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Publication date:
2010

Document Version
Publisher's PDF, also known as Version of record

Citation for published version (APA):
Buhmann, K. (2010). *Reflexive regulation of CSR to promote sustainablility: understanding EU public-private regulation on CSR thourgh the case of human rights*. Faculty of Law Legal Studies, University of Oslo.

University of Oslo

University of Oslo Faculty of Law Legal Studies
Research Paper Series
No. 2010-07

Papers from the *Sustainable Companies* Research Project

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Reflexive regulation of CSR to promote sustainability: Understanding EU public-private regulation on CSR through the case of human rights

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Abstract: This article discusses Corporate Social Responsibility (CSR) from the perspective of governmental regulation as a measure to promote public policy interests through public-private regulation intended to influence firms' self-regulation. Presenting a 'government case' for CSR, the connection between climate change and environmental sustainability, and social, economic and other human rights lend human rights as part of CSR a potential for meeting some environmental and climate concerns and handling adverse side-effects. The article analyses two EU initiatives: The EU Multi-Stakeholder (MSF) on CSR and the EU CSR Alliance. Focusing on human rights based in international law, it analyses the patterns of negotiation in the MSF and the background for the launch of the CSR Alliance. It shows that analysing public-private regulation of CSR from the perspective of reflexive law theory assists us in understanding the mechanisms by which public authorities seek to influence firm's behaviour through CSR in order to promote public policy objectives. The analysis indicates that to be effective, reflexive regulatory approaches to public-private regulation should pay careful attention to procedural design in order to balance power disparities among participants. Finally, the analysis suggests that a juridification of CSR is taking place. This development is welcome because legal theory and scholarship's insight into institutionalisation of norms of conduct has much to offer to society's interests in promoting companies' responsibility with regard to aspects of sustainable development, such as climate impact.

Key words: Corporate Social Responsibility (CSR), reflexive law, human rights and environment, business and human rights, 'government case for CSR', juridification of CSR

1. Introduction

Corporate social responsibility (CSR) is normally held to be action beyond legal compliance and an issue of corporate self-regulation. CSR is therefore not seen to have much relation to public law or to regulatory procedures that involve public organisations. Nevertheless, several governmental or intergovernmental institutions have launched initiatives to influence corporate self-regulation on matters of CSR-relevance. Among these, the Commission of the European Communities (Commission) in 2002 established a Multi-Stakeholder Forum (MSF) on CSR to encourage self-regulation among EU-based companies through public-private CSR-norm-creation. In 2006, the MSF was followed by a CSR Alliance, comprising firms and the Commission. This article looks at how the EU and particularly the Commission

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has gone about these efforts while staying within the official EU definition which considers CSR to be voluntary action. In particular, it considers how stakeholders have influenced the normative output through negotiations and arguments on the role to be played by international law as a normative source of CSR, and whether CSR should be voluntary or mandatory.

This article differs from the mainstream of CSR studies through its public regulation approach to CSR as well as from its general legal theory informed approach. Much economic, organisational and management literature on CSR is concerned with the so-called 'business case for CSR'. This 'business case' is assumed to demonstrate that CSR is justified economically (for a discussion and literature overview see e.g. Barnett 2007). Rather than discussing the business case, this paper approaches CSR from the perspective of (inter-)governmental promotion of CSR to engage companies in the implementation of public policy interests, in particular the promotion of sustainable human and environmental development. Inspired by the 'business case' terminology, this article refers to that public policy interest as 'the government case for CSR'.

Along with governments and intergovernmental organisations increasingly taking an interest in CSR, a juridification of CSR is taking place. While they seek to stay within the positivistic approach to law which informs the understanding of CSR as 'voluntary' in the sense that it is opposed to 'mandatory' action, governments and intergovernmental organisations increasingly use public law to steer companies towards taking social responsibility. The emergence of CSR reporting schemes in Denmark, Sweden, France, the United Kingdom and other countries is an example of this. As this article shows, organisations at above-national level also draw on public international law as a normative source to inform CSR, with the intention that public international law feed into companies' self-regulation on CSR. The case of the EU Multi-Stakeholder Forum on CSR, discussed below, is an example of this.

CSR generally relates to environmental sustainability, workers' rights and human rights. More recently, climate concerns have come to be embraced by CSR, especially through public policy initiatives (for example the UN Global Compact's 'Caring for Climate' (www.unglobalcompact.org) and the Danish Government's Action Plan for CSR (Danish Government 2008)). With particular relevance to recent concern with green-house-gas emissions caused by business and other climate concerns, human rights relate at a very basic level to the living conditions of individual workers, management, suppliers, buyers, and communities in which businesses operate. Climate degradation may have severe effects on access to land, water, wood and natural energy resources for individuals as well as companies, and on the lives and cultures of indigenous groups in the North as well as the global South. It may cause more countries to fall into poverty, and those which are already poor to become even poorer. This is not only a concern for countries at immediate risk of such developments, but also for countries further removed geographically from the immediate risks. It may have severe effects on related social and economic as well as other human rights, and may lead to armed conflicts. Therefore, human rights and international human rights law have a particular potential to promote CSR concerns beyond the narrow conception of civil and political rights common in European contexts. First, because the full range of human rights (civil, cultural, economic, political and social) are defined extensively and in considerable detail in international hard and soft law which may lend guidance to CSR normativity. Second, because media and other stakeholders pay strong attention to the way

that human rights are affected by business. Risk management is a driver of CSR for many companies. In his most recent report, the UN Special Representative of the Secretary General (SRSG John Ruggie) on business and human rights has highlighted the economic interest for companies to avoid reputation and litigation risks by paying attention to human rights, including rights that relate their environmental impact (Ruggie 2010: section B (*Legal compliance*)).

The research question which this article seeks to analyse and answer is: How may the process-oriented legal theory of reflexive law help us better understand public-private processes of CSR-regulation? To operationalise the findings, a secondary question asks how that insight may be drawn on to strengthen the potential of CSR and corporate self-regulation to promote public policy interests? The article explores the role which public-policy interests have played in the negotiations and outcome of the EU's emerging soft regulation of CSR, based on two cases: the MSF, and the EU CSR Alliance. International human rights law is applied in this article as a variable representing public policy concerns established in hard and soft international law.

The analysis suggest that understanding public-private CSR regulation through the perspective of reflexive law offers a basis for understanding how authorities may seek to promote public policy interests, such as corporate responsibility related to sustainability, through CSR. The case study demonstrates that to be successful, regulatory approaches to public-private creation of CSR norms should pay careful attention to the design of the procedure with a view to balancing power disparities among participants. As reflexive law type multi-stakeholder regulatory approaches to CSR keep proliferating at national and intergovernmental levels, these insights may be of use to authorities and other social actors with an interest in sustainability and the environmental and social impact of companies. The analysis also suggests that the way in which the EU Commission draws on the CSR paradigm as an avenue for realising policy aims contributes to a juridification of CSR. The juridification takes place in two ways. Partly through the role which the Commission intends for public international law on human rights to have as normative source for EU based companies in relation to CSR. Partly through the Commission's application of a regulatory strategy which works along the lines of reflexive law, that is, a legal theory.

From the perspective of this article, the promotion of public policy interests through CSR is legitimate in principle. In fact, the 'government case' may benefit from being recognised for its impact on emerging public-private regulation of CSR. However, more insight is needed into processes and outcomes. This is required to preserve legitimacy of authorities' regulating firms indirectly through this method, and to limit abuse by any involved actors, state or non-state. The analysis of the EU MSF and CSR Alliance as reflexive law aims to contribute such insight. The article does not purport that the introduction of reflexive law in relation to CSR is new. However, it suggests that reflexive law provides an understanding of some important mechanisms that drive or aim to drive firms' self-regulation on CSR, and firms' efforts to affect governments' substantive guidance. It does that by generating insight into the methods that authorities may use to stimulate firms' self-regulation, drawing on CSR as a method to promote the implementation of public policy aims.

The article proceeds as follows: Section 2 explains the basis for selection of the cases and the method for the analysis. Section 3 places CSR in a context of law. It opens with a

presentation and criticism of the voluntary-mandatory dichotomy that marks much CSR debate. This is followed by a presentation of human rights as a CSR issue and the challenges which CSR and international law present to each other. A brief presentation of the EU approach is followed by a suggestion on the potential which law holds for CSR. This part argues that the 'voluntary'-'mandatory' dichotomy shrouds some contributions which law and legal theory may make to strengthening and implementing CSR. Section 4 presents the two case studies, focusing on the attempts of the Commission and other stakeholders to influence the normative output of the processes in terms of human rights. Section 5 sets CSR normativity into a public policy context with particular regard to EU aspects. It argues that the EU's approach to CSR regulation exemplifies an emerging 'government case' for CSR through which authorities draw on CSR to promote environmental and human sustainable development. Section 6 describes reflexive law as a regulatory strategy. Section 7 draws together sections 4-6 into an analysis of the MSF and CSR Alliance as reflexive regulatory initiatives. It finds that the processes constitute reflexive regulation by coincidence rather than by theory-based intent, and argues that power disparities between actors was a decisive factor in the limited role which international human rights law came to play in the final outcome of the MSF. The concluding section 8 draws up recommendations for application of reflexive law for CSR regulation to meet societal, political and legal concerns, and suggests perspectives.

