

# The Danish CSR Reporting Requirement

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## **MIGRATION OF CSR-RELATED INTERNATIONAL NORMS INTO COMPANIES' SELF-REGULATION THROUGH COMPANY LAW: The Danish CSR reporting requirement**

Karin Buhmann \*

### **Introduction<sup>1</sup>**

With effect from financial years starting January 2009 or later, large Danish companies subjected to a statutory requirement to prepare Corporate Social Responsibility (CSR) reports. The reporting provision was established through an amendment to the Financial Statements Act, introducing a new provision (§99a).<sup>2</sup> Complementary regulation has introduced similar CSR-reporting requirements for institutional investors and loan providers. The introduction of the reporting requirement indicates a transition of CSR from being subject to each company's own strategic choice and priorities, to being an issue regulated by the government through law. The reporting requirement was preceded by a 2008 governmental Action Plan on CSR which, among other initiatives, announced the government's intention to make CSR reporting mandatory.

In introducing CSR reporting requirements, Denmark follows on the steps of several other countries, including France, Sweden, United Kingdom, the Netherlands, and Australia. However, the Danish requirement breaks new ground through its integration of international CSR instruments which refer to international law. The reporting provision's text refers directly to the United Nations (UN) Global Compact and the Principles for Responsible Investment (PRI). The Global Compact was developed under the UN as an initiative of then Secretary General Kofi Annan. Its ten principles address human rights, labour rights, environment and anti-corruption. The PRI (sometimes incorrectly, even in the Danish reporting provision, referred to as UNPRI) is not a UN initiative but was developed with support from the Global Compact and the UN Environmental Programme (UNEP). Under the Danish reporting provision, companies which have submitted a Communication of Progress (CoP) report under the Global Compact or PRI need not report specifically on CSR in their Financial Statement. Thus, a Global Compact or PRI CoP may double as the CSR report for Danish statutory purposes.

The idea that companies should respect human rights is part of the CSR paradigm. Efforts to establish human rights obligations for companies under international law have so far petered out, mainly due to absence of sufficient political will among states as international law-makers. The UN Global Compact developed as an alternative effort to provide normative guidance to companies on human rights and other CSR aspects. The objective of this article is to discuss how the Danish reporting provision's understanding of CSR and particularly its Global Compact CoP reporting option may promote a migration of international law into company self-regulation through national company law. The article relates narrowly to that subject, addressing it in the context of limited

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<sup>2</sup> Act No. 1403 (27 December 2008) amending the Act on Financial Statements [Lov om ændring af årsregnskabsloven].

conventional international law regulation on companies to reduce globalisation's adverse effects on social and environmental concerns and the potential and ambitions of the Danish CSR reporting provision to address those concerns.<sup>3</sup>

Due to space limitations, the article does not discuss whether CSR reporting in general is effective for promoting CSR, nor does it discuss alternative reporting instruments. The discussion of CSR instruments is limited to the Global Compact. The article does not specifically discuss PRI as the latter does not directly address issues regulated by international law.<sup>4</sup>

Section 2 briefly introduces the 2008 Danish CSR Action Plan, and the CSR reporting requirement. Section 3 provides a brief overview of UN Global Compact and its background. Section 4 discusses the way in which the Danish reporting requirement seeks to promote a migration of CSR related international law into company self-regulation and business-to-business relations. Particular emphasis is on the effects of the Global Compact reporting option provided by §99a. Section 5 concludes..

## **2. The Danish CSR Action Plan and the CSR reporting requirement**

### *2.1. The CSR Action Plan*

The Danish Government's 2008 CSR Action Plan<sup>5</sup> presented the reporting requirement as one among a series of initiatives.<sup>5</sup> Reporting was held to promote transparency about CSR and strengthen the opportunities of buyers, consumers, investors, employers, the community and media to relate to and understand how companies and investors apply CSR.<sup>6</sup>

The Action Plan was prepared by the Danish Commerce and Companies Agency the Ministry of Economic and Business Affairs with participation from governmental agencies.<sup>7</sup>

Consultative meetings with industry, employees' organizations and NGOs were held on a multi-stakeholder basis at the onset of the strategy development process and on a bilateral basis throughout the process. The idea of mandatory CSR reporting was only introduced towards the

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<sup>3</sup> For further information on the Danish reporting clause, auditing requirements and other issues, reference is made to other sources, such as the CSR website of the Danish Government ([www.csrgov.dk](http://www.csrgov.dk)) with links to English language documents as well as the original Danish documents, and to the *Mapping paper* for Denmark (draft November 2010, expanded and revised February 2011) prepared by Buhmann, Karin *et.al.* in the context of the *Sustainable Companies Project* hosted by the Faculty of Law, the University of Oslo, and to articles by Karin Buhmann and Kim Fücksel in *Nordisk Tidsskrift for Selskabsret* No. 3, 2009.

<sup>4</sup> PRI was developed as an investor initiative. It enjoys support from the UN Global Compact and UNEP Finance Initiative (UNEP FI), but unlike the Global Compact does not have a formal link to the UN in terms of organisation or other key features. The PRI Principles are intended to provide a framework for taking social, environmental corporate governance issues into account. Incorporating a specific reference to the Global Compact, participants commit, amongst others, to ask for information from companies regarding adoption of/adherence to relevant norms, standards, codes of conduct or international initiatives, such as the UN Global Compact. Unlike the Global Compact, PRI contains no specific reference to international law instruments, such as the Global Compact does with regard to human rights, labour rights, environment and anti-corruption. The PRI Principles are voluntary and based on commitment from the top-level leadership of the investment business. An annual progress report has to be submitted (<http://www.unpri.org>, last visited 20 January 2011)..

