB's exposure draft of a revised *Framework* (IASB, 2008, ch. 2) does not include GTFV or PF. It says (para. BC 2.41) that these are not included because they are the same as 'faithful representation', which *is* included as a qualitative characteristic. So, according to the IASB, true and fair equals fair equals faithful. This would suggest much redundancy in the English language.

The 'override' for IFRS reporters

As noted earlier, the Directives and laws also contain a feature in addition to the GTFV requirement: an 'override', that is a requirement to depart from the detailed rules of the laws when this would be necessary to achieve a TFV. In this section, it will be important to distinguish between the override in law and the override in standards, and to distinguish between the override *of* law and the override *of* standards.

One conclusion from the Opinions of Hoffman and Arden was that, since a court would be likely to hold that compliance with a standard is necessary in order to give a TFV, there was some room to depart from the details of law, especially to comply with UK standards, but there was little room to depart from the standards. That is, an override *in* law was expected to lead to overrides *of* law but not to overrides of standards.

An override (in standards of a standard) is required in the *Foreword* to UK accounting standards (para. 19) in 'exceptional circumstances', and this was inserted into FRS 18 (para. 15) in 2000. Such an override was introduced into IAS 1 (para. 13; now para. 19) in 1997 for 'extremely rare circumstances'. Evans (2003) provides a useful outline of the development of the override in IAS 1.

Alexander (1999) approved of the override in IAS 1, on the grounds that the objective of financial statements must surely be to PF rather than to obey rules. Nobes (2000) disapproved on the grounds that: (i) the override was more appropriate for law than for standards; (ii) different countries understood PF differently; and (iii) many countries had no monitoring/enforcement agency to check the proper use of the override. Incidentally, just as an override in law of standards might be an empty category (at

[14] For example, paras. 4(C), 4(G), 8(A), 8(G), 9, 18.
[15] For example, both are found in para. 15.
[16] For example, paras. 28 and 29 contrasted with paras. 42, 44, 46.

least in the UK), so an override in standards of law might be empty (because standards do not require compliance with law). For example, the use of the law's override to avoid depreciation of investment properties is an override in law of law, although the reason was to obey SSAP 19.

A difference between the override in law and that in standards concerns whether or not it is a last resort. In the Directives and in the Companies Act (as it applies to UK GAAP, i.e. s. 396), the departure is a last resort after exhausting the possibilities of giving a TFV through extra disclosures. However, this is not so clearly the case in IAS 1 (or in FRS 18).[17] IAS 1 does require extra disclosures where this is necessary in order to PF, but says that disclosures cannot rectify inappropriate accounting (paras. 17 (c) and 18). This last point can be interpreted as a rejection of the view in some continental European countries that, for example, tax-driven items in the financial statements were 'fair' once explained in the notes (Ordelheide and Pfaff, 1994: 107–108). The sort of extra disclosures intended by IAS 1 might include explanations of large disasters or surprising triumphs after the balance sheet date, which need to be explained in order to PF. Of course, these particular disclosures are already required by IAS 10.

The exact criteria for departures under IAS 1 include the existence of the extremely rare circumstances but also that compliance would be 'so misleading that it would conflict with the objective of financial statements set out in the *Framework*' (IAS 1, para. 19), which is:

> 'to provide information about the financial position, performance and changes in financial position of an entity that is useful to a wide range of users in making economic decisions.' (*Framework*, para. 12)

In other words, IAS 1's override is not a 'PF override'. The above objective is sufficiently vague that it would be difficult for a treatment to be so misleading as to conflict with it. However, IAS 1 then states that the departing entity shall disclose that it has complied with IFRS 'except that it has departed from a particular requirement to achieve a fair presentation' (IAS 1, para. 20 (b)). So, perhaps an inability to achieve a fair presentation is what is really meant; and that might be more likely to occur. By contrast, the overrides in law and UK standards are clearly TFV overrides.

