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Integrating human rights in emerging regulation of Corporate Social Responsibility: The EU case

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Key words: Corporate Social Responsibility (CSR), human rights and business, reflexive law, juridification of CSR, discourse

Abstract: This article analyses the EU Commission’s policy based approach to regulating Corporate Social Responsibility (CSR) and the role of international human rights law as a normative source for the regulatory output in two initiatives launched in 2002 and 2006. The article argues as starting point that the understanding of CSR as ‘beyond law’ tends to shroud the contributions that international human rights law and legal theory based regulatory technique lend to CSR normativity and regulation, not only outside the EU but also within. The EU experience shows that due to power relations and their impact on multi-stakeholder negotiations and their outcome, this potential does necessarily unfold. It also shows that the procedural design of reflexive multi-stakeholder regulatory processes is significant for bringing forth the normative contributions of international law to CSR in public-private regulation. Finally, the article suggests that within the public policy context in which EU CSR regulation is emerging, the normative role of international human rights law which the Commission suggests for CSR in Europe and the application of the reflexive regulatory technique contribute to a substantive as well as procedural juridification of CSR, especially in the formative stage of defining CSR normativity. The latter adds a significant new perspective to the understanding of CSR and its relation to law, although it need not conflict with the understanding of CSR being ‘voluntary’ in the sense of action beyond direct legal obligations.

1. Introduction

According to the concept of Corporate Social Responsibility (CSR), a company is expected to take responsibility for its social and generally also its environmental impact on society. ‘Social’ CSR...
issues are often understood as the company’s relationship to and impact on employees and the external community. In many cases in corporate, NGO and emerging public policy and legislative practice, this aspect of CSR is defined with reference to international law instruments on labour rights and human rights.

In 2002, the EU Commission launched a *Multi-Stakeholder Forum (MSF) on CSR* with an aim of formulating a European guiding framework for CSR. In 2006 the Commission launched a new initiative, the *CSR Alliance*, designed as a learning forum for European companies. The MSF and the CSR Alliance are primarily procedural but with normative objectives. Both are based in EU policy but the procedures as well as outputs have a degree of a soft law character. In both cases, human rights and the consideration of international human rights instruments feature strongly among the normative objectives defined by the Commission in Communications which back the initiatives. Analysing the processes of the MSF and the Alliance as public-private regulation of CSR, this article tries to explain the role which international human rights law was awarded as a normative source in the MSF as well as for the launch of the Alliance.

Normally held to be action beyond legal compliance, CSR has tended to be seen to be an issue of self-regulation within each company. At the same time, CSR has become adapted by political bodies as a means to implement public policy objectives. Particularly during the last decade, intergovernmental as well as national level public institutions have launched initiatives to influence corporate self-regulation both in terms of substance and through establishing procedures to promote companies’ endeavouring into such substantive self-regulation, including through participation in public-private co-regulation. As described elsewhere, at the international level, the United Nations (UN) Global Compact which comprises ten principles building on international law on human rights, labour standards, environmental sustainability and anti-corruption, is an example (see Buhmann 2009, Buhmann 2010). The EU Commission’s efforts, starting with the MSF in 2002 and continued with the CSR Alliance from 2006, are another example.

On that backdrop, this article analyses the EU Commission’s attempts at regulating CSR through promoting procedural and substantive business self-regulation and public-private co-regulation, and particularly the role awarded to international human rights law. The EU MSF on CSR and the CSR Alliance serve as cases for the analysis.

CSR has come to be understood as mainly action ‘beyond legal requirement’. Unfortunately, that approach has also led to an idea that CSR and law are distinct. As part of its general argument, this article argues that international human rights law has much to lend to defining and developing CSR in a European context, and that implementation of human rights may also assist in implementing CSR policy goals. This applies not only with an extra-European focus on working condition in the third world, but also in an intra-EU context addressing the so-called ‘Lisbon’ policy goals of inclusiveness and employability to which the EU Commission paid particular attention especially in the later stages of the MSF.

The article argues that a failure to reflect the contributions of international human rights into the outcome of the MSF was due in part to the procedures of the MSF which did not sufficiently handle power disparities between participants in the process of negotiation. Further, it argues that partly based on this lesson, regulation of CSR through public-private processes needs to handle power disparities between parties through careful design of procedure, and that reflexive law, although originally developed to handle regulatory dilemmas at national state level, is applicable
at the intergovernmental level at which EU CSR regulation takes place. Finally, the article suggests that within the public policy context in which EU CSR regulation is emerging, both the normative role of international human rights law which the Commission suggests for CSR in Europe and the application of the reflexive regulatory technique contribute to a substantive as well as procedural juridification of CSR, especially in the formative stage of defining CSR normativity. The latter adds a significant new perspective to the understanding of CSR and its relation to law, although it need not conflict with the widespread understanding of CSR being ‘voluntary’ in the sense of action beyond obligations which apply directly to a company under national public law.

This article differs from the mainstream of CSR research through its public regulation perspective on CSR. It differs from the mainstream of articles on law and CSR by focussing on the process aspect of the formulation of normative directives, and from the mainstream of articles on policy issues and human rights in a CSR context through its focus on the little explored EU efforts to promote human rights normativity in CSR. Articles (MacLeod 2007, Oxford Pro Bono Publico 2009, compare Voiculescu 2007) which have addressed the latter tend to focus on the specific (and limited) directive norms of EU regulation on CSR.

The article is structured as follows: Section 2 provides a brief introduction to the EU’s emerging regulation of CSR. This is followed by a presentation of the theoretical and methodological framework for the analysis and a justification for the adopted approach which combines international human rights law, reflexive law and discourse analysis. Section 3 places the concept of CSR in the context of law and legal scholarship, including international law and other initiatives which influence CSR normativity. Section 4 sets CSR normativity into a human rights law and policy context with particular regard to EU aspects. Section 5 on the EU MSF on CSR and CSR Alliance provides the background (5.1.) and case studies of the MSF (5.2.) and the CSR Alliance with particular focus on the launch of the Alliance (5.3.) Section 6 argues the relevance of the theoretical approach of reflexive law for analysis of the MSF and the CSR Alliance. Drawing on this and the case studies, section 7 discusses discourses on the form of regulation and the role of international human rights law which took place in the context of the MSF and which framed the establishment of the Alliance. Section 8 concludes and sets out some perspectives for further research.

In accordance with EU usage and much general CSR work, in this article the term ‘company’ refers to all companies, both transnational and others, regardless of sector or country of domicile or operation, size, ownership and structure. Except where set out in specific instruments, such as the European Parliament proposal for Codes of Conduct for European Multinational Corporations or the UN Draft Code of Conduct on Transnational Corporations, the term ‘corporate’ is used in the non-technical sense, interchangeably with ‘company’, regardless of the company form. ‘Corporate Social Responsibility’, therefore, in this article does not refer only to social responsibility (or responsibilities) of corporations, but of companies in the above general sense. The ‘EU Commission’ is used as a general reference to the Commission of the European Communities and the Commission of the European Union.

2. Background, theory and method

3 For a related usage and inspiration for the usage in here (employing ‘business enterprise’ rather than ‘company’), see Ruggie (2010).
In 2002, the EU Commission launched a *Multi-Stakeholder Forum (MSF)* on CSR with an aim of formulating a European guiding framework for CSR. At the outset, the Commission suggested strongly that the European CSR framework which was to be developed by the MSF be based on internationally agreed principles on human and labour rights. The final product, however, was much less strong in references to international human rights law than what could have been expected based on indications from the Commission and other stakeholders and the strong role which human rights law and practice generally hold in Europe. The MSF was technically headed by the Commission but industry, employers, employees and NGOs were main participants.

In 2006, the Commission launched a new CSR initiative, the *CSR Alliance*. The CSR Alliance was announced to be a learning forum comprising the Commission and European companies with the aim of exchanging best practice. At the launch of the Alliance, the Commission again suggested international human rights law as a strong normative source for CSR.

The launch of the MSF was based on a Commission Green Paper on a European Framework for CSR (Commission 2001), and a Commission Communication (Commission 2002). The Green Paper and the Communication were formulated, at least in part, on the background of a 1999 Resolution from the European Parliament (European Parliament 1999), which had called for Codes of Conduct for European Multinational Corporations, as well as the European Strategy on Sustainable Development (‘the Gothenburg strategy’) (Commission 2001a). The 1999 Resolution mentioned core labour standards, human and children’s rights as topics in need of attention through regulation of European companies when acting outside the EU, particularly in developing countries. The CSR Alliance was announced in a 2006 Communication (Commission 2006), the Commission’s first Communication on CSR after the final report of the MSF in 2004. None of those instruments – the Green Paper, the Communications or the European Parliament Resolution – are hard law. However, they have a certain soft law effect pertaining to emerging EU regulation of CSR.

Human rights are often considered part of CSR. However, the insistence by the EU Commission and many others that CSR is ‘voluntary’ without nevertheless clearly stating what precisely this entails with regard to law and legal requirements, tends to shroud the contributions that international human rights law may make to CSR normativity.

For the purposes of this case study based analysis, international human rights law is the overall normative point of reference with the purpose of analysing the EU Commission’s approach to making companies take sources of international human rights law (including international labour law) into account as a normative foundation for their self-regulation on CSR, and to draw lessons

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3 For a discussion on the soft law character of Commission Green Papers and Communications see Senden (2005), esp. at 23-24.

4 Apart from the CSR instruments mentioned in this article which define ‘social’ CSR issues with reference to human rights and labour law, in this author’s experience, human rights feature strongly in the CSR policies and perception of many Nordic and European companies. In this, Nordic and European companies and the regional context possibly differ from that of other regions, such as the United States and parts of Asia. This may partly explain why Florian Wettstein in a 2009 article argues that human rights concerns have not traditionally been seen as a part of CSR, or as a part that warrants special attention, a view with which this author disagrees on this as well as a number of other grounds which the current article does not allow for elaborating, although this author agrees with a number of other points made by Wettstein (see Wettstein 2009 esp. from 142). In addition, Wettstein’s analysis which refers the EU Commission’s 2001 Green Paper on CSR (Commission 2001) appears to overlook the significance which human rights hold in the Green Paper.
on how this may be done effectively through soft public-private regulatory schemes. The analysis particularly considers the normative role of international hard and soft law instruments on human rights with regard to the EU MSF and CSR Alliance. It also discusses the inter-relationship between objectives of a political nature which are addressed directly through the EU initiatives, and specific human rights standards. These are argued to be complementary for the purpose of Commission CSR objectives as well as elements of human rights implementation in EU member states and beyond.

With the exception of law-based requirements on CSR reporting which are found in some European and other states, CSR regulation is generally not subject to regulation in conventional legislative texts. For this reason, ordinary preparatory works for legislation are also scarce. For a study of the development of CSR normativity in a public-private regulatory context, statutory texts and case law are so scarce that other forms and sources of data materials must be identified to provide an empirical basis for analysis. This is particularly so in an EU context because so far, the EU has shunned the development of conventional EU law on CSR. The study on which this article builds on, therefore takes inspiration from discourse theory and method as a supplementary method for data collection and analysis. At an overall level, discourse theory and discourse analysis are concerned with analysis of power relations and the role (and use) of discourse to shape society, including politics and ideas on what is appropriate conduct in a social setting. Discourse theory ranges from very abstract theories of power to very concrete methods for textual analysis, often applied in some type of combination. Collection of the empirical data (texts) which form the body of the two cases on which this article builds has been based on a discourse theory inspired textual reading of official EU documents related to the MSF and the establishment of the CSR Alliance as well as speeches, and reports produced as part of these initiatives. The analysis is also discourse analysis inspired in the sense that power relations are a main point of focus and serves as explanation for the outcomes of the MSF in relation to the construction of the concept of CSR. This analysis focuses on the role to be played by international human rights law for a European framework on CSR as a constitutive element of the CSR construct, and on the construction of CSR as ‘voluntary’ or ‘mandatory’. It should be noted that the study is not, however, a fully-fledged discourse analysis.

The application of discourse analysis to legal studies is a relatively novel but not untested method in legal scholarship (see for example Holdgaard 2008, Kjær 2002, Koskenniemi 1989, Kennedy 1987, and compare Linderfalk 2009 and Perez 2004). A discourse analytical approach to studies of CSR in a legal scholarship based context has also been undertaken in a couple of other instances, notably a legal-anthropological study of language at CSR meetings and CSR reports by Conley and Williams (2005). The relevance of the approach is also underscored in a recent study which recognizes the speech act quality of corporate codes of conduct (Herberg 2008, at 24). With a related but also different approach from the one undertaken in here, another recent study by Koudiadaki on reflexive law and the implementation of EC Directive rules on employee consultation in Britain applies textual analysis to provide contextual understanding (Koudiadaki 2009).

In the current article, the textual data serves as empirical data much the same as preparatory texts for statutory or other regulation serve in many other legal studies. The application of discourse theory and method on which the in the current article draws has served as a method for reading

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5 It is likely that a different basis for analysis could be found within jurisdictions with developed CSR legislation and/or case law, e.g. in the United States case law based on the Alien Torts Claims Statute.
statements produced and presented during the MSF process. The method of textual reading is inspired by Norman Fairclough’s critical discourse theory and textual focused method (see for the general approach which has inspired this study, inter alia Fairclough 2003, 2001, 1995 and 1992). In the current context, however, it does not focus on specific linguistic features but on those linguistic parts of the statements which specifically seek to shape the construction of the CSR concept in the European context, with particular focus on the role to be played by international human rights law as part of the normative construction of CSR and CSR as ‘voluntary’ or ‘mandatory’.