<sup>5</sup> The Danish Government (2008) *Action Plan for Corporate Social Responsibility*, English version available at [http://www.eogs.dk/graphics/Samfundsansvar.dk/Dokumenter/Action\\_plan\\_CSR.pdf](http://www.eogs.dk/graphics/Samfundsansvar.dk/Dokumenter/Action_plan_CSR.pdf) last visited 20 January 2011.

<sup>5</sup> The objective of the Action plan was to "promote social responsibility and help Danish businesses reap more benefits from being at the global vanguard of corporate social responsibility. It will underpin the goal of making Denmark and Danish businesses internationally renowned for responsible growth.". The Danish Government (2008): Foreword.

<sup>6</sup> The Danish Government (2008) *supra* note 5: 39-40.

<sup>7</sup> Agencies, including ministries, charged with employment, consumer affairs, immigration, environment, climate finance and foreign affairs issues.

end, reportedly partly in an effort to promote wide political support for the Action Plan among governmental as well as opposition political parties.<sup>8</sup>

Grouped into four key areas, the Action Plan sketches 30 initiatives to be implemented within a four year time frame: (1) Propagating business-driven Social Responsibility, (2) Promoting companies' Social Responsibility through government activities, (3) The corporate sector's climate responsibility, and (4) Marketing Denmark for responsible growth.

The reporting requirement is especially linked to action areas 1 and 2. Action area 1 focuses on strengthening CSR through reporting and reference to what the Action Plan refers to internationally agreed principles for social responsibility. Particular reference is made to the Global Compact and PRI. The Action Plan also notes that businesses may help fill gaps where rules have yet to be established or where existing rules are not efficiently imposed.<sup>9</sup> The Plan notes that Danish companies may request foreign suppliers to observe human or labour rights in their internal processes or relations with sup-suppliers. The Action Plan indicates that corporate conduct and consciousness of social responsibility have the potential to produce "results unattainable through legislation and rules".<sup>10</sup> Striking the 'business case' argument prevalent in organisational theory on CSR, the Action Plan emphasises the benefits of CSR to companies. In the Action Plan's perspective, business-driven CSR is closely related to improving competitiveness, but may also be of benefit to states.<sup>11</sup>

Action area 2 focuses on promoting CSR through government activities, including CSR reporting by state-owned companies and public procurement integrating CSR requirements based on the international law instruments that provide the foundation for the Global Compact.<sup>12</sup> The Action Plan also announced an objective to ensure that major state-owned public limited companies and government investment funds as well as the Export Credit Agency become participants in the Global Compact.<sup>13</sup> As Global Compact participants are expected to submit an annual CoP, this complements the reporting requirement.

## 2.2. The CSR reporting requirement

The CSR reporting requirement applies to large companies, roughly corresponding to the 1100 largest companies in Denmark.<sup>14</sup> Through its detailed requirements on CSR reporting, Danish law goes a step further than required by the EC Modernisation Directive.<sup>15</sup>

<sup>8</sup> Information provided to this author by participants in the Action Plan preparatory group.

<sup>9</sup> The Danish Government (2008) *supra* note 5: 5.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.*, Chapter 4.

<sup>13</sup> Emphasis on CSR as relevant to governmental investment funds and the Export Credit Agency reflects recommendations by the United Nations Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Referring to the *state duty to protect*, the SRSG has emphasised that as state agencies, those organisations have an obligation to ensure that their activities do not violate human rights directly or indirectly. See *Protect, respect and remedy: A framework for business and human rights*. Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (UN Doc. A/HRC/8/5 (2008); SRSG (2007) *Expert Consultation on the Role of States in Effectively Regulating and Adjudicating the Activities of Corporations With Respect to Human Rights*, 8-9 November 2007, Copenhagen: Background note, p. 1, <<http://www.reports-and-materials.org/Copenhagen-8-9-Nov-2007-background.pdf>>, last visited 21 January 2011.

<sup>14</sup> The reporting requirement applies to companies in accounting class C, and listed companies and state-owned companies in accounting class D. Large companies in accounting class C comprise companies that exceed at least two of the following three size limits: Total assets/liabilities of DKK 143 million, net revenue of DKK 286 million, and an average of 250 full-time employees. For details in English, see Danish Commerce and Companies Agency (2008) *About the Danish law: Report on social responsibility for large businesses*,

§99a does not precisely define CSR but provides a guiding understanding. According to the provision, CSR is a company's "voluntary integration of, amongst others, human rights, social issues, environmental or climate issues and fighting corruption into their business strategy and activities".<sup>16</sup> §99a provides that

The report shall contain information about

1) the policies of the [company] on social responsibility, including any standards, guidelines or principles for social responsibility that the [company] is using;  
2) how the [company] realises its policies on social responsibility, including any systems

or procedures in this respect;

3) assessment of the [company] on achievements resulting from its work on social responsibility in the financial year, and any future expectations to the work of the [company].<sup>17</sup>

There is no obligation to have a CSR policy. Companies which are subjected to the reporting provision simply have to state if they do not have a CSR policy.<sup>18</sup>

CSR is often held to be 'voluntary'. According to the Danish Government, the reporting requirement does not change the voluntary character of CSR. The Government reasons as follows: No specific CSR action but only reporting is required. According to the official explanation, provided in the preparatory works for §99a, it remains the decision of each company and its management whether and to what extent considerations of human rights, social issues, environmental or climate issues, anti-corruption work etc. are to be integrated in a company's business strategy and activities.<sup>19</sup>

§99a allows for a set of options for submission of the CSR report. It may be integrated into the financial statement in the management review part, presented as an addendum to annual financial statement, or on the company's website. In the latter cases, the annual financial statement must state where the information is available (e.g. electronically on the company's website). In all cases the information is subject to external audit, but auditing is limited to a consistency check.

