Why Law Matters: Corporate Social Irresponsibility and the Futility of Voluntary Climate Change Mitigation

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1. CORPORATE SOCIAL RESPONSIBILITY (CSR) AND THE LAW

Corporate Social Responsibility (CSR) encompasses an enormous complexity of debate and private and public initiatives. This article deals with one section of the debate, with the definition of CSR commonly accepted by business and legislators as the starting point.

CSR in a sustainable development perspective could be seen as dealing with and bringing together two interrelated issues: first, legal compliance and, second, the company's responsibility for going beyond such compliance, with the legal rules forming the floor and the voluntary part of CSR being a striving beyond that—a race to the top. In that sense, CSR would encompass and form a bridge between hard law, soft law, and ethical obligations. Certainly, there is no doubt about the necessity of companies acknowledging their societal role as all-important components of our societies. We have little hope of achieving overarching societal goals such as that of a sustainable development without the contribution of companies. The limitations of existing regulation, including notably environmental law, necessitate a different approach to involve companies as part of the solution to pressing challenges such as climate change.

CSR in the sense just indicated could have been the different approach, merging the legal and ethical obligations of companies and the people involved in them.

However, the business lobbyists have captured the CSR concept and ensured that the definition legislators subscribe to is that of CSR as a voluntary activity. The business message may be said to be: 'Do not legislate us, and we are willing to talk about how we behave.' This is not meant to ignore that good is done in the name of CSR. Certainly, the CSR movement has led to or been a part of a process where no business leader with respect for herself will claim that her company disregards CSR. However, as this article will argue, defining CSR through delimitation against legal obligations is deceptive and detrimental to the development of a sustainably and socially responsible business and has contributed to giving CSR a bad name.

This article goes on to address several of the problems associated with this voluntary CSR concept, forming an argument to show why law matters, and specifically why company law has to be involved in addressing the necessity of getting companies to contribute to climate change mitigation. This article concludes with some reflections on the CSR contribution to a truly responsible business debate.

2. WHY VOLUNTARY CSR IS PROBLEMATIC

2.1. How Both Mainstream Corporate Governance and Voluntary CSR Promote Shareholder Primacy

Business acceptance of the non-primacy of shareholder interests seems to be a necessary prerequisite for business to become sustainable, also in the environmental sense. As long as profit (maximization) for shareholders is the overarching goal, any attempt...
at prioritizing environmental concerns and prioritizing climate change mitigation will quickly hit a ceiling. As the Intergovernmental Panel on Climate Change (IPCC) has pointed out, there is a potential for existing technology to reduce greenhouse gas emissions, but a number of barriers prevent this potential from being realized. The conceived primacy of shareholders and of profit maximization for shareholders is arguably one such barrier. Current debates about companies can be divided into two main trends that seem to point in different directions, and in many ways, they do. In one important way, namely the effect that they tend to have, the two debates, however, arguably both promote shareholder primacy and both serve to lessen the chances of us achieving socially responsible businesses. Socially responsible businesses, as in businesses that are operated as to not work against and to contribute as far as possible to overarching societal goals, notably that of a sustainable development, is a prerequisite for the achievement of these goals.

The Corporate Governance debate has spawned a number of corporate governance codes and legislative measures, such as the European Union (EU) Directive on shareholder rights. This debate focuses on investors, first and foremost shareholders, and their relationship with the board of the company and, by extension, its management. The CSR movement, on the other hand, advocates corporate responsibility for those affected by a company's actions: employees, other (external) workers, the local communities, and the environment. At what we might tentatively view as the meeting point between the focus on investors' interests and the trend towards social responsibility, we find Socially Responsible Investment (SRI), 'green funds', and a certain level of attention being paid by investors to corporate behaviour, beyond what is traditionally seen as the shareholders' only concern, the financial bottom line.

Nonetheless, the main focus of the corporate governance debate is, and seems set to remain for the foreseeable future, the traditional agency issues of how to get the board and management to act in line with the shareholders' interests, defined not as environmentally sustainable investment, but as achieving the highest possible profits in the form of dividends and an increasing share price. In the current corporate governance view, the company is more or less the property of the shareholders, a tool for maximizing their income. The problem with this focus is that it restricts the discussion to one small part of the complex web of relationships that exists both within the company and between the company and society. Therefore, a good corporate governance system 'may be perceived as a necessary, but not a sufficient condition for corporate responsibility.'