Fairclough’s theory is normally applied in a political science context with a view to analysing power relations and how language creates or shapes social events and features. In the context of the analysis informing this article, this has been complemented by the approach of Ernesto Laclau and Chantal Mouffe who argue that discourses are modalities for acting out ‘struggles’ to achieve hegemony in terms of deciding the substantive contents of terms etc. (see for example Andersen 2003, Collin 2003, esp. at 98-110). In the context of constructing CSR within the EU MSF, CSR as a concept is a ‘floating signifier’. It is a value laden concept which, however, lacks a precise definition. Various stakeholders, some of which have been included in the EU MSF, struggle to gain impact to fix the normative substance to be connected to CSR in the EU context. In this article, discourse analysis is employed in a legal scholarship context which sets it apart from the political science context but still contributes to understanding the Commission’s and MSF participants’ struggles to determine what is to be understood normatively by CSR in the EU and for EU based companies. Discourse theory and analysis provides a way to identify and read texts to understand how their positions and arguments impact on the end normative result, that is, the way in which CSR as a normative concept is constructed through the EU MSF process. In the context of the theme of the study, the discourse theory inspired approach also adds theoretical and informing perspective to the analysis of the argumentative struggle between stakeholders. That is of particular relevance in view of the attention paid by reflexive law theory to balancing power relations (see below in this section and the section on reflexive law and below in sections 6-7).

In terms of specific method, empirical data has been gathered through initial identification of texts produced as part of the MSF and the CSR Alliance set-up and processes. The texts have been identified through the website which the EU Commission has established on CSR. The texts have been subjected to a discourse analysis inspired textual reading in which the statements have been studied, particularly with regard to their arguments in favour or against international law as a normative source for a European guiding framework on CSR, and general use of reference to international human rights law, and the form of regulation which CSR in Europe should be subjected to. The analysis in here is based on a larger study. Space restraints do not allow the rendering of all relevant quotes in this article. Instead, selected quotes and summaries of longer text sections substantiate the analysis of the case studies.

Following the text-based description and preliminary analysis of the MSF and the CSR Alliance in sections 5.2. and 5.3., the EU Commission’s approach to regulating CSR is analysed in section 6 from the perspective of reflexive law. Reflexive law is a both a theory and a regulatory strategy, based in legal/socio-legal theory. Reflexive law is a process oriented legal theory. The terminology

7 See footnote 1.
of reflexive law refers to learning and exchange between social sub-systems of their expectations and demands of each other as well as best practice, and other modalities to support reflection within and between social sub-systems. Reflexive law assumes reflection within public authorities on their own regulatory capacities, followed by their setting up procedural institutions to promote reflection among the corporate sector and/or others, to internalize (and further reflect) societal concerns and demands through self-regulation. The theory of reflexive law which is also the foundation for the regulatory strategy was developed by German legal theorist Gunther Teubner in the 1980s and has been debated and applied analytically in later writings by Teubner as well as by other authors (see further section 6). It was originally developed as a response to what was seen as a regulatory crisis of the interventionalist state (typically the welfare state) to meet or handle societal challenges and needs through ordinary top-down substantive law. It targeted regulatory challenges and the effectiveness of law within nation states, providing an option to supplement formal substantive legislation with a regulatory technique which allowed greater participation of those whose actions were necessary in order to handle the societal challenges and demands. Such participation could be achieved through procedural co-regulatory modalities which could be established by authorities. The procedural framework was seen to provide a forum for dialogue and mutual learning on expectations and experience between different social sub-systems. Through this, it was expected to support the mutual reflection between those sub-systems in relation to regulation and self-regulation on the topics concerned, and their ability to internalise societal concerns, needs and expectations.

Applying reflexive law in the context of CSR is not by itself new. Teubner has addressed CSR from the perspective of reflexive law, and others have followed (see also section 6 below). What is new in this article is the application of reflexive law to understand regulatory processes undertaken outside a context of ordinary law-making in an EU setting, and to draw conclusions on how such processes may be rendered more effective and legitimate.

The theory of reflexive law as applied in this article is based on the early writings on reflexive law in which the theory was proposed as a regulatory technique to supplement formal and substantive law to meet challenges related to environmental degradation, inequality and unemployment in (European) welfare states. While not disregarding later contributions or applications of reflexive law, drawing on the origins of the theory has been found to be the most useful approach for the current article and the application of reflexive law in a different regulatory context and at a different systemic level than the national level for which it was originally intended – in casu the efforts of the EU Commission as an authority at intergovernmental level to procedurally and substantively promote corporate self-regulation in order to meet societal challenges. Reflexive law presents a way to understand emerging EU regulation of CSR in terms of regulatory strategy and technique to encourage the private sector to self-regulate, to analyse the results and challenges of the Commission’s initiatives, and draw lessons for more effective public regulation of private-sector self-regulation on CSR to meet political and other societal concerns.

Reflexive law theory draws on systems theory, but combines that with other theory based approaches to law and regulation, such as Habermasian theory and Nonet and Selznick’s responsive law. Systems theory focuses on systems and does not normally discuss ‘actors’. For the purposes of the current article it should be noted that Teubner’s reflexive law theory recognises interaction between representatives of economic, political and legal systems. Referring to these representatives as ‘actors’ in the current context accords with international law’s recognition of ‘state actors’ and ‘non-state actors’ and its compartmentalisation of different rights, duties and access to law-making,
depending on the ‘state’ or ‘non-state’ status. Reference to actors also accords with discourse analytical approaches (compare Hajer 1995).

With developments in societal, political and legal concerns on human rights, labour conditions especially in developing and transitional countries, environmental and climate challenges and related regulatory efforts at intergovernmental levels to target the conduct of companies, the need for understanding soft and public-private regulatory modalities of a reflexive type has been pushed from the national level on to the intergovernmental level. This is particularly so with regard to efforts by intergovernmental organisations, e.g. within the EU or the UN. This observation underscores a need for increased understanding of and insight into strategies through which public institutions may promote corporate self-regulation on CSR and related issues at intergovernmental level. Such a need is further underscored by public and political expectations that various intergovernmental bodies act to influence corporate behaviour on human rights. The need for insight is strengthened because of limited direct or formal legislative powers and state backing in many cases, due to the general structure of international law as well as in the case of the EU limited independent legislative competences of the EU with regard to human rights and labour standards rights especially as they pertain to business action. The latter case for insight into such regulatory modalities combines with and is further stressed by the tendency over the past decade for intergovernmental bodies to launch relatively informal public-private regulatory initiatives precisely to address societal concerns that cannot easily be met through ordinary legislative measures (see Buhmann 2009 and compare Krisch & Kingsbury (2006) and Kingsbury, Krisch & Steward (2005).

While the institutional context for use of reflexive regulatory strategies for intergovernmental CSR regulation, such as that which frames the EU Commission’s efforts, differs from the national law context which led Teubner to propose the theory, the concerns are the same: Societal needs (including needs based on similar concerns: inequality, poverty, unemployment, environmental degradation) which translate into policy objectives and require being addressed through effective regulatory action, combined with the inability or inefficiency of formal legislation or law-making to do so, and the potential role of the private sector to contribute to solving the problems. For this reason, reflexive law has been found for the purposes of the current analysis to provide a useful theoretical framework for analysis and explanation of the functioning and results of the MSF and the launch of the CSR Alliance as done in sections 6-7.

Given the relative immaturity of legal-theory-based CSR analysis of contemporary and emerging CSR schemes and particularly the scarcity of empirical research on the process of EU Commission initiatives to regulate CSR, some delimitations are in place: The aim of the current article is the relatively modest one of describing and analysing the EU MSF and the launch of the CSR Alliance in terms of processes that weave together international law particularly on human rights with policy goals, and analysing implications of this for regulatory strategy and procedure. The main focus of the discourse theory inspired analysis (section 7) is on negotiations and other language based exchanges that took place as part of the MSF and the Commission’s launch of the Alliance, and the role played by international human rights law as normative source for CSR in the EU context throughout these processes. The concluding section 8 draws on this to formulate recommendations on reflexive law inspired public-private regulation on CSR.

3. The concept of CSR and its relation to law
CSR is a dynamic and open term. Although neither scholars nor practitioners have one single definition of CSR, there is general consensus that CSR means for companies to take
responsibility for their social and environmental impact (Crane, Matten & Spence 2008:4-7, and compare on the debate on the concept Carroll 1979, Carroll 1991, Carroll & Schwartz 2003, Newell & Frynas 2007, Hopkins 2006, Wan 2006). In practice, this means that companies take action to mitigate or prevent negative social and environmental impact or to maximise positive impact, generally beyond the obligations of directly applicable statutory law. With variations, this is reflected in definitions of CSR employed by various business organisations, NGOs and (inter-)governmental organisations.

Corporate responsibilities for human rights and labour rights are often embodied in CSR as ‘social issues’. This was reflected already in the so-called ‘Triple Bottom Line: People, Planet, Profit’ (Elkington 1998) which set in motion the process of CSR-reporting in a many companies in Europe and beyond. The human and labour rights informed understanding of social issues as part of CSR remains reflected in the widely used CSR reporting tool Global Reporting Initiative (GRI) and its third-generation G3 reporting guidelines launched in 2006 and in CSR policies and strategies of a number of companies. The understanding of CSR, however, differs somewhat between regions. Whereas corporate philanthropy is a relatively prominent part of the conception of CSR in the United States and in some parts of Asia, in Europe CSR is generally perceived as corporate practice directly related to the employees of the company, its community, suppliers or customers.

CSR is often although in practice not exclusively understood to be ‘voluntary’. Like there is no commonly agreed precise definition of CSR, there is also no specific understanding of what exactly ‘voluntary’ means with regard to CSR. Various definitions and discussions indicate a narrow understanding of ‘voluntary’. This comes out, for example, in the EU’s definition (below). Set in contrast to ‘mandatory’ action, in practice, this idea of CSR is understood to mean that CSR is to act beyond immediate compliance with national public law applying to the specific business entity. Indeed, as further discussed below, the alleged quality of CSR to be ‘beyond law’ creates some confusion and is not by all means conducive to the development and implementation of CSR. The dichotomy appears to assume that ‘mandatory’ is distinguished from ‘voluntary’ by presence or absence of public law and coercion related to the non-observance of such law. It therefore also assumes a highly positivistic approach to law, according to which legal obligation implies effective coercive sanctions. As demonstrated below, the understanding is not by all means in accordance with significant parts of management theory which assumes that CSR entails at least abiding by the letter and perhaps even the spirit of the law, nor with business and emerging legislative practice in many states.

Instruments and standards of public international law serve as normative guidance for much CSR action, and also inform social expectations of business. The assertion that CSR is ‘voluntary’ therefore also assumes that the pertinent international law instruments and standards are perceived – and the international legal order construed – to not establish obligations for companies. For companies that prefer minimal legal constraint and who build on CSR as ‘voluntary’ as a marketing parameter (‘do-gooding’), a construction of international law as not creating obligations for companies is therefore paramount. As we shall see, that approach had a strong impact in the context of EU emerging regulation of CSR in the 2002-2004 MSF on CSR.

Overall, the dichotomy between mandatory and voluntary action, understood as compliance with law respectively acting beyond the requirements of law, has played a relatively prominent role in later years’ efforts to define corporate responsibilities for social and human rights. This was evident

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8 Available at <http://www.globalreporting.org/ReportingFramework/G3Online/> (last visited 30 November 2010).
not only in debates within the EU MSF as well as on corporate responsibilities for human rights in the UN Human Rights Commission 2004-2005 and (since 2006) the UN Human Rights Council. The dichotomy is reflected in formal presentations of the EU’s CSR Alliance as ‘not a regulatory instrument’, and a similar representation of the UN Global Compact. The dichotomy has been fuelled by certain business organisations and NGOs but is perceived by many others as unfruitful and having slowed down progress in developing normative consensus and guidelines (see for example Chandler 2008).

Indeed, an understanding of CSR which is well-entrenched in organisational scholarship assumes that compliance with law is part of CSR. In an article which is often cited in management oriented CSR studies and applied at business schools, Archie B. Carroll in 1979 provided a definition according to which “(t)he social responsibility of business encompasses the economic, legal, ethical, and discretionary expectations that society has of organizations at a given point in time” (Carroll 1979: 500). In Carroll’s understanding of CSR, those four categories are not mutually exclusive, nor are they intended to portray a continuum with economic concerns on one end and social concerns on the other. Legal responsibilities are understood as business’ fulfillment of its economic mission within the framework of legal requirements. They are “the ground rules – the laws and regulations – under which business is expected to operate” (ibid.)

