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Herausgegeben von:
Prof. Dr. Christian Tietje
Prof. Dr. Gerhard Kraft
Prof. Dr. Rolf Sethe

Karsten Nowrot

The Relationship between
National Legal Regulations and CSR Instruments:
Complementary or Exclusionary Approaches
to Good Corporate Citizenship?

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By

Karsten Nowrot

Institut für Wirtschaftsrecht
Forschungsstelle für Transnationales Wirtschaftsrecht
Juristische und Wirtschaftswissenschaftliche Fakultät
der Martin-Luther-Universität Halle-Wittenberg

Dr. Karsten Nowrot, LL.M. (Indiana) is senior lecturer and researcher at the Transnational Economic Law Research Center (TELC) (Director: Prof. Dr. Christian Tietje, LL.M.) at the Faculty of Law, Economics and Business of the Martin Luther University Halle-Wittenberg, Germany.

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Institut für Wirtschaftsrecht
Forschungsstelle für Transnationales Wirtschaftsrecht
Juristische Fakultät
Martin-Luther-Universität Halle-Wittenberg
Universitätsplatz 5
D-06099 Halle (Saale)
Tel.: 0345-55-23149 / -55-23180
Fax: 0345-55-27201
E-Mail: ecohal@jura.uni-halle.de

INHALTSVERZEICHNIS

A. Introduction*

The current international system is characterized by an increasing diversity of often interconnected law-making processes – or, it is probably more precise to speak of normatively relevant regulatory processes because not all of these instruments are legally binding in a traditional sense.[1] In describing and assessing the "emerging legal pluralism beyond the state level",[2] recourse is also frequently taken to self-regulatory steering mechanisms developed by individual corporations, business organizations, and/or these entities in cooperation with other governmental and non-governmental actors at the national and international levels.[3] In this connection, one of the questions that arises – and is indeed currently quite high on the research agenda – concerns the issue of the respective "conditions under which market actors, if at all, may be expected to contribute to the provision of public goods by filling regulatory gaps and by contributing to the spread of norms".[4]

Against this background, this paper is aimed at contributing to the identification of possible driving forces for corporations to accept the position of norm-entrepreneurs by evaluating the – so far only rudimentary analyzed – role played by national legal regulations as one of the notable factors[5] in the companies' environment that possibly determines the degree to which corporations engage in the development of Corporate Social Responsibility (CSR) instruments. Thereby, taking into account the complexity of this issue a comprehensive evaluation of which would ultimately require a detailed assessment with regard to the specific conditions in every individual country, it will not be possible to elaborate on all its manifold implications in an inclusive way. Rather, this contribution – by distinguishing between the respective legal

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* The contribution is based on a presentation given at the CONNEX (Connecting Excellence on European Governance) Workshop "Private Corporations as Norm Entrepreneurs in the EU and Beyond: Investigating Political, Societal and Economic Driving Forces of Private Self-Regulation" at the TU Darmstadt on 1-2 June 2007. I would like to thank *Prof. Dr. Christian Tietje, LL.M.*, *Alan Brouder, LL.M.* as well as the participants of the workshop, in particular *Dr. Nicole Deitelhoff,* for their valuable comments on an earlier version of this paper.

1 See thereto *Nowrot*, in: Tietje/Sethe/Kraft (eds.), Beiträge zum Transnationalen Wirtschaftsrecht, Heft 33, 6 *et seq.*, with further references.

2 *Delbrück*, Indiana Journal of Global Legal Studies 9 (2002), 401 (422); see also, e.g., *Senghaas-Knobloch*, in: Dicke *et al.* (eds.), Liber amicorum Jost Delbrück, 677 (690); *Nowrot*, Normative Ordnungsstruktur, 438 *et seq.*, with further references.

3 See recently Human Rights Council, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/HCR/4/035 of 9 February 2007, paras. 45 *et seq.*; from the numerous literature on this issue see for example *Haufler*, A Public Role for the Private Sector, 8 *et seq.*; *Simons*, Relations Industrielles/Industrial Relations 59 (2004), 101 *et seq.*; *Sethi*, Setting Global Standards, 85 *et seq.*; *Herberg*, in: Winter (ed.), Multilevel Governance, 149 *et seq.*

4 See the current research project "Corporations as Norm Entrepreneurs?" undertaken at the Institute of Political Science at the TU Darmstadt, Germany. Further informations on this project are available on the internet: <www.csrproject.tu-darmstadt.de/index.php?id=pw_csrstart&L=2> (visited on 30 June 2007); see also, e.g., *Fuchs*, Understanding Business Power, 135 *et seq.*, with further references.

5 With regard to other important driving forces see for example *Bhagwati*, in: Siebert (ed.), Global Governance, 23 (35); *Fuchs*, Understanding Business Power, 135 *et seq.*, with further references.

environment within the EU and outside of the EU context – confines itself to identifying some general tendencies and characteristics of the relationship between national legal regulations and CSR instruments and the mutual influence that these normatively relevant steering mechanisms exercise on each other.

For this purpose, the paper has been divided into three parts. The first part (B.) will be devoted to an identification of the general relationship between (national) legal regulations and CSR instruments in order to lay the foundation for the following more specific analysis of the influence exercised by national law on the activities of corporations as norm-entrepreneurs. The second part (C.) provides an evaluation of the relationship between national legal regulations and CSR instruments in the EU context. In the third part (D.), some aspects of the home as well as host state legal environment of EU-based corporations operating in countries that are neither members of the EU nor the OECD will be discussed. Finally, the conclusion will argue that the existence or absence of effectively enforceable national legal regulations as well as the potential ability and willingness of governmental actors to adopt new laws exercises in many ways a profound influence on corporations, business associations and other non-state actors to accept the role as norm-entrepreneurs.

B. The General Relationship between National Legal Regulations and CSR Instruments

The task of evaluating the role played by national legal regulations as a driving or inhibiting force in the company environment – and thus as an external factor – for corporations to engage in the development of CSR instruments inherently presupposes the possibility of distinguishing national law – or law in general – and CSR instruments.