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<<http://www.eogs.dk/graphics/Samfundsansvar.dk/Dokumenter/About%20the%20Danish%20law.pdf>> last visited 21 January 2011; Danish Ministry of Economic and Business Affairs/Danish Commerce and Companies Agency (2008) *Bill on amendment to the Act on Annual Accounts: Social Responsibility Reporting*,

<[http://www.csrgov.dk/graphics/Samfundsansvar.dk/Dokumenter/Proposal\\_Report\\_On\\_Social\\_Resp.pdf](http://www.csrgov.dk/graphics/Samfundsansvar.dk/Dokumenter/Proposal_Report_On_Social_Resp.pdf), last visited 21 January 2011>; (including Explanatory Comments).

<sup>15</sup> The Modernisation Directive (2003/51/EC) prescribes that large companies annually report on non-financial key performance indicators, among others environmental and employee matters relating to their worldwide business activities. The Directive does not specify what is meant by environmental and employee matters. On the Directive and its implementation, see Lambooy, Tineke E. & N. Van Vliet (2008) Transparency on Corporate Social Responsibility in Annual Reports, *European Company Law* Vol. 5 No. 3: 127-135.; and compare the situation in Sweden where the Government has introduced guidelines on state-owned companies' external reporting according to the Global Reporting Initiative (GRI) Guidelines, see Swedish Government (2008) *Guidelines for external reporting by State-Owned Companies*.

<sup>16</sup> §99a, section 1, 2<sup>nd</sup> clause. Note that the unofficial translation of §99a available at the Danish Government's CSR website applies less open-ended language than the official Danish text by excluding the "amongst others" in the pertinent clause (Ministry of Economic and Business Affairs (2008), *supra* note 14..

<sup>17</sup> §99a, section 2, quoted from unofficial translation available at the Danish Government's CSR website. The translation refers to 'business' where this article employs the term 'company' (Ministry of Economic and Business Affairs (2008), *supra* note 14).

<sup>18</sup> §99a, section 1.

<sup>19</sup> Explanatory comments (Bemærkningerne til L 5/2008 om ændring af årsregnskabsloven, section 1), for English translation see Ministry of Economic and Business Affairs (2008), *supra* note 14.

In addition, section 7 of §99a provides for a special reporting option for companies which participate in the Global Compact or PRI. Such companies may choose to report simply through the Communication of Progress (CoP) report which participants in the Global Compact or PRI have to prepare under those instruments.<sup>20</sup> A similar reporting option is provided for by Statutory Orders that pertain to financial institutions and institutional investors.<sup>21</sup> Subsidiaries of Danish holding companies or conglomerates are exempt from the CSR reporting requirements, provided the parent company complies with the reporting requirements for the full conglomerate or submits a CoP under the UN Global Compact or PRI.

The explanatory comments note that the option for CoP reporting was established because The Global Compact is based on international instruments on human rights, labour rights, environmental protection and fighting corruption.<sup>22</sup>

Allowing Global Compact or PRI CoPs to double as CSR reports for the purposes of the Danish reporting requirement reduces the risk that companies already participants in the UN Global Compact or PRI perceive the CSR reporting requirement as an additional burden. It also supports the Government's foreign and development policy objectives of promoting human rights, labour rights and environmental protection through various measures, including investments and other actions of Danish companies in developing and transitional countries. The objective of the CoP reporting option is therefore dual: To encourage more Danish companies to participate in the Global Compact or PRI,<sup>23</sup> and to reduce CSR reporting resources for companies participating in either of those two initiatives.<sup>24</sup>

### 3. The United Nations Global Compact

#### 3.1. Multi-level regulation and hybrid law

The Global Compact is one of a small series of initiatives launched by intergovernmental organisations over the past decade in an effort to seek to establish norms for company conduct with regard to human rights and other CSR-issues, especially labour rights and the environment. The term 'intergovernmental' is used in this respect to indicate that the initiative differs from conventional international law. The Global Compact was initiated and developed by the UN Secretary-General and his Office, that is, the executive of the UN. The UN Global Compact was initiated in 1999 by UN Secretary General Kofi Annan and developed in a multi-stakeholder process under the Office of the UN Secretary-General, that is, the executive of the UN until its launch in mid-2000.<sup>25</sup> Thus, the organising body is an organ under an organisation which is based

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<sup>20</sup> The Global Compact or PRI CoP reporting option parallels that which is established under the Environmental Planning Act for companies subjected to turn in 'green accounts' to do so through EMAS reporting. (Statutory Order No. 210, 03/03/2010, on certain companies' provision of environmental information [Bekendtgørelse om visse virksomheders afgivelse af miljøoplysninger], § 13.

<sup>21</sup> See Statutory Order No. 1305 16/12/2008, § 135, Statutory Order No 1043 05/11/2009, § 62, Statutory Order No. 1310 16/12/2008 § 132, Statutory Order No. 1307 16/12/2008, § 24.

<sup>22</sup> Explanatory comments (Bemærkningerne til L 5/2008 om ændring af årsregnskabsloven, section 1), for English translation see Ministry of Economic and Business Affairs (2008), *supra* note 14.

<sup>23</sup> Danish Commerce and Companies Agency (2008) *About the Danish law: Report on social responsibility for large businesses*, <<http://www.eogs.dk/graphics/Samfundsansvar.dk/Dokumenter/About%20the%20Danish%20law.pdf>> visited 20 January 2011.

<sup>24</sup> In practice, however, avoiding double reporting has turned out to be limited due to different reporting deadlines for CSR reports under Danish law and under Global Compact.

<sup>25</sup> On the development of the Global Compact, see Buhmann, Karin (2011) *Balancing interests* with references; also Mayer, Ann Elisabeth (2009) Human rights as a dimension of CSR: The blurred lines between legal and non-legal categories, *Journal of Business Ethics* Vol. 88: 561-577.

on agreement between governments (the UN Charter), but it does not enjoy law-making powers on its own (other than with regard to intra-UN administrative matters).