Carroll’s 1979 definition assumes that social responsibilities of business include compliance with law in the narrow sense of directly applicable legal obligations (what we may refer to in this context as lex), but does not seem to recognize a wider role for law in CSR, such as for legal instruments that do not apply directly to the pertinent business to inform CSR normatively. Moreover, it does not appear to recognize law as regulatory strategy to promote certain political or societal objectives that may be met through corporate CSR action (both of the latter may be referred to in this context as ius). A later model by the same author, the ‘CSR Pyramid’, also includes legal responsibility, understood as obeying the law (Carroll 1991). In a 2003 article with Mark S. Schwartz, Carroll introduced a three-domain approach developed partly in response to weaknesses of the 1979 definition and the 1991 model. One of the major points of the 2003 article is an elaboration of the ‘legal domain’ to go beyond simple legal compliance and include also action undertaken in order to avoid civil litigation and in anticipation of (new) law. In addition, compliance is elaborated to comprise three forms: ‘passive’ (the idea that a company does what it wants and just happens to be acting within the boundaries of the law, i.e. no specific intention to comply with the law), ‘restrictive’ (the idea that the legal system limits, constrains or modifies otherwise intended behavior in a restrictive fashion to promote conduct within the boundaries of legal compliance), and ‘opportunistic’ (when a company takes advantage of loopholes in legislation, in many cases complying with the letter of the law but not the spirit of the law; or chooses to place operations in a particular jurisdiction because its weaker legal standards are found favourable to the company’s objectives) (Schwartz & Carroll 2003). The latter category of opportunistic compliance is of particular relevance in an (international) human rights and labour law context. Research suggests that the category of anticipation, i.e. when a company acts in a particular way to preempt new or amended law and therefore to keep the idea of voluntary action, is also of high practical relevance in a number of contexts (for example, Hess & Warren 2008 with references, Adams 2002).

Although corporate social responsibilities were debated as from early as the 1930s in US legal scholarship (Berle 1931, Dodd 1932) with a European attempt at revival in the 1980s by Gunther Teubner in a private law Corporate Governance context (Teubner 1985), CSR tended for the majority of the 20th century to be considered a topic outside of the realm of relevance to the legal
field. One reason for this is likely to be the allegation that CSR is beyond the requirements of law, although this to some extent disaccords with Carroll’s understanding. Taking on the line of thinking promoted strongly by American economist Milton Friedman (1970), popularly rendered as ‘the business of business is business’, lawyers tended to debate whether corporate social responsibility was at all within the mandate of a company’s management and its fiduciary duties, rather than what actions a socially responsible company could or should be engaging in. The change in interest for CSR which the legal field has seen since the mid-1990s is due to a number of trends and possible reasons. Among these, cases lodged in national courts over the past decade (in the United States under the Alien Torts Claims Statute and in the United Kingdom and some other countries under their national statutes) have demonstrated that companies’ impact on labour rights, human rights and the environment is of legal relevance with regard to torts, compensation and legal practice. Codes of Conduct are increasingly incorporated into contracts between supplier and buyer companies, with CSR commitments in such Codes becoming legally binding on the supplier in the \textit{intra partes} relationship. Work undertaken in the context of various intergovernmental, national and NGO forums to clarify the extent of corporate social and human rights responsibilities and encourage corporate self-regulation also touch on normative and regulatory issues of relevance to lawyers and drawing on sources of law, particularly international law. Grievance mechanism schemes like the National Contact Points (NCPs) established under the OECD Guidelines for Multinational Enterprises draw on legal method for investigation and complaints handling.\footnote{Information to author from member of a European NPC.} Some nation states, including the United Kingdom, France, Sweden, Australia, and most recently Denmark,\footnote{Based on the Danish Government’s CSR Action Plan launched in May 2008, a Bill was prepared in the Fall 2008 to require large Danish companies to provide annual CSR accounts. The amendment (§99a) to the Act Financial Statements was passed by the Danish Parliament in December 2008, with effect from financial years starting 1 January 2009 and later. Understanding CSR as the ‘voluntary integration of, amongst others, human rights, social issues, environmental or climate issues and fighting corruption into their business strategy and activities’, the reporting provision requires large companies to inform on whether they have a CSR policy or not, how the policy is implemented, the company’s assessment of what has been achieved through its CSR activities in the year of the report, and an assessment of the management’s expectations of the company’s future CSR activities. It allows for companies that provide Communication of Progress reports to the UN Global Compact on UN Principles of Responsible Investment to refer to those reports as their annual accounts instead of having to produce specific annual CSR accounts. Similar reporting provisions have been introduced for institutional investors. In late 2010, Norway announced plans to introduce legislative requirements on CSR reporting, based on the Danish approach.} have promulgated statutes with legally binding requirements on certain companies and/or institutional investors to report on the social impact of their business and investments.

At the same time, the international society has moved to regulating CSR-related topics through conventional instruments of international law: At intergovernmental level, the first major attempt by the UN to formulate a code of conduct for transnational corporations was initiated in 1977. It was finalised in 1990 (UN Draft Code of Conduct on Transnational Corporations 1990) but abandoned within two years due to opposition from certain governments and companies, partly as a result of the North-South conflict and the Cold War. The draft code incorporated obligations for TNCs to, \textit{i.e.}, respect host countries’ development goals, observe their domestic law, respect fundamental human rights, and observe consumer and environmental protection objectives. OECD’s Guidelines for Multinational Enterprises were adopted in 1976, followed by the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in 1977 (both revised in 2000). A new effort at UN level to regulate the behaviour of TNCs with regard to CSR relevant issues was made with the draft Norms on Human Rights Responsibilities of the Transnational Corporations and other Business Enterprises (‘the draft UN Norms’) prepared 1998-2003 by a working group set up by the then UN Human Rights Commission (United Nations Sub-Commission on the Promotion
and Protection of Human Rights 2003). Following this, the UN Secretary General appointed a Special Representative on business and human rights in 2005\(^{11}\) (SRSG John Ruggie) with the original mandate 2005-2007 extended in 2007 by the UN Human Rights Council. Following the Human Rights Council’s unanimous ‘welcome’ in June 2008 of the final report\(^{12}\) of the Special Representative proposing a ‘Respect, Protect and Remedy’ policy framework (Ruggie 2008), the mandated was extended by the Human Rights Council for another three-year term 2008-2011 with the objective of operationalising the 2008 framework (Human Rights Council 2008). Although the work of the Special Representative has made it clear that there are distinctions between corporate responsibilities for human rights and CSR in general and particularly with regard to state duties, there are important overlaps in terms of societal moves pushing for corporate responsibility and resulting types of regulatory efforts at various levels.

The UN Global Compact was established in 2000 as an initiative of the UN Secretary General, then Kofi Annan.\(^{13}\) The Global Compact is strongly supported also by the current UN Secretary General Ban Ki-Moon. The Compact is run by a small secretariat in New York and funded primarily through contributions from donor states. Participation is primarily for companies but has recently been opened also to public institutions and cities, and has been growing steadily especially in later years. As of early 2009, company participants number around 6000. Participants commit to the ten principles on human rights, labour standards, environmental protection and anti-corruption. Among the Compact’s ten principles, principles 1-2 and 3-6 refer directly to international law instruments on human and labour rights, in particular the Universal Declaration of Human Rights and the 1998 ILO Declaration on fundamental principles and rights at work which refers to the core labour principles of freedom of association and collective bargaining, non-discrimination in employment, elimination of forced labour and elimination of child labour.

Also testifying to the increasing role of international law to inform CSR, the 2007 G8 Summit in Germany agreed to promote corporate and other forms of social responsibility (Chair’s Summary 2007, G8 2007) specifically referencing the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the UN Global Compact as normative bases.

The above developments which have taken place over the past decades demonstrate that CSR is becoming a field of interaction between society and law. This has particularly been sparked by the increased focus on human rights responsibilities of business. The Special Representative of the UN Secretary General on Human Rights and Business has considered the interrelationship between social expectations and new or emerging legal regulation and highlighted the significance of societal processes which lead to a gradual hardening or ‘juridification’ of societal CSR expectations to become legally binding requirements on companies and states, and related to companies ‘social licence to operate’ (Ruggie 2007, \textit{i.a.} paras. 44, 62, 72, 80; Ruggie 2008 para. 54).

As the overview above shows, law and CSR related in a number of ways. On several grounds, the alleged ‘voluntary’-‘mandatory’ dichotomy surrounding much of the CSR debate may be

\(^{11}\) The Special Representative was appointed on a request from the Human Rights Commission to the Secretary General (UN Doc. E/CN.4./2005/L.87).


\(^{13}\) For details on the UN Global Compact, see www.globalcompact.org, and for a brief overview of the establishment of the initiative, Buhmann 2010.
characterized as false and as alleging a distinction between legal compliance and voluntary action that does no justice to the law-based normativity which today permeates CSR in a number of ways as indicated above: First, CSR has been defined by organisational scholarship as also encompassing compliance with law. Second, in order to go beyond the law, one has at least to know about what is required by law. Third, more and more states especially in Europe but also in industrialised as well as developing countries outside Europe are imposing CSR reporting requirements on certain companies and/or investors with a objective of affecting their actions prior to reporting. Fourth, in developing countries, CSR is increasingly coming to be understood as compliance, with a new term, ‘CSR+’, coined to suggest voluntary action beyond what is mandated by law.\textsuperscript{14} In fact, as described elsewhere, for some time some companies and CSR consultants acting in countries with weak enforcement of CSR-relevant legislation, e.g. on labour rights, have considered simply acting in accordance with the law to be CSR (Buhmann 2005). In these contexts, CSR includes observing legal requirements that are not likely to be enforced and ensuring that the company and its suppliers do not abuse their power, personal contacts or funds, including through bribes, to avoid enforcement. Last in this context but not least, links between CSR and law are also indicated by several studies published in recent years which place CSR in a legal context. Such texts have demonstrated the relevance of CSR to various fields of national and international law, such as Corporate Governance and company law, economic law, contract law, torts law, international trade law, international labour law, international human rights law, arbitrated settlements of transnational disputes and combined approaches of soft and hard regulation to dealing with regulatory challenges of a globalised society (see for example Addo 1999, Jägers 2002, Clapham 2006, Mares 2006, Zerk 2006, Marella 2007, Mucklinski 2007, MacLeod 2007, McBarnet 2007).

Summing up on this, the normative links between CSR and law are numerous and of a character that negate an inflexible understanding of CSR as only requirements beyond law. At least from a legal scholar’s perspective, there is a need for an understanding of CSR that allows for a degree of realignment between the management oriented approach to CSR as being anything but applicable, enforced positive law (\textit{lex}), and the much wider understanding of law as societal regulatory response and normativity (\textit{ius}) found among branches of legal theory, especially but not exclusively sociology of law. Accordingly, CSR is understood in this article as action by private or public institutions to contribute to sustainable use or development of human or environmental resources which is not required by binding (‘hard’) law directly applicable to that entity or enforced as a result of such law. This leaves open the possibility that CSR practices may be guided by soft regulation or by hard law not directly applicable to the acting entity (e.g., international treaty law in relation to private non-state actors). The case for this understanding is further elaborated in the context of the following section which specifically considers the links between human rights and CSR normativity in an international and EU law as well as EU Member States context.

4. CSR normativity and Human Rights: Linking objectives and action through sources of law

International human rights law presents a particular potential to intergovernmental regulation of social responsibility. The Special Representative on business and human rights, SRSG John Ruggie, has done much to connect international and national law, especially through emphasis on state obligations under international law to protect against human rights violations by individuals (including legal persons) against other individuals, and international law as a normative source for company due diligence and the corporate responsibility to respect human rights (Ruggie 2008, Ruggie 2010). Recent developments, such as the BP oil spill in the Mexican Gulf in 2010 and

\textsuperscript{14} Author’s interview with representatives from the Confederation of Danish Industries, 19 February 2009.
increased desertification for example in China, have drawn attention to the linkages between environmental degradation and climate change and human rights, such as access to food and health impacts of fighting environmental damage. With a potential to expand the European and Northern hemisphere attention to human rights beyond civil and political rights which in many ways tend to be the primary area of human rights focus in those parts of the world, such developments have also contributed to strengthening insight into the links between social and economic human rights, and environment and climate. Later year’s climate change concerns have also spurred some interest in exploring how a human rights approach can feed into addressing environmental and climate concerns.\textsuperscript{15}

The relevance of addressing the implications of CSR on normative conceptions and forms of regulation is underscored by the fact that legal regimes must and do adapt to normative changes in society. A dynamic and adaptive character of law has been emphasised as a feature of international human rights law and has also evidenced itself clearly in the course of ECJ case law on fundamental rights. As CSR is increasingly addressed not only by companies but also by (inter-)governmental agencies, regulatory initiatives may gradually take on new forms to allow them be contained within the constraints of traditional views on duty-bearing legal personality and formal regulatory powers at intergovernmental level.

CSR normativity reflects an internationalisation of societal norms and law on human and labour rights and the environment informing demands of business from outside and within business itself. As indicated, instruments of international human rights (used in here in a broad sense encompassing also international labour rights/law) are often relied on by NGOs, companies, auditors and (inter-)governmental bodies in order to explain the substantive contents of social issues of CSR. In terms of substantive contents, CSR is often related to societal expectations of good corporate behaviour, \textit{i.e.} expectations of a certain level of consideration of environmental sustainability and of morals in observing minimum standards in relation to labour or human rights, even if these minimum standards do not apply to the company in a legally binding way. For example, many consumers and investors expect a responsible company not to pollute or deplete drinking water sources for the local community, not to employ forced labour, and not to exploit the labour force in poor countries by offering sub-standard working conditions. Such societal expectations become normative as they drive and motivate corporate practice. Their role as possible pre-cursors to legal regulation have been acknowledged by the Special Representative of the UN Secretary General on Human Rights and Business in his February 2007 report to the UN Human Rights Council (Ruggie 2007, para. 62).