However, this appears to be, not only at first sight, for a variety of reasons a quite disputable proposition. First, both components – the concept of CSR as well as of law in general – currently still lack a clear and universally-agreed definition, a factor that obviously complicates the undertaking of distinguishing them from one another. This has been frequently emphasised in the literature with regard to the concept of CSR.[6] However, also with regard to the precise understanding of what exactly law is, the fa-

[6] See, e.g., *Rieth*, in: Schirm (ed.), New Rules for Global Markets, 177 (179) ("The concept of corporate citizenship or corporate social responsibility (CSR) is a very amorphous one. Different definitions are thrown into the debate with very different emphasis, depending on the interest of the author."); *Aaronson*, Journal of World Trade 41 (2007), 629 (632) ("There is no internationally accepted approach to CSR"); *Muchlinski*, in: Sullivan (ed.), Business and Human Rights, 33 (34) ("The phrase 'corporate social responsibility' can mean many different things and the obligations of firms in this matter can be drawn rather widely."); *Henderson*, Misguided Virtue, 17 ("Although much has been written about corporate social responsibility, there is to my knowledge no standard agreed presentation, no authoritative textbook treatment, of CRS as here defined."); *Zammit*, Development at Risk, 1 ("What is CSR? There is no easy response: the term seems to cover whatever corporations and their critics think it should embrace."); as well as recently European Parliament Resolution of 13 March 2007 on Corporate Social Responsibility: A New Partnership, P6_TA-PROV(2007)0062, para. 3 ("Recognises that a debate remains open among different stakeholder groups on an appropriate definition of CSR").

mous saying by Immanuel Kant in his "Critique of Pure Reason" that jurists are still searching for a definition of their concept of law[7] still appears to be valid.[8]

Second, even based on the more or less vague understanding that we have of law as well as of CSR – their distinction probably most briefly being summarized with the catchphrase "voluntary versus mandatory"[9] – it appears to be that both concepts share a considerable number of common features and are indeed also often closely interrelated with each other – an observance that finds its vivid expression for example in the characterization of many CSR instruments as "soft law" in the broader sense of the meaning.[10]

Both national legal regulations and CSR instruments stipulate rules of behaviour; they are steering instruments intended to influence the conduct of the actors to which they are addressed. Furthermore, both types of rules are adopted based on the claim to be in general effective with regard to the realization of their respective goals,[11] and, in this connection, both do not always fulfil this premise all of the time in practice. However, despite their shortcomings in specific cases, CSR instruments such as codes of conduct or cooperative steering regimes have, because of their innovate implementation mechanisms, the potential to be, and in fact are, often at least as effective as national legal regulations with regard to the realization of their respective goals.[12] This is one of the primary reasons why, in addition, national legal regulations and CSR instruments with regard to their implementation mechanisms are increasingly shaped by the same broader approach of "law-realization" as being distinct from the tradi-

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7 *Kant*, Critique of Pure Reason, 639.

8 See for example *Hart*, The Concept of Law, 1 ("Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question 'What is law?'.").

9 See, e.g., *Zerk*, Multinationals, 32; *Aaronson*, Journal of World Trade 41 (2007), 629 (631); as well as with regard to the "voluntary approach of CSR" recently the G8 Summit 2007 Declaration "Growth and Responsibility in the World Economy" of 7 June 2007, para. 26, available on the Internet: <www.g-8.de/Webs/G8/EN/G8Summit/SummitDocuments/summit-documents.html> (visited on 25 June 2007); and International Chamber of Commerce, Policy Statement "The Role of the United Nations in Promoting Corporate Responsibility", Doc. 141/86 rev 2 final of 21 June 2007, 1 ("For ICC, corporate responsibility (CR) is the voluntary commitment by business to manage its activities in a responsible way."), available on the Internet: <www.iccwbo.org/uploadedFiles/ICC/policy/business_in_society/Statements/141-86%20rev2%20final.pdf> (visited on 2 July 2007).

10 See, e.g., *Kirton/Trebilcock*, in: Kirton/Trebilcock (eds.), Hard Choices, Soft Law, 3 (9); *Aaronson*, Journal of World Trade 41 (2007), 629 (631); *Nanda/Pring*, International Environmental Law, 7; in the narrow sense of the meaning, however, "soft law" only refers to the respective non-mandatory steering instruments adopted by states and international organizations, see *Thürer*, Zeitschrift für Schweizerisches Recht N.F. 104 (1985), 429 (434); *Buntenbroich*, Menschenrechte und Unternehmen, 23.

11 Generally on the claim of effectiveness as an inherent characteristic of legal rules see for example *Radbruch*, Einführung, 13; *Alexy*, Begriff und Geltung, 139 *et seq.*; *Kirchhof*, Private Rechtsetzung, 45; *Hilf/Hörmann*, in: Dupuy *et al.* (eds.), Essays in Honour of Christian Tomuschat, 913 (916 *et seq.*); with regard to effectiveness as one of the key criteria for the evaluation of CSR instruments see, e.g., recently Human Rights Council, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/HCR/4/035 of 9 February 2007, paras. 56 *et seq.*

12 See thereto for example *Koenig-Archibugi*, in: Held/Koenig-Archibugi (eds.), Global Governance, 110 (129 *et seq.*).

tional means characterized by the considerably narrower term "law-enforcement".[13] National legal regulations are, for various reasons to a growing extent, no longer exclusively designed in accordance with the traditional commanding style of legislation combined with the threat of civil, administrative, or criminal law sanctions.[14] Rather, in the same way as CSR instruments, they also provide for other regulatory techniques, among them reporting requirements or other indirect steering mechanisms such as the offering of incentives to encourage an intended behaviour[15], thereby paving the way for what might be characterized as law-induced CSR.

Furthermore, bearing in mind that the creation of legal and other rules of behaviour is never an end in itself but merely a means to an end,[16] it is noteworthy that both sets of steering instruments are value-based; they share a general orientation towards the realization of the common good.[17] Disregarding the challenges connected with the forming of the common good[18] and leaving aside the fact that certain rules of behaviour can in individual cases also be overwhelmingly considered unjust and thus might provide the basis for the most confrontational form of relationship, namely CSR-induced civil disobedience by corporations,[19] the design and adoption of national legal rules as well as CSR instruments is, in principle, aimed at the realization of community interests such as the protection of human rights and the environment, the implementation of labour, health, and social standards, or the fostering of welfare – to name only a few broad goals.[20]

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[13] On the notion of "law-realization" as being distinct from "law-enforcement" see *Tietje*, Normative Grundstrukturen, 132 *et seq*. with further references.