The revised versions of IAS 1 (both the 2003 version and the 2007 version) raise a more complex issue because the PF override only applies:

> '… if the relevant regulatory framework requires, or otherwise does not prohibit, such a departure.' (para. 19 of the 2007 version)

It would appear that the EU or UK regulatory frameworks do not directly require such departures *from IFRS standards*, but neither do they prohibit them, so the override applies in the EU.

The legal Opinions of Hoffman and Arden dealt hardly at all with the 'override', but Moore's (2008) Opinion considers several points related to it. First, he asks (paras. 36–40) whether IAS 1's 'extremely rare circumstances' are the same as FRS 18's 'exceptional circumstances'. He concludes that they *are* the same and 'very limited indeed'. Moore does not further consider whether they are the same as the Directive's 'exceptional circumstances' and the Act's 'special circumstances'. Presumably, the convenient answer would be that they are all the same.

In the literature, there is debate about whether the Directives' 'exceptional circumstances' that require departures from law can occur across the board (e.g. non-depreciation of investment properties) or whether they must be unique to a particular company. Alexander (1993, 1996) and Nobes (1993) argue for the wider interpretation. Ordelheide (1993) and Van Hulle (1993 and 1997) argue against. In UK corporate practice, the former view held without legal challenge. For example, many companies did depart from the law in order to obey SSAP 19, as noted earlier.

An across-the-board departure from the Act's requirement to depreciate investment property buildings might be said to be an 'exceptional' or a 'special' circumstance, even though it was not 'extremely rare'. That is, departures by dozens of companies every year could still be exceptional/special if all the departures relate to the same issue, but it would be less easy to argue that these departures were extremely rare. In my view, IAS 1's criterion for departures should therefore be seen as more restrictive than those in the other documents. Evans (2003: 321) comes to a similar conclusion because IAS 1's requirement is 'far less clearly or explicitly stated'.

Moore (2008: Appendix) also refers to a decision of the European Court of Justice (ECJ), concerning a German company (the *ES Bauunternehmung* case of 2000). The ECJ held, referring to the Fourth Directive, that:

> 'The exceptional cases referred to in art 31(2) are therefore those in which separate valuation

[17] See paras. 16 and 18 of FRS 18.

would not give the truest and fairest possible view of the actual financial position of the company concerned.'[18]

Moore, with remarkable restraint, calls this 'rather opaque' and 'puzzling' (Appendix: paras. 16 and 17). To put it another way, this is a complete misunderstanding by non-British lawyers of a form of words invented by British accountants.[19] First, it is not 'the' view but 'a' view that is required; second it is not 'truest and fairest' that is required. The 'the' for 'a' error had been made before, for example, in the Spanish implementation of the Fourth Directive (Nobes, 1993: 42). This apparent[20] double error by the ECJ, if followed by other courts, would set an impractically high standard for directors and auditors and would open up a wide scope for litigation by users of financial statements who subsequently suffer loss.

A final point is that the requirement that the circumstances for departure should be 'extremely rare' is not a practicable criterion for the directors of a particular reporting entity. Whether the circumstances will be rare or not depends on the other criteria for when they should occur. Since there are no clear criteria, the requirement for rarity amounts to the standard-setters imploring the preparers not to use the override.

The IFRS override in practice

ICAEW (2007) surveyed 200 annual reports of EU listed companies relating to 2005. They found no examples of the use of IAS 1's override (p. 11). CESR (2007) do not report any examples; and technical partners[21] of audit firms cannot name any more than the two below. Nobes and Zeff (2008) looked at the audit reports of all the companies included in the main stock market indices of Australia and four EU countries, and again find no examples, although audit reports might not disclose use of the override, as explained below.