Consumers’ and other stakeholders’ expectations of moral conduct of companies are often shaped by sources of international law, especially international labour and human rights law, \textit{e.g.} relating to child labour/minimum age for employment, working hours and overtime pay. This applies even though these sources of law do not apply directly to companies, but to states. International treaties on human rights are binding (hard law) on states that have ratified them. Normative directions contained in CSR are increasingly seen by companies and some types of stakeholders as binding, even though they are not formally so. Corporate CSR action, for example value statements, codes of conduct and non-financial reports, increasingly refer to international law on human and labour rights and the environment, although private companies are not duty-bearers under international law. Evidenced \textit{i.a.} by the human and labour rights principles of the UN Global Compact

\textsuperscript{15} For example, the topic of human rights is included as an aspect under the international and company law informed ‘Sustainable Companies’ project hosted at the Institute of Private Law at the University of Oslo.
(especially principles 1-6), the GRI reporting guidelines and the process standard SA8000, the social or ‘people’ dimension increasingly appears to be perceived or explicitly defined as containing aspects of human and labour rights, including rights to non-discrimination and equal opportunities, education, vocational training, work and decent working conditions. The UN Global Compact and the draft UN Norms both specifically define corporate responsibilities on the basis of international law. Through such references, international law comes to inform CSR in terms of its normative substance in ways comparable to the role that sources of law play in conventional legal practice and analysis.

The preambular statement of the Universal Declaration on Human Rights in which the UN General Assembly proclaimed the Declaration “a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society (…) shall strive (…) to promote respect for these rights and freedoms (…)” has come to serve for many companies as a basis for a commitment to human rights. The revisions in 2000 of the 1976 OECD Guidelines for Multinational Enterprises which were originally formulated in the context of transnational finance, were made to include labour standards and human rights and to extend the applicability of the Guidelines to worldwide activities of OECD based multinational enterprises and a recommendation to encourage compliance with the Guidelines through the supply chain. Also carried out in 2000, revisions to the 1977 ILO Tripartite Declaration were made to incorporate the fundamental principles and rights at work. The Universal Declaration on Human Rights, the OECD Guidelines, and the ILO Tripartite Declaration are among soft law instruments relating to human rights that are often referenced in corporate CSR policies, strategies, Codes of Conduct and CSR reporting.

In developing countries, CSR action based on international law as a source may contribute to human rights implementation. The EU and several Member States have policies of promoting human and labour rights in third world countries. Traditionally, development cooperation and bilateral policy dialogue have been the means for implementation of foreign policy goals. If EU based companies undertake activities that go beyond the requirements of national law or beyond the extent to which national law is enforced, they may effectively contribute to their implementation of those foreign policy goals. In an EU context, CSR has recently become approached as a means for contributing to ‘responsible competitiveness’, i.e. competitiveness with respect of human and core labour rights.

Commission statements on CSR emphasised already in the 2001 Green Paper that CSR has a strong human rights dimension (Commission 2001: 14), and that “this is recognised in international instruments such as the ILO Tripartite Declaration (…) and the OECD Guidelines (…)” (ibid.). In its 2002 Communication on CSR, the Commission stated that EU based companies should “demonstrate and publicise their worldwide adherence” to the OECD Guidelines, and that their Codes of Conduct should integrate the ILO fundamental Conventions and draw on these instruments in defining CSR (Commission 2002: 6-7, 13). Overall, the message was that EU based companies should observe the OECD Guidelines and the ILO Tripartite Declaration in actions outside EU. Thus, at least with regard to activities outside of EU, the Commission expressed a clear intention that EU based companies should let CSR be informed by international human rights instruments of a hard as well as soft law character.

16 Social Accountability International/SA 8000 process standard, see <http://www.sa-intl.org/> last visited 30 November 2010.
The Commission also tied CSR to the EU’s ‘Lisbon process’. The Lisbon Strategy was agreed to in March 2000 by EU Heads of State and Government. The overall objective was to make the EU "the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion". Setting a time goal by 2010, a number of specific goals were set out, often referred to as the ‘Lisbon goals’ with the process to gradually implement them as the ‘Lisbon process’. The Lisbon Strategy was revised by the European Council of 22-23 March 2005 which decided to place renewed focus on growth, innovation and employment and encourage the strengthening of social cohesion and the mobilisation of national and community resources in the Strategy's economic, social and environmental dimensions (Lisbon European Council 2000, Council of the European Union 2005). Some of the Lisbon goals, such as the goals of equal opportunities, social inclusion, raised employment and employability and lifelong learning, have much in common with legal claims or rights to non-discrimination in the labour market and beyond, the right to work and to labour market education. Such rights are provided by Constitutions or statutory law in some Member States, and their implementation is a legal obligation of Member States under international human rights treaties such as the European Social Charter and the International Covenant on Economic, Social and Cultural Rights which Member States have ratified independent of their EU membership.

CSR topics related to human rights have entered the EU Lisbon Goals indirectly through focus on economic, social and environmental dimensions, with calls for business to develop and engage in CSR to promote inclusiveness, growth and employment and cater for European competitiveness. Each of those social issues is directly linked to human rights (especially rights to non-discrimination, and social rights to work, education, an adequate standard of living, social services and the highest possible standard of health), and consequently to a Member State’s obligations under international human rights law.

Inclusiveness has obvious parallels to the overarching human rights principle of non-discrimination. The non-discrimination principle, and its detailed corollary that discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status are assumed prima facie to be arbitrary unless solid reasons are demonstrated for the opposite, run as a general undercurrent of most international human rights law instruments and are embodied in the European Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights and the European Social Charter. The principle of non-discrimination is also established in the Charter of Fundamental Rights of the European Union (EU Charter). Among discriminatory grounds, the Charter includes national minority, disability and age. Inclusiveness informed by the human rights principle of non-discrimination would therefore mean, in relation to the labour market, a labour market without discrimination of any of the above grounds. The connection to national human rights obligations, however, connects EU policy goals within employment and social policy. From this perspective, the interconnectedness between CSR and human rights could be made pragmatically useful both to Member States and the EU both before and after the entry into force of the Treaty of Lisbon.

CSR is not only about acting responsibly in developing countries or in countries other than one’s own. Increasingly, CSR is approached particularly by public institutions in welfare states as a response to challenges resulting from aging, migratory patterns and employment needs. Perhaps because the Lisbon process is mainly discussed academically by political scientists and because the ‘Lisbon goals’ are pursued from political or economic perspectives, the Lisbon goals of
inclusiveness and employment are generally not addressed in terms of human rights in intra-EU contexts. Nevertheless, there are important points of complementarity between specific human rights and the Lisbon goals, in particular related to non-discrimination, the right to work, certain rights in work all within the EU, and to addressing labour and human rights concerns related to production in or sourcing from developing or transitional countries. Among the latter, child labour, forced labour, excessive working hours and low standards of working conditions, occupational health and safety and pay insufficient for an adequate standard of living have made the headlines in European news-media recurrently in recent years and increasingly inform investment decisions of institutional investors as well as buying patterns of consumers and political pressure exerted by politicians, NGOs and others.

Although social or economic development does not equate social or economic rights, there is ample opportunity that CSR may not only contribute to improved implementation of relevant international law or related standards in states outside the EU, but also within the EU. While the EU has certain powers to regulate companies as well as Member States, implementation by Member States of their international human rights obligations is not a direct Community concern. However, as all Member States have acceded to key international human rights treaties dealing, i.a., with aspects related to employment rights and non-discrimination and consequently have obligations under international law to implement those treaties, Member States’ progressive implementation of their commitments under international law is potentially instrumental in achieving the EU objectives of employment and inclusiveness, and vice versa. Given that records of social and non-discrimination rights are among the most problematic in several EU Member States and that – as indicated by Philip Alston and Joseph Weiler (2004) - human rights are increasingly becoming a challenge for the EU as such, the potential synergy would seem to be considerable.

The Commission has specifically tied CSR to intra-EU welfare state challenges through links to the implementation of the Lisbon goals. The EU Commission’s 2006 Communication on CSR (Commission 2006) links CSR explicitly with the Lisbon goals of promoting employment and inclusiveness within the EU. Although not stated and perhaps not realized in the political science and economics oriented context of the Lisbon process, corporate action for increased inclusiveness in the labour market or provision of vocational training may result in improved implementation of the human rights of non-discrimination and of the right to work. Inclusive employment practices are therefore instrumental for implementing states’ obligations under international or EU law to combat discrimination in employment. Affirmative action oriented recruitment policies and efforts to establish on-the-job training programmes may also contribute to further implementation of human rights related to rights to work and vocational training, as well as related human rights, such as social work related rights, education, adequate standard of living, social services and the highest possible standard of health. Similarly, with regard to ‘responsible competitiveness’ of EU based companies acting outside of the EU, if such companies have recruitment and employment practices which respect international standards on minimum working age, forced or involuntary labour, working hours and leisure, occupational health and safety, pay, and related concerns, this would in effect contribute to improved implementation of these standards in host states.

With the introduction in the EU Treaty of the commitment to defend human rights and basic freedoms (art. 6) and the powers to take legislative action to combat racial discrimination (art. 13), the EU has involved itself more directly in anti-discrimination beyond gender-discrimination. Still, national-level implementation of human rights as well as the social objectives of employment and inclusiveness in the labour market do not fall within the ordinary legislative powers of the EU. Seen
in this light, CSR and co- and self-regulatory processes involving business and civil society present themselves as alternative options to regulate human rights issues as they effectuate themselves or may be implemented at the level of EU based companies’ interaction with society. Based on these considerations and particularly the potential that CSR and human rights have for mutually strengthened processes of implementation, the analysis below will consider, i.a., the way in which human rights have been linked with emerging EU regulation of CSR.

5. The EU Multi-Stakeholder Forum and CSR Alliance

5.1. Background

In 1999, the European Parliament adopted a Resolution on a Code of Conduct for European TNCs (European Parliament 1999), calling for modalities to ensure and monitor that European companies observe international labour standards and other human rights, in particular when acting in developing and transitional countries. Adopted in Gothenburg in 2001, the European Strategy for Sustainable Development (European Commission 2001a) focussed on sustainable human and environmental development. The European Parliament resolution and the Gothenburg strategy fed into a line of specific CSR-targeted initiatives from the Commission from 2001: The Commission’s 2001 Green Paper on CSR, Promoting a European Framework for Corporate Social Responsibility, which argued that companies should take social responsibility on a voluntary basis, stressed the strong human rights dimension of CSR, particularly in relation to international operations and global supply chains, and made reference to soft law instruments such as the ILO Tripartite Declaration and the OECD Guidelines (Commission 2001, section 2.2.3). The 2002 Communication on CSR, Corporate Social Responsibility: A business contribution to sustainable development, stated, i.a., that companies were to demonstrate social responsibility in relation to the third world, and explicitly encouraged companies to take ILO labour standards and OECD’s Guidelines as minimum standards in their Codes of Conduct (Commission 2002, section 5.1.). The most recent Communication on CSR, the 2006 Communication, Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility, linked CSR especially to the Lisbon process and its goals of inclusiveness, employment and social cohesion (Commission 2006). This Communication also contained some human and labour rights aspects related to non-EU relations, including to competitiveness (so-called ‘responsible competitiveness’) which is also referred to by the Lisbon strategy. Another Communication, Promoting decent work for all: The EU Contribution to the implementation of the decent work agenda in the world (Commission 2006a) links CSR with decent work in line with core labour standards defined by the ILO. The latter has particular regard to labour conditions in countries outside the EU itself.

In the 2001 Green Paper, the EU Commission introduced its definition of CSR which it has applied since then. The Commission defines CSR as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis” “not only fulfilling legal expectation, but also going beyond compliance and investing ‘more’ into human capital, the environment and the relations with stakeholders” (Commission 2001, paras. 20 and 21). Particularly noteworthy is the fact that the Commission defines CSR as action undertaken “on a voluntary basis”, “not only fulfilling legal expectation” but “beyond compliance”. The definition does not specify how to understand “legal expectation”. The insistence that CSR is action beyond compliance and legal expectations does give grounds for some confusion as ‘legal expectations’ arguably could go beyond directly applicable law to embody also

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standards of international law that are not transformed into national law by the host state, or transformed but not effectively enforced with regard to companies. ‘Legal expectation’ might also be more than compliance – for example not only to follow the letter of the law (compliance), but going beyond this to follow the spirit of the law. However, this does not appear to be the intention of the Commission. On the contrary, as we shall see below, efforts to induce human rights normativity based on international human rights law are perceived by the Commission not to conflict with the understanding of CSR as ‘voluntary’. This underscores the observation made above that dealing with CSR from the legal perspective requires a broad understanding which allows for considering the normative influence that may be provided by law which does not create legally binding requirements directly applicable to an entity in question, such as a company, but which nevertheless are relevant as part of the general legal context in which a company acts, including as part of international obligations of a host country or as normative guidance that a company may decide to draw from international law.