The UN Global Compact is a type of hybrid law. It has normative ambitions, and links these to international law instruments on human rights, labour rights, environment and anti-corruption. It was initiated by and its development essentially progressed as a regulatory process under an organ without legislative powers but which acted in response to a need to limit adverse effects of globalisation and lack of sufficient political will among states to institute norms of conduct on companies through conventional international law.<sup>26</sup>

The group which developed the Global Compact had a mixed composition with considerable involvement of non-state actors, not only from the civil society (as do many processes within conventional framework for international law-making) but also companies. Unlike conventional international law-making, the participation of non-state actors was not limited to observer status. Business and civil society participated actively in shaping the Global Compact. The normative results are non-binding, but not without consequence. In the case of the UN Global Compact, commitment obliges (as in CoP reporting) and lack of compliance is not unsanctioned.

The Global Compact certainly does not fall within established legal categories, but also is not without legal relevance, nor impossible to characterise legally despite its hybrid character. The UN Global Compact and some other examples of intergovernmental regulation initiatives on CSR contain features related to *Global Administrative Law*<sup>27</sup> (or Global Public Law), and to *reflexive law*.<sup>28</sup> Drawing on the approach of Wouters and Wellens, it may be described as *multilevel-regulation*.<sup>29</sup> ‘Regulation’ is understood in a broad sense, “referring to the setting of rules, standards or principles that govern conduct by public and/or private actors”.<sup>30</sup>

The Global Compact complements international law as type of soft hybrid law. It merges public international law and private self-regulation in a context of transnational problems and transnational law. As is well known, international public law addresses itself to states. In the case of binding provisions, a state is under an obligation to ensure that its national legal system complies with the

<sup>26</sup> The process of the UN SRSG on human rights and business and the output, especially the 2008 ‘UN Framework’ *Protect, Respect, Remedy*, and the EU Multi-stakeholder Forum on CSR are other examples of a blurred category of law, as is the EU’s Multi-Stakeholder on CSR. For details and further discussion of the initiatives, their backgrounds, objectives, procedures and results and comparisons with the UN Global Compact, see Buhmann, Karin (2011) *Balancing interests in public-private CSR-schemes: The Global Compact and the EU’s Multi-Stakeholder Forum on CSR*, in Buhmann, Morsing & Roseberry (eds.) *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives*, London: Palgrave Macmillan: 77-107; Buhmann, Karin (2011) Reflexive regulation of CSR to promote sustainability: Understanding EU public-private regulation of CSR through the case of human rights, *International and Comparative Corporate Law Journal*, Vol. 8, No. 2: 38-76; Buhmann, Karin (2009) Regulating Corporate Social and Human Rights Responsibilities at the UN plane: Institutionalising new forms of law and law-making approaches? *Nordic Journal of International Law* Vol. 78, No. 1: 1-52.

<sup>27</sup> Kingsbury, Benedict, Nico Krisch and Richard B. Stewart (2005) The Emergence of global administrative law. *Law and Contemporary Problems* Vol. 68 No. 3: 15-61; Krisch, Nico and Benedict Kingsbury (2006) Introduction: Global governance and global administrative law in the international legal order. *European Journal of International Law* Vol. 17 No. 1: 1-13; and discussion in Buhmann, Karin (2009) *supra* note 26.

<sup>28</sup> For example, Teubner, Gunther (1983) Substantive and reflective elements in modern law. *Law and Society Review* Vol. 17 No. 2: 239-285; Teubner, Gunther (1984) Autopoiesis in Law and Society: A Rejoinder to Blankenburg. *Law and Society Review* Vol. 18 No. 2: 291-301; and discussion in Buhmann, Karin (2009) *supra* note 26.

<sup>29</sup> ‘Multilevel’ refers to “a variety of forms of decision making, authority, policy making, regulation, organisation, ruling, steering, etcetera, characterized by a complex interweaving of actors operating at different levels of formal jurisdictional or administrative authority, ranging from the local level, via the national level, to the macro-regional and global level”, see Wessel, Ramses & Jan Wouters (2007) The phenomenon of multilevel regulation: Interaction between global, EU and normative regulatory spheres: Towards a research agenda, in Føllesdal, Andreas, Ramses Wessel & Jan Wouters (eds) *Multilevel regulation and the EU*. The Hague: Brill: 9-47, at 11-12.

<sup>30</sup> *Id.*



international provisions. The international human rights system has expanded beyond the conventional confines of state centred international law by recognising a limited degree of legal personality for individuals (non-state actors). Even so, the international human rights machinery remains weak, and developments in terms of recognition of duties for non-state actors so far have failed to include legal persons as duty holders, including in the 1998 Statute of the International Criminal Court (ICC).

Despite initial opposition among some parts of civil society and some governments against UN cooperation with the private sector, the UN General Assembly has repeatedly supported the initiative through General Assembly resolution since 2000.<sup>31</sup>

With globalisation of markets and supply chains, the risk that products sold around the world are made in countries which have not acceded to key international instruments on human rights and other CSR issues or do not implement them effectively has grown. Under current international law, the opportunities to deal with this are very limited. The Global Compact seeks to provide an alternative by appealing directly to companies to ‘become part of the solution’ rather than the problem.