It seems that there is certainly no 'routine' use of the override in IFRS accounting, as seen for example under UK GAAP as a mechanism for departing from law in order to obey standards. However, there are two one-off examples, which are examined here: National Express Group PLC of the UK, and *Société Générale SA* of France. Incidentally, these examples are both expressed as overrides of IFRS through the mechanism of IAS 1 rather than through the mechanism of law. That is, technically, the context is PF rather than GTFV, although this would not be evident in French, as noted earlier.

In the case of National Express (NE), an IAS 1 override was used for the 2005, 2006 and 2007 statements. In each case, the auditors, Ernst & Young, gave an unqualified audit opinion on TFV in accordance with EU-endorsed IFRS, and on compliance with the Companies Act and the IAS Regulation. Indeed, assuming that use of the IAS 1 override is appropriate, a clean audit opinion can also be appropriate.

The override concerns the group's pension obligation. The directors explain[22] that NE owns train operating franchises. As such, it has defined benefit pension obligations for the related employees. Industry practice is for owners to fund plans while they own a franchise, and then to transfer any pension deficit to a new owner. NE calls the obligation 'that arises under the terms of each franchise agreement' a 'constructive obligation'. It contrasts this to the 'legal obligation' to fund a deficit that might potentially[23] arise (but never has before) under certain conditions at the end of a franchise. NE says that it accounts for the constructive but not the legal obligation, and that this involves a departure from IAS 19 in order to PF.

Incidentally, obligations arising under the terms of an agreement are not 'constructive' as NE calls them but 'legal' (IAS 19, para. 52). Whether legal or constructive, an obligation should be recorded at its present value (IAS 19, para. 54), which involves estimating future cash outflows and discounting them. This requires estimations of such data as future salary increases, mortality rates and employee turnover (IAS 19, paras. 69, 73, 88). For example, if a company expected all the employees in its defined benefit plan to leave before

[18] As quoted by Moore (2008, Appendix: para. 16).

[19] Rutherford (1985) records that the *words* 'true and fair view' were suggested to the Cohen Committee on company law reform (that led to the 1947 Act) by the Institute of Chartered Accountants in England and Wales. There is some detail on this in Parker and Nobes (1994: 1–2). The *concept* that there should be some goal beyond accuracy, correctness or compliance with rules can also be said to be a British invention rather than a continental one, given that it is not generally found in the laws of EU member states until the 1980s or later (see Nobes, 1993).

[20] As noted earlier, one must allow for different professional registers and different degrees of flexibility in different languages. However, from the perspective of English law and an English court dealing with such a case, this conclusion is erroneous, as English Counsel suggests.

[21] Interviews with Andy Simmonds of Deloitte on 10 July 2008, Peter Holgate of PricewaterhouseCoopers on 25 June 2008 and Robert Overend of Ernst & Young, 21 August 2008.

[22] See, for example, notes 2 and 35(b) of the 2007 Annual Report.

[23] NE (note 35(b) of the 2007 Annual Report) refer to an opinion from legal advisers about a liability that could theoretically arise if subsequent franchisees did not take over the deficit. However, this would break contracts, and has not been experienced in practice.

their benefits had vested or to die on their retirement days, then the pension obligation might[24] be measured at zero. In conclusion, if particular obligations are not expected to lead to any payments, they should be measured at zero. So, NE is right to focus on what it calls the constructive obligation. However, I suggest that this does not require a departure from IAS 19, and therefore does not need the use of the override in IAS 1. The 'legal' obligation should indeed be taken account of, but measured at zero.

In support of this conclusion, one can look at the treatment of similar[25] defined benefit obligations of train operating companies in other groups. For example, FirstGroup plc (audited by Deloitte) and Stagecoach plc (audited by PricewaterhouseCoopers) each state[26] that the company recognises the obligation that it 'expects to fund'. NE and FirstGroup, but not Stagecoach, provide disclosures of what the financial statements would have looked like if the obligations that they do not expect to pay for had been fully accounted for. So, all three companies account in the same way, but NE thinks that it needs to depart from IAS 19 to do so, and FirstGroup thinks that it needs to give an extra disclosure to PF.