5.2. The Multi-Stakeholder Forum

The MSF was set off on the background of the Commission Green Paper (2001) and the Communication (2002) on CSR. The MSF was established with the aim of promoting innovation, transparency and convergence of CSR practices and instruments, developing problem understanding, discuss values and relevant action and make recommendations, i.a., through exploring the appropriateness of establishing common guiding principles for CSR practices and instruments. The Commission encouraged the MSF to address and agree on guiding principles, i.a., on the relationship between CSR and competitiveness, effectiveness and credibility of codes of conducts, to be based on “internationally agreed principles” in particular the OECD Guidelines; and definition of commonly agreed guidelines for labelling schemes, supporting the ILO core conventions and environmental standards (Commission 2002, section 6).

The MSF comprised a range of stakeholders with an interest in CSR: Chaired by the EU Commission, with a membership of 18 organisations representing trade unions and workers’ cooperatives, industrial and employers and commerce organisations, and NGOs engaged in human rights, consumers’ interests, fair trade and sustainable development. In addition, 11 institutions or organisations held observer status (including the European Parliament, the EU Council, OECD, ILO, and UNEP). The working method combined plenary (‘High Level’) meetings and thematic round tables.18 The end product was a report (‘Final Report’) (European Multi-Stakeholder Forum on CSR 2004 – Final Report). The MSF website was established and managed by the Commission, and background information, minutes and other information uploaded through the Commission.

At the launch of the MSF in October 2002, it was noted that CSR holds potential for contributing to the strategic goals set by the Lisbon and Gothenburg strategies and to promoting core labour standards and improving social and economic governance in the context of globalisation (EU Multi-Stakeholder Forum on CSR 2002a). The objectives and mandate specifically mention international human rights and labour instruments as sources of the guiding framework to be established: The objective and mandate were as follows:

- Improving knowledge about the relationship between CSR and sustainable development (including its impact on competitiveness, social cohesion and

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18 The Round Tables dealt with the following issues: Improving knowledge about CSR and facilitating the exchange of experience and good practice, Fostering CSR among SMEs, Diversity, convergence and transparency of CSR practices and tools, and CSR Development aspects.
environmental protection) by facilitating the exchange of experience and good practices and bringing together existing CSR instruments and initiatives, with a special emphasis on SME specific aspects;

- exploring the appropriateness of establishing common guiding principles for CSR practices and instruments, taking into account existing EU initiatives and legislation and internationally agreed instruments such as OECD Guidelines for multinational enterprises, Council of Europe Social Charter, ILO core labour conventions and the International Bill of Human Rights (EU Multi-Stakeholder Forum on CSR 2002a).

As we see from this, the MSF basically had two, closely interlinked, objectives: The first was to serve as a learning forum on CSR, including through the exchange of experience and good practices between participants; the second was to explore ‘the appropriateness of establishing common guiding principles for CSR practices and instruments’ in a process that would take into account a list of key international human rights instruments. Besides the OECD Guidelines this process was suggested to consider the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights which all form part of the International Bill of Human Rights, ILO core conventions and the Council of Europe Social Charter. In other words, the objective and mandate reference a series of significant and comprehensive human rights instruments which are treaties and as such hard law, or in the case of the Universal Declaration has come to take on a character of customary international law with regard to some standards. The Commission’s references to those instruments do not consider or mention the fact that according to doctrinal international law, these instruments are binding on states, not on companies.

Particularly the early High Level meetings of the MSF addressed human rights issues in ways that referred directly to or suggested influence from international human rights law. In addition to the suggested list of sources set out in the MSF objectives, the so-called “international dimension” which was defined to include human rights, democratisation and conflict prevention aspects was to be taken into account as cross-cutting issues by all the Round Tables (EU Multi-Stakeholder Forum on CSR 2002b).

The minutes and detailed records of presentations made at MSF meetings suggest that specific statements were more meagre in human rights language but still indicate that human and labour rights play a role for CSR within the EU and for responsible competitiveness also beyond the boundaries of the Union. This was particularly the case in statements made by the Commission and NGOs, and with some exceptions less so in statements made by business and their organisations. At the High Level Meeting at which the MSF was officially launched, Enterprise Commissioner Erkki Liikanen said, i.a., that “through CSR-initiatives, businesses accept the challenge of increased societal expectations and contribute to sustainable development. The three pillars of sustainable development – financial, social, environmental – are inter-related” (EU Multi-Stakeholder Forum on CSR 2002c). Employer organisations expressed commitment to promote responsible business conduct throughout Europe and the world, stressing that CSR should be voluntary and seen in a global context. Business networks and organisations underlined that CSR is a vital component of business competitiveness. They argued that the MSF had the potential to make a significant contribution to European competitiveness and the achievement of the Lisbon goals fostering an open dialogue between the different parties. Trade unions held that CSR was to be understood in the broader sense, integrating social, environmental and societal aspects, ensuring that companies act
responsibly not only towards their workforce but also to citizens at large and throughout the whole supply chain (EU Multi-Stakeholder Forum on CSR 2002c).

MSF members held various views on whether CSR was to be mandatory or remain ‘voluntary’, and to what extent CSR should be informed by international law. Also at the first High Level Meeting, some NGOs (‘social NGOs’) argued that CSR must not replace regulation but rather be seen as complementary initiatives to help promote a more inclusive workplace and society. CSR is a global issue: it concerns all activities of the company throughout the whole supply chain, both inside and outside Europe. The [MSF] must make strong recommendations on how to establish a convergence of CSR standards, in order to promote credible, verifiable systems of reporting and auditing and establish clear guidelines which will recognise the most advanced companies, and encourage the rest to meet their standards and go beyond.” Human Rights and development oriented NGOs argued much stronger in favour of a law-based approach, referring to problems of adherence to international standards and a need to replace the notion of responsibility with accountability. In CSR language, accountability refers to the possibility to be held legally to account for violations of human rights and other CSR relevant concerns. These NGOs “stressed the importance of the international perspective and the focus on enforcement and implementation of already existing standards. At global level there are few safeguards against abuses in social and environmental issues so there is an urgent need to shift from the concept of companies responsibility towards that of accountability” (EU Multi-Stakeholder Forum on CSR 2002c).

Discussions at the High Level meeting about a year later, in November 2003, related extensively to the composition and contents of the final report which was to be submitted in June 2004. The minutes and statements indicate that the MSF’s objective of taking into account internationally agreed human and labour rights instruments besides existing EU initiatives and legislation was addressed but that there was not general agreement on the role which the international instruments were to have in the report. The discussions led to an agreement that the report would reaffirm the second part of the MSF objective by listing those principles and conventions which were referred to in the objective (EU Multi-Stakeholder Forum on CSR 2003). A joint proposal for a Final Report format from a committee comprising groupings of employers, workers and NGOs stated this would lead to MSF members “recognis[ing] the current efforts of those companies and stakeholder organisations which use these common reference principles, standards and conventions as a basis for successful and sustainable CSR initiatives and partnerships, not reinvent[ing] principles which already exist but rather make sure that what exists leads to improved situations and concrete results, and encourage[ing] other companies and stakeholder partners to build on good experiences and develop CSR initiatives that can contribute to the realisation of these principles, standards and conventions” (Coordination Committee 2003).

The discussions on the voluntary or mandatory character and the role to be played by international law were somewhat interwoven at the November 2003 High Level meeting. Employers’ organisations stressed that CSR is not to be confused with debates about compliance with existing social or environmental legislation or the need for more legislation in these areas or corporate governance. They held that “CSR is about developing and living up to voluntary commitments and about coherence in implementing communicated values” (EU Multi-Stakeholder Forum on CSR 2003). Civil society organisations called for developing tools that would enable the development of a common language for CSR to give the CSR practices greater credibility and ensure that CSR can be can be measured in the same way and objectively verified against internationally agreed instruments such as the ILO core labour standards. These groups also argued that relying
exclusively on voluntary measures is insufficient, and that more focus must be on implementing existing regulation (EU Multi-Stakeholder Forum on CSR 2003).

At the final High Level meeting in June 2004, trade unions held that although CSR may be voluntary, is not optional, thus suggesting that social expectations demand CSR even if the law does not. Trade unions also argued that there is a need for precise criteria to define and measure CSR and recommended a European framework with standards, annual CSR reporting, product and process certification, codes of conduct and criteria for accessing public funds (EU Multi-Stakeholder Forum on CSR 2004). Civil society organizations held that if CSR is to be credible and useful, tools should be based on internationally agreed principles. They also held that social and environmental reporting based on common reporting standards should be mandatory (EU Multi-Stakeholder Forum on CSR 2004, Parent 2004, Oosting 2004, FIDH 2004).

Overall, participants at the MSF did not agree on which form regulation of CSR should take, nor on the role to be played by international law to inform CSR normatively. Disagreement remained as to whether CSR should be mandatory or voluntary, or whether a mixture would be preferable. A number of arguments were proposed in favour of government regulation and intervention. Others argued in favour of self-regulation and voluntarism. A variance of views on these issues is reflected in the reports of the four round tables, and in the Final Report. Throughout the MSF process, NGOs generally argued for mandatory regulation and for international law to inform CSR, while business and employers’ organisations were in favour of a non-mandatory approach and a limited role for international human rights law. At the end, proponents of a non-mandatory approach were successful, and the role to be played by human rights law was limited to the references in the first part of the report which reaffirm the instruments referred to in the mandate. Partly due to these divergences, the MSF did not result in the formulation of a very specific framework on CSR. In fact, the listing of international human rights instruments in the final report is limited compared to the listing made by the Commission for the MSF mandate and objective, as well as if compared with the listings in the Green Paper or the 2002 Communication. The main instruments noted in the Final report as reference for CSR are the ILO Tripartite Declaration, the OECD Guidelines, and the UN Global Compact. While these are, indeed, important in that they deal directly with issues of social responsibilities of business, they are also all non-binding instruments that at the most serve as guidance for companies. Stronger instruments – the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the EU Charter of Fundamental Rights, the European Social Charter and the 1998 ILO Declaration on fundamental principles and rights at work – are noted with the comment that they contain values that can inspire companies when developing their CSR, which in turn can play a role in reinforcing and making tangible the values these texts represent (European Multi-Stakeholder Forum on CSR 2004 – Final Report: 6). The report states:

‘Recalling the baseline understanding, and after having heard and discussed around fifty cases involving companies and stakeholders, the Forum recognises that there are a number of reference texts and instruments, which have served as a starting point or guidance for companies and stakeholders when developing their CSR approaches. The aim here is not to try to be exhaustive or prescriptive, but the Forum would like to draw attention to a number of key texts. (…)'
Important reference texts and instruments, both developed with the involvement of business and directly addressed to them are:
- the ILO tripartite declaration of principles concerning Multinational Enterprises (MNEs) and social policy (1977, revised 2000),
- the OECD guidelines for MNEs (1976, revised 2000),
- the UN Global Compact (2000)

There are also a number of texts addressed more widely to states and governments, containing values that can inspire companies when developing their CSR, which in turn can play a role in reinforcing and making tangible the values these texts represent. The Forum highlights the following texts:
- the Council of Europe Convention for Protection of Human Rights and Fundamental Principles (1950),
- EU Charter of Fundamental Rights (2000)
- the ILO Declaration on fundamental principles and rights at work (1998),
- Rio Declaration on Environment and Development (1992) and its Agenda 21 (1992),
- UN guidelines on consumer protection (1999)
- The EU Sustainable Development Strategy, as adopted by the European Council at the Gothenburg Summit (2001)

The Final Report is at one time a tribute to the significance of international law as a source for the normative substance of CSR, and a sad testimony to the extent of disagreement among the MSF stakeholders on the degree to which companies should involve themselves in active implementation of the very same standards that are the end goal of international law instruments on human rights, labour rights and the environment. The listing of human rights and other international instruments is made in the brief first part of the report. As such, it frames the remainder of the report. However, while the first part of the report reaffirms international and European agreed principles, standards and conventions of relevance to CSR, the recommendations and future initiatives which make up the bulk of the Final Report are mainly focused on raising awareness and improving knowledge of CSR, capacity building and competences to help mainstream CSR, and ensuring an enabling environment for business, without references to human rights or other international law instruments and aspects (European Multi-Stakeholder Forum on CSR 2004 – Final Report: 6).

Consequently, the human rights aspects are not integrated into the operative part of the report or made an operative part of a guiding framework for CSR in Europe. Rather, focus appears to have shifted during the two-year MSF process from human rights and legal standards to policy-goals of a more limited application and without any reference to how these might be strengthened by a human rights approach. The report notes that the Lisbon and Gothenburg strategies provide the European framework for sustainable development of society and economies, “aiming to make the European
Union a more competitive, dynamic knowledge-based economy, capable of sustainable economic growth with more and better jobs and greater social cohesion, delivering a cleaner, safer and healthier environment” (European Multi-Stakeholder Forum on CSR 2004 – Final Report: 14-15). Its recommendations are directed to governmental bodies rather than companies when the report suggests that EU institutions and governments step up their efforts towards a more co-ordinated policy approach and that they implement the Lisbon goals and Gothenburg strategy. In addition, the report recommends that public authorities ensure that there is both a legal framework and the right economic and social conditions in place to allow “companies which wish to go further through CSR, to benefit from this in the market place both in the EU and globally” (ibid). Thus, contrary to the initial designations of the Commission and contrary to what had been argued by NGOs and civil society, business representatives were successful in shifting focus from law as a normative source or a method for regulation of CSR to law as a tool for strengthening companies’ economic interests in CSR. Although the report does not deny the role of human rights in CSR, it does not promote it, nor does it suggest an operative integration of human rights, human rights standards, or the normatively informing role of international human rights law into CSR. The message from those participants in the MSF who were the most successful in carrying their points, arguments and priorities through in the wording of the Final Report was a bleak one with regard to the normative role of international human rights law to guide CSR in Europe. In this regard and in view of the potential of CSR to promote human rights in the interface between companies and their employees, local communities and other stakeholders, the report becomes an example of what has been succinctly described by Arat (2006) as the power of the powerful – in casu parts of industry and its networks – to have the ability and will to attempt to curb the content and reach of human rights.

