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To Pursue or Not to Pursue CSR and Sustainability Goals

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FOREWORD

Over the past decades, it has become increasingly more common to talk about "corporate social responsibility" (CSR). What is meant hereby is perhaps not entirely clear but the general assumption seems to be that CSR refers to companies' social responsibility, their commitments to pursue sustainability goals, not only under their legal obligations to do so, but also based on a voluntary engagement of going beyond law.[1] The concept of sustainability goals is most commonly understood as based on the triple-bottom line, balancing economic, social and environmental interests.[2] Sustainability goals thus refer not only to the economic part of business, but also to safeguarding workers' rights, protecting human rights, pursuing environmental goals and combating corruption. The commitments are largely voluntary in the sense that they are presumed to go beyond direct obligations under state law. However, in a broader perspective, the concept of voluntariness has been be contested.[3]

The pressure for companies to abide by sustainability standards has intensified over the past two decades. This movement originates from diverse factors. One is the media attention to unethical behaviour of branded companies that has influenced consumers' preferences in product and producer choices and has raised their awareness about social issues. The media and non-governmental organisations' attention has led to a number of legal disputes involving consumer law claims.[4]

Secondly, international law has been developing with increasing speed and has initiated an international and regional dialogue on such topics as companies' attitude to corruption or safety of working conditions. Since the first adoption of the OECD Guidelines for Multinational Enterprises in 1976,[5] we have seen the emergence of the UN

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[1] Communication from the Commission, A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM (2011) 681 final, 3.1.

[2] UN, Report of the World Commission on Environment and Development: Our Common Future, 20 March 1997, Transmitted to the GA as an Annex to document A/42/427 - Development and International Cooperation: Environment, para 27.

[3] For an early criticism of the voluntary understanding of CSR see e.g. Doreen McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, for Law' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell, *The new corporate accountability* (CUP 2009) 12; Halina Ward, 'Legal Issues in Corporate Citizenship' (2003) Global Ansvar Swedish Partnership for Global Responsibility, London: International Institute for Environment and Development; Jennifer A Zerk, *Multinationals and corporate social responsibility: limitations and opportunities in international law* (CUP 2006) 33-36.

[4] For a prominent case from the USA, see Nike, Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002) and Nike, Inc. v. Kasky, 539 U.S. 654 (2003); for a case from a European jurisdiction, see e.g. Hamburg Consumer Protection Agency's case against Lidl, <www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/bangladesh-lidl.html> accessed 4 April 2017.

[5] Current edition OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing.

Global Compact in 2000,[6] the proposal and failure of the binding UN Norms on the responsibilities of transnational corporations with regard to human rights in 2003,[7] followed by the adoption of a soft-law UN 'Protect, respect and remedy framework' in 2008[8] and the Guiding Principles in 2011.[9] Currently, the UN is yet again negotiating a binding international agreement on business and human rights issues.[10]

Lastly, various states have already acknowledged the importance of additional corporate social and environmental obligations and have introduced new laws that either directly or indirectly enhance the corporate interest in CSR. Laws on non-financial reporting and human rights due diligence are examples of this.[11]

This increased awareness and regulatory activity put companies under such pressure that in a practical sense the element of voluntariness in CSR seems to be disappearing. Moreover, it may be questioned whether some private law rules, tort law in particular, may in fact create a legal obligation on the part of the company to pursue CSR goals in order to avoid liability.

In parallel with this and shifting the focus to states, they are under different kinds of obligations to pursue sustainability goals. Many of these are binding at the international law level. This is true for instance with respect to obligations on the states that are parties to the European Convention on Human Rights, the ILO conventions and the United Nations Convention against Corruption. And it is crucial not only for the protected subjects but also for corporations coming as investors that states

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[6] <www.unglobalcompact.org>accessed 4 May 2017.

[7] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

[8] UN Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Protect, respect and remedy: a framework for business and human rights, U.N. Doc. A/HRC/8/5, 7 April 2008.

[9] UN Human Rights Council, Report of the Special Representative of the Secretary - General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. A/HRC/17/31, 21 March 2011.

[10] UN Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/RES/26/9, 14 July 2014 (the third session of the UN working group will take place from 23rd to 27th October 2017.)

[11] E.g., at the EU level, Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, OJ 2014 L182/19, Art 19a; Denmark, Section 99a of the Financial Statements Act (LBKG 2015-12-10 nr 1580 Årsregnskabsloven); UK, Modern Slavery Act 2015; Netherlands, 2017 Child Labour Due Diligence Law (Wet Zorgplicht Kinderarbeid).

adhere to their international commitments. In order to reiterate the states' obligations, various soft law instruments require states to pursue sustainability goals. Most notably, the first pillar of the UN 'Protect, respect and remedy framework' refers to the states' obligation to actively protect human rights.