[14] See thereto *Grimm*, in: Grimm (ed.), Zukunft der Verfassung, 241 (247); *Zerk*, Multinationals, 36; as well as already *Krüger*, VVDStRL 11 (1954), 137.

[15] From the numerous literature on this issue see for example *Tietje*, Internationalisiertes Verwaltungshandeln, 264 *et seq*.; *Schmidt-Aßmann*, Verwaltungsrecht als Ordnungsidee, 120 *et seq*.; *Franzius*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), Grundlagen des Verwaltungsrechts, Vol. I, 177 (178 *et seq*.), each with further references.

[16] *Kirchhof*, Private Rechtsetzung, 116; *Tietje*, VVDStRL 66 (2007), 45 (73); *Bull*, Staatsaufgaben, 325.

[17] Generally on the orientation towards the realization of the common good as an inherent characteristic of legal rules *Häberle*, Öffentliches Interesse, 17 *et seq*.; *Allott*, Indiana Journal of Global Legal Studies 5 (1998), 391 (395 *et seq*.); *Nowrot*, Normative Ordnungsstruktur, 486 *et seq*. With regard to CSR it is sufficient to state here, that – although there is still a considerable debate as to which community interests have to be promoted by companies under this concept – general agreement exists that CSR is aimed at the promotion of community interests, see for example concerning the purposes of private self-regulation to provide and promote "collective goods" as well as to avoid "collective bads" *Wolf*, Journal of Business, Economics & Ethics 6 (2005), 51 (53).

[18] On this issue see for example *Schuppert*, in: Schuppert/Neidhardt (eds.), Gemeinwohl, 19 (21 *et seq*.).

[19] Generally on the possible tensions between legal and ethical requirements and thus the millennia-old discussion on the relationship between law and morality see the comprehensive treatment by *Alexy*, Begriff und Geltung, 15 *et seq*., with further references. In the course of this analysis the respective – and in practice also important – issue of CSR-induced civil disobedience will not receive further treatment.

[20] On the notion of "community interests", also known as "global public goods" see for example *Simma*, RdC 250 (1994), 217 (235 *et seq*.); *Delbrück*, in: Götz *et al.* (eds.), Liber amicorum Jaenicke, 17 (29 *et seq*.); *Frowein*, in: Hailbronner *et al.* (eds.), Festschrift Doehring, 219 *et seq*.; as well as the various contributions in Kaul *et al.* (eds.), Global Public Goods, 2 *et seq*.; and Kaul *et al.* (eds.), Providing Global Public Goods, 2 *et seq*.

Thereby, national legal regulations and CSR instruments are clearly interconnected with regard to the identification of the underlying values to be implemented, and thus the forming of the common good – they are mutually inspiring each other. On one side, the substantive norms of domestic as well as international law, which are generally limited with regard to their personal and/or territorial scope of application, and the values enshrined in them form to a considerable extent the material basis for the goals intended to be pursued by CSR instruments, which are thus often primarily or even exclusively aimed precisely at extending the limited scope of application of the respective legal rules of behaviour.[21] The underlying motive of many CSR instruments to make the international legal regime on human rights applicable to in particular transnational corporations is but one, albeit particularly controversially discussed, example. At the same time, the identification and implementation of community interests can start off exclusively on the basis of CSR instruments and only subsequently enter the legal realm.[22] In these situations, it is not so much the scope of application of the respective rule of behaviour that is altered, but rather the character of the substantive rule itself, that is transformed. The issue of "corruption abroad" provides a vivid example for this approach. Not only was until the end of the 1990s, the "bribing" of foreign officials and employees of foreign corporations abroad not considered to be a criminal offence in Germany and many other European countries. It was even possible to claim the respective amounts as "useful expenses" when filing the tax return. The fight against these forms of corruption started off in Europe primarily as a civil society initiative – with a prominent role played by Transparency International – on the basis of CSR instruments and only gradually let to the adoption of respective legal rules.[23]

In light of these findings, one cannot but agree with the observation that – on the domestic level as well as in particular with regard to the international system as a whole – the distinction between "hard law" and non-binding regulatory instruments is from a functional perspective in general becoming increasingly blurred.[24] Furthermore, it hardly comes as a surprise that in the literature CSR is not infrequently treated as being the superordinate concept by characterising it as "an exceptionally

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21 See also, e.g., *Buhmann*, Corporate Governance 6 (2006), 188 (189 *et seq.*).

22 See for example *Wolf*, Journal of Business, Economics & Ethics 6 (2005), 51 (62).

23 For a more comprehensive description and evaluation of this issue see for example *Reinhardt-Salcinovic*, in: Tietje/Sethe/Kraft (eds.), Beiträge zum Transnationalen Wirtschaftsrecht, Heft 55, 5 *et seq.*; *Rochow*, in: Tietje/Sethe/Kraft (eds.), Beiträge zum Transnationalen Wirtschaftsrecht, Heft 56, 5 *et seq.*, each with further references.

24 See, e.g., *Shelton*, in: Shelton (ed.), Commitment and Compliance, 1 (10) ("The line between hard and not-law may appear blurred."); *Koh*, Yale Law Journal 106 (1997), 2599 (2630 *et seq.*) ("International law now comprises of a complex blend of customary, positive, declarative, and 'soft' law, which seeks not simply to ratify existing practice, but to elevate it."); *Orrego*-Vicuña, in: Bröhmer *et al.* (eds.), Festschrift Ress, 191 (200) ("The classical distinction between *lex lata* and *lex ferenda* thus also becomes increasingly blurred."); *Tietje*, Internationalisiertes Verwaltungshandeln, 255 *et seq.*; *Peters*, in: Mastronardi/Taubert (eds.), Staats- und Verfassungstheorie, 100 (112); *Zumbansen*, RabelsZ 67 (2003), 637 (658); a more comprehensive analysis of this phenomenon is provided, e.g., by *Abbott/Snidal*, International Organization 54 (2000), 421 *et seq.*

broad-reaching and varied melange of soft and hard law"[25] with any attempts to distinguish between law and CSR necessarily being "confusing and unhelpful".[26]