### *3.2. Global Compact Principles, participation and CoP reporting*

In various statements, key spokespeople for the Global Compact formulates its goal as involving companies in the implementation of the goals of the UN. Human rights are a part of the UN goals as defined in the UN Charter.<sup>32</sup> It is natural, therefore, that human rights form a key part of the Global Compact. Indeed, Principles 1 and 2 are on human rights. Principles 3-6 are on labour core rights (non-discrimination, freedom of association and collective bargaining, elimination of child labour and slavery). Principles 7-9 are on environmental responsibility and principle 10 on anti-corruption.<sup>33</sup>

Although they fall into four main issue areas, the Global Compact principles all have a human rights aspect. The human rights aspects of the Global Compact are significant not only in their own right, but also for their relations and possible leverage effect for environmental and climate concerns.<sup>34</sup> The labour rights recognised in Principles 3-6 are also recognised to be human rights. Corruption may adversely affect each of the other issues areas, but may also be fought through civil and political human rights. Interlinkages between human rights and environment are increasingly recognised. Climate concerns have added to that insight by throwing light on the impact on access to food, water, conditions for an adequate standard of living, land, housing and other social or economic human rights that may be affected by environment as well as climate.

The Global Compact website clearly indicates that the ten principles all build on instruments of international law: The Universal Declaration on Human Rights, ILO’s 1998 Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN Convention against Corruption. Somewhat overlooked in many academic discussions of the Global Compact, links at the Global Compact website refer to or directly lead to detailed

<sup>31</sup> Resolution adopted by the General Assembly, *Towards global partnerships*, UN Doc. A/RES/55/215, 21 December 2000 and later resolutions with the same title passed on a biannual basis by the UN General Assembly.

<sup>32</sup> Charter of the United Nations, art. 1(3), compare arts. 13(1), 55(c) and 56; see also discussion in Buhmann, Karin (2009) *supra* note 26

<sup>33</sup> For details on the ten principles, see Global Compact website, ‘The ten principles’, [www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html](http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html), last visited 20 January 2011.

<sup>34</sup> On the relationship between human rights and climate change, see also for example Stand Up For Your Rights (2009) *The Human Side of Climate Change*, Amsterdam, December 2009; and on the Global Compact and Climate Change, United Nations Global Compact, *Caring for Climate: The Business Leadership Platform*, [http://www.unglobalcompact.org/docs/news\\_events/8.1/caring\\_for\\_climate.pdf](http://www.unglobalcompact.org/docs/news_events/8.1/caring_for_climate.pdf), last visited 21 January 2011.

explanations and information on the international instrument on which each of the ten principles build.<sup>35</sup> Through the website links and explanations, the international instruments and their relevant specific provisions are made to serve as sources for the principles, arguably along lines comparable to sources of law for legal construction.

In addition to participants' commitment to the ten principles, the Global Compact works to promote the ten principles and UN goals in a wider sense through 'learning forums' for participants, particularly through regional networks; through 'policy-dialogue'; and through 'partnerships' with companies. Partnerships aim to address problems related to the ten principles, such as child work in the supply chain.

Since launch in 2000, the number of participating companies has risen steadily and in January 2011 was around 6200.<sup>36</sup> Participation is also open to governmental authorities, cities and other non-corporate entities. Participation is established through a formal letter from a company CEO (or equivalent management level) to the UN Secretary General, declaring commitment to the Global Compact and the ten principles.<sup>37</sup> The Global Compact CoP policy, which has developed over some years, requires business participants to communicate annually to all stakeholders their progress in implementing the ten principles and to post the report electronically on the Global Compact website.<sup>38</sup>

The CoP requirement was established in response to concern of the Global Compact being 'toothless' in terms of control and enforcement, and that it might be abused as 'blue-washing' (referring to the blue of the UN flag).<sup>39</sup> Although the Global Compact website otherwise does not apply much legal system language, such language is found in the CoP policy, and use of legal system language has in fact been strengthened in later years' revisions which has introduced terms such as 'violations'<sup>40</sup> and describe the CoP policy as a reflection of the "trend towards greater accountability and transparency" that also leads more and more companies to produce CSR reports.<sup>41</sup> The CoP is referred to as "a disclosure to stakeholders (e.g., investors, consumers, civil society, governments, etc.) on progress made in implementing the ten principles of the UN Global Compact, and in supporting broad UN development goals".<sup>42</sup>

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<sup>35</sup> See Global Compact, *Human Rights*,

<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/humanRights.html>; Global Compact, *Labour*, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/labour.html>; Global Compact, *Environment*, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/environment.html>; and Global Compact, *Anti-corruption*, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/anti-corruption.html>, last visited 20 January 2011.

<sup>36</sup> Global Compact website, 'Participants and Stakeholders',

[http://www.unglobalcompact.org/participants/search?commit=Search&keyword=&joined\\_after=&joined\\_before=&business\\_type=2&sector\\_id=all&cop\\_status=all&organization\\_type\\_id=&commit=Search](http://www.unglobalcompact.org/participants/search?commit=Search&keyword=&joined_after=&joined_before=&business_type=2&sector_id=all&cop_status=all&organization_type_id=&commit=Search), last visited 21 January 2011

<sup>37</sup> See Global Compact, *How to participate, Business Participation*,

[http://www.unglobalcompact.org/HowToParticipate/Business\\_Participation/index.html](http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html), last visited 21 January 2011.

<sup>38</sup> UN Global Compact: Note on integrity measures

(<http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html> last visited 21 January 2011), UN Global Compact (2010) *Communicating Progress – Overview* (<http://www.unglobalcompact.org/COP/index.html>, last visited 21 January 2011).

<sup>39</sup> For a critical view of the Global Compact, see Nolan, Justine (2005) The United Nation's compact with business: hindering or helping the protection of human rights? *University of Queensland Law Journal*, Vol. 24: 445-466.