2. Method

The theory of reflexive law offers an entry-point for understanding politically and economically motivated governmental efforts to promote private self-regulation in relation to societal concerns. Human rights are drawn on as the specific issue to be assessed in terms of the role of international law during negotiations and in the normative outcome of the reflexive law process. Human rights and international human rights law formed a significant part of the normative point of departure and intended outcome of the MSF formulated by the Commission. Human rights as part of CSR was also a key point of contention in the process of negotiation. Human rights are interesting as a case for public-private negotiations to develop CSR, because under international human rights law, human rights are state obligations, and because firms tend to prefer not being subjected to expectations that they observe human rights other than what follows from the obligation to observe applicable law in the country of operation. In several cases during the past, firms have negotiated against extended responsibilities or even legal obligations for human rights. To the extent, however, that firms do accept responsibilities for human rights, this may assist states in implementation of their horizontal obligations related to human rights. Firms' acceptance of human rights responsibilities may also assist the general promotion of human rights, particularly in states with low levels of national human rights law or enforcement. Such results correspond to policy objectives of the EU and many developed states towards developing states.

The EU MSF and CSR Alliance have been selected as cases because both constitute procedural forums with a regulatory aim, with the CSR Alliance to some extent a result of the failures of the MSF as seen from the Commission's perspective. Both are established by a public organisation without direct legislative powers in relation to the specific issue of human rights and business but with concern with the promotion of public policy interests, *in casu* human rights and related concerns, through CSR. The EU's emerging regulation of CSR has only been the issue of scant research so far (among the relative few examples, see MacLeod 2007, Voiculescu 2007, Oxford Pro Bono Publico 2009, De Castro 2006) although

its potential impact is considerable, given the international outreach and activities of European business. This analysis supplements and complements analyses of (inter-)governmentally driven regulatory initiatives for the promotion of CSR by this and other authors (e.g. McLeod 2007, Buhmann 2009, 2010 and forthcoming).

The analysis of the two cases is based on official EU documents related to the MSF and the establishment of the CSR Alliance, as well as speeches and reports produced as part of these initiatives.[1] The textual data serve as empirical data somewhat like preparatory works for a statute or a treaty. In this case, they demonstrate how actors have sought to influence the outcome of the two types of public-private regulatory forums established by the Commission. For a study of the development of CSR normativity in a public-private regulatory context, statutory texts and case law are scarce. Other forms of materials provide a better empirical basis, at least in an EU context.[2] The present analysis is made on the basis of a larger study of the materials which has subjected the texts to a discourse analysis. Space restraints do not allow the rendering of all relevant quotes in this article. Instead, selected quotes and summaries of longer text sections substantiate the analysis. The role of international human rights law as a normative source for the normative outcome of the regulatory processes is assessed in a context of discursive struggles between actors to influence the outcome.

3. CSR and law

3.1. The 'mandatory'-'voluntary' dichotomy

Neither scholars nor practitioners agree on one single definition of CSR. However, there is general agreement that CSR entails for companies to take action to mitigate or prevent negative social and environmental impact of their activities or to maximise positive impact (Carroll 1999, Crane, Matten & Spence 2008: 4-7, compare Morsing & Thyssen 2003). The notion of voluntary action is strongly ingrained in the understanding of CSR among many practitioners and academics. That understanding implies that is action beyond compliance with law. As we shall see below, the 'mandatory'-'voluntary' debate played a considerable role in the MSF negotiations.

In the EU context, the 'beyond-compliance' approach is adopted in a 2001 Communication in which Commission defines CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis (...) not only fulfilling legal expectation, but also going beyond compliance and investing 'more' into human capital, the environment and the relations with stakeholders" (Commission 2001a paras. 20 and 21). As of 2010, this definition continues to guide the Commission's approach to CSR.

Arguably, the idea that CSR is de-coupled from legal requirements is somewhat out of touch with parts of theory and practice (compare Blowfield & Frynas 2005, Zerk 2006). In terms of practice, compliance with law is a basic requirement in several internationally recognised public as well as public-private CSR instruments (for example, the process standard SA8000 and the new ISO 26000 Social Responsibility Standard). In terms of legal theory, several studies published in recent years place CSR within a legal context, demonstrating the

[1] For a related approach to legal science studies of CSR, compare Herberg (2008:24)'s recognition of the *speech act* quality of corporate codes of conduct, and Conley & Williams (2005).

[2] It is likely that a different basis for analysis could be argued within jurisdictions with developed CSR legislation and/or case law, e.g. in the United States case law based on the *Alien Torts Claims Act*.

relevance of CSR to various fields of national and international law (and vice versa), such as Corporate Governance and company law, economic law, contract law, torts law, international trade law, international labour law, international human rights law, arbitrated settlements of transnational disputes and combined approaches of soft and hard regulation to dealing with regulatory challenges of a globalised society. And of particular interest is the fact that even organisational theory recognised the role of law for CSR: In an otherwise influential article from 1979, organisational scholar Archie B. Carroll stated that "(t)he social responsibility of business encompasses the economic, legal, ethical, and discretionary expectations that society has of organizations at a given point in time"(Carroll 1979:500). In Carroll's understanding of CSR, legal responsibilities are understood as business' fulfillment of its economic mission within the framework of legal requirements. They are "the ground rules – the laws and regulations – under which business is expected to operate" (Carroll 1979:500, compare Carroll 1999). Carroll's definition assumes that social responsibilities of business include compliance with valid law, but does not seem to recognise a wider role for law in CSR, such as for legal instruments that do not apply directly to the pertinent business, or for law as regulatory strategy to promote certain political or societal objectives. With Mark Schwartz, Carroll later revised this somewhat (Schwartz & Carroll 2003), creating an opening towards 'the spirit of the law'.

3.2. Human rights and CSR

Human rights have become an integrated part of CSR for many practical purposes, many of which are related to sustainable human and environmental development. In the CSR context, human rights are increasingly seen to represent internationally agreed minimum standards of behaviour that apply to businesses as well as to governments. The normative role of human rights is evident in CSR policies and principles of many companies; and in established and emerging private and public-private CSR-standards. This includes several CSR instruments developed through public-private multi-stakeholder negotiation during the past decade, in particular the UN Global Compact (www.unglobalcompact.org), the new ISO standard 26000 on Social Responsibility,[3] and particularly the three-pronged UN framework '*Protect, Respect, Remedy*' framework presented in 2008 by SRSG John Ruggie (Ruggie 2008). A set of draft UN Norms on business responsibilities for human rights included environmental sustainability (Sub-Commission on the Promotion and Protection of Human Rights 2002). The normative role of human rights has permeated into some CSR-reporting requirements in national law. A 2008 amendment to the Danish Act on Annual Accounts includes human rights in its suggested understanding of CSR for CSR reporting required by the Act, along with environment, climate, workers' rights and anti-corruption.[4] International human rights law also features as part of the normative sources drawn on in EU initiatives to promote CSR regulation and self-regulation. Still, human rights originated as obligations of states towards individuals and under international human rights law are state obligations. States' human rights obligations include aspects of horizontality, in particular for states to regulate to ensure against human rights violations by companies and to adjudicate when such violations occur.[5] Measures from governmental or intergovernmental organisations to make human rights part of corporate self-regulation on CSR therefore, arguably, presents an effort driven by public-

[3] On ISO 26000, see http://isotc.iso.org/livelink/livelink?func=ll&objId=3935837&objAction=browse&sort=name.
[4] Article § 99a, promulgated by Act 1403 27.12.2008 amending the Danish Financial Statements Act.
[5] This has also been recognised on several occasions since 2008 by the SRSG in explanations of his usage of the 'corporate *responsibility* to respect' (as opposed to the state *duty* to protect).

policy interests and may even present efforts to implement obligations under international human rights law.