However, having outlined the respective obstacles and despite these and numerous other discouraging statements, the analysis does not need to be brought to an end at this rather early stage. Despite their numerous similarities, it is submitted that from a formal perspective – and by taking recourse to purpose-oriented definitions[27] of national law on one side and steering instruments belonging to the realm of CSR on the other side – it is nevertheless possible to clearly distinguish these two concepts from one another and thus to evaluate the role played by national legal regulations as an external driving force for corporations to engage in the development of CSR instruments. Thus, for the purpose of this analysis, national legal regulations are defined as mandatory rules of behaviour, usually adopted by the state or its sub-entities, whose implementation is in principle guaranteed by the state. On the contrary, CSR instruments can be defined as non-mandatory rules of behaviour in the sense that their implementation is not guaranteed by the state. In other words, these instruments in particular cannot be invoked in court because the decision to comply with them is either voluntary in nature or their enforcement is dependent upon other implementation mechanisms. National legal regulations create binding obligations while the respective basis for compliance with other rules of behaviour belonging to the realm of CSR is exclusively provided by a self-commitment of the addressees or societal expectations. Consequently, it is possible to clearly distinguish between legal obligations, the observance of which belonging to the realm of what could be labelled "Corporate Legal Responsibility" (CLR), and other rules of behaviour, the compliance of which being exclusively a concern of the realm of CSR.

Finally, it has to be emphasised that such a distinction is not only useful for the purposes of the research focus of this paper. Far from being merely an artificially-construed basis for the present analysis, this issue also appears to lie at the heart of the currently "highly polarized"[28] debate on the extent to which corporations – beyond their important role played in the process of welfare-creation for society[29] – should

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[25] *Kinley/Nolan/Zerial*, Company and Securities Law Journal 25 (2007), 30 (33).

[26] *Zerk*, Multinationals, 30.

[27] See, e.g., *Aharoni*, Quarterly Review of Economics and Business 11 (No. 3, 1971), 27 (36) ("The proper definition to be used depends to a large extent on the problems discussed."); generally on purpose-oriented definitions see also *Rickert*, Lehre von der Definition, 37; *Dubislav*, Die Definition, 106 *et seq.*; *Schneider/Schnapp*, Logik für Juristen, 47 *et seq.*

[28] *Ruggie*, Opening Remarks at the Wilton Park Conference "Business and Human Rights: Advancing the Agenda", 10-12 October 2005, at 6, available on the Internet: <www.reports-and-materials.org/Ruggie-Wilton-Park-Oct-2005.doc> (visited on 25 June 2007).

[29] See thereto for example International Chamber of Commerce, Policy Statement "The Role of the United Nations in Promoting Corporate Responsibility", Doc. 141/86 rev 2 final of 21 June 2007, 4 ("The benefits of CR are many, but it must always be recognized that the best and most effective way for business to contribute to sustainable development is by creating wealth for its owners, employees, customers and society at large."), available on the Internet: <www.iccwbo.org/uploadedFiles/ICC/policy/business_in_society/Statements/141-86%20rev2%20final.pdf> (visited on 2 July 2007); European Commission, Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, COM(2002) 347 final of 2 February 2002, 5 ("The main function of an enterprise is to create value through producing goods and services that society demands, thereby generating profit for its owners and shareholders as well as welfare for society, in particular through an ongoing process of

also contribute to the promotion of other community interests and, in particular, whether the fulfilment of such additional expectations should be secured also on the basis of respective legal obligations.[30] All of the various relevant state and non-state actors clearly differentiate – explicitly or at least implicitly – between legally binding obligations on the one side and more or less voluntary commitments on the other side in their discourses on this issue. Already this observation could thus serve as an indication that national legal regulations are also a factor taken into account by companies in their decisions as to whether and to what extent to take up the role as norm-entrepreneurs.

C. The Relationship between National Legal Regulations and CSR Instruments in the EU context

In order to evaluate the relationship between domestic law and CSR instruments in the context of the EU, it is necessary to outline the characteristics of the "legal environment" in which corporations operate. Within the EU, companies face not only a quite dense network of often detailed regulatory requirements as regards issues such as consumer and environmental protection or workplace health and safety. Rather, the respective legal obligations are also generally very effectively enforced by the member states. Thus, leaving aside the reduced capacity of states to regulate certain developments as a result of the processes of globalization,[31] Community as well as national legal regulations overall still provide a quite effective steering instrument in the context of the EU.[32]

Thereby, it has to be acknowledged that according to the prevailing view in many of these countries the relationship between self-regulatory mechanisms developed by the market participants and legal regulations should in practice be governed by the principle of subsidiarity and the state is thus in general only asked to intervene by legal means in case market forces and self-regulatory mechanisms have proven to be unsuccessful,[33] and that processes of regulatory de-hierarchization and thus the model of the

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job creation."); as well as already *Friedman*, New York Times Magazine of 13 September 1970, 32 *et seq.*, 122 *et seq.*

30 On this focal point of the current debates see for example *Clapham*, Human Rights Obligations, 195 *et seq.*; *Kinley/Nolan/Zerial*, Company and Securities Law Journal 25 (2007), 30 *et seq.*; *Nowrot*, Philippine Law Journal 80 (2006), 563 (565 *et seq.*), each with further references.

31 From the numerous literature on this issue see, e.g., *Delbrück*, Indiana Journal of Global Legal Studies 9 (2002), 401 (408 *et seq.*); *Nowrot*, in: Tietje/Sethe/Kraft (eds.), Beiträge zum Transnationalen Wirtschaftsrecht, Heft 33, 12 *et seq.*, with further references.

32 Generally on this issue for example *Reimer*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), Grundlagen des Verwaltungsrechts, Vol. I, 533 (599 *et seq.*), with numerous further references.

33 On the respective discussion with regard to Germany see, e.g., *Stober*, Allgemeines Wirtschaftsverwaltungsrecht, 86 *et seq.*; *Schmidt*, Öffentliches Wirtschaftsrecht, 72, 520; *Isensee*, Subsidiaritätsprinzip und Verfassungsrecht, 106 *et seq.*; *Isensee*, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, Vol. IV, 117 (152 *et seq.*); *Herzog*, Der Staat 2 (1963), 399 (411 *et seq.*); *Schliesky*, Öffentliches Wettbewerbsrecht, 125 *et seq.*; *Schliesky*, Öffentliches Wirtschaftsrecht, 100 *et seq.*; *Knauff*, Gewährleistungsstaat, 227 *et seq.*; *Lackner*, Gewährleistungsverwaltung, 68 *et seq.*, each with further references.