<sup>40</sup> "The [CoP] is an important demonstration of a participant's commitment to the UN Global Compact and its principles, and as such a violation of the [CoP] policy will result in the change in a participant's status and eventually in the delisting of the participant.", UN Global Compact (2010): *Communicating Progress*, *supra* note 46.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

A CoP must contain a statement by the CEO (or equivalent) expressing continued support for the Global Compact and renewing the participant's ongoing commitment to the initiative and its principles; a description of activities or policies taken to implement the Global Compact principles and to support broader development goals, and a measurement of outcomes.<sup>43</sup> The CSR reporting guidelines developed by the Global Reporting Initiative/GRI, a civil society organisation, is recognised but not required for Global Compact reporting purposes.<sup>44</sup>

During the first five years of participation, a COP must address at least two of the Global Compact's principle issue areas (human rights, labour, environment, anti-corruption). After five years, business participants are required to address all four issue areas. In cases where a participant finds that an issue area is not relevant, an appropriate explanation must be provided in the COP. Non-communication is not without sanctions: companies that do not submit CoPs within the time frames set are listed at the Global Compact website as non-communicating and after one year will be delisted from the Global Compact.<sup>45</sup>

Partly due to limited resources of the Global Compact Office (a New York located approximately 15 UN staff organisation which has taken over management of the initiative from the Secretariat-General), CoP information is not subjected to monitoring by the Global Compact Office. Instead, CoPs are uploaded at the Global Compact website, allowing civil society, media and other stakeholders to exert control and monitor coherence between a company's actions and the information placed in its CoP. Thus, in practice, the Global Compact counts on civil society to monitor companies' reports and to employ economic or related sanctions, such as 'naming & shaming' strategies towards companies found to be wanting in terms of coherence between their reports and reality. The idea is to enable civil society which is often closer than the Global Compact Office or auditors to the sites of operation and business impact to observe this and compare with CoPs.

#### **4. §99a as a measure to promote migration of international human and social law into company self-regulation**

##### *4.1. The place for innovative regulation to make companies internalise human rights*

It has become generally recognised that although globalisation has many positive effects, some are less happy. Although business activities in many cases lead to employment and other social goods, globalisation has also led to increased information on business conduct which actually or potentially causes infringements of human rights, including the international core labour rights which are also human rights. Environmental harm and climate concerns may be caused for some of the same reasons, and in addition may themselves cause human rights to deteriorate.

Given the recognised weakness of international human rights law, other social as well as environmental fields of international law in terms of enforcement, there is good cause for nation states to consider how to complement the exigencies and objectives of international (human rights) law by national law. The state duty to protect human rights which follows from the horizontality doctrine and has been emphasised by the UN Special Representative on human rights and business, Professor John Ruggie, entails that states parties to international human rights treaties have an obligation to ensure that human rights infringements are not caused to individuals by other

<sup>43</sup> *Id*; United Nations Global Compact (2009) *Policy for the "Communication on Progress" (COP)*, [http://www.unglobalcompact.org/docs/communication\\_on\\_progress/COP\\_Policy.pdf](http://www.unglobalcompact.org/docs/communication_on_progress/COP_Policy.pdf), last visited 21 January 2011.

<sup>44</sup> On the GRI and latest version 'G3' reporting guidelines, see <http://www.globalreporting.org> and <http://www.globalreporting.org/ReportingFramework/G3Guidelines/>, last visited 20 January 2011.

<sup>45</sup> Organizations that have been delisted must reapply to join the initiative. Their new letter of commitment must include a COP. The Global Compact Office, on a regular basis, publishes the names of business participants that have been delisted for failure to communicate on progress. United Nations Global Compact (2009) *supra* note 52,

individuals (including companies).<sup>46</sup> To honour the state duty to protect, states may resort to several measures, ranging from statutory requirements of conduct and adjudication to complementary soft measures. One of the key challenges, however, is the fact that many cases of human rights abuse related to company activities caused by transnational companies take place in host states rather than home states, or are caused by suppliers operating in states without an effective human rights legal framework or enforcement. To address that, states may consider extraterritorial application of home state law or innovative measures to induce companies to self-regulate on CSR and to introduce CSR requirements in their dealings with suppliers. The Danish CSR reporting provision is an example of the latter. It is an innovative measure that seeks to induce human rights, labour rights, environment, anti-corruption into company self-regulation. Complementing the understanding of CSR in §99a(1), the CoP reporting option has a particular role in this context due to its reference to international law. The next section will discuss the potential to affect a “migration of international norms”<sup>47</sup> into company self-regulation.

#### *4.2. Migration of the Global Compact’s international law references through §99a into company policies*

The Danish CSR Action Plan makes explicit that the Government seeks to introduce international law as part of the normative sources – one might say sources of law – of Danish companies and institutional investors. Referring in the understanding of CSR to human rights, labour rights, anti-corruption and the environment, §99a establishes a direct link to a set of legal issues which are primarily regulated in international law. By establishing a reporting option linked to an instrument which builds its principles directly on international human rights, labour, environmental and anti-corruption law, the Danish reporting clause establishes a normative connection – like a source of law – between the pertinent international law instruments, companies’ CSR reporting, and corporate self-regulation on CSR which may result from (and is intended by the government to result from)<sup>48</sup> the CSR reporting process. The latter in particular includes the development of CSR policies and their implementation, as well as changes to existing policies and implementation as a result of increased transparency caused by the CSR reporting requirement..

The Danish CSR Action Plan, explanatory comments to §99a and reporting Guidance issued after the adoption of §99a repeatedly refer to the Global Compact and the international law instruments on which it builds as ‘internationally recognised reference frameworks’. The language and its occasional mix-up of different types of international law instruments may reflect a combination of policy considerations leading to a preference for wording that is vague in view of the considerable political and business disagreement surrounding efforts at defining human rights responsibilities for companies,<sup>49</sup> and a limited international law insight by the drafters and/or some readers. References to “internationally agreed principles” or similar language indicate the Government’s intention to

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<sup>46</sup> SRS (2008), *supra* note 13.