Intergovernmental efforts to formulate behavioural norms for multinational corporations have been attempted since the 1970s but not been overall successful. In particular, UN initiatives to make top-down rules have met with difficulty.[6] This is in part because the discourse on corporate responsibilities for human rights is putting long-standing notions on duty-bearing subjectivity under pressure. Companies are non-state actors and as such not duty-bearers under current customary and treaty based international law according to which duties are held by states. The development of the UN Global Compact and the work of the UN SRSG on business and human rights have provided new impetus and company acceptance of corporate responsibility based on international law principles. This has come about partly through bringing non-state actors into the process of defining normativity. SRSG reports consider, *i.a.,* the interrelationship between social expectations and new or emerging legal regulation (Ruggie 2007, 2008).

3.3. The EU approach

CSR related concerns have been targeted through conventional EU law in some cases, in particular in relation to employee protection and occupation health and safety and through regulation of public procurement and EU-funded activities in developing states. However, the EU approach to regulation of CSR has mainly been couched as a political rather than a law-making process. This is partly due to limited legislative competence of the EU, partly due to lack of agreement among Member States and within the Commission on whether CSR should be subjected to statutory regulation or remain 'voluntary'. As demonstrated below, results in terms of a normative framework have been relatively meagre so far. As the discussion below of the MSF and CSR Alliance demonstrates, part of the reason may be lack of understanding of the inherently legal aspects of public-private regulatory processes, even if these take place outside a conventional law-making context.

The European Parliament in 1999 adopted a *Resolution on a Code of Conduct for European TNCs* (European Parliament 1999). This was followed by the Gothenburg *Strategy for Sustainable Development* (Commission 2001b) and a Green Paper and Communication on CSR issued by the Commission, *Promoting a European Framework for Corporate Social Responsibility*. The 2001 Green Paper argues that corporations should take social responsibility on a voluntary basis. It stressed that CSR has a strong human rights dimension, particularly with regard to international operations and global supply chains. It made several references to international law instruments including the ILO Tripartite Declaration of Principles concerning Multinational Corporations and Social Policy, and the OECD Guidelines for Multinational Corporations (Commission 2001a section 2.2.3). A 2002 Communication formed the basis for the MSF launched later that year. The Communication stated *inter alia* that corporations should demonstrate social responsibility in relation to the third world and explicitly encouraged companies to take ILO labour standards and the OECD Guidelines as minimum standards in their codes of conduct (Commission 2002 section 5.1). A 2006 Communication (Commission 2006a) linked CSR more closely to intra-EU policy goals of promoting inclusiveness, employment and social cohesion. The CSR Alliance was launched in this context. With particular regard to labour conditions in third states, another

[6] For an overview, see for example Buhmann, Karin (2009).

Communication (Commission 2006c) linked CSR with decent work in line with core labour standards as defined by ILO.

3.4. The potential of law for CSR

The dichotomy between mandatory and voluntary action, understood as compliance with law respectively acting beyond the requirements of law, has played a relatively prominent role in recent years' efforts to define corporate responsibilities for social and human rights. This is evident from debates within the EU MSF, the United Nations (UN) Human Rights Council and its predecessor the UN Human Rights Commission. The dichotomy is reflected in formal presentations of the EU's CSR Alliance as well as the UN Global Compact as not being regulatory instruments. The dichotomy has been fuelled by certain business organisations and NGOs, but is perceived by others as unfruitful in having slowed down progress in developing normative consensus and guidelines (see *e.g.* Chandler 2008). Arguably, the case of the EU MSF, discussed below, is an example of this. A narrow conception of law as 'black letter statutory requirements' obscures the fact that 'law' is much more than statutes. As indicated by Zerk (2006:34-36), legal norms come in many other forms that statutory law. Perhaps even more importantly, law is also a theory on the institutionalisation of societal norms. Regulatory techniques developed within the field of legal theory may contain valuable considerations for CSR. A greater appreciation of law's insight into institutionalisation of behavioural norms and its scholarship on regulatory strategies may contribute to understanding and conceptualising normative developments and norm-creating processes taking place in the context of the CSR-paradigm.

To summarise, there is much more law to CSR than meets the eye that only looks for directly applicable statutory provisions. For the CSR community and regulators to accept that CSR and law are not distinct, simply by accepting as a point of departure that law is not just black-letter requirements but that law forms a normative source for CSR in many ways, is a first step towards enhancing the contribution of law and legal theory to understand and strengthen CSR, its evolution, implementation and normative impact. For example, in the absence of legislative competences or capacity or political will to expand corporate duties for sustainable development through statutory law and/or treaty law, the stimulation of firms' self-regulation through reflexive law presents an option for governments and intergovernmental organisations, and for non-state actors with an interest in CSR.

Legal regimes must and do adapt to normative changes in society. As CSR is increasingly addressed not only by non-state actors but also by (inter-)governmental organisations, regulatory initiatives may gradually take on new forms to allow them to be contained within the constraints of conventional views on formal regulatory powers at intergovernmental level and duty holders on human rights. The MSF and CSR Alliance, introduced in the next section, are examples of this. This argument is further unfolded in the subsequent sections on how EU policy objectives, CSR and human rights relate, and on reflexive law as a regulatory strategy.

4. Case studies

4.1 The EU Multi-Stakeholder Forum

4.1.1. Objectives, organisation and procedure

At the launch of the MSF, the Commission announced the aim to be innovation, transparency and convergence of CSR practices and instruments. The MSF was intended to develop problem understanding, discuss values and relevant action, and make recommendations. The Commission invited the MSF to address the relationship between CSR and competitiveness, effectiveness and credibility of codes of conducts based on internationally agreed principles, in particular the OECD Guidelines. It suggested the MSF "develop commonly agreed guidelines and criteria for measurement, reporting and assurance" (2002:15). It also suggested that ILO core conventions and the OECD Guidelines form the basis of such schemes and labelling schemes (Commission 2002 section 6).

The MSF was chaired by the Commission. 18 organisations were members, representing trade unions and workers' cooperatives, industrial and employers and commerce organisations, and NGOs engaged in human rights, consumers' interests, fair trade and sustainable development. Observer status was held by 11 entities including the European Parliament, the EU Council, OECD, ILO, and UNEP.

The procedure (working method) combined plenary ('High Level') meetings and thematic round tables. The end product was a report ('Final Report').

4.1.2. The process

In terms of substantive expected output and normative foundations, at the launch of the MSF in October 2002 the Commission noted that CSR holds potential for contributing to the strategic goals set by the EU's Lisbon and Gothenburg strategies, and for promoting core labour standards and improving social and economic governance in the context of globalisation (MSF 2002a). The objectives of the MSF specifically list ILO core labour conventions, the European Social Charter, the International Bill of Human Rights (the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights) and the OECD Guidelines as instruments to be taken into account when exploring the appropriateness of establishing common guiding principles for CSR (MSF 2002a). The 'international dimension' of CSR was understood to include human rights along with democratisation and conflict prevention. This dimension was considered cross-cutting and to be taken into account by the four Round Tables[7] along with competitiveness, social cohesion, environmental protection and consumer issues (MSF 2002b). The early High Level meetings of the MSF addressed human rights issues in ways that suggest some influence by international human rights law. The minutes suggest that specific statements were more meagre in human rights language but indicate that human and labour rights did play a role for the discussion of internal as well as external dimensions of CSR.

Various statements delivered as part of the MSF process referred to social expectations in social sub-systems external to the economic system (businesses) as an existing as well as politically desired driver for corporate self-regulation. Enterprise Commissioner Erkki Liikanen stated that CSR-initiatives indicate businesses' acceptance of the challenge of increased societal expectations, and contribute to sustainable development. Employer organisations expressed commitment to promote responsible business conduct throughout

[7] Round Table themes were: Improving knowledge about CSR and facilitating the exchange of experience and good practice; Fostering CSR among SMEs; Diversity, convergence and transparency of CSR practices and tools; and CSR Development aspects.

Europe and the world (MSF 2002c). Business networks and organisations considered that by fostering an open dialogue between the different parties, "the [MSF] can make a significant contribution to European competitiveness and the achievement of the Lisbon goal[s]." Trade unions expressed the view that "CSR is to be understood in the broader sense, integrating social, environmental and societal aspects, ensuring that companies act responsibly not only towards their workforce but also to citizens at large and throughout the whole supply chain" (MSF 2002c).

There was no agreement among MSF participants as to the form of regulation for CSR which should be sought (mandatory or voluntary), nor on the role of international law as a normative source for a European framework. The lack of agreement is reflected in Round Table reports and in the Final Report (MSF 2004b). Business and employers' organisations argued mainly in favour of CSR to remain voluntarism and without any strong influence from international law. NGOs generally argued in favour of CSR becoming regulated by law, and to be informed by international law. Social NGOs argued that CSR should not replace regulation but rather be seen as complementary initiatives to help promote a more inclusive workplace and society. They held that CSR is a global issue, concerning activities throughout the whole supply chain. Therefore, the MSF should recommend how to establish a convergence of CSR standards to promote credible, verifiable systems of reporting and auditing and establish clear guidelines within and outside Europe. Human Rights and development NGOs stressed the importance of the international perspective, also implying a strong normative role for international human rights law. They also argued for a shift from the concept of companies *responsibility* towards that of *accountability* (MSF 2002c), stressing the formal legal aspects.