"cooperative state" are gaining increasing momentum.[34] Nevertheless, the existence of detailed and effective national legal regulations as well as the potential and willingness of EU member states to adopt new laws exercises in a number of ways a profound influence on the behaviour of corporations and other non-state actors with regard to the development of CSR instruments intended to apply within the EU.

First, due to their direct or indirect legislative competences and the general readiness to make use of them, it is the national governments and parliaments as well as the Commission and the European Parliament that emerge as the central actors in determining the steering strategy with regard to a specific issue. Consequently, corporations and other societal forces such as NGOs and labour unions do not primarily interact and cooperate with each other in shaping the regulatory approach, but all of them concentrate primarily on participating in and thereby influencing the decision-making processes of the respective state actors because it is they who – in the words of Theodore Roosevelt[35] – "carry a big stick" and are often ultimately willing to use it.

Second, issues that have been made the subject of national legal regulations are usually extensively covered by a set of effectively enforced rules of behaviour. Thus, the respective rules are not only shaped by national legal regulations with regard to their content. Also, known incidents of non-compliance by corporations with these rules are almost exclusively dealt with in the realm of CLR by way of civil, administrative, or criminal law sanctions. It follows from these findings that concerning the manifold issues that are covered by detailed national legal regulations, there is hardly any need and incentive for private self-regulation. Furthermore, in case other societal forces identify new challenges that in their opinion require the development of respective rules of behaviour, they primarily concentrate on bringing the issues to the attention of government actors on the national or supranational level and consider self-regulatory alternatives in the form of CSR instruments merely as an option for a transitional period.[36] The above mentioned regulatory history of the issue "corruption abroad" might serve as an instructive example in this connection.

Third, considering the central role played by state actors and their ability to adopt new legal regulations that can effectively be enforced, it hardly comes as a surprise that CSR instruments in the EU context are frequently adopted as non-binding self-commitments included in informal "gentlemen's agreements" between corporations and/or business associations on the one side and governmental actors on the other. Starting off for example in Germany as early as in the 1960s, these commitments are, on the surface, purely voluntary in nature, but taking a closer look, most certainly strongly motivated by the desire to avoid national legal regulations on the respective issues and thus made in light – or, more precise, under the "threat" – of viable alternative legislative means.[37] From the numerous examples, one only need mention the

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[34] See thereto only *Schoch*, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, Vol. III, 131 (147 *et seq.*); *Becker*, Kooperative und konsensuale Strukturen, 55 *et seq.*; Wolf, in: Benz/Papadopoulos (eds.), Governance and Democracy, 200 (203).

[35] See *Miller*, Theodore Roosevelt, 337 ("And writing to a friend a few days later, he [Theodore Roosevelt] observed: 'I have always been fond of the West African proverb: Speak softly and carry a big stick; you will go far.'").

[36] See also, e.g., *Wolf*, Journal of Business, Economics & Ethics 6 (2005), 51 (62).

[37] See for example *Peters*, in: Mastronardi/Taubert (eds.), Staats- und Verfassungstheorie, 100 (119 *et seq.*).

guidelines concerning advertising for cigarettes of 1962, the commitment by the German cement industry of 1984 to gradually reduce and ultimately eliminate the use of asbestos products, or the "National Compact for Job Training in Germany" of 2004. Although it should not be overlooked that this approach also involves a number of advantages on the side of the governmental actors, and despite the fact that these self-commitments or non-binding agreements often receive a high degree of publicity, a sober evaluation of their overall importance reveals that they overwhelmingly concern very specific issues and are, due to the fact that they do not impose legal obligations on the governmental actors not to take recourse to legislative measures, in particular in case of demonstrated ineffectiveness easily substitutable – and in practice often subsequently substituted – by effectively enforced national law.[38]

In light of these findings, it can be concluded with regard to the relationship between national legal regulations and CSR instruments in the context of the EU that both sets of rules of behaviour are generally complementary by being exclusionary. They complement each other from the perspective of the overall framework of responsibilities that companies face when operating in the EU. However, they exclude each other with regard to individual issues since matters that are covered by national legal regulations the compliance with belonging to the realm of CLR do not leave any larger meaningful room for parallel CSR instruments. Because of the dominant and to a large extent exclusionary role played by national legal regulations in the EU, CSR instruments play a rather minor role when viewed in the overall regulatory context applicable to corporations. Aside from the above mentioned approach of state- or law-induced CSR which, however, is also subject to legal constraints,[39] these instruments generally either serve as transitional steering instruments or concern very specific issues with the respective rules of behaviour being primarily developed and adopted in a co-operative effort between state actors and corporations or their business associations.

Concerning the role played by national legal regulations as a factor determining the degree to which corporations take on the role of norm-entrepreneurs, it derives from these findings that in the EU context, national law serves as both, an inhibiting as well as a driving force. It has to be regarded as an inhibiting force as far as a certain issue is already subject to national legal regulations, because neither corporations nor other actors have an incentive or see the need to develop what would be in fact a parallel regulatory framework the compliance with which being already adequately secured on the basis of the same set of rules of behaviour belonging to the realm of CLR. Consequently, it is in the EU context not so much the existence of national legal regulations but rather the potential of state actors to adopt new and effectively

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[38] For a more comprehensive evaluation of these steering instruments and the political as well as legal issues arising from them see, e.g., *Schoch*, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, Vol. III, 131 (152 *et seq.*); *Schliesky*, Öffentliches Wirtschaftsrecht, 145 *et seq.*; *Huber*, Zeitschrift für Gesetzgebung 17 (2002), 245 *et seq.*; *Di Fabio*, JuristenZeitung 52 (1997), 969 *et seq.*, each with further examples and references.