<sup>47</sup> The phrase “a migration of international norms” draws on Scott, Craig & Robert Wai (2004) Transnational governance of corporate conduct through the migration of Human Rights norms: The potential contribution of transnational ‘private’ litigation, in Joerges, Christian, Inger-Johanne Sand & Gunther Teubner (eds). *Transnational governance and constitutionalism*, Oxford and Portland Oregon: Hart: 287-320, esp. at 289-290. Scott and Wai mainly deal with the relationship between international and transnational systems of law. As this article discusses, similar developments, however, may be observed in terms of a migration of international human rights norms as well as some other types of international law norms to company law and company self-regulation within the context of particular national legal systems.

<sup>48</sup> For further discussion of the Government’s objective of inducing company self-regulation on the CSR issues stated in §99a, see Buhmann, Karin (2010) CSR-rapportering som refleksiv ret: Årsregnskabslovens CSR-redegørelseskrav som typeeksempel [CSR reporting as reflexive law: The Act on Annual Account’s CSR reporting requirements as a model example]. *Juristen* No. 4 2010: 104-113.

<sup>49</sup> See for example Kinley, David, Justine Nolan and Natalie Zerial (2007) The politics of corporate social responsibility: Reflections on the United Nations Human Rights Norms for Corporations, *Company and Securities Law Journal*: 30-42.

encourage reporting companies to build their understanding of CSR on those instruments of international law on which the Global Compact and some other CSR instruments build.<sup>50</sup>

On the one hand, §99a establishes flexibility and freedom of choice. On the other hand, the option to report through a Global Compact CoP provides a substantive contribution to the construction of the understanding of CSR according to the opening paragraphs of the provision. Because the Global Compact Principles refer to human rights, labour rights, environment and anti-corruption, Global Compact CoPs naturally have to refer to these principles. By implication, the international law instruments on which each of the principles may also be considered in a careful reporting process, causing the international law foundation of the ten principles to migrate into companies' CSR policies.

For companies that are new-comers to the CSR-field and enter it due to the reporting requirement, the reporting provision's understanding of CSR in combination with the reference to Global Compact CoP reporting may serve as inspiration and normative source for the formulation of CSR policies. Similar effects may result for companies which already make CSR reports but which due to the transparency caused by the reporting provision decide to adapt the reporting style or to adopt the Global Compact understanding. This may cause a migration of international human rights, labour rights, anti-corruption and aspects of environmental law into companies' self-regulation.

The CSR reporting requirement could lead to increased CSR requirements to flow from companies subjected to the CSR reporting requirements to small and medium-sized enterprises (SMEs) that act as suppliers but are not themselves subjected to §99a's reporting requirement.

Through its possible effects on CSR requirements in supplier contracts within as well as outside Denmark, the reporting requirement and CSR Action Plan play on the economic reality surrounding companies. Economic reality complements the reporting provision through demands on suppliers to live up to requirements of buyers. In order to ensure consistency between their own report and action by suppliers, companies sourcing from countries prone to human rights, labour, environmental or anti-corruption problems may pay particular attention to the Global Compact's Principles in contractual relations with suppliers. It may be useful for a company directly subjected to the reporting requirement to refer to the Global Compact and the instruments on which it builds, or to even integrate obligations to comply with the pertinent international instruments in business-to-business Codes of Conduct and/or contractual provisions.

#### *4.3. Impact of the reporting provision*

The Danish CSR reporting requirements are at once flexible and legally binding. In principle, CSR remains voluntary. However, for the number of companies, which have a CSR policy and are subjected to the reporting requirements under the Act, informing external stakeholders of the existence of their CSR policy is no longer truly a voluntary matter. §99a softly introduces international law on human rights, labour rights, environment and anti-corruption as a foundation for companies' CSR policies and reports. Through the medium of national company law, a migration of these types of international law and their specific standards into company self-regulation may take place. Promoting business requirements of business partners, through contracts with suppliers the pertinent instruments and standards, may be caused to migrate into the policies and practices of yet other companies, including possibly some outside of Denmark. So far, however, it is not possible to draw conclusions on the actual effects in this respect.

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<sup>50</sup> Including the OECD Guidelines for Multinational Enterprises.,

Auditing requirements applying to the mandatory Danish CSR reports are not strict. Auditors are only required to conduct a ‘consistency revision’. Auditing of a Financial Report declaring that CSR reporting is made through a Global Compact CoP progress must include whether the company fulfils conditions for applying that particular reporting modality. This means that the auditor must conduct a consistency check of whether a CoP is available to the public at the Global Compact website. The audit must also comprise a check of whether the Financial Statement information on where the CoP is available to the public is correct. The auditor has no obligation to conduct a check on consistency between the information in the CoP and the company’s practice.<sup>51</sup> Thus, auditing of consistency between CSR information and performance is left to others – generally civil society, investors, buyers and other interested stakeholders, with the obvious limitations which this gives.

CSR increasingly forms an element in risk management of investors and trade partner. A CSR report which informs readers that the company does not have a CSR policy may impact negatively on the assessment of the company as an objective of investment or as a trade partner. The reporting requirements may induce more companies to develop CSR policies and others to revise their policies and consider the understanding of CSR in § 99a. Because the understanding of CSR is not clearly defined but §99a refers to human rights, social issues, environmental, climate and anti-corruption, all of which are covered by the UN Global Compact, companies may look to the Global Compact for inspiration.

It is too early to make conclusions on the effects of the reporting provisions on the adoption by Danish companies of the Global Compact principles. However, numbers indicate a certain effect. Prior to the introduction of the CSR reporting requirement, many large Danish companies already had CSR-policies and CSR-departments. Several of those already applied the Global Compact principles. The number of Danish companies participating in the Global Compact has risen dramatically since the introduction of the reporting requirement. As of 20 January 2011, 195 Danish companies and a total of 220 organisations are UN Global Compact participants.<sup>52</sup> This is up from around 50 participating organisations prior to the adoption of the CSR reporting requirement.