Discussions at the High Level meeting in November 2003 reflect the MSF objective of taking internationally agreed human and labour rights instruments into account. It was agreed that the Final Report was to reaffirm this by listing those principles and conventions (MSF 2003). A joint proposal from a committee comprising groupings of employers, workers and NGOs stated this would lead to MSF members "recognis[ing] the current efforts of those companies and stakeholder organisations which use these common reference principles, standards and conventions as a basis for successful and sustainable CSR initiatives and partnerships, not reinvent[ing] principles which already exist but rather make sure that what exists leads to improved situations and concrete results, and encourage[ing] other companies and stakeholder partners to build on good experiences and develop CSR initiatives that can contribute to the realisation of these principles, standards and conventions" (Coordination Committee 2003).

At the November 2003 High Level meeting, employers' organisations stressed that CSR should not be confused with compliance with existing social or environmental legislation or the need for more legislation in these areas. They held that CSR is about developing and living up to voluntary commitments. Trade unions emphasised the link between CSR and the Lisbon strategy, arguing in favour of an integrated approach between competitiveness and social cohesion. NGOs called for tools to enable the development of a common language for CSR. The held that the EU should work towards firms' CSR claims or actions being objectively verified against internationally agreed instruments such as the ILO core labour standards. They discouraged relying exclusively on voluntary measures (MSF 2003).

At the final High Level meeting in June 2004, trade unions stated that CSR may be voluntary but is not optional. They called for precise criteria, based on a European framework with standards, annual CSR reporting, product and process certification, codes of conduct and criteria for accessing public funds (MSF 2004a). NGOs held again that if CSR is to be credible, tools should be based on internationally agreed principles (e.g. international human rights and labour law). Social and environmental reporting based on common reporting standards should be mandatory (MSF 2004a, Parent 2004, Oosting 2004, FIDH 2004).

4.1.3. The outcome

In the end, the MSF did not lead to a concrete framework on CSR. The Final Report is both a tribute to the significance of international law as a potential and politically desired source for the normative substance of CSR, and a testimony to the extent of disagreement among the Commission and various MSF stakeholders on the degree to which businesses should engage in implementation of standards contained in international law instruments on human rights, labour rights and the environment. The first and brief part of the Final Report reaffirms international and European agreed principles, standards and conventions of relevance to CSR. However, its recommendations and suggested future initiatives are mainly focused on raising awareness and improving knowledge of CSR, capacity building and competences to help mainstream CSR. The ILO Tripartite Declaration, the OECD Guidelines, and the UN Global Compact are noted as main reference instruments for CSR (MSF 2004b:6). While these are, indeed, important in that they deal directly with issues of social and particularly responsibilities of business including for human rights, they are also all non-binding, not very detailed in terms of human rights standards, and, at the most, serve as guidance for corporations. Core international human rights instruments comprising more detailed standards – the Universal Bill of Rights, the European Convention on Human Rights, the EU Charter, the ESC and the 1998 ILO Declaration on fundamental principles and rights at work – are noted but with the comment that they contain values that can inspire companies when developing CSR policies etc., and that this in turn can play a role in reinforcing and making tangible the values these texts represent (MSF 2004b:6). Although at least with regard to treaties, this may be argued to reflect the fact that those instruments directly address states, it also indicates the lack of agreement to base an EU CSR framework on detailed human rights standards contained in those very instruments.

The report notes that the Lisbon and Gothenburg "strategies together provide the European framework for sustainable development of society and economies, aiming to make the European Union a more competitive, dynamic knowledge-based economy, capable of sustainable economic growth with more and better jobs and greater social cohesion, delivering a cleaner, safer and healthier environment" (2004:14-15). Returning the reflection on regulatory capacity from business to governments, business argued that authorities have the responsibility for coordinating policy and ensuring an enabling environment, including the legal framework (2004b:14-15). They argued that public authorities should ensure that there is both a legal framework and the right economic and social conditions in place to allow companies which wish to "go further through CSR" to benefit from this in the market place, both in the EU and globally. The suggested implications are twofold: If governments do not ensure the legal framework for human rights and other CSR issues business does not need go further. Where companies do undertake CSR, this should translate into economic benefits for companies, supported by formal law and public policy. The MSF outcome turns formal law into an instrument for furthering business interests, and defines business expectations for

public institutions in this respect. That result was a fair way off the Commission's objective of making corporations self-regulate based on normative guidance by comprehensive international human rights instruments.

4.1.4. Re-launch of the MSF

The MSF was re-launched in 2006. At the first meeting of the new MSF in December 2006 the Commission presented its recommendations for future action (Commission 2006d). They mainly concerned promoting the priority areas related to CSR that were listed in the 2006 Communication on CSR (Commission 2006a). Accordingly, focus was on the Lisbon strategy and the Gothenburg strategy for sustainable development. Companies were invited to contribute to public policy objectives such as the integration of labour markets and social inclusiveness, the creation of employability competences, and responsible competitiveness in a globalised economy contributing to the fight against poverty at global level (Spidla 2006).

A speech by the Commissioner for Employment, Social Affairs and Equal Opportunities Vladimir Spidla at the occasion of the re-launch of the MSF is particularly interesting in light of regulating CSR as reflexive law. This will be reverted to in section 7. Commissioner Spidla stated that with regard to "a topic like CSR, it is not sufficient that the Commission makes regulatory guidelines. Certain actors, such as NGO representatives, are of the view that the European framework for CSR is not complete, that it should go further. But it is through dialogue that progress is made, CSR initiatives should build on a process of exchanges based on critical analysis" (Spidla 2006, author's translation from the French original). The Commissioner added that the Commission wanted to facilitate and promote dialogue on the topic among all stakeholders (Spidla 2006). Referring to the role of international law instruments in informing CSR, the statement continued: "The results of the Forum are also that from now on, European enterprises that operate globally will make reference to internationally agreed texts, i.e. the OECD Guidelines, the ILO conventions, environmental conventions ratified by Member States, and to universal texts on human rights" (Spidla 2006, author's translation).

4.2. The CSR Alliance

The CSR Alliance was officially launched by the Commission in March 2006 in its first CSR Communication after the MSF Final Report, '*Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility*' (Commission 2006a). The Communication was originally scheduled for mid-2005 but came out almost one year later, suggesting difficulties in realigning the MSF results with Commission policies. The first part of the title refers to the so-called 're-launched Lisbon Strategy' and indicates a shift from CSR based on external issues and international law, to internal social and employment policy objectives. Other parts continued to link CSR to sustainable development and responsible competitiveness. It explicitly states that companies can help reconcile European economic, social and environmental ambitions through CSR (Commission 2006a:1). The Commission noted that "alongside public policy responses, CSR practices can contribute to a range of relevant policy objectives", including higher levels of labour market inclusion and recruitment from disadvantaged groups, employability, job creation, investment in skills development and life long learning, and greater respect for human rights and core labour standards, especially in developing countries (Commission 2006a:2, Commission 2006b). European companies are invited to strengthen their commitment to CSR

and "behave responsibly wherever they operate, in accordance with European values and internationally agreed norms and standards" (Commission 2006a:3).

The Commission declared that to achieve those aims, it found a new political approach necessary. This approach which was embodied in the CSR Alliance meant continuing dialogue "with all stakeholders" but seeing companies as primary actors in CSR. The main element in the Commission's new approach was presented as an innovative partnership with enterprises, Member States and stakeholders, organised as the European Alliance for CSR. It would be open to European enterprises of all sizes (Commission 2006a:4, 7) and based on the priorities of the re-launched Lisbon strategy to respond to the challenges of increasing global competition, demographic trends and a sustainable future (Commission 2006a: Annex). The Commission stressed that the Alliance "is not a legal instrument" but based on voluntary commitment, with the results to be understood as voluntary business contributions to the achieving the Lisbon goals. The understanding of a legal instrument is apparently simple and arguably simplistic: The fact that the Alliance "is not to be signed" is stated as the reason why it is alleged not to be a legal instrument (Commission 2006a:3, 6). The Alliance is described as a political umbrella for new or existing CSR initiatives by large companies, SMEs and their stakeholders, and "a vehicle for mobilising companies in the interests of job creation, economic growth and sustainable development" (Commission 2006a: 6). Its activities include fostering innovation and entrepreneurship which addresses societal needs, mainstreaming CSR into EU policies, particularly with regard to employability and diversity, working conditions, and promotion of CSR globally in accordance with the three ILO, OECD and UN regulatory instruments noted as main reference texts by the MSF Final Report (Commission 2006a:4-5).