[39] In this connection, one only needs to refer to the controversially discussed issue in the legal regime on public procurement with regard to the extent to which the state is allowed to pursue in the course of the tendering procedure other, not directly procurement-related goals such as for example the protection of the environment, see thereto, e.g., *Tietje/Wolf*, in: Schneider (ed.), Beihilfe- und Vergaberecht, 85 *et seq.*; *Aaronson*, Journal of World Trade 41 (2007), 629 (649 *et seq.*); *Ruthig/Storr*, Öffentliches Wirtschaftsrecht, 356 *et seq.*; *Ziekow*, Öffentliches Wirtschaftsrecht, 154, each with further references.

enforced national laws that serves as a driving force for companies to engage in the development of self-regulatory mechanisms with regard to issues not yet covered by national law.

D. The Relationship between National Legal Regulations and CSR Instruments beyond the EU

Corporations operating in countries that are neither a member of the EU nor of the OECD, can and frequently do face not only very different political, economic and social conditions, but closely related with these factors also a quite dissimilar legal environment in particular when doing business in so-called "weak governance zones".[40]

First, the domestic legal systems of the host states often either provide no or only very rudimentary legal rules of behaviour for corporations in particular concerning the realization of community interest that go beyond the fostering of economic welfare, or/and the respective and sometimes even detailed and comprehensive legal obligations have due to a lack of effective enforcement mechanisms in their majority only acquired the questionable status of so-called "book law".[41] Although on a theoretical level it should be noted that the actual effectiveness of its implementation is no longer regarded as a constitutive element of individual legal regulations,[42] in practice the often rudimentary character of the substantive provisions of domestic law combined with the inability or unwillingness to provide meaningful enforcement mechanisms on the side of the host state constitutes the single most important difference between the importance attached to national legal regulations in the EU context and the often rather marginal role played by this type of steering instruments in other countries.[43]

Second, another important characteristic of the legal environment in which EU- or OECD-based companies operate outside their home countries is the limited direct normative guidance provided by the national legal regulations of their home states. While the jurisdiction of states to regulate activities within its territory or with regard to its nationals is directly based on their sovereignty, the extraterritorial application of national legal regulations requires, under public international law, the existence of a recognized link and the exercise of this jurisdiction in a reasonable manner.[44] Disregarding the problems connected with the determination of a multinational corpora-

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40 Generally on the respective conditions and challenges resulting from these environments see, e.g., OECD, OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, adopted by the OECD Council on 8 June 2006, available on the Internet: <www.oecd.org/dataoecd/26/21/36885821.pdf> (visited on 25 June 2007); OECD, Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses, Working Papers on International Investment, Number 2002/1, May 2002, available on the Internet: www.oecd.org/dataoecd/46/31/2757771.pdf> (visited on 25 June 2007); *Ballentine/Nitzschke*, Die Friedens-Warte 79 (2004), 35 *et seq.*

41 On this term and its implications see already *Oppenheim*, in: Festschrift für Karl Binding, 141 (147, 191).

42 See thereto for example *Alexy*, Begriff und Geltung, 147.

43 See also, e.g., *Weschka*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 66 (2006), 625 (628 *et seq.*); *Aaronson*, Journal of World Trade 41 (2007), 629 (633 *et seq.*).

44 For a more comprehensive treatment of these issues see, e.g., *Tietje*, in: Tietje (ed.), Internationales Wirtschaftsrecht, § 1, paras. 106 *et seq.*; *Herdegen*, Internationales Wirtschaftsrecht, 24 *et seq.*; *Zerk*, Multinationals, 104 *et seq.*, each with further references.

tion's nationality,[45] and leaving aside the controversial legality of taking recourse to extraterritorial jurisdiction in specific cases, it is sufficient to note for the purpose of this analysis that home states are – contrary to other areas such as competition law and the imposition of economic sanctions – overall still very reluctant to take recourse to an extraterritorial application of their national legal regulations in the present context.[46]

Third, and finally, with regard to their CLRs under international law – an issue that also comes up when operating in the EU context but reaches particular importance under the conditions of host as well as home state regulations exercising only a minor or very sectoral influence on the behaviour of corporations – it has to be realized that, although it has already for quite some time been argued in the legal literature that international human rights treaties may be interpreted as also being directly applicable to private actors such as corporations,[47] the majority of international legal scholars, by taking recourse to the drafting history of the respective conventions and the teleological method of treaty interpretation, has quite convincingly demonstrated that human rights treaties as well as, for example, the increasing number of international conventions aimed at combating bribery, do not impose direct obligations on any other entity than the states being parties to the particular convention.[48] Furthermore, despite some notable recent developments, such as attempts to enforce alleged human rights obligations towards corporations before domestic courts particularly in the United States,[49] one cannot but agree – on the basis of the still predominant approach to international legal personality[50] – with the view that corporations have nei-

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45 On this issue see, e.g., *Muchlinski*, Multinational Enterprises, 534 *et seq.*; *Staker*, British Yearbook of International Law 61 (1990), 155 *et seq.*; *Jennings/Watts*, Oppenheim's International Law, Vol. I, Parts 2 to 4, 863 *et seq.*, each with further references.

46 See thereto *Aaronson*, Journal of World Trade 41 (2007), 629 (634) ("no government demands that its firms adhere to its national social and environmental regulations everywhere it operates"); as well as for example *Zerk*, Multinationals, 104 *et seq.*, 145 *et seq.*; *Weschka*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 66 (2006), 625 (629 *et seq.*), each with numerous further references.

47 See, e.g., *Paust*, Vanderbilt Journal of Transnational Law 35 (2002), 801 (813 *et seq.*); *Jägers*, Corporate Human Rights Obligations, 36 *et seq.*

48 See thereto for example UNHCR, Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/2005/91 of 15 February 2005, paras. 7(a), 50; *Kamminga*, in: International Law Association (ed.), Report of the Seventy-First Session, 422 (423 *et seq.*); *Ruggie*, Business and Human Rights, 19 *et seq.*; *Joseph*, Netherlands International Law Review 46 (1999), 171 (175).

49 From the numerous literatures on this issue see only *Joseph*, Corporations and Transnational Human Rights Litigation, 21 *et seq.*; as well as the judgement of the United States Supreme Court in *Sosa v. Alvarez-Machain et. al.*, 124 S. Ct. 2739 (2004), also reprinted in: 43 I.L.M. 1390 (2004), which, according to *Shamir*, Law and Society Review 38 (2004), 635 (642), is probably "significantly limiting the type of future claims that may be brought against MNCs"; for a related view see also, e.g., *Carver*, in: International Law Association (ed.), Report of the Seventy-First Session, 430 (433) ("Thus, the category of potential claim is not closed; but the threshold that will now have to be overcome in order to use the ATS is much higher than had been supposed in the wake of *Filartiga*.") (italic emphasis in the original); *Nolte*, in: Grote *et al.* (eds.), Festschrift für Christian Starck, 847 (854 *et seq.*).