In sum, several factors and instruments at national and international law level push for the pursuance of sustainability goals by companies and states alike. However, when making governance decisions whether to pursue or not to pursue sustainability goals, companies and governments may face a confusing dilemma. Whereas *not pursuing* sustainability goals would seem to involve next to reputational, economic and business also legal risks, including the risk of liability; the decision to *pursue* sustainability goals may not be risk free either and may equally involve liability issues or other legal risks. The reason for this is that at both national and international levels and at both private law and public law levels, there are legal rules and norms that seem to be pulling in opposite directions.

At the private law level, there may for example be a conflict between tort law obligations on the one hand and company law obligations to pursue profit maximisation on the other hand.[12] Directors in companies bear the duty of care towards shareholders. Whether this duty has been exercised or not is traditionally assessed by the reaction of the market; positive economic outcome has been associated with well exercised duty of care. Pursuing CSR goals is costly and most often without a direct link to economic benefits for the company, since such benefits are usually seen only in the long term.[13] That is why it has often been argued that the pursuance of CSR goals in fact breaches company law and may thus lead to directors' liability.[14] A parallel conflict may arise with regard to pension funds, where directors may be obliged to act against the wishes of the fund's members to pursue CSR goals in order to avoid liability for not acting with due care to make the most profitable investments.[15]

With regard to states, there may be a conflict between their international obligations to pursue sustainability goals on the one hand and public procurement law, trade law or investment law obligations to pursue economic wealth and growth on the other. While it is clear that states have the obligations to protect human rights and the environment

[12] See the contributions of Peter Rott in this issue.

[13] For an economic analysis of pursuing environmental CSR goals, see Forest L Reinhardt, Robert N Stavins and Richard HK Vietor, 'Corporate Social Responsibility Through an Economic Lens' (2008) 2 Rev Environ Econ Policy 219.

[14] For discussion on this topic and extended literature references until 2009, see e.g. Doreen McBarnet, 'Corporate social responsibility beyond law, through law, for law', University of Edinburgh School of Law Working Paper No. 2009/03, 18-21, available through papers.ssrn.com.

[15] See the contributions of Alexandra Horváthová, Rasmus Kristian Feldthusen and Vibe Ulfbeck in this issue.

and to combat corruption against anybody aiming to breach relevant rules,[16] it is less clear whether states may actively promote sustainability issues when acting as a market actor. The possibility to include sustainability criteria into public procurement tenders has been widely limited by their frequent disconnection from the subject matter of the specific contracts.[17] Inclusion of social requirements into public procurement tenders then may be considered as a smoke screen for a preferential treatment of local suppliers; and thus, their inclusion might lead to the invalidation of the concluded contract and, in an extreme case, to state liability. When looking into international investment law, the situation is even more tense. The pursuance of the sustainability agenda by a host state may lead to a breach of the non-discrimination and fair and equitable treatment principles, and in extreme situations even result in an expropriation of the investment under international investment law.[18] Finally, also constitutional law may pose limits to states' pursuance of sustainability goals. This issue has arisen in connection to the recent Urgenda case. The case opened the path for courts to find a state responsible for not pursuing sustainability goals in the interests of its citizens. However, it also raised an important question of how far courts can go in imposing sustainability obligations on the state without breaching the principle of division of powers.

These conflicting legal rules and norms, some pushing for the pursuance of CSR and sustainability goals and some suggesting the risk of liability for the same, were in the focus of the conference titled 'To Pursue or Not to Pursue CSR Goals: Legal Risks and Liabilities' held in Copenhagen on 6-7 October 2016. This conference was an initiative of the Centre for Enterprise Liability, Copenhagen University (CEVIA)[19] and the International and Transnational Tendencies in Law centre, Aarhus University (INTRAlaw)[20] and co-organised with the Sustainable Market Actors for Responsible Trade (SMART)[21] project and the CSR Legal Research Network.[22] The speakers addressed the issue of whether companies, states and other entities that are required by transnational private regulation and soft law to pursue CSR and sustainability goals in their activities may in fact face legal risks and liabilities for doing or not

[16] In respect to human rights, the states' obligation to protect was clearly reaffirmed in the first pillar of the 'Protect, respect, remedy framework' and the subsequent Guiding Principles, see supra notes 8 and 9.