The composition of the Alliance was not received favourably by all. In particular, trade unions and NGOs were upset with being excluded from direct participation in work on CSR in the Alliance. They thought that the Commission had taken the CSR agenda hostage for the promotion of jobs and employment to the possible detriment of implementation of international law principles on human and environmental sustainable development. They feared that the Commission's continued commitment to CSR being voluntary rather than mandatory might exacerbate that tendency (Euractiv 2006, ECCJ 2006).

5. The 'government case for CSR' and EU public policy objectives

It is widely accepted that companies and their networks engage in production of norms for themselves, through codes of conduct and other forms of self-regulation on CSR and other matters (Dilling, Herbert & Winter 2008, see also Steinhardt 2005, Teubner 2004)). It is also well-known that many corporate codes of conduct include provisions on human rights issues and environmental concerns. Corporations react to social expectations (*e.g.* Ruggie 2008, Herberg 2008) by integrating norms established in international human rights and environmental law into the codes they make for themselves and their suppliers. While there is some recognition that private self-regulation can contribute to public policy interests (e.g. Meidinger 2008, Glinski 2008, Trubek & Trubek 2006, Lobel 2005), it is less well recognised that from a public policy perspective, corporate self-regulation on human rights may be useful in its own right. Business self-regulation on human rights may contribute to horizontal level respect and protection of rights. In principle, this relates to the full spectrum of human rights as well as impact on and consequences of environmental and climate developments. Business self-regulation does not relieve States of their duty to protect and

ensure implementation of such rights through formal law addressing corporations or of enforcement. But it can make their tasks easier and provide for innovative approaches through corporate integration of human rights objectives.

National governments have an interest in companies conducting themselves in certain ways, because this may decrease social tensions, environmental degradation and global warming. Governments have an interest in CSR as a modality to implement public policy objectives, because it ultimately contributes to government funds (such as taxes) and limits their need to be spent on social services for the unemployed or underemployed, court cases on discrimination, or a host of other human rights related issues. Corporate self-regulation may limit needs to spend public funds to re-establish damaged natural environments or provide drinking water or food – both of which are related to the human rights to adequate food and health – to individuals who have lost natural water resources or access to land. Intergovernmental organisations have an interest in companies behaving in accordance with certain social norms on social responsibility for a number of the same reasons, transposed to the international level of their mandates or objectives but effectively also playing out in national settings. However, intergovernmental institutions, such as the UN or the EU, have limited formal powers to regulate the behaviour of corporations with regard to CSR issues. This applies especially human and labour rights. These powers may be limited for formal reasons (as in the case of the EU) or for practical reasons (lack of state support for treaties to regulate transnational and other corporations, as in the case of the UN).

Arguably, the EU's approach to CSR exemplifies an emerging 'government case' for CSR through which authorities draw on CSR to promote environmental and human sustainable development. The 'government case' for CSR is a logical extension of the role which business has in today's world. It is also a challenge for intergovernmental organisations, because they lack regulatory powers. National governments wanting make businesses act in accordance with public policy interests have two basic options: binding legislation, or introducing non-binding measures which provide guidance for companies to (hopefully) self-regulate. The latter sometimes takes place at an implicit background of the authorities' competence to introduce binding legislative requirements if the non-coercive measures do not result in intended effects. Where such competences do not exist, alternative measures must be sought. This, therefore, is what happens when intergovernmental organisations engage in setting up public-private forums for shared development of CSR normativity.

The 'government case' for CSR implies that governments have an interest in CSR as a modality to implement, or assist in implementing, public policy and legal objectives. Governments therefore naturally employ regulatory modalities at their disposal to promote this interest, that is, to make companies engage in CSR. Through such modalities, for example reflexive law as a regulatory strategy, governments may induce regulation within companies. Because this regulation is not based on compulsion but on incentives, it is generally perceived as 'voluntary' in the perspective of companies or the CSR community. Still, however, it is based on governmental regulation, often in the form of public law, such as law-based economic incentives or statutes on CSR-reporting. It this way, the 'government case' may lead to self-regulation that complements the idea of CSR as company self-regulation on the basis of the owner's ethical values, civil society action or media campaigns.

The EU and several Member States have policies of promoting human and labour rights in third world countries but have no legislative powers to regulate these matters inside other sovereign states. So far, the willingness to apply EU or Member States' national law extraterritorially has been very limited in this area. Traditionally, development cooperation and bilateral policy dialogue have been the means for implementation of foreign policy goals to promote sustainable development. When EU based companies undertake human rights relevant activities that go beyond the requirements of national law in host states or beyond the extent to which such law is enforced, they in effect contribute to the implementation of EU foreign policy goals to promote human rights in third states. When EU institutions embrace CSR as a means for contributing to the EU policy goal of 'responsible competitiveness'(referring to competitiveness with respect of human and core labour rights and other CSR issues related to production costs) they also in effect engage business in implementation of public policy goals of changing legal conditions in third states.

The Lisbon Strategy agreed to in March 2000 by EU Heads of State and Government aimed to make the EU a competitive and dynamic knowledge-based economy with sustainable economic growth, more and better jobs and greater social cohesion by 2010. To achieve this, a number of specific goals were set out.[8] Some of these, such as the goals of equal opportunities, social inclusion, raised employment and employability and lifelong learning have much in common with legal claims or rights to non-discrimination in the labour market and beyond, the right to work and to labour market education. Such rights are provided by Constitutions or statutory law in some Member States and their implementation is a legal obligation of Member States under international human rights treaties such as the Council of Europe's European Social Charter and the International Covenant on Economic, Social and Cultural Rights which Member States have ratified on a bilateral basis.

CSR is not only about acting responsibly in developing countries or in countries other than one's own. Increasingly, CSR is approached in welfare states as a response to challenges resulting from aging society, migratory patterns and employment needs of particular groups, and to promote climate consciousness and reduce CO2 emissions by European companies.

Originally, human rights were not considered part of the objectives of the then European Communities (EC). Although EC case law and Treaty amendments have changed this somewhat, national-level implementation of human rights does not fall within the general legislative powers of the EU. Furthermore, except for some non-discrimination issues, EU legislative competences in labour law issues related to CSR are as a general rule limited and/or complementary to those of Member States.[9]

Several Commission statements on CSR emphasise a strong human rights dimension in CSR (Commission 2001a:14), and that "this is recognised in international instruments such as the ILO Tripartite Declaration (...) and the OECD Guidelines (...)" (Commission 2001a:14). Human and labour rights have been linked with CSR issues in the third world in relation to the Cotonou Agreement and the GSP+ scheme. In its 2002 Communication on CSR, the Commission stated that EU businesses should "demonstrate and publicise their worldwide

[8] The principal process of implementation of the Lisbon Strategy is the 'Open Method of Coordination' (OMC) (see e.g. Bercusson 2008 at 185).

[9] For a detailed discussion of the legal basis for EC/EU CSR measures, see Oxford Pro Bono Publico (2009): 8-12

adherence" to the OECD Guidelines which includes human as well and environmental concerns, and that their codes of conduct should integrate the ILO fundamental conventions and draw on these in defining CSR. It also stated that companies should observe the OECD Guidelines and the ILO Tripartite Declaration in actions outside EU (Commission 2002:6-7, 13, see also Commission 2001:14-15). Thus, at least with regard to extra-EU activities, the Commission expressed a clear intention that European firms should let their actions be informed by international instruments with a human rights substance.

Whereas international human rights law aspects of CSR do come out to some extent in extra-EU CSR matters, in the intra-EU context the links between CSR and issues with a potential human rights effect remain couched in the policy terms of the Lisbon goals. The Commission suggested links between CSR and the Lisbon goals on inclusiveness and promotion of employment. This was particularly clear in the 2006 Communication on CSR (Commission 2006a). CSR topics related to human rights entered the EU Lisbon Goals more indirectly through focus on economic, social and environmental dimensions and calls for business to develop "a sense of social responsibility" to promote inclusiveness, growth and employment. This, however, suggests that in the absence of formal legislative powers, less formal public-private regulatory processes to encourage corporate self-regulation on CSR present themselves as options for EU institutions to regulate companies through soft measures. This has a potential effect on human rights compliance at the horizontal level of EU based companies' interaction with society. The MSF and the CSR Alliance are examples of such public-private regulatory processes with an encouragement potential.