50 See thereto the comprehensive study by *Nijman*, Concept of International Legal Personality, 29 *et seq.*; see, however, also with regard to the increasing inadequateness of this approach in light of the structural changes in the international system for example *Nowrot*, Philippine Law Journal 80 (2006), 563 (568 *et seq.*); *Higgins*, Problems and Process, 49 *et seq.*; *Klabbers*, in: Petman/Klabbers

ther under treaty law nor in the realm of customary international law – except for a small number of very specific regulations – received a sufficient degree of normative recognition by states and international organizations with regard to the imposition of obligations under international law.[51]

In the same way as in the EU context, these characteristics of the legal environment – the absence of detailed and/or effective national legal regulations combined with a general reluctance or legal and factual inability of host and home states as well as the international community to adopt new laws – exercise a profound influence on the behaviour of corporations and other non-state actors with regard to the creation and implementation of CSR instruments intended to apply outside of the EU.

First, it is noteworthy with regard to the approach adopted by the relevant participants, that non-state actors such as NGOs or labour unions in the host, but in particular in the home states, having identified challenges that require the development of respective rules of behaviour, proceed in the initial phase in the same way as in the EU context based on exactly the same motives. They approach state actors on the national, supranational and international level and try to influence their respective decision-making processes, because it is these state actors that have the competence to adopt effectively enforceable legal rules. However, contrary to the EU context, the role of these governmental actors is overall considerably diminished by their unwillingness or inability to create an effective legal framework dealing with corporations operating beyond the EU/OECD.

The consequence is, second, a "strategic reorientation" on the side of NGOs and other societal forces.[52] Although societal forces also subsequently continue to participate in the decision-making processes of governmental actors and in particular also take part in the development and implementation of CSR instruments adopted by them such as the OECD Guidelines,[53] or at least facilitated by them like in the case of the United Nations Global Compact,[54] interactions between non-state actors such as corporations, business associations, NGOs and labour unions play a considerably more important role than in the EU context. Being unable to convince the respective state actors to adopt rules of behaviour belonging to the realm of CLR, non-profit-

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(eds.), Nordic Cosmopolitanism, 351 (353 *et seq.*); as well as Human Rights Council, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/HCR/4/035 of 9 February 2007, para. 20.

51 See, e.g., *Tomuschat*, Human Rights, 91; *Ruggie*, Business and Human Rights, 19 *et seq.*; *Weschka*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 66 (2006), 625 (659); *McCorquodale*, in: Bottomley/Kinley (eds.), Commercial Law and Human Rights, 89 *et seq.*; *Lowe*, Italian Yearbook of International Law 14 (2004), 23 (30).

52 See thereto also for example *Furger*, in: Appelbaum/Felstiner/Gessner (eds.), Rules and Networks, 201 (223); *Love*, in: Love (ed.), Beyond Sovereignty, 71 (91).

53 OECD Guidelines for Multinational Enterprises, reprinted in: I.L.M. 40 (2001), 237; as well as thereto from the numerous literature recently Association Sherpa, The OECD Guidelines for Multinational Enterprises – An Evolving Legal Status, prepared by *Yann Queinnec*, June 2007, available on the Internet: <www.oecdwatch.org/docs/Sherpa_Draft_OECD_Guidelines_Legal_Study_English.pdf> (visited on 25 June 2007).

54 With regard to the United Nations Global Compact see the information on the Internet: <www.unglobalcompact.org> (visited on 25 June 2007); as well as, e.g., *Nowrot*, in: Tietje/Sethe/Kraft (eds.), Beiträge zum Transnationalen Wirtschaftsrecht, Heft 47, 5 *et seq.*, with further references.

oriented societal forces direct their efforts directly to the companies as being the addressees of the intended rules of behaviour. They try to convince them that it is in their best interest to take part in the development and implementation of meaningful CSR instruments, but also take recourse to other channels of influence such as scandalization,[55] providing incentives and/or the raising of consumer's expectations. A vivid example for the respective approach adopted by non-state actors is the founding of the Forest Stewardship Council (FSC) in 1993[56] that was primarily motivated by the deadlocked intergovernmental negotiations aimed at a comprehensive legal regime on forestry.[57] Although it should not be overlooked that the engagement of companies in the development and implementation of CSR instruments is in part also – in the same way as in the EU context – motivated by the desire to avoid legislative actions by home and host states as well as the international community,[58] it is to a large degree also the direct pressure by other non-state actors which let them taking on the role of norm-entrepreneurs.

Third, taking into account that even issues which have been made subject of national legal regulations by the host state are frequently not covered by a set of effectively enforced rules of behaviour in the realm of CLR, there is – contrary to the EU context – actually room and often a need for a parallel regulatory framework comprising of CSR instruments in order to provide an effectively implemented steering regime. Thus, although for example workplace health and safety might be covered by the domestic law of the host state, the lack of respective enforcement mechanisms or the respective unwillingness on the side of the host state can very well ask for the creation of a parallel set of rules of behaviour – often also including higher standards than provided by the host state – in the realm of CSR.

Based on these findings, it can be concluded with regard to the relationship between home as well as host state national legal regulations on the one side and CSR instruments on the other side beyond the EU, that both set of rules of behaviour are generally complementary without necessarily being exclusionary. Leaving aside the above mentioned constellation of CSR-induced civil disobedience, they again complement each other from the perspective of the overall framework of corporate responsibilities. However, they also often do not exclude each other with regard to individual issues but leave room for parallel regulatory regimes of CLR and CSR.

Furthermore, they complement each other in at least two more noteworthy ways. First, while the legal environment in the EU context increasingly displays the above mentioned phenomenon of law-induced CSR, the respective conditions outside of the EU have paved the way for what might be characterized as CSR-induced support for the optimization of national legal regulations in the host states.[59] This multi-facetted

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[55] See thereto for example *Fischer-Lescano/Teubner*, Regime-Kollisionen, 18, with further references.