The other case involving a PF override concerns the unauthorised trading at *Société Générale* that dominated the financial news in early 2008. The directors of the company explain in the 2007 Annual Report (note 40) that, in accordance with IAS 1, they are departing from IAS 10 ('Events after the balance sheet date') and from IAS 37 ('Provisions, contingent liabilities and contingent assets') in order to PF. They say that, if they had known of the unauthorised trading, they should (according to the standards) have recorded a gain of €1,471m in 2007. On 19 January 2008 onwards, the unauthorised trading (some of which had been conducted in that month) was uncovered. It was unwound in a falling market, creating a loss of €6,382m.

Société Générale explain that, in contravention of IAS 10 (para. 3), this unwinding was treated as an 'adjusting event';[27] and in contravention of IAS 37 (para. 14), a provision was shown in the 2007 balance sheet even though there was no liability to anyone at that date. As a result, *Société Générale* charged a net loss of €4,911m in 2007.

It is clear why the directors might have wanted to do this. First, it got the bad news out of the way rather than repeating it when the 2008 results were announced in early 2009. Second, it bolstered the evidence that led to the result that: 'The loss thus recognized has been considered tax deductible.' (Note 40).

We can now ask whether this complies with IAS 1. First, were there 'extremely rare circumstances'? The company refers to trading activities 'of an exceptional scale', and must hope that the loss will indeed prove to be 'extremely rare'. The second condition is that compliance would be 'so misleading that it would conflict with the objectives of financial statements set out in the *Framework*' (para. 19). As explained earlier, this is taken to mean that the statements would not have presented fairly.

The company is required (IAS 1, para. 20(c)) to explain why compliance would be 'so misleading'. The nearest it came to doing this was to say: 'In order to provide more relevant information for understanding the financial performance of the Group in 2007 . . .'. Of course, non-compliance does not do that in this case. The loss occurred (in both the unrealised/unsettled sense and in the realised/settled sense) in 2008.

Fearnley (2009) writes in favour of *Société Générale*'s treatment and asks: 'How can a sensible person believe it is right to treat unrealised gains on securities held for trading as distributable profits . . . ?' However, this question contains two misunderstandings. First, there is no clear definition of 'unrealised'. It has different meanings in different countries. For example, in the UK, we have for decades been taking gains on unsettled monetary balances to the profit and loss account (under SSAP 21 or now FRS 23). We have been treating them as realised for legal purposes. Approximately speaking, if accountants say that gains are realised, then they are (CA 1985, s. 262(3); CA 2006, s. 853(4)). The ICAEW (2008: 9) regards fair value increases on trading instruments as realised. So, sensible accountants can believe it is right. Second, the financial statements in question were consolidated, so they can tell us nothing about distributable profit. There is no such thing as a distributable profit of a group. *Société Générale*'s distributable profit is

[24] Assuming, for example, that no lump sums were due to an estate and that pensions did not transfer to spouses.

[25] The technical partners of the three audit firms mentioned in this section (see footnote 21) believe that, as all the obligations arise under rail franchise agreements, the facts of the cases are likely to be similar.

[26] Stagecoach, 2008 *Annual Report*, p. 51; FirstGroup, 2008 *Annual Report*, p. 88.

[27] One that provides 'evidence of conditions that existed at the end of the reporting period . . .'. It could perhaps be argued that the 'conditions' were the unauthorised trading. However, if this had been discovered (and closed down) by the end of 2007, a gain would have been recorded in 2007 whereas SG charged a loss.

calculated under French law relating to the parent company financial statements. Anyway, IFRS is not designed to show distributable profits any more than it is designed to show taxable profits or regulatory capital for banks. It would be wise to have different rules for all these different purposes.