Summing up, the EU draws on CSR as a measure to promote public policy interests within as well as outside EU where EU legislative competences are limited. Thus, the 'government case for CSR' becomes a driver for initiatives to encourage companies to self-regulate on CSR. Space constraints do not allow a discussion of constitutional, legal certainty, democratic, legitimacy or political problems related to whether CSR and public-private regulation should be made use of in this context. In the present article, the fact that the Commission has engaged in promoting public-private regulation of CSR and that it does refer to international human rights law as a normative source to inform the outcome are taken as observable facts and therefore as processes to be better understood. To understand how the process works, we move to reflexive law which is precisely a strategy for public-private regulation intended to influence business self-regulation where governmental regulatory capacity is limited.

6. CSR and reflexive law

As a process and communication oriented legal theory, reflexive law offers a theoretical framework for understanding public-private regulation on CSR. Founded in social science systems theory and autopoiesis theory, the terminology of reflexive law refers to learning and exchange of demands, expectations and best practice between social sub-systems. It builds on this and other modalities to support reflection and (self-)regulation within and between social sub-systems. Incidentally but most likely not without substantive reason, many of the statements related to the EU MSF and CSR Alliance use similar terminology.

Reflexive law theory was developed in the 1980s by German legal philosopher Gunther Teubner as an alternative to traditional top-down instrumental or substantive regulatory strategies and their opposite, *i.e.* complete de-regulation. It originates in recognition that

regulatory strategies of welfare states in the 1970s-1980s were ineffective for addressing environmental degradation, social inequalities and other societal concerns which required the cooperation of non-State actors for their solution (Teubner 1983, 1986, 1993). In his proposition of reflexive law theory, Teubner drew on and brought together some ideas of Niklas Luhmann and Jürgen Habermas. The approach in here is based mainly on Teubner's inspiration from Luhmann' systems theory and ideas of autopoietic law. Teubner's reflexive law theory shares with Habermasian theory an emphasis on participation, discourse and balancing of power disparities.

Reflexive law theory is concerned with procedures for multi-participant law-making rather than with the resulting substantive norms. Norms are to be defined in a self- or co-regulatory process by those actors who will be subjected to them and who represent the interests at stake. Reflexive law theory holds that this will lead to more adequate norms to regulate behaviour of businesses and other societal actors than traditional top-down/command-control governmental substantive law.

Reflexive law assumes a form of procedural form for the law-making process. The procedural forum frames decision-making and communication processes. Reflexive law theory does not claim that substantive, top-down regulation should be abandoned, but supplements statutory law as a regulatory strategy by offering an alternative. Authorities retain control by establishing procedures that guide self-reflection but leave organizations, such as companies, the freedom and choice to determine their own norms of conduct discursively. Other societal actors are offered a learning process that enables them to reflect on the consequences of their actions in relation to the community and to integrate societal needs and demands through self-regulation. Reflexive law, therefore, is a form of public (procedural) law for regulation which achieves substantive results through co- and self-regulation by societal actors.

Reflexive law theory includes an important but little developed assumption that institutional procedural mechanisms should be designed to neutralize power disparities in order to limit abuse of power by stronger participants in the process (see Teubner 1986:316-317, Teubner 1993:94). This requirement adds a specific normative aspect to reflexive law and its procedural focus. The normative quality of reflexive law is evident through its emphasis on two interrelated aspects: Participation of societal actors in the development of norms, and establishing a balance of power between participants in this process. The latter reflects back on procedure because balance of power should be achieved through the procedures set up for the reflexive regulatory process. In establishing reflexive regulatory processes, authorities therefore need to be aware of the normative requirement that procedures take power disparities into account to ensure that they cater for equal possibilities for all affected to inform the substantive normativity. As further argued below, power disparities were influential for the MSF outcome. As discussed elsewhere (Buhmann forthcoming/2010), newer Habermasian theory may complement reflexive law theory with regard to this crucial aspect.

As indicated, reflexive law theory is related to systems theory and ideas on self-referentiality and autopoeisis. Self-referentiality perceives the legal system as an operatively closed system, which is at the same time cognitively open to the environment and able to learn from it (Teubner 1984:293, 1986:309, 1993:69, Luhmann 1986:113, 1988a:19-20, and for

discussion in a CSR related context Arthurs 2008:20, Perez 2008:294-296). Social sub-systems, such as the economic system which includes businesses, may react to developments in other social sub-systems, *e.g.* the political or the legal system (Teubner, Nobles & Schiff 2003, Luhmann 1988b). Social sub-systems and their expectations work as 'perturbance' or 'irritants' on each other, making other sub-system change or adapt norms and their institutional appearance. This approach to the interaction between social sub-systems is instructive in relation to CSR regulation in public-private forums. It assists us in understanding how reflexive law is not just a way of involving stakeholders in norm-making, but also of making them consider and integrate societal demands or expectations in the process of creating norms, e.g. on sustainability, working conditions, or non-discriminatory recruitment practices.

Reflexive law also suggests focusing on communication processes, in their particular sense of being an integrated part of systems theory. Through the transmission of irritants, communication and action in a system outside law may be turned into legal communication and legal action, or from outside the economic system (firms) into business self-regulation. This helps us understand how reflexive law works through communication of concerns and demands between social sub-systems to affect the collective norm-creation in a multi-stakeholder forum or the self-regulation in a particular sub-system. The analysis of the MSF and CSR Alliance below will show how this may work in practice.

In sum, reflexive law does not directly regulate conduct to realise particular, predetermined goals, but aims at inducing reflection-based co- or self-regulation through procedures that facilitate transmission of 'irritants' in the form of normative expectations between actors from different social sub-systems. It aims at promoting the development of behavioural norms that both respond to societal needs and public policy concerns and are acceptable to those subjected to the norms.

The application of reflexive law has had a certain revival in later years with scholars applying reflexive law to various regulatory practices. Several CSR-related practices have been discussed as forms of reflexive law. This applies for example to environmental management and labeling as self-regulation and auditing (Orts 1995a:1311-1313, Orts 1995b:788-789), non-financial reporting (Hess 1999), national implementation of EU Directives (Deakin & Hobbs 2007). Of particular interest to the topic of this article, Orts found in a study of the EU's Eco-Management and Audit Scheme (EMAS) and other environmental regulatory schemes, found that much environmental law is reflexive in character "almost unconsciously", "almost randomly", without an informing theory. As a result, he found several examples, including EMAS, to be less effective than intended (1995a:1287). Addressing social reporting as a form of reflexive law, Hess argues that "as a reflexive law, a social report would not mandate that certain predetermined outcomes be reached, but would instead require a corporation to reflect on how its practices impact society and to open up dialogues with the relevant stakeholders" (1999, at 46). Through making social reporting mandatory, legislators may guide corporations to be open to society's expectations or demands and towards institutionalising responsible decision-making, while at the same time creating a regulatory system that would be flexible to the situation of each particular company. Processes of social reporting may guide changes conduct and promote self-regulation, encouraging corporations to re-examine practices and reform these according to information on stakeholder's views (Hess 1999, at 42-46). Deakin & Hobbs (2007) have

demonstrated that reflexive regulation may be oriented towards a specific substantive output, *in casu* for Member States to introduce local standards that are more favourable to workers than those required by the relevant EU Directive. According to their analysis, the EU Working Time Directive which sets minimum standards that companies must live up to but leaves space for voluntary corporate action "beyond compliance" to introduce local standards that are more favourable to workers, may be considered reflexive law. Deakin & Hobbs consider the EU Commission's 2001 Green Paper on CSR an example of a functional relationship between a framework of legal controls, and voluntary action "beyond compliance", given its definition of CSR focusing on voluntary action, combined with the Commission's insistence that CSR complements regulation or legislation and cannot be a substitute for such measures. Two recent articles on the capacity of reflexive law to raise labour standards in Europe (specifically the United Kingdom) (Barnard, Deakin & Hobbs) and in low-wage supply countries (Arthurs 2008) show a certain pessimism towards the capacity of reflexive law. They therefore question the feasibility of drawing on reflexive law to complement substantive state law. Notably, Barnard and others suggest that part of the problem may lay in insufficient development of the legal mechanisms to underpin CSR as reflexive law in a way that engages companies and their employees. These authors found some reluctance among companies and business organizations to see CSR as touching upon company-internal issues, that is, employment issues. A slightly more optimistic note is made in a 2007 article on reflexive law as a modality to deal with gender based pay gaps (Deakin & McLaughlin). This study too suggests that more needs to be known about the way in which reflexive law works as a regulatory strategy in practice. There are, however, also indications that reflexive law may work as a strategy towards making companies and their organizations internalise external demands and expectations, at least with regard to company-external issues such as human rights problems in conflict zones (Buhmann, Roseberry & Morsing forthcoming/2010 at note 28, on guidelines on human rights for businesses operating on weak governance zones, developed by the International Organisation of Employers, the International Chamber of Commerce and OECD's Business and Industry Advisory Council at the invitation of the SRSG on Business and Human Rights, John Ruggie).