[56] On the history, organizational structure and membership of the FSC see the information on the Internet: <www.fsc.org/en> (visited on 2 July 2007); as well as, e.g., *McNichol*, in: Djelic/Sahlin-Andersson (eds.), Transnational Governance, 349 (353 *et seq.*); *Meidinger*, European Journal of International Law 17 (2006), 47 *et seq.*; *Pattberg*, Governance 18 (2005), 589 *et seq.*

[57] See, e.g., *Pattberg*, International Environmental Agreements 5 (2005), 175 (179); *Pattberg*, Governance 18 (2005), 589 (604 *et seq.*).

[58] See thereto also *Wolf*, Journal of Business, Economics & Ethics 6 (2005), 51 (58).

[59] See thereto also, e.g., European Commission, Green Paper – Promoting a European Framework for Corporate Social Responsibility, COM(2001) 366 final of 18 July 2001, 7 ("Corporate social

issue whether at all, by which means and to what extent corporations should beyond the stimulation of economic growth also engage in political activities with the aim to facilitate changes in the respective host countries is increasingly being addressed in CSR instruments.[60] Second, national legal regulations of the home states as well as international legal rules complement the CSR instruments by frequently serving as the already above mentioned material basis for the goals intended to be pursued by the self-regulatory mechanisms that are consequently first and foremost also aimed at extending the limited scope of application of the legal rules of behaviour. Thus, it can be concluded that national legal regulations of the home states as well as the substantive norms of international law clearly serve as what can be characterized a "formative" force with regard to the content of CSR instruments intended to apply to corporations operating outside the EU.

Concerning the role played by national legal regulations of the home and the host states as a factor determining the degree to which corporations take on the role of norm-entrepreneurs, it can be stated that it is – contrary to the EU context – not primarily the existence of legal rules of behaviour or the potential of state actors to adopt new laws that has to be regarded as an inhibiting or driving force for private self-regulation. This finding corresponds to the generally reduced importance attached to legal regulations as steering instruments for companies operating outside the EU/OECD and hardly comes as a surprise taking into account that in particular "weak governance zones" are by definition characterized by a reduced steering capacity of the traditional – legal – means of determining the behaviour of all relevant actors.[61]

Rather, it is precisely the absence of applicable and effective national legal regulations which has to be regarded as a major driving force which motivates corporations as well as in particular also other non-state actors to take on the role of norm-entrepreneurs in order to fill the respective "regulative gap"[62] on the basis of CSR instruments. Thereby, however, national legal regulations in particular of the home states and international legal regimes frequently exercise a considerable "formative" force with regard to the material content of the respective CSR instruments.

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responsibility should nevertheless not be seen as a substitute to regulation or legislation concerning social rights or environmental standards, including the development of new appropriate legislation. In countries where such regulations do not exist, efforts should focus on putting the proper regulatory or legislative framework in place in order to define a level playing field on the basis of which socially responsible practices can be developed."); as well as recently European Parliament Resolution of 13 March 2007 on Corporate Social Responsibility: A New Partnership, P6_TA-PROV(2007)0062, para. 3.

60 See for example OECD, OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, adopted by the OECD Council on 8 June 2006, at 18 *et seq.*, available on the Internet: <www.oecd.org/dataoecd/26/21/36885821.pdf> (visited on 25 June 2007).

61 See thereto, e.g., OECD, OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, adopted by the OECD Council on 8 June 2006, at 32 *et seq.*, available on the Internet: <www.oecd.org/dataoecd/26/21/36885821.pdf> (visited on 25 June 2007).

62 *De Schutter*, in: Alston (ed.), Non-State Actors and Human Rights, 227 (229).

E. Concluding Findings

The overall predominantly complementary – and complex – relationship between national legal regulations and CSR instruments shows that the existence or absence of effectively enforceable national legal regulations, as well as the ability and willingness – or inability and unwillingness respectively – to adopt new laws on the side of state actors exercises a profound influence on corporations and other non-state actors in their decisions to take on the role as norm-entrepreneurs. In addition, the analysis has tried to demonstrate that the general distinction between legal rules of behaviour on the one side and CSR instruments on the other side has – despite fervent pleas to the contrary – not only considerable merits but also reveals that CSR instruments have – in particular also in the eyes of the relevant actors – primarily a subsidiary, albeit important, function and thus amount to an "add-on" if seen from the point of view of effective enforced legal rules of behaviour.[63]

Finally, it has to be emphasized from a broader perspective that the, with regard to specific issues in particular in the EU context frequently exclusionary, but concerning the overarching goal – the optimized incorporation of companies in the promotion of community interests – clearly complementary character of the relationship between national legal regulations and CSR instruments should not merely be viewed as a specific feature of our current international and domestic social order. Rather, it is but one – albeit, in light of the influence potentially exercised by corporations and the in general reduced steering capacity of the states, increasingly important – expression of the fact that the forming and realization of the common good has always been and still is a shared responsibility of states as well as all non-state actors,[64] undertaken on the basis of a division of labour.[65]

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[63] See thereto, e.g., European Commission, Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, COM(2002) 347 final of 2 February 2002, 5 ("CSR is behaviour by businesses over and above legal requirements"); European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility, COM(2006) 136 final of 22 March 2006, 2 ("It is about enterprises deciding to go beyond minimum legal requirements and obligations stemming from collective agreements in order to address societal needs."); as well as recently European Parliament Resolution of 13 March 2007 on Corporate Social Responsibility: A New Partnership, P6_TA-PROV(2007)0062, para. 4.

[64] See *Di Fabio*, JuristenZeitung 52 (1997), 969 (974); as well as European Parliament Resolution of 13 March 2007 on Corporate Social Responsibility: A New Partnership, P6_TA-PROV(2007)0062, para. 45 ("Points out that social and environmental responsibility applies to governmental and non-governmental organisations as much as it does to business, and calls on the Commission to fulfil its commitment to publish an annual report on the social and environmental impact of its own direct activities, as well as developing policies to encourage the staff of EU institutions to undertake voluntary community engagement").

[65] See thereto for example *Isensee*, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, Vol. IV, 3 (54); *Schuppert*, in: von Arnim/Sommermann (eds.), Gemeinwohlgefährdung, 269 (292 *et seq.*); *Heintzen*, VVDStRL 62 (2003), 220 (237).

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