Before turning to the reaction of the auditors, it is relevant to note that the company had pre-cleared the use of the override with both the banking supervisor and the stock market regulator in Paris (Annual Report, note 1), both of which organisations would have reasons for trying to 'draw a line under' the affair.

Large French listed companies are required[28] to appoint two auditors. Some, like *Société Générale*, choose two Big Four firms; in this case, Deloitte and Ernst & Young. Faced with the management of one of the largest and (previously) most respectable companies in France and compliant governmental regulators, the auditors would have been in a difficult position. Once one of the firms had accepted the need for an override, the other would have presumably found it especially difficult to disagree. The joint audit report (pp. 266–267) mentions the override twice but states that this is 'Without qualifying the opinion' on 'true and fair view ... in accordance with IFRS as adopted by the European Union'.

In summary, *Société Générale* broke several accounting standards, but it does not explain why it was impossible to PF by waiting until 2008 to record losses that did not exist by the end of 2007 (in some cases relating to contracts that did not exist by the end of 2007). Some might wish to argue, under a quite different accounting system, that the part of the loss that related to contracts of 2007 should be recorded in 2007, even though the contracts were in profit at the end of 2007. However, PF and GTFV exist in a context (Hoffman and Arden, 1983: paras. 8–11; Arden, 1993: para. 4; Alexander, 1993: 297), and the context was IFRS. This is not to say that complying with IFRS will automatically cause statements to PF. It is to say that a departing company would need to make a strong case that it is impossible to PF (in the general context of IFRS) by complying with the rules of IFRS. No case was made. Incidentally, the rules (IAS 10) require disclosures in the 2007 statements concerning the events of January 2008, but not in an attempt to correct the financial statements of 2007, rather to give useful information for interpreting those statements by decision-making investors.

[28] *Lois sur les Sociétés Commerciales*, art. 223.

The conclusion from this section is that use of the PF override is very rare in IFRS practice. In my opinion, in the first case above (National Express), the presentation was fair, but this could have been achieved without using the override. In the second case (*Société Générale*), fairness could have been achieved by complying with the standards, so the override should not have been used. This supports the case against the override made by Nobes (2000) and the decision of the FASB (2008) to exclude the override, i.e. on the rare occasions that the IAS 1 override is used, it is used wrongly.

A critique of Counsel's Opinion

The original Opinion of Hoffman and Arden (1983) dealt primarily with the extent to which an accounting standard could restrict usage of the options allowed within the law. The context was the attempt by the standard-setters to impose current cost accounting. The conclusion was that standards would be persuasive in a court that was seeking to establish the practices necessary for a TFV to be given. Arden (1993) focussed especially on the effects of the *Companies Act 1989* and the new standard-setting machinery from 1990. She concluded that standards had been strengthened. Neither Opinion dwelt at any length on the 'override'.

As noted above, the FRC obtained and published an up-dated Opinion on the TFV from Michael Moore QC (hereafter, 'Counsel'). Some aspects of this have been referred to above where relevant. This section draws these references together and then adds further comment.

Counsel concludes (Moore, 2008: para. 4B) that the requirement to GTFV remains supreme. It has been supported in UK and EU courts (see below) and by the new s. 393 of the Companies Act. Counsel believes (para. 4C) that GTFV is not different from PF, although that has been questioned above.

Counsel notes (para. 4E) that the override has been preserved. Incidentally, Counsel repeatedly refers to a company's 'ability' to depart from standards (paras. 4E and 37) and states that IFRS 'permits' departures (para. 36). The relevant section of the Opinion (paras. 36–40) is headed '... when departures ... are permitted'. However, this is misleading: no discretion is allowed in law (CA 2006, s. 396) or by FRS 18 (para. 15) or by IAS 1 (para. 19). If an accounting treatment would enable financial statements to GTFV/PF, a departure is forbidden; if it would not, a departure is *required*. Counsel then goes on to say that, where compliance would not enable PF, departure 'may be necessary' (para. 38) and 'is appropriate' (para. 40) but still avoids the clearer 'is necessary'.