By proposing reflexive law as a theoretical framework for addressing regulation of CSR, this article is not claiming to be offering revolutionary ideas. Indeed, reflexive law was related to CSR in early discussions of reflexive law by the author of the theory (Teubner 1985). However, over the past decade, concerns that led to development of reflexive law theory have shifted from the national to the intergovernmental level of regulation. This article therefore proposes that reflexive law may also be a relevant strategy for addressing concerns at this level. This is particularly the case when conventional (coercive or, in CSR-language, 'mandatory') regulation encounters difficulties, for example because of lack of political support among formal law-makers. Based on the findings of this article and others that address reflexive law as a regulatory strategy to complement state or EU law (e.g., Barnard *et al.* 2004, Deakin & McLaughlin 2007), legal scholarship may develop more insight into the strengths and weaknesses of reflexive law as a regulatory strategy. In turn, this may feed into governmental or intergovernmental use of reflexive law to promote self-regulation among companies. The meager results of the COP15 Climate Summit in Copenhagen in December 2009 suggest that the relevance for alternative modes of regulation of global concerns grows when conventional international policy and international law-making is unable to gather sufficient agreement to deliver substantive regulation.

7. The MSF and CSR Alliance: Regulatory strategy

7.1. Reflexive law

In its efforts to regulate CSR, the EU Commission has employed an approach of involving affected societal actors. While the Commission has consistently suggested that corporate self-regulation on CSR take certain substantive issues and normative sources into account, especially on human rights and drawing on international law instruments, it has indicated that CSR was not to be an issue of mandatory requirements on the basis of directions issued by (EU) authorities. This is evident from the 2001 definition of CSR through the speech by Commissioner Spidla at the 2006 re-launch of the MSF (Spidla 2006). The latter clearly indicates the view that if CSR regulation is to be effective and to become accepted by those for whom it creates (societal) obligations, it should not be based on rules made solely by authorities. Indeed, this might be a sort of a compromise between the results of the 2002-2004 MSF that CSR was not to be subject to formal regulation, and a view of the Commission that there is a public and societal interest in CSR being subject to some form of regulation, even self-regulation. Outputs discussed in the MSF process include labelling, certification and reporting schemes. In reflexive law literature, these have been characterised as examples of reflexive regulation. The approach and much of the wording used by Commissioner Spidla at the 2006 relaunch of the MSF and the launch of the CSR Alliance suggest that the initiatives are informed by much of the same type of thinking that caused the development of reflexive law as a theory and regulatory strategy. The emphasis on dialogue as a basis for learning about and integrating social expectations, exchanges (between social sub-systems) and abstention from formal top-down regulation in favour of corporate self-regulation suggests considerations resembling key points informing reflexive law as a regulatory strategy.

The Commission established forums allowing stakeholders to meet and learn about concerns of actors representing other social sub-systems and to take part in a shared regulatory process with non-state actors having the main stake in defining the substantive output. With the 2002 Communication and the 2002-2004 MSF, the Commission offered selected stakeholders an opportunity to set the framework for CSR regulation in the EU. The MSF launched in 2002 was an initiative that involved both firms as organisations directly affected by CSR expectations, and other stakeholders, such as civil society organisations representing employees and human rights, environmental or other interests. Commission documents indicate that the process was based on the recognition that public and wider societal interests and expectations require companies to take responsibility for their actions in society and for the role they may play in promoting welfare policy objectives. This approach to regulation has the key characteristics of reflexive law, although not necessarily a 'pure' approach. The strategy aims at corporate self-regulation but also has co-regulatory features (compare Senden 2005).

The Final Report (2004) neither met the Commission's objective that the MSF would establish a framework for CSR nor, particularly, with regard to the role that international law and specifically human rights instruments were to play for such a framework. A new initiative, the CSR Alliance, was launched in 2006 and the MSF was re-launched. In this case, the regulatory strategy was more clearly aimed at self-regulation but in a two-pronged way: The MSF is a channel for keeping the multi-stakeholder process going, and as we saw

in Commissioner Spidla's speech, also serves as input on societal concerns, normative issues and normative sources. The CSR Alliance was established as a learning forum for businesses, ostensibly aimed at exchanging best practices but through this clearly also a modality for displaying models and encouraging laggards to follow. The 'learning forum' approach is a key feature of reflexive law and supports the finding that the regulatory procedures initiated by the Commission are off-set on the basis of ideas embodied in the theory of reflexive law.

The MSF appears to have been an effort to regulate CSR reflexively without being informed by the theory. This may explain why the procedure apparently did not create a proper balance of power between business and other stakeholders, and also why substantive guidance drawing on formal law was included to such an extent that it apparently worked against the outcome desired by the Commission. Obviously, if authorities have very clear ideas about a normative outcome that is related to substantive public law, reflexive law may not be the proper regulatory strategy in the first place. In the case of CSR regulation at EU level, limitations of formal legislative powers creates particular challenges. Soft or informal public-private regulatory strategies such a reflexive law become an option. This stresses the relevance of application of the relevant theory by authorities.

With the CSR Alliance, the Commission seems to have learned from the experience of the MSF. The aim of working through CSR to achieve certain objectives related to human rights was not been abandoned, but the strategy was changed. Apart from the Commission, the 'learning forum' includes only those social actors who are the subject of the intended self-regulation, and learning by peer example is given a much stronger role as the normative source than is international law. Significantly however, several European 'CSR leaders' in the CSR Alliance base their CSR policies on international law, including human rights law. The Alliance was established and presented as an instrument for self-regulation. However, given the amount of directions contained in the 2006 Communication, the Alliance in combination with the MSF 2006 makes a regulatory claim, to give effect to Community policy objectives. Combined with the outcome of the MSF 2002-2004 and its reference to international law, this is likely to be intended to provide a considerable normatively guiding effect on the outcome of the Alliance. The results of the CSR Alliance to date (March 2010) and particularly a "Toolbox" published in 2009 on the basis of company practice and exchanges, suggest that international human rights and labour law in fact feature as sources of normative guidance for company self-regulation. This is the case, for example, with regard to occupational health and safety, gender issues in employment, treatment of foreign workers and supply chain management, although references are relatively indirect.

The case studies of the EU MSF on CSR and the EU CSR Alliance demonstrate that the regulatory technique employed by the EU to induce corporate self-regulation on CSR contains elements of reflexive law in terms of procedure as well as in terms of the Commission's intention that it result in labeling, reporting and related self-regulatory schemes. However, this appears to be coincidental or "unconscious" rather than intentional use of reflexive law, uninformed by the theory. By implication therefore, and paralleling the findings of Orts in his 1995 study on EMAS (above), it was less effective than intended. The subsequent section will demonstrate that power disparities between actors had a significant effect on the regulatory outcome and on the effectiveness of the process to deliver the substantive results originally intended by the Commission. Lessons for future use of reflexive regulatory techniques and their procedural design will be drawn up in the concluding section.

7.2. The role of international human rights law

While it is relatively easy to determine that the MSF and the CSR Alliance display features of reflexive law, the role of international human rights law as a normative source for the regulatory output is more complicated. This touches both on the extent to which authorities may give normative guidance for reflexive norm creation, and on the role that international law has in CSR.

The Commission sought to influence the normative self-regulatory output of the MSF by suggesting a normative focus on human rights, with international law as the source. Thus, the Commission did not limit itself to establishing the procedure for regulation, but also indicated its view on public interests to be considered and on what it considered to be appropriate sources of substantive norms. The Commission insists that CSR is voluntary action and not law. Nevertheless, law – albeit international law and not law that directly binds companies – is awarded a major role as a normative source of CSR. While specific instances of reflexive regulation may have a specific normative objective and be able to achieve this with success (e.g. Deakin & Hobbs 2007), setting substantive normative goals may also cause a stifling of the reflexive regulatory process. As indicated by Arthurs (2008:26), state law, state institutions and state policies may endanger reflexivity. Regardless of the general societal acceptance and even expectation that CSR takes human rights into account, the MSF outcome demonstrates that setting substantive public law as a clear normative element for the reflexive regulatory process may backfire. In the MSF case, business simply returned the invitation to regulate to authorities, both with regard to human rights standards and with regard to conditions for implementation of policy objectives.