The MSF was re-launched in 2006 following the 2006 Communication and in order to remedy the dissatisfaction of NGOs and labour unions which were upset at not being including in the CSR Alliance. The Commission convened the first meeting of the new MSF in December 2006. At this meeting, based on a request contained in the 2004 Final Report of the MSF the Commission presented an overview of past, ongoing and future CSR activities of trade unions, civil society organisations, employers organisations and business networks, along with some recommendations by the Commission (Commission 2006b). Commission recommendations for future action were mainly concerned with promoting the priority areas related to CSR that were listed in the Commission 2006 Communication on CSR. Accordingly, the focus was on the Lisbon and Gothenburg strategies, inviting companies to contribute to public policy objectives such as the integration of labour markets and social inclusiveness, investment in the creation of employability competences, and responsible competitiveness in a globalised economy, contributing to the fight against poverty at global level, without references to human rights or international human rights law (Spidla 2006).

Given the origin to the first MSF as well as its outcome, statements made by the Commissioner for Employment, Social Affairs and Equal Opportunities Vladimir Spidla are worth noting both of interest for an analysis the role which the Commission continues to attempt to award to international law as a source for CSR and for the analysis which will be undertaken below of the Commission’s approach to regulating CSR as reflexive law. In his speech at the re-launch of the MSF in December 2006, Commissioner Spidla stated on the strategy for regulation of CSR that with regard to

a topic like CSR, it is not sufficient that the Commission makes regulatory guidelines. Certain actors, such as NGO representatives, are of the view that the European
framework for CSR is not complete, that it should go further. But it is through
dialogue that progress is made, CSR initiatives should build on a process of exchanges
based on critical analysis.  

Reiterating the role of international law instruments in informing CSR, Commissioner Spidla stated
in immediate continuation of the above:

The results of the Forum are also that from now on, European enterprises that operate
globally will make reference to internationally agreed texts, i.e. the OECD Guidelines,
the ILO conventions, environmental conventions ratified by Member States, and to
universal texts on human rights.

Summing up on those points, Commission Spidla stated that the Commission wants to facilitate and
promote dialogue on the topic among all stakeholders. We will revert to these statements in the
analysis in sections 6 and 7.

Human rights continue to feature in the re-launched MSF. As previously, this is mainly in the
context of the so-called ‘global dimension of CSR’. The MSF meeting in February 2009 discussed
the impact and influence of the study and continued work of the Special Representative of the UN
Secretary General on Human Rights and Business, and issues related to the right to food, as well as
EU cooperation with the ILO and OECD to promote CSR based on the international standards to
which these organisations are committed. Also discussed was the need to counteract unfair
competition by companies violating human rights, require companies to undertake human
rights due diligence, and the possibilities to have more effective enforcement mechanisms
by introducing extraterritorial jurisdiction among EU member states and allowing
criminal prosecution of companies for human rights violations to a greater extent than
currently in the EU member states (EU Multi-Stakeholder Forum on CSR 2009).

5.3. The framing and launch of the CSR Alliance

The idea to launch the CSR Alliance was officially announced by the Commission in
March 2006 in its Communication ‘Implementing the Partnership for Growth and Jobs: Making
Europe a Pole of Excellence on Corporate Social Responsibility’ (Commission 2006). In this
Communication, the Commission specifically links CSR with the Lisbon process which had been
re-launched in 2005 with a particular focus on employment and economic growth. In addition, the
Communication links CSR with human rights in the context of the European strategy for
sustainable development and in order to promote responsible competitiveness. This distinction
suggests that human rights are perceived as issues to be addressed primarily outside the EU, in
developmental and trade relations. While there may be political reasons behind the absence of links
made between the Lisbon process and human rights in the intra-EU context, the omission to

19 Author’s translation from the French original: “un sujet tel que la RSE, il ne suffit pas que la Commission émette
d’en haut des lignes directrices. Certains acteurs, tels que les représentants des ONG considèrent (…) que le cadre
européen de RSE n’est pas complet, qu’il faut aller plus loin. Mais c’est en dialoguant que l’on progresse, les initiatives
de RSE doivent s’appuyer sur un processus d’échanges critiques (…)” (Spidla 2006).
20 Author’s translation from the French original: “Les résultats du Forum c’est aussi que désormais, les entreprises
européennes qui opèrent dans le monde se réfèrent aux textes agréés au plan international, c’est-à-dire aux principes de
l’OCDE, aux conventions de l’OIT, aux conventions environnementales ratifiées par les Etats-membres, aux texts
universels des droits humains” (Spidla 2006).
mention such links also appears to underscore the lack of perception of complementarity between the Lisbon goals and human rights, and perhaps a lack of realisation of the human rights aspects of the problems which the Lisbon process attempts to address.

This finding is supported by the working of the introductory part as well as the Annex of the Communication. These argue that companies can help reconcile European economic, social and environmental ambitions through CSR (Commission 2006: 1 and Annex). The Commission notes that “alongside public policy responses, CSR practices can contribute to a range of relevant policy objectives”, including higher levels of labour market inclusion and recruitment from disadvantaged groups, employability, job creation, investment in skills development and life long learning, and greater respect for human rights and core labour standards, especially in developing countries (Commission 2006:2, Commission 2006c). European companies are invited to strengthen their commitment to CSR and “behave responsibly wherever they operate, in accordance with European values and internationally agreed norms and standards” (Commission 2006: 3).

An institutional cooperative set-up comprising companies working with the Commission was argued to be the way to achieve these aims. Introducing the CSR Alliance, the Commission reported that it saw a new political approach as necessary, continuing dialogue “with all stakeholders” but seeing companies as primary players in CSR (Commission 2006: 4 and Annex). The wording chosen suggests a play specifically on that on State responsibility for human rights employed in the Global Compact and the 2003 Draft UN Norms on Human Rights responsibilities of Multinational Enterprises and Other Business Enterprises: Whereas states are described in those two instruments as having primary responsibility for human rights and business having human rights obligations within their spheres of influence, the Alliance is based on an inverted view: Companies are seen as the primary players in CSR, public authorities are seen as having a supportive role to promote it (Commission 2006c). Compared with the strong references to international human rights law at the outset of the MSF 2002-2004 and perhaps particularly the references to human rights treaties which establish obligations for ratifying states, this suggests that industry’s arguments during the MSF were successful in indicating to the Commission that industry is aware that according to international law doctrine, human rights are basically states’ obligations. It also suggests that industry has been successful in implying that states’ or Commission concerns with human rights problems should by addressed by strengthening states’ efforts to implement their obligations, with CSR and corporate action in general possible complementary contributions. While the Communication is not devoid of references to international human rights law, such references (which are limited to the ILO Tripartite Declaration, the OECD Guidelines, “the Global Compact, as well as other reference instruments and initiatives”) are made in relation to the Commission’s efforts and as a basis for the Commission’s cooperation with governments and other stakeholders, and not in relation to the Alliance or its priority activities (Commission 2006: 8, compare 12).

The main element in the new approach was described as an innovative partnership with enterprises, Member States and stakeholders in the form of the European Alliance for CSR, open to European enterprises of all sizes and based on the priorities of the re-launched Lisbon strategy to respond to the challenges of increasing global competition, demographic trends and a sustainable future (Commission 2006: 4, 7 and Annex). The Commission characterised the Alliance as “not a legal instrument” but based on voluntary commitment, with the results to be understood as voluntary business contributions to the achieving the Lisbon goals (Commission 2006: 3). Probably also in an effort to calm concerns among companies that the Alliance might entail legal commitments or accountability, the Alliance was described as “a political umbrella for new or existing CSR
initiatives by large companies, SMEs and their stakeholders”, “a political process to increase the uptake of CSR amongst European enterprises” and “a vehicle for mobilising companies in the interests of job creation, economic growth and sustainable development” (Commission 2006: 3 and 6).

In tandem with the announcement of the CSR Alliance, the Commission announced plans to re-convene meetings of the MSF in 2006 to enable dialogue with all stakeholders (Commission 2006). The composition of the Alliance was not received favourably by all. In particular, trade unions and NGOs were upset with being excluded from direct participation in work on CSR in the Alliance. They felt that the Commission had taken the CSR agenda hostage for promotion of jobs and employment to the possible detriment of implementation of the international law instruments and principles informing CSR. They feared that the Commission’s continued commitment to CSR being voluntary rather than mandatory might exacerbate this (Euractiv 2006).

Progress Reporting from the CSR Alliance copies the style of language of the 2006 Communication, describing the Alliance as a new political approach on CSR and devoid of references to legislation being linked to CSR. Rather, deregulation and CSR are implicitly linked: The Alliance “is based on a double commitment: On the one hand, the European Commission will strengthen a business friendly environment. On the other hand, and through a voluntary approach, enterprises will further focus their efforts to innovate CSR (...)” (The European Alliance for CSR 2008: 5). From one perspective, the CSR Alliance continues the line adopted by the latter part of the 2002-2004 MSF, with limited direct references to human rights or human rights law and an insistence that CSR is voluntary in what appears to be the sense of not being subject to legally mandated requirements. From another perspective, the dialogue and learning forum character of the Alliance and its membership which comprises CSR-friendly business organisations and their members, some of which take a human rights law-inspired approach to CSR within and outside Europe, provide opportunities for companies to learn and be inspired about the normative role that human rights law may play for defining their own CSR normativity and self-regulating on the basis of societal expectations on companies’ human and other social responsibilities. While the absence of civil society may be lamented from the perspective of democratic legitimacy, it appears as if the composition of the Alliance as a forum which does not include organisations that argue strongly in favour of legally mandated CSR action provide an environment in which some companies adapt their normativity, internalise societal concerns and expectations and build their self-regulation on human rights on the basis of the fruitful experience of other companies.

The implications of the MSF and the CSR Alliance will be further discussed in the subsequent sections which will address the initiatives from the perspective of reflexive law and with regard to the role of international human rights law.

6. The relevance of reflexive law for analysing emerging EU regulation of CSR

For the legal scholar, the Commission’s insistence on CSR being voluntary combined with its efforts to promote support public-private regulation of CSR and to provide the substantive normativity of human rights raises a question of how to analyze and categorize the process: On the one hand, the Commission’s efforts to promote CSR and the two public-private initiatives of the MSF and the CSR Alliance do not fit ordinary patterns of parliamentary law-making. On the other hand, the normative and regulatory aim is clear, as is the objective of inducing certain behavioural regulation in companies beyond simply setting out public policies whose implementation requires the active action of the private sector, and hoping that companies will follow by themselves. The
MSF and the CSR Alliance demonstrate an intention to procedurally initiate and substantively influence the process that will ultimately lead companies to self-regulate. The MSF and the CSR Alliance somewhat resemble the definition of co-regulation provided by the EU Commission in its 2001 White Paper on Governance as an alternative to legislation and non-legislation, with the reservation that the possibilities for EU authorities to intervene “by establishing the specific rules needed” is limited (Commission 2001b: 21 compare 33).

From the traditional perspective of the legal scholar and legal regulation, the MSF and the CSR Alliance are not law, neither are their objectives to create law in the ordinary positivist sense. Nevertheless, from above overview and preliminary analysis of the case studies indicate that the two initiatives are not irrelevant from a legal perspective, particularly one concerned with the process of making law including soft law, and one concerned with the interrelationship between international human rights law and normativity and human rights implementation in other legal systems. In this case, this interrelationship plays out in relation to at least two other legal systems: The system of EU law (which in the case of human rights necessarily involves the interaction between the system of EU law and national legal systems), and the system of private law as it relates to companies. In addition, we are able to draw some preliminary findings on the MSF and the CSR Alliance: Both initiatives are primarily procedural, but with considerable substantive intentions to shape normativity and self-regulation of companies on CSR. The MSF 2002-2004 was set up as a co-regulatory initiative, prepared within the framework of the 2002 Communication serving as a preparatory instrument. Failing clear and forward-moving results of the kind envisaged by the 2002 Communication, the Alliance was established and presented as an instrument for self-regulation. However, given the amount of directions contained in the 2006 Communication, the Alliance in combination with the MSF 2006 makes a steering claim giving effect to Community policy objectives which, in combination with the outcome of the MSF 2002-2004 and its reference to international law, may be intended to have a considerable normatively guiding effect on the outcome of the Alliance.

This combination of procedural forums established by an authority with limited regulatory capacity in the pertinent field (in casu the Commission and the powers of the Commission and the EU as such to regulate human rights behaviour of EU based companies and the limited powers to regulate labour law), the clear objective to promote self-regulation by providing possibilities for various stakeholders representing various societal interests to share views, expectations and experience make a case for considering the MSF and the CSR Alliance from the perspective of reflexive law. As we recall from the brief introduction to reflexive law in section 2, reflexive law is characterised by dialogue and learning, exchange between social sub-systems of their expectations and demands of each other as well as best practice, and other modalities which will support reflection within and between social sub-systems. Arguably, the possibilities created by the MSF and the CSR Alliance for interaction and learning between different social sub-systems including not only companies, NGOs and political and regulatory institutions, but also the different types of legal systems with regard to human rights normativity, further strengthen the relevance of taking a reflexive law approach.