Counsel concludes that departures should be 'very limited' (para. 4F) or 'very limited indeed' (para. 40), which presumably are intended to mean the same thing. However, there is no discussion of the difference between overrides of law and overrides of standards. As noted above, Counsel's conclusion that the UK's 'exceptional' is the same as IFRS's 'extremely rare' is not convincing.

Counsel also says that:

> '... as accounting standards have become more detailed ... the scope for persuading a Court that financial statements which do not comply with relevant accounting standards give a true and fair view, or achieve a fair presentation has become very limited ...' (para. 44)

At first sight, this seems counter-intuitive. If standards were still broad-brush and lacking in detail, there would be fewer requirements that could potentially need to be departed from. On the other hand, a broad-brush requirement might generate the need for departures because it did not allow for specific exceptions regarded as necessary for a TFV. However, Counsel is not commenting on the trend in the quantity of potential *causes* for departures but rather on the trend in the scope for persuading a court that departures are necessary. It is certainly plausible that the instructions of the standard-setters will be taken more seriously by the courts if the standard-setters show that they have already considered special/exceptional circumstances, either by allowing exceptions or by discussing in a *Basis for Conclusions* why they are not allowed.

The court cases considered by Counsel (paras. 11–17) include five British ones that were decided after the Opinions of Hoffman and Arden. Counsel believes that these confirm that the courts 'rely very heavily upon the ordinary practices of professional accountants', and confirm 'the likelihood that a Court would hold that compliance with a standard is necessary to meet the true and fair requirement' (para. 8).

Counsel also considers two cases concerning German companies that had come before the ECJ. One of these ('*ES Bauunternehmung*') is referred to above. The other ('*Tomberger*' of 1996) also confirms the primacy of the TFV. However, Counsel notices (Appendix: para. 10) another interesting linguistic problem. The Advocate General had concluded that:

> 'The principle requires the balance sheet to be drawn up so as to give not only a true (even in the relative sense in which that adjective is traditionally and necessarily used as regards balance sheets) but also a fair (essentially with regard to the good faith of the persons drawing up the balance sheet) representation ...'

Counsel notes that the Advocate General's understanding of 'fair' is not what 'might be understood by an English lawyer'. Indeed, the requirement is not that the preparers must act in good faith but the more demanding requirement that the presentation must not be misleading. This is further evidence of the apparent[29] misunderstanding, noted above, by continental lawyers of a phrase invented by British accountants. One must admit, though, that an exact and settled meaning of the TFV does not exist among British accountants.

In sum, Counsel confirms the need for directors and auditors to check that statements GTFV/PF, independently from compliance with rules. Counsel also confirms the continuation of the override but notes that it is very limited. Counsel also points out some doubtful aspects of ECJ opinions and judgments.

However, in my view, Counsel is not persuasive on other issues: that TFV is the same as PF, and that 'exceptional cases' (FRS 18) are as restrictive as 'extremely rare circumstances' (IAS 1). On the latter subject, it would have been useful if the Opinion had discussed the difference between departures from law and departures from standards.

Along the way, I have noted examples of loose terminology in the Opinion (e.g. 'permits' departure instead of 'requires' it; and see the points in footnotes 10 and 14; and there are others).[30] Normally one might let these pass. However, the key point about the Opinion is its interpretation of words, so precision with words is vital, at least in an English law context. Given that the Opinion has been published by the FRC and will be a continuous source of official guidance, these lapses are of importance.

The earlier Opinions of Hoffman and Arden are iconic because they are convincing. They are also elegantly written. For example:

> 'The SSAP is intended to crystallise professional opinion and reduce penumbral areas in which divergent practices exist and can each have claim to being "true and fair"' (1983, para. 10);

> '... the provisions of the Schedule are static

[29] See footnote 20.