The MSF mandate and some of the early debate expressed clear links between CSR, European and international law, and the policy aims of the Lisbon strategy, including inclusiveness and responsible competitiveness. From this perspective, law – including international law – is a clear source for CSR, and CSR-informed business practice an obvious avenue towards implementation of the Lisbon goals. This includes those of human rights relevance as set out in section 5 above. In later meetings the links to law including international law were downplayed in favour of debating CSR as voluntary or mandatory. The links between business action and implementation of the Lisbon goals were also downplayed. The final report reiterated the basic links, but did so in a way that separated the direct normative significance for business as much as it asserts the legislative and other institutional obligations for authorities. The Alliance refers to those same instruments, and the launch of the MSF 2006 re-introduced them.

The Commission's response through the Alliance to the outcome of the MSF indicates that the Commission considers CSR an important channel for implementation of paramount societal challenges of the EU and its Member States in relation to employment, inclusiveness and the future of European business in a world of increased global competition as well as to environmental concerns. The Commission places a considerable part of the responsibility for meeting those challenges on business by tying together the relevance of CSR to meeting the goals of the Lisbon and Gothenburg strategies and sustainable development with companies as the main actors in CSR. At the same time, it reiterates the role of international instruments which were mentioned in the MSF Final Report as key normative sources informing business CSR.

The implications of these findings are drawn up in the following section which concludes on the case studies and provides perspectives for integration of international law on human rights and other global sustainability concerns in reflexive type public-private CSR regulation.

8. Conclusion and perspectives

8.1. Conclusion

Recognition of the 'government case for CSR' explains how public policy interests work as a driver for (inter-)governmental measures to promote CSR. Reflexive law theory explains how initiatives like the MSF complement conventional substantive EU law to promote public policy interests. It also indicates that in the launch of the CSR Alliance, based in ideas of learning and dialogue, the Commission took a reflexive regulatory approach to inducing self-regulation in the business sector. In both cases, however, the use of reflexive law as a regulatory strategy appears to be incidental rather than intended. The application of the reflexive regulatory strategy seems not to have been informed by the theory. Rather, the reflexive regulatory approach appears to be a result of limited formal law-making powers on the part of the EU/Commission combined with realisation on the part of the Commission that the public policy interests to which CSR can contribute are best realised in cooperation with stakeholders and through a degree of business self-regulation based on its reflections on stakeholder expectations.

Application of the reflexive law theory answers the first part of the research question set out above by demonstrating how legal theory may help us better understand public-private processes of CSR-regulation. To answer the second part of the question, we will focus on how this insight may be drawn on to promote the potential of CSR and corporate self-regulation to promote public policy interest, such as human rights and environmental sustainability through the integration of international human rights law as a normative source.

In the case of the MSF as well as the CSR Alliance, it is clear that the Commission found international human rights law to be a significant normative source for CSR in relation to European companies. In particular with regard to the MSF, the Commission, however, was not successful in having international human rights law considered to the degree originally envisaged. As for the CSR Alliance, references to international law remain indirect. This raises two additional questions as spun-off from the second research question: *why* the normative influence of international human rights law became meagre, and *how* such influence can be strengthened in public-private regulation of CSR that draws on a reflexive regulatory approach. An obvious answer is that the Commission was unsuccessful in achieving intended objectives with regard to international law through the MSF, because the process worked as reflexive law but without being informed by the theory. Crucially, this meant that insufficient attention was paid to balancing power differences, allowing business interests not favouring international law on sustainability concerns to have a very strong influence on the normative outcome to the detriment of those of civil society and, to some extent, the Commission as representative of public interests. The lesson is that design of public-private regulatory processes which work as reflexive law need to pay careful attention to the design of the process and procedural rules to allow involved actors a measure of equal power. Obvious as this may seem, it only becomes so because we are able to view the

processes through the lense of reflexive law and therefore identify weaknesses based on that theory.

This confirms that if reflexive regulation is to work, the procedural design is significant. As noted, the method for doing so has not been elaborated in reflexive law theory. The MSF and CSR Alliance cases suggest that authorities should pay attention to dealing with power disparities in order that the regulatory output reflects the concerns and interests of all involved. They also need to design the process so that all relevant stakeholders are involved. If not, the result may not be considered as legitimate (see also Trubek & Trubek 2006:24). Civil society's reactions to the CSR Alliance demonstrate precisely this: Unless all relevant stakeholders are involved in the process, the result will not be perceived as legitimate. Dealing with power disparities by excluding weaker but relevant stakeholders is not the appropriate option. The findings of the current analysis indicate a need for more research into the procedural aspects of handling this aspect of reflexive law in practice.

The analysis of process and outcome also indicates that reflexive law works as a regulatory strategy to encourage self-regulation, but that achieving particular substantive pre-set results may be difficult. Arguably, a public institution's objective of achieving quite specific substantive results through reflexive regulatory process may conflict with the idea of reflexive law. This may in part explain why the Commission was not successful in having international human rights law considered to a wide extent as a source informing CSR. One lesson to be derived from this is for authorities to have confidence in the communicative process of reflexive regulation that allows actors to learn about the concerns of those representing other social sub-systems and integrate these through self-regulation. If the procedural design is set up to appropriately encourage inter-systemic learning and exchange of exchanges and 'irritants' in a balanced way, the normative result would reflect societal interests in a balanced way. Obviously, public authorities can form part of the actors taking part in the exchange of expectations, including expectations that business respect behavioural standards defined in international law. Observing and even promoting human rights has become an ingrained part of social expectations of business CSR action – with international human rights standards forming the normative basis. An effective reflexive regulatory process may reasonably be expected to lead businesses to reflect this in their normative self-regulation. In sum, to bring forth this regulatory potential, the procedure which supports the norm-creation process must establish conditions conducive to learning about social expectations.

8.2. Perspectives

The analysis opens up perspectives for an increased recognition and application of law as a theory on institutionalisation of norms to provide for public-private regulation of CSR, which is effective towards meeting public policy interests to which business may contribute. This need not conflict with the idea that CSR is voluntary. It simply draws on the insight of law as a theory to inform strategies and procedures adopted for norm-creation and the promotion of business self-regulation. The lessons of the EU MSF and the CSR Alliance, therefore, may feed into other emerging public-private initiatives on regulating of CSR at national as well as intergovernmental level.

Application of the theory of reflexive law including its theoretical implications for procedural design and form of normative guidance may provide for more effective public-private

communicative processes. Ultimately this may lead to corporate self-regulation that corresponds to societal expectations and public policy needs, including for business to respect international minimum behavioural standards. The proceedings of the MSF and the launch of the Alliance demonstrate that in the Commission's approach to CSR as a modality for meeting societal challenges, the role of international law as a normative source for filling out the substantive contents of CSR is also significant. In addition to common social expectations that business respect and promote internationally agreed minimum standards of behaviour, international law takes on particular but little noted relevance for CSR in an EU context as obligations of Members States to implement or support EU policy objectives on related concerns..

Statements produced as part of the MSF leave no doubt that European public institutions and civil society do expect businesses to integrate social concerns and public policy interests in their activities. The MSF shows that those actors consider standards and instruments of human rights and other international law to be prime normative sources for such business self-regulation, even though the standards and instruments do not apply directly to businesses as duty-bearers under international law.[10] The implication is that social actors may be better able to agree on and create CSR norms if they acknowledge the informing role of international law as a normative source. For this to happen, there is a need to better recognise that although CSR is generally defined as voluntary action, law is neither insignificant, nor irrelevant. As the analysis of the EU's approach to regulation of CSR shows, law – understood both as regulatory strategy and as normative standards and instruments – has much to contribute to effective CSR regulation among businesses.

Finally, the analysis indicates a gradual juridification of CSR. Through its strategy of politicisation of CSR in order to serve the implementation of public policy objectives, the Commission simultaneously introduces legal theory based regulatory strategy (reflexive law) and law-based normativity (with international law as a source) into emerging CSR regulation. which may add significant new perspectives to the relatively common (if incorrect) idea that CSR and law are quite distinct,

Such a development may contribute in important ways to an institutionalisation of corporate social responsibility, through reflexive law and other types of soft regulatory measures. In the CSR context, law is often understood in a relatively narrow positivistic perspective as simply meaning compulsion and coercion, based on state law. However, is not only about statutes and coercive enforcement. Law comes in many other forms, including as discussed in this article as reflexive law. Legal theory and scholarship's insight into institutionalisation of norms of conduct has much to offer to society's interests in promoting companies' responsibility with regard to CSR and other aspects of sustainable development, such as climate impact. From this perspective, public law a theory, scholarship and regulatory strategy has important potential for the development of company norms of conduct, and for implementation of these norms. Further analysis and discussions of this, however, goes beyond the scope of this article and must await further work.

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[10] This finding corresponds to the findings of the SRSG John Ruggie that stakeholders hold companies to account in front of the "courts of public opinion", see Ruggie (2007) para. 84.

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