Moreover, the background to the EU Commission’s CSR initiatives resembles that which led to the formulation of the theory of reflexive law: Societal needs translate into policy objectives and require being addressed through effective regulatory action, inability or inefficiency of formal legislation or law-making to do so; and the potential role of the private sector to contribute to solving the problems.
The theory of reflexive law was formulated as an alternative to traditional instrumental or substantive law-making and their opposite, complete de-regulation. It recognised that regulatory strategies of welfare states in the 1970s-1980s were ineffective for addressing environmental degradation, unemployment and social inequalities and other societal concerns, which required the cooperation of the economic sub-system for their solution (Teubner 1983, 1986, 1993 esp. at 66). The theory argued that substantive law (aiming at particular, often welfare oriented, goals through state-made formal regulation and specific standards) was unable to meet the demands that result from an increasingly differentiated society. Reflexivity was argued as a middle path: It would lead to more adequate legal regulation produced in internal reflection within the pertinent organisations or sub-systems, through a sort of regulated autonomy (Teubner 1983; compare Scheuerman 2001, Orly 2005). To promote reflexive regulation, governmental bodies may establish procedures and organisational forums and frameworks that facilitate internal discourse among other organisations and their adaption to external demands, concerns and expectations through self-regulation. Authorities may guide the process by providing normative guidance, but normative outputs are ideally made by those who will be subjected to the output and who represent the interests at stake.

Reflexive law assumes three types of reflexivity: Reflection within public authorities on their own regulatory capacities; authorities setting up procedures for self-regulation or co-regulation by those to be subjected to the resulting normative output; and reflection by the latter upon their actions and their impact and needs for adopting normative guidelines or correctives.

As a regulatory strategy, reflexive law builds on the assumption that regulation is more effective and more easily accepted if created by those directly affected by it. The focus is on establishing procedures that allow for a range of those involved or affected (or, in CSR language, stakeholders) to have access to influence decisions or rules that are made and the way that conflicts are solved. Reflexive regulation does not directly regulate behaviour to realise particular, predetermined goals. Instead, it aims at encouraging processes of reflection leading to self-regulation, based on the particular organisation’s reflections on its impact on society, and the sharing of views, expectations and experience. Through the procedures of reflexive regulation, authorities retain control, whereas other participants are offered a learning process that enables them to reflect on the consequences of their actions in relation to the community and to integrate societal needs and demands through self-regulation. To limit abuse of power by stronger participants in the process, reflexive law assumes a degree of neutralization of power disparities by institutional procedural mechanisms (Teubner 1986: 316-319; Teubner 1993: 94). This establishes a connection to the common usage of ordinary procedural law to ensure rights and opportunities of individuals and groups, especially in relation to more powerful ones, such in human rights law and national administrative law the relationship between citizens and authorities.

As examples, social reporting schemes such as those introduced by a number of European states contain reflexive elements by defining procedures (such as for stakeholder dialogues) which allow companies to learn about expectations and demands of stakeholders and to reflect these in their self-regulation. Certain labeling schemes, such as governmentally authorized and controlled eco- or sustainability labeling schemes contain reflexive features by providing for a process of reflection of societal expectations of the product, producer and production process and internal reflection leading to the decision to adopt the label and self-regulate so as to honour the
conditions for use of the label. The establishment of social reporting schemes as well labeling schemes assumes authorities’ reflection on their regulatory capacities with regard to achieving the desired end result. Indeed, the theory of reflexive law has been applied to such schemes, primarily at national level but also at EU and transnational level. Touching on environmental management and labeling as self-regulation and auditing (Orts 1995: 1311-1313, Orts 1995a:788-789), non-financial reporting (Hess 2008, Hess 1999), globalization of law and transnational private regulation (Scheuerman 2001), and labour law (Arthurs 2008, Deakin & Hobbs 2007, Deakin 2005, Rogowski 2001, 1994, Rogowski & Wilthagen 1994, Wilthagen 1994), several of these are closely related to substantive issues that are often considered to come under the umbrella of CSR.

While reflexive law has often been seen to be primarily procedural, Deakin & Hobbs (2007) demonstrate that reflexive regulation may be oriented towards a specific substantive output. Also of interest in the current context, in his study of the EU’s Eco-Management and Audit Scheme (EMAS) and other environmental regulatory schemes, Orts (1995: 1287) found that many environmental laws are reflexive in character but appear to be so “almost unconsciously”, “almost randomly, without a theory informing them” and therefore less effective than intended. Arguably, reflexive law is also normative in its own right. This normative quality comes out through the theory’s emphasis on two interrelated aspects: Participation of the economic subsystem and civil society in the development of norms, and establishing a balance of power between participants in this process. The latter reflects back on procedure as power balance should be achieved through the procedures set up for the reflexive regulatory process. In establishing reflexive regulatory processes, authorities therefore need to be aware of the normative requirement that procedures take power disparities into account to ensure that the procedures cater for equal possibilities for all affected to inform the substantive normativity. However significant this is for the legitimacy of the reflexive regulatory process and its substantive outcome, the technicalities of how to provide the process with the procedural set-up to balance power disparities will be further explored below.

The EU Commission’s approach to regulating CSR in Europe has been to involve affected partners while indicating from the outset that CSR was not to be an issue of mandatory requirements on the basis of directions issued by (EU) authorities. This view is reflected in the Commission’s definition of CSR and also in the announcement by Commissioner Spidla at the re-launch of the MSF in 2006 of CSR. As we saw above, on this occasion the Commissioner both stressed that CSR should be developed in a public-private partnership drawing on dialogue and that international human rights law as a relevant normative source to inform CSR. Especially the former part of the statement indicates a view that for CSR regulation to be effective in the sense of being accepted by those for whom it creates (societal) obligations, it should not be based on directives by authorities. Indeed, this might be a sort of a compromise between the results of the 2002-2004 MSF that CSR was not to be subject to formal regulation, and a view of the Commission that there is a social interest in

CSR being subject to some form of regulation, even if through co- or self-regulation. Accordingly, the Commission has established channels through which stakeholders have been able to meet and cooperate to create substantive regulation on CSR. With the 2002 Communication and the 2002-2004 MSF, the Commission offered invited stakeholders the opportunity to set the framework for CSR regulation in the EU. The MSF launched in 2002 involved not only business as entities directly affected by CSR expectations, but also other stakeholders, such as civil society organisations representing employees and NGOs representing communities. The Commission documents indicate that the process, which was launched with the MSF, recognises that societal interests demand that companies take on certain responsibilities for their actions in society and for the role they may play in promoting welfare policy objectives. This approach to regulation has the key characteristics of reflexive law. The strategy is at once one of co-regulation and one aimed at corporate self-regulation. The CSR Alliance was established as a learning forum for private companies, aimed at exchanging best practices. The learning forum approach is a key feature of reflexive law. The use of learning forum approach indicated that that the regulatory procedures initiated by the Commission work along ideas like those of reflexive law.

Approached along these lines, the Commission’s efforts to promote regulation of CSR in EU through the establishment of public-private forums to provide for dialogue, learning and ultimately internalization of societal concerns in companies may be characterized as an example of reflexive law. Like the EMAS in the example analysed by Orts (above, this section), the MSF and CSR Alliance were reflexive in character but seem to be so almost unconsciously or randomly, without a theory informing them. Indeed, as further discussed in the following section in relation to power disparities among stakeholders, this may be why the MSF was less effective than intended, both with regard to the establishment of a guiding framework for CSR and particularly and as further discussed in the following section, with regard to integration of human rights normativity.

The fact that the regulatory approach was not fully effective with regard to parts of the original substantive objectives, precisely because it was not informed by relevant regulatory theory, does not negate the relevance of theoretically approaching the MSF or other EU CSR initiatives from the perspective of reflexive law. On the contrary, doing so provides a framework for analysis which assists in understanding the processes from a legal perspective and in explaining some of the failures of the MSF in terms of norm-setting, particularly because of lack of fulfillment of the normative requirement of balance of power. This also helps explains civil society’s reservations against the CSR Alliance due to lack of participation.

Although the theory of reflexive law was originally developed for application in a national law context, the observations above indicate that it may also relevantly be applied in a context of intergovernmental regulation. The following section draws on the theory to gain a more detailed understanding of the discursive process and outcome of the 2002-2004 MSF and the launch of the CSR Alliance with regard to the role played by international human rights law for CSR normativity in the context of EU efforts to promote European companies’ self-regulation.

7. The MSF and the CSR Alliance discourses on the form of regulation and the role of international human right law
The analysis in this section combines the theoretical approach of reflexive law including its normative focus on procedures to neutralise power disparities among stakeholders, with the discourse analysis inspired readings of the MSF and Alliance texts in sections 5.2. and 5.3. The objective is to analyse what those texts and readings tell us about the way arguments and positions promoted by participants worked to influence the result of the MSF and the establishment of the CSR Alliance. We want to see how these arguments, positions and participants influenced the construction of CSR with particular regard to the form of regulation of CSR and the role of international human rights law as a normative source. Based on that, we will assess how the reflexive law procedure dealt with power disparities between participants (to the extent that such discursive power was not simply based on the more convincing argument).

We have established above that reflexive law is a useful theoretical approach for understanding the MSF and the CSR Alliance. Accordingly, this section will focus on what actually happened within the procedural framework established by the Commission for the MSF, what the results were and why they arose, and how this influenced the establishment of the Alliance. The sub-discourse on whether CSR should be ‘voluntary’ or ‘mandatory’ is material on its own, but also for the role of international human rights law to inform CSR normatively. References to international human rights law or specific references to human rights standards can be made explicitly in Member States’ statutory regulation establishing binding obligations for companies.

Recall a few key points of the theory of reflexive law: Through establishing procedures for exchange of views and concerns, reflexive law is based on a learning process building on exchange of views and experiences of those subjected to regulation and in some cases also those affected by actions of the former. Reflexive law theory recognises that power differences between participants in the reflexive regulatory process may exist and should be minimised through procedures.

At the launch of the 2002-2004 MSF, the Commission clearly indicated that it intended CSR to be informed by certain normative sources, in particular international human rights law and related ‘internationally agreed’ instruments. Thus, the Commission did not limit itself to establishing the procedure for regulation, but also indicated its view on social interests to be considered and of substantive norms. Although the Commission insists that CSR is voluntary action and not law, law – albeit not law that directly binds companies, but international law which addresses itself directly to states – is awarded an intended major role as a normative source of CSR.

Initially, the MSF in its mandate and debate expressed clear links between CSR, European and international law, and the aims of the Lisbon strategy, including inclusiveness and responsible competitiveness. From this perspective, law, including international human and labour rights law, is a clear and obvious source for CSR, and CSR-informed business practice an obvious avenue towards implementation of the Lisbon goals. In later meetings the links to law, including international law, were downplayed in favour of a debate on CSR as voluntary rather than mandatory. The links between business action and implementation of the Lisbon goals were also played down. The final report, however, reiterates the basic links, albeit in a way that does not integrate human rights law with operative aspects of CSR.

As the objective of the 2002-2004 MSF was not met with regard to establishing a framework or, arguably, with regard to the role that international law on human rights and particular human rights instruments were given to have to play by the 2004 Final Report, the Commission launched a new initiative in 2006, the CSR Alliance, and also organised a re-launch of the MSF. In this case, the
regulatory strategy was more clearly aimed at self-regulation but in a two-pronged way: The MSF is a channel for keeping the process going, and as we saw in Commissioner Spidla’s speech, also serves as input on normative issues and normative sources.

The Communication which announced the Alliance refers to those same instruments of international law as were mentioned in the MSF Final Report, and the launch of the MSF 2006 re-introduced them. Although the references are limited to the instruments agreed to by the MSF, these steps indicate that the Commission is serious about getting companies to consider human rights, but also that it is struggling with the approach it can take to make companies internalise this expectation.

The Commission’s response to the outcome of the MSF through the subsequent establishment of the Alliance indicates that the Commission considers CSR a *sine qua non* for implementation of paramount societal challenges of the EU and its Member States in relation to employment and inclusiveness and in relation to the future of European business in a world of increasing global competition. The Commission places a considerable part of the responsibility for meeting these challenges on business by tying together the relevance of CSR to meeting the goals of the re-launched Lisbon strategy and sustainable development with companies as the main players in CSR, at the same time reiterating the role of instruments of international law, agreed to in the MSF Final Report, as key informing sources of business action for CSR.

The debates and intentions surrounding the MSF and the Alliance indicate that in the Commission’s approach to CSR as a modality for meeting societal challenges on employment, inclusiveness and sustainable development, law and legal institutions not only have a considerable role, but the role of international law as a source of the substance of CSR is significant. International law takes on relevance for CSR in an EU context because obligations of Members States to implement human rights, e.g. of non-discrimination and labour rights, may support EU objectives of inclusiveness and employment, as well as with regard to responsible competitiveness and implementation of EU human rights policy objectives outside the EU’s borders. The analysis shows that law and law-based rules in the view of the Commission and several participants from within civil society but also some business organisations play an important role in defining the substance of CSR. In this connection, the Commission and civil society as well as some business organisations particularly emphasised international law and soft regulation on human and labour rights (the 1998 ILO Declaration, the OECD Guidelines, the UN Global Compact, and a range of UN and European hard law instruments on human and labour rights. The analysis also shows that interest groups (stakeholders) understand this and cooperate in networks comprised by business, trade unions and NGOs to influence the substance and form of CSR regulation to counter or promote corporate responsibilities to lift tasks which are state obligations not only in traditional welfare state thinking (e.g. promoting employment opportunities) but also according to international human rights law.