With only one reporting round having been completed so far and research on reporting not addressing spill-over effects on other companies, it is also too early to make conclusions on actual effects of causing a migration of norms based on international law on human rights, labour rights, environment and anti-corruption into company policies and practice. It is likely, however, that an interrelationship between legal and societal expectations will come into play here, due to the transparency caused by reporting. Media scrutiny of CSR (at least in the Danish context) tends to focus as much on suppliers as on the large buyer itself, and tends to hold the large company to morally responsible especially for human rights infringements in the supply chain, even if conducted by other independent actors.<sup>53</sup> That approach to monitoring exposes CSR reporting companies to reputational risks. The mere risk which negative media or NGO attention may mean to a CSR reporting company, based on media or NGO reports on corporate irresponsibility in the

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<sup>51</sup> Audit requirements are provided by Statutory Order No. 761 (20 July 2009) on publication of Corporate Governance and CSR reports on a company’s website [Bekendtgørelse om offentliggørelse af redegørelse for virksomhedsledelse og redegørelse for samfundsansvar på virksomhedens hjemmeside mv.]..

<sup>52</sup> Global Compact website, ‘Participants and Stakeholders’, <[http://www.unglobalcompact.org/participants/search?commit=Search&keyword=&country%5B%5D=47&joined\\_after=&joined\\_before=&business\\_type=2&sector\\_id=all&cop\\_status=all&organization\\_type\\_id=&commit=Search](http://www.unglobalcompact.org/participants/search?commit=Search&keyword=&country%5B%5D=47&joined_after=&joined_before=&business_type=2&sector_id=all&cop_status=all&organization_type_id=&commit=Search)> visited 20 January 2011.

<sup>53</sup> For example, the TV documentary “The Dark Side of Chocolate”, directed by Miki Mastrati (2010), streamed on Danish TV DR2 on 16 March 2010, on child labour in cocoa plantations in Western Africa, see also <http://www.thedarksideofchocolate.org/> (last visited 20 January 2011); and the TV documentary “Blod i mobilen” (‘Blood mobiles’), directed by Frank Poulsen, streamed on Danish TV DR2, 2 November 2010, see also [bloodinthemobile.org/](http://bloodinthemobile.org/) (last visited 20 January 2011).

supply chain, may act as a strong driver on companies subjected to reporting requirements to make CSR demands on their suppliers and to strengthen monitoring of observance of such requirements.

According to a survey<sup>54</sup> prepared by for the Danish Agency for Commerce and Companies on the basis of the first reporting round (CSR reports submitted in 2010 pertaining to financial year 2009), 97 per cent of companies subjected to the Act's reporting requirement submitted a CSR report. Among those, 91 per cent stated to have CSR policies. However, only 37 per cent provided information on what had been achieved through social responsibility initiatives during the financial year, and any expectations it has regarding future initiatives. 28 per cent of the reporting companies drew on the UN Global Compact or other international standards as reporting inspiration. Where applied, however, Global Compact was generally seen to lend structure to the reporting and to make implementation easier. Limited resources to incorporate Global Compact Principles or limited relevance in the Danish context were the most common cause for companies not selecting to report according to Global Compact.

Among CSR themes reported on, environment and climate were the most frequent, probably mirroring the level of Danish companies' activities in those fields. Social issues related to Danish places of work were also common. The latter finding probably mirrors the fact that labour conditions are subjected to a high degree of regulation through Danish law, EU law and collective agreements and that for this reason companies are familiar with the pertinent issues. The study indicated that the reporting requirement had had the effect of making several companies without previous experience in CSR engage in CSR. It also indicated that the reporting provision had led to increased awareness and focused work on CSR, and had lent direction to CSR work with companies with previous CSR experience.

Overall, findings based on assessments of examples drawn from the first round of mandatory CSR reporting suggest that the way towards companies' integration of international human and labour rights law may, however, be longer than simply promulgating the reporting provision. The survey's information suggests that the Global Compact is perceived by companies as a relevant normative source for CSR (and CSR reporting) but that companies tend to select for reporting the issues with which they are already familiar and perhaps also those least prone to lead to reputational conflicts, let alone allegations of infringements of human rights. The also applies to core labour rights which are mainly problems outside of the EU sphere, and particularly in certain third world countries or regions.

## 5. Conclusion and perspectives

Through its direct reference to Global Compact, the Danish CSR reporting provision expresses two tendencies which have become increasingly strong during the past decade or so: One tendency is a gradual juridification of societal expectations of companies. The other is degree of porosity between legal sub-systems which normally function as distinct systems: Public international law, national (public) law, and (national) corporate law. This porosity means that international law influences national law and normativity on business ethics and CSR reporting. In the Danish case, through the reporting provision's direct reference to Global Compact, national corporate law seeks to actively draw on international law as part of the foundations for assessment and reporting on CSR.

The Danish CSR reporting provision is an example of a process in which national law supports an evolution in social expectations over the past 15-20 years: International law on human rights, labour

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<sup>54</sup> Ministry for Economic and Commerce (2010) *Samfundsansvar og Rapportering i Danmark – Effekten af rapporteringskrav i årsregnskabsloven*.

standards, anti-corruption and to some extent environmental protection and (emerging law on) climate concerns 'migrate' from international public law standards addressed to states, to becoming normative standards which companies need to relate to actively and independent from state protection in their countries of operation. Thus, the CSR reporting requirement has a potentially much wider impact than simply as a provision requiring certain companies to produce a non-financial statement as part of their annual report.

It remains to be seen what effect fines for companies not complying with the reporting provision and non-legal sanctions, such as reputation damage, will have on the effectiveness of the reporting requirement. For the time being, however, the reporting provision and its links to CSR-relevant international law indicates that students with a background in human rights, labour rights, environment, climate and anti-corruption will have increased employment opportunities in the CSR and legal departments of companies as well as in law firms advising companies on CSR and reporting.