[17] See the contribution of Marta Andrecka and Kateřina Peterková Mitkidis in this issue.

[18] See the contribution of Ying Zhu in this issue.

[19] <http://jura.ku.dk/virksomhedsansvar/english/>accessed 8 May 2017.

[20] <http://law.au.dk/en/research/forskergrupper/international-and-transnational-tendencies-in-law-intralaw/> accessed 8 May 2017.

[21] <http://www.smart.uio.no>accessed 8 May 2017.

[22] <https://csr-legal-research.com>accessed 8 May 2017.

doing so. This special issue presents five of the contributions, discussing the topic both from the company (private) and state (public) perspectives.

The special issue opens up with a contribution by Peter Rott, who furthers the discussion on directors' duties and corporate social responsibility (CSR) in light of several developments in German law (and beyond), namely case law relating to directors' duties under the legality principle and developments in tort law that may have impact on the duty to avoid unnecessary risks to the benefit of the company. The author concludes that these legal developments may not only justify the pursuance of CSR but they may even pave the way towards a duty to include (at least aspects of) CSR into the policy and operations of the corporation under the business judgment rule in the quest to avoid unnecessary risks.

In parallel to the company's view, the second contribution by Alexandra Horváthová, Rasmus Kristian Feldthusen and Vibe Ulfbeck discusses similar issues from the perspective of directors of pension funds in the EU. The contribution addresses the question of whether the prudent person principle included in the IORP Directive[23] is compatible with the ESG-principles introduced by the new 2016 directive on pension funds,[24] and whether this means that all investments made by pension funds from the EU have to be made in an environmentally and socially responsible way in order to avoid the risk of legal liability claims. The authors find that the compliance of the two depends on the assessment if such sustainability investments are in the 'best interest' of the investors. This assessment is to be made by the fund's directors. If this assessment is conducted in a diligent and procedurally correct manner, there is a little chance for any liability claim for pursuing or not pursuing sustainability goals to be successful.

The third contribution by Marta Andrecka and Kateřina Peterková Mitkidis bridges the private and public law spheres by discussing and comparing sustainability requirements in procurement processes of public organisations and private companies. The authors find a number of similarities, particularly in respect to the topics covered and the processes used, and differences, namely with respect to the drivers of sustainability procurement and the applicable legal regulation. The authors conclude that while there is an obvious right to include sustainability considerations into both public and private procurement processes, there are only contours of the legal obligation to do so, and that, quite counter-intuitively, there seem to be more legal risks associated with the inclusion of sustainability requirements into procurement processes rather than with ignoring them.

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[23] Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision, OJ 2003 L 235/10.

[24] Directive (EU) 2016/2341 on the activities and supervision of institutions for occupational retirement provision (IORPs), OJ 2016 L 354/37.

The fourth contribution by Ying Zhu analyses the tension between international investment law (IIL) and the pursuance of sustainability goals by the host state. While IIL calls for restricting the host state's interference with foreign corporations; pursuance of sustainability goals necessarily requires governmental regulation. The author proposes to reconcile the tension by taking account of sustainability goals in international investment arbitration through adopting a balanced interpretation of international investment obligations.

The final contribution by Carola Glinski investigates the tension between national and private CSR measures on the one hand and the WTO law on the other. The contribution addresses three issues: the extraterritorial character of CSR measures (national 'non-product related production measures'), the attribution of private CSR regulation to the importing state and under what conditions private transnational CSR standards can be considered as 'international standards.' While taking an analysis of the *Tuna Dolphin II*[25] and *EC – Seal Products*[26] decisions as a point of departure, the author concludes that the decisions show a mixed picture of the admissibility of CSR measures, containing arguments pointing both towards the discriminatory character of CSR measures and to their legitimate purpose of protection of national moral perceptions. The discriminatory character of CSR measures may be disguised and will depend on how the actual CSR measures are drafted. Finally, the author comes to the conclusion that there is currently no legal basis for holding states responsible for purely private CSR regulation.

By contrasting examples from different legal systems, the special issue thus analyses in more detail the character of the outlined conflicts to examine whether companies and states may in fact be in a "catch 22" situation or whether the conflicting goals can be to some extent reconciled.

We thank the speakers at the conference, the contributors and NJCL for making this special issue possible and hope that this publication will bring more academic dialogue between the advocates and opponents of the legal basis of CSR and sustainability concerns.

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[25] *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS/381/AB/R.

[26] *EC – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS/400/AB/R, WT/DS 401/AB/R.