[30] For example, readers of the Opinion should note that references in paras. 16 and 17 to paras. 6E and 6 should be to 8E and 8.

whereas the concept of a true and fair view is dynamic' (1983, para. 13);

'Thus what is required to show a true and fair view is subject to continuous rebirth' (1993, para. 14).

If others concur about the examples of unconvincing conclusions and the terminological lapses in the latest Opinion, it might not achieve the iconic status of its predecessors. It should be mentioned, though, that even the 'iconic' Opinions do not address the central issue of what directors and auditors should do to test that financial statements GTFV or PF.

US developments

Changes in the content of IFRS have, at least since 2002,[31] been dominated by convergence with US accounting. Consequently, US developments in the area of PF are likely to be relevant to further revision of IFRS.

In the above section on 'True, fair, presentation, and view', the US approach to PF was introduced, including the conclusion that PF in US practice has been regarded as weaker than GTFV in UK practice. Furthermore, unlike the position in the UK under either UK standards or IFRS, there has been in practice no 'override' in US GAAP. This feature is explored by Alexander and Archer (2000) and by Evans (2003: 320).

Until 2008, there was no specific mention of an override in US official literature directed at companies, although guidance to *auditors*[32] instructs them not to give an opinion that financial statements conform with GAAP if there is a departure from GAAP other than in 'unusual circumstances' that would make the statements misleading. This does not seem to be a particularly high hurdle for departures, but in practice an override has not been used, because it is addressed to auditors not to company management and because it is presumed that the SEC would not accept departures (Van Hulle, 1997: 718; Evans, 2003: 320; FASB, 2008: para. A.11).

The FASB has now issued SFAS 162 as guidance to companies on 'The hierarchy of generally accepted accounting principles' (FASB, 2008). This does not mention PF (except in Appendices that are not part of the standard). Furthermore, the FASB explains (para. A.12) that it has deliberately excluded the possibility of an override. This clarifies the position and renders all speculation on the applicability of the override in the US of historical interest only.

It also makes the positions of the IASB and the FASB more starkly opposed, since the IASB recently confirmed[33] the importance of the override. However, past and present American members of the IASB have questioned[34] the propriety of the override in the light of its use by *Société Générale*. It seems likely that, when[35] IFRS becomes accepted or required by the SEC for reporting by US corporations, the PF override in IAS 1 will specifically be made inoperative by arranging for the regulatory regime not to accept it (IAS 1, para. 19). This has already been done, for example, in Australia.[36]

Sir David Tweedie championed the insertion of the override in IAS 1, against the arguments of other Anglo-Saxons.[37] He is due to retire as chairman of the IASB in 2011. It seems plausible that he will be replaced by a national from another country with a long tradition of standard-setting and of opposition to the override, e.g. Australia, Canada or the US. This suggests that the days of the override are numbered.

Conclusions and implications

This paper examines eight developments of 2005–2008 that affect the GTFV or PF requirement in the context of IFRS reporting by UK companies. These have not been analysed in previous literature.

IFRS reporters must now both GTFV and PF, and auditors must, in effect, give an opinion on both. All the regulatory authorities conclude that GTFV is the same as PF. However, this is not supported in the academic literature, and the arguments for the conclusion are still flimsy despite recent developments. An investigation prompted by Counsel's reference to translations of GTFV and PF in IASB documents reveals international attempts to ensure acceptance of the convenient conclusion that PF equals GTFV.

There is much literature on the TFV override in law, and some literature on the PF override in IAS 1. This paper concludes that there are several import-

[31] This process was officially inaugurated by the 'Norwalk Agreement' between the IASB and the FASB in 2002.

[32] Rule 203 of the AICPA's *Code of Professional Conduct*.

[33] For example, in the *Basis for Conclusions* (paras. BC 23–30) in IAS 1 of 2007.

[34] Tony Cope and John Smith; see Norris (2008).