As we saw above, industry argued mainly against mandatory regulation and against basing CSR regulation on hard law instruments of international law. NGOs and trade unions argued in favour of binding regulation based on hard international law. The Commission initially referred to international human and labour rights law, but in relation to the construction of CSR in a European context through the MSF, the Commission was not able to bring forward the international law point to have much bearing on the outcome. This raises issues concerning the ability of the Commission’s choice of regulatory strategy to bring about certain substantive outputs, and its ability to balance inputs as part of this process.
As a regulatory strategy, the MSF 2002-2004 established procedures for input from stakeholders with the aim of producing a substantive normative output. The actual output, as well as the role played by business for the outcome of the 2002-2004 MSF, indicates that the procedure did not effectively deal with power imbalances between stakeholders. This is supported by the observation that the Commission – as reflected in the 2006 Communication and in Commission Spidla’s speech – still considers human rights an important normative issue in CSR and still considers international human rights law an important informing source. The regulatory strategy of the 2002-2004 MSF did not seem to take power differences much into account. If it had, we could have expected to find as part of the documents or instructions presented as part of the launch of the MSF in 2002 a list of procedural rules reflecting a procedural set-up intended to neutralise power disparities between stakeholders. It seems that the multi-stakeholder strategy was chosen primarily as a means to bring stakeholders together, exchange views and subtly attempt to direct the substance of resulting co- and self-regulation. In accordance with the finding above, this indicates that the Commission’s objectives and its perception of regulatory difficulties and social needs to be addressed resembled those which led to the development of the theory of reflexive law, but that the Commission just happened to apply the reflexive regulatory strategy without being informed by the theory.

The fact that power differences were not dealt with through the procedure strengthens the assumption that the application of regulatory strategy had not been informed by the theory of reflexive law. The outcome is mainly in accordance with the discursive interests and positions of industry. The MSF outcome relegated international human rights law to a somewhat isolated role with only a few instruments mentioned as key instruments for CSR in a European context. It also demonstrates the power of strategic discourse to shape normativity and achieve results that favour the interests of particular participating stakeholders, especially if such stakeholders understand the positions of others and the formal rules which these are ultimately subjected to, such as in this case doctrine on international law subjectivity. Those not interested in CSR becoming ‘mandatory’ were not only successful in achieving that no references were made to CSR to be regulated by law. They also obtained that references to law were made in such a way as to encourage the Commission and Member States to use law to promote a favourable environment for companies with no specific references between this and CSR action or commitments. In addition, industry successfully ensured that references to human rights obligations mentioned obligations of states and authorities, not companies. Correct as this is according to international law doctrine, it does little to promote human rights normativity among European companies.

The process comprising an on-going series of meetings and the possibility for stakeholders to present statements is closely interwoven with the outcome both in terms of the form of regulation of CSR recommended by the Final Report, and the role awarded to international human rights law. Both in terms of process and outcome, in particular the limited role awarded to international human rights law, the MSF experience confirms the need to procedurally deal with power differences when reflexive regulatory strategies are employed.

The establishment of the CSR Alliance appears to represent a lesson learned by the Commission through the MSF, but it does not represent a more inclusive or balanced approach to dealing with power disparities between economic actors and civil society. The decision to exclude civil society from the Alliance may work in the sense of establishing a ‘safe haven’ for exchange of views and experience for companies, but it almost killed civil society support for the Commission’s initiative and belief in its neutrality and sincerity with regard to promoting CSR.
The process and outcome of the MSF indicate that reflexive law in principle works as a regulatory strategy to encourage co- and self-regulation on CSR and the more limited sub-discourse of business responsibilities for human rights but that achieving particular substantive results may be difficult. Successfully achieving such results through a process which builds on reflexive law’s paradigm of effective implementation as a result of ‘ownership’ created through participation in norm-creation may require very careful design of the reflexive regulatory process to respect its autonomy and still provide substantive normative guidance.

8. Conclusion and perspectives

The first part of these concluding comments build on observations above on the MSF and the CSR Alliance as processes of constructing the concept of CSR and regulating CSR through reflexive public-private regulation, how they dealt with power imbalances, and the impact of this on the output of the processes with regard to international human rights law as a normative source for business self-regulation and for public-private co-regulation of CSR. From the perspective taken here, access to processes of creating regulation should be approached not only in terms of formal access to provide input, but also in terms of balancing of interests in relation to the resulting output. The second part introduces observations that the EU Commission’s effort to integrate human rights law into CSR and the application of the reflexive law approach may contribute to a juridification of CSR. The last part draws some perspectives on how the EU Commission’s effort to promote CSR and corporate self-regulation through co-regulation with business and civil society may relate to the emerging legal discourse on ‘new governance’, and suggests some possible research topics to follow up on this.

Increased integration of law-based normativity into CSR in order to inform and clarify the normative substance of CSR indicates a shift from involving companies through policy to involving them through non-enforceable responsibility based on law. The EU MSF and the EU Alliance are examples of this course, drawing particularly international law as a normative source but also working through supranational forms of procedural regulation, potentially supported by national regulatory modalities. The choice of a reflexive regulatory process seems accidental rather than intended. As such, the lessons that may be drawn are potentially useful for identifying obstacles for successful reflexive regulation that may addressed in intentional reflexive law-making, such as other intergovernmental efforts to promote corporate human rights observance through self-regulation on CSR.

As we have seen, the Commission has consistently made clear links between CSR, sustainable development and instruments of international human rights law. At the same time, despite obvious substantive issues of correspondence between the Lisbon goals and core human rights principles as well as concrete human rights standards, the link has not been made explicit. As a result of imbalances in the MSF, human rights and international human rights law as a source for EU public-private co-regulation as well as corporate self-regulation of CSR was limited to vague references to instruments of a very soft law character, with no agreement on substance and no agreement on mandatorily required minimum obligations.

Although the MSF included civil society organisations, companies and employers’ organisations were able – especially through their member organisations’ network structures – to particularly
strongly promote the views of their constituents. And despite the relatively broad composition of the MSF, the large majority of those who may benefit from CSR demands on business (such as consumers, investors or governments) or be subjected to such demands (such as suppliers, especially in third world states) do not have direct access to the norm-formulation process, nor to influencing the choice of form of norms (mandatory or voluntary) or of regulation (hard or soft). On the contrary, particularly the MSF process testifies to the power of industry to influence normative substance and the procedural form of a regulatory CSR framework, in this case with the effect of significantly influencing the outcome of the MSF. The composition of the Alliance also indicates that business interest – perhaps also within the Commission – had considerable power in directing the follow-up to the MSF. The impact of this is particularly thought-provoking given that the business sector was only one among several types of involved stakeholders in the MSF, and that CSR is based on recognising the effects of business on society. This indicates that if reflexive regulation is to result in normative outputs that are legitimate in terms of balance, the procedure established for public-private co-regulation or private self-regulation must be better able to handle power differences among those providing input. Given that the MSF and the CSR Alliance processes are most likely reflexive law ‘by co-incidence’ rather than intended regulatory processes based on the theory of reflexive law, the presence of some output deficiencies is not too surprising. The observations above suggest that such deficiencies may be dealt with through a more careful design of the procedure in accordance with the theory of reflexive law.

Teubner’s ideas on reflexive law and CSR were made mainly from a private law angle: How to achieve effective regulation at the level of companies. However, from a public law angle, reflexive regulation may also be an approach to make businesses adapt their behaviour so as to contribute to fulfilling societal or more specific political objectives, such as human rights related objectives of non-discrimination at the work place or labour practices that conform with international law. From this perspective, the appropriateness and effectiveness of reflexive law as a regulatory theory is worth considering as a regulatory option for governmental and intergovernmental bodies. A main lesson from the EU Commission’s experience in this context is that reflexive law as a regulatory strategy needs to be informed by the theory. This means that the procedural design should be carefully considered, and a balance must be struck between the substantive normative intention of authorities that create the procedural framework and what can be expected in terms of precise substantive normative output of the reflexive regulatory process. If authorities hold very well-defined or comprehensive normative substantive objectives at the outset, reflexive law may not be the appropriate strategy, or the strategy may need to be supplemented by other regulatory strategies.

These observations also suggest that law in fact has much to lend to CSR. Not in terms of mandatory regulations and black-letter law, but in terms of legal theory informing processes and sources of norm-creation. Application of the theory of reflexive law including its theoretical implications for procedural design and form of normative guidance may provide for more effective public-private interaction and collaboration in norm-creating processes. Ultimately this may lead to corporate self-regulation that corresponds to societal expectations and public policy needs. The proceedings of the MSF and the launch of the Alliance demonstrate that in the Commission’s approach to CSR as a modality for meeting societal challenges, the role of international law as a normative source for filling out the substantive contents of CSR is also significant. In addition to common social expectations that business respect and promote human rights, international law takes on particular but little noted relevance for CSR in an EU context as obligations of Members States to implement human rights may support EU policy objectives. In the Lisbon context, human rights obligations to provide for non-discrimination and labour rights
may support EU objectives of inclusiveness and employment. Company self-regulation on human rights may support responsible competitiveness and implementation of EU human rights policy objectives outside the EU’s borders. Law and law-based rules, in particular international law and soft regulation on human and labour rights (the 1998 ILO Declaration, the OECD Guidelines, the UN Global Compact, and a range of UN and European hard law instruments on human and labour rights) play an important role in defining the substance of CSR.

Through its strategy of politicization of CSR in order to serve the implementation of public policy objectives, the Commission has introduced law-informed regulatory strategy (reflexive law) and law-based normativity (with international law as a source) into CSR regulation. In view of the hesitant approach to law among some organisational scholars and other academic fields with CSR interest, further analysis may add significant new perspectives to the understanding of CSR and the contributions which legal scholarship may make to the promotion of CSR. In particular, legal scholarship’s insight into the institutionalisation of norms of conduct may add to the development and implementation of CSR, including human rights aspects. Such research could integrate some of the findings and arguments of the UN Special Representative on Human Rights and Business. It could complement the work of the Special Representative with respect to the development of human rights respecting corporate cultures. It could also go further than the Special Representative’s recommendations and connect to human rights objectives of EU and other states to which companies may contribute beyond simply not doing harm.

Touching finally on the issue of ‘new governance’ which has been raised with this author by some commentators, the analysis of the effectiveness of the approach taken by the Commission and lessons learnt for the reflexive law approach to be effective for public-private regulation of CSR may feed into the general scholarly debate on ‘new governance’. That debate and emerging theory is placed somewhat at the interface of law and politics, with a focus on decentralized, participatory and problem-solving-based approaches to regulation (for example Hess 2008, Trubek & Trubek 2006, Scott & Trubek 2002). Hess (2008) describes ‘new governance’ as a broad term that covers various types of participatory, decentralized, problem-solving regulation orchestrated by governments as an alternative to command-and-control regulation with its focus on centralized dictation of rules and state-imposed penalties for non-compliance. As indicated by Lobel (2005), studying reflexive law as a particular regulatory strategy in the context of public-private regulation as ‘new governance’ has relevance because reflexive law is a particular regulatory strategy that works according to the same ideas as ‘new governance’ in general. The analysis in the current article stands apart from others within the emerging ‘new governance’ field by providing experience of the particular regulatory strategy of reflexive law within the particular intergovernmental setting of the EU Commissions initiatives at public-private regulation of CSR, and by including international human rights law as a normative source. The analysis in this article opens for a discussion of the possibility that the EU MSF and the EU CSR Alliance and their normative references to international law may have a soft law character in terms of substance and procedure that could be addressed partly as aspects of or in a context of ‘new governance’. Other studies may want to address legitimacy both in terms of criteria for participation and selection of participants, in terms of the norms that result from the public-private process of regulation, and in terms of the mandate of the authority (in this case the EU Commission, an executive body) that initiates and drives the process of formulating norms. Accountability may be addressed both with regard to the public-private process and respect of the resulting norms. In addition, effects on legal certainty and the rule of law should be addressed with regard to the role provided to economic entities in defining norms that will apply to many
other such entities that have not been involved in the regulatory process, and the clarity and precision of the resulting norms. The role of international human rights law, based in universal standards adopted by states which are members the UN or other international organisations, could be further addressed with regard to its effects on the legitimacy of the norms created through public-private regulation.

Related to this, the analysis of the EU experience may also feed into the discourse on network governance and network-based law-making (Picciotto 2008, 2003, Ruggie 2004). At international and national levels, the development of CSR action, guidance and norms has been a process strongly influenced by interest group networks. Future research might analyse the MSF in more detail to learn more about how interest group networks or other types of networks may act to influence normative outcomes of regulatory processes. Such research might analyse networks’ influence on the end result of the 2002-2004 MSF with regard to the form of regulation as well as the role of international human rights law, or the collaboration and outcomes of the re-launched MSF since 2006 or of the CSR Alliance..

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