[35] In August 2008, the SEC announced a proposal to require IFRS by 2014, and for some companies to allow it earlier than that.

[36] Paragraphs 17 to 20 of the pre-2007 version of IAS 1 are not included in AASB 101 because they are inconsistent with the Corporations Act.

[37] Camfferman and Zeff (2007: 391) record opposition from Australia and the US, and even from the other half of the UK delegation (i.e. the present author).

ant differences between the overrides in law, IAS 1 and FRS 18. Strictly, the override in IAS 1 should not be described as a PF override at all. This contrasts with the updated Counsel's Opinion, which does not discuss the differences between law and standards, and concludes that IAS 1 and FRS 18 have the same override. Several apparent misunderstandings of the TFV by the ECJ are examined. The implications are extensive. Legal opinion, especially that of the ECJ, would suggest that the PF override, although rare, might be justified rather more often that it has occurred in practice so far.

Two examples (perhaps the only two examples) of use of the PF override in IFRS were examined, with the conclusions that the UK case involved proper accounting but did not need the override, and the French case involved improper accounting and should not have used the override. The implication is that, on balance, the IAS 1 override does more harm than good, and should be removed.

Next the updated Counsel's Opinion was examined. One can agree with Counsel that TFV remains supreme. However, as noted earlier, Counsel is less than wholly convincing that GTFV equals PF or that the circumstances for the override are the same in various regulations. Other aspects of the Opinion were also questioned. The implications are that the Opinion might not become iconic like its predecessors, and that the FRC might at least wish to correct some aspects of the Opinion as published on its website.

In the US, the FASB has at last made it clear that there is no PF override for companies. Indeed, there is no PF *requirement* for them. The implication is that the FASB will argue for the removal of the override in IAS 1 as part of convergence.

Although this paper has been set in the specific context of UK companies reporting under IFRS, many of the above conclusions and implications are relevant outside the UK, especially for companies and auditors elsewhere in the EU.

Research issues

This paper has analysed and synthesised a number of technical developments. It is hoped that this will be useful to researchers in the field of financial reporting by helping them to be precise about the institutional setting. Without this precision, hypothesis development might go awry, or data might be misinterpreted.

As part of the above, some predictions have been made which can be assessed in due course. For example, it has been suggested that US regulators will not allow the PF override when they impose IFRS, and that the IASB will abandon IAS 1's override. In addition, some propositions have been put forward that can be scrutinised and assessed by other researchers. First, it is proposed that, to the extent that the PF override is used, it is more often misused than used correctly. Second, IAS 1's 'extremely rare' circumstances should be seen as more restrictive than the 'exceptional' or 'special' circumstances found in other requirements. Third, Counsel's Opinion of 2008 is less convincing than those of 1983 or 1993.

Other hypotheses have been raised above, directly or implicitly, that can be the subject of empirical research. Initially, I present the following in the context of UK listed companies:

H1: Before 2005, the TFV override was used more often to depart from law than to depart from standards.

H2: The TFV override of law is used less under IFRS than it was under UK GAAP.

H3: The PF override is used less than the GTFV override of standards was.

H4: UK auditors tend to see TFV as a portmanteau term more now than they did before 2005.

H5: UK auditors (compared to French and German auditors) perceive TFV as nearer to 'not misleading' than to 'in accordance with the facts'.

H6: The degree to which investors perceive GTFV to be a stronger criterion than PF has decreased.

H7: Companies listed on US exchanges have a greater tendency than others to disclose compliance with IFRS and to seek audit opinions on this (in addition to reference to EU-IFRS).

There is already evidence, referred to above, that H1 to H3 would probably be confirmed by formal testing.

Most of the hypotheses could also be tested as they stand for some other jurisdictions, e.g. New Zealand. With some amendment, some of them could be applied in other EU countries. Scholars from Roman law countries might wish to investigate whether similar developments and debates to those above are occurring in their countries, and if not, why not?

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