The CSR debate typically stands on the outside of the company and is concerned with the company's responsibility towards those parties and interests that seem to be implicitly defined as being external to the company, even including the company's own employees. Proponents of CSR generally seem to direct their arguments towards the management and board of the company and the shareholders. This inevitably, albeit unwillingly, supports a definition of the company as consisting of only shareholders, board members, and management, which, in turn through the influence of the corporate governance debate, are seen, respectively, as principals (shareholders) and agents (board members and, by extension, management). This observation is not meant to dismiss the fact that the CSR movement has significantly contributed to bringing important issues on the impact of the companies to the forefront. Nor is it meant to deny the likelihood of some companies being serious about their CSR profile, and not resorting to it only for marketing purposes.

8 "[W]e seem unable to communicate to our business community that these risks [consequences of climate change as modelled by the IPCC] are just not worth running. ... Adaptation costs are inevitable but adaptation without strenuous efforts at mitigation is reckless", J. Cameron, 'Climate Change in Business', in Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work, ed. D. Frostreet & C. Strick (Oxford: Oxford University Press, 2005), 25-34, at 29.
10 Companies utilize a heterogeneous group of workers, mainly, it seems, through the choice of companies situated in Western Europe, not employed directly by the company. See also J. Dine, Companies, International Trade and Human Rights (Cambridge: Cambridge University Press, 2005), 13-20. Through so-called outsourcing, much of the direct legal responsibility for workers in other countries is removed from our public companies - and often also from the consciousness of the European general public, especially with regard to workers in developing countries. In addition, with respect to workers in Europe, there seems to be a growing tendency towards other kinds of contractual relationships than the traditional one of employment, as illustrated by the green paper on this issue. Commission Green Paper on Modernising Labour Law, COM (2006) 708 final (22 Nov. 2006), 3, expressing concern on the development of a grey area where basic employment or social protection rights may be significantly reduced.
12 P. Cornelius & B. Kogut, 'Creating the Responsible Firm: In Search for a New Corporate Governance Paradigm', German Law Journal 4 (2003): 45 and 51. However, that does not mean that economic and financial performance no longer matters. Opening a company and is concerned with the company's responsibility towards those parties and interests that seem to be implicitly defined as environmentally sustainable investment, but as achieving the highest possible profits in the form of dividends and an increasing share price. However, that does not mean that economic and financial performance no longer matters. Opening a company and is concerned with the company's responsibility towards those parties and interests that seem to be implicitly defined as environmentally sustainable investment, but as achieving the highest possible profits in the form of dividends and an increasing share price. However, that does not mean that economic and financial performance no longer matters. Opening a company and is concerned with the company's responsibility towards those parties and interests that seem to be implicitly defined as environmentally sustainable investment, but as achieving the highest possible profits in the form of dividends and an increasing share price.
13 See, for example, L. Enriques & B.J. Richardson, Socially Responsible Investment Law: Regulating the Unseen Polluters (Oxford: Oxford University Press, 2008).
14 See B. Sjäffel, Towards A Sustainable European Company Law. A Normative Analysis of the Objectives of EU Law, with the Takeover Directive as a Test Case (Alphen aan den Rijn: Kluwer Law International, 2009), as 3.3.5, 4.1.3, and 4.3.5.
15 Cornelius & Kogut, supra n. 12, 49.
16 See Sjäffel, Towards A Sustainable European Company Law, supra n. 14, s. 4.1.4.
17 Ibid.
18 See ibid., ss 4.1.3, and 13.2-1.2.
19 Some advocates of CSR and, notably, some stakeholder theorists argue in favour of more fundamental changes. Not all have a from-the-outside-in perspective, but the CSR movement taken as a whole has a from-the-outside-in perspective and an-on-a-voluntary-basis-only approach that makes it rather toothless.
is expressly defined to be a voluntary exercise. Its voluntary nature was clearly important to corporate input to the European Commission's CSR work and the Commission has, apparently without reservation, accepted the corporate definition of social responsibility as voluntary,\(^{20}\) and thereby accentuated a picture of the company as something that, legally speaking, concerns first and foremost the shareholders.\(^{21}\)

The general acceptance of the shareholder perspective of the company is further underlined by the shareholder versus stakeholder debate, which may be seen as the collision point between the corporate governance trend and the CSR movement.\(^{22}\) To perhaps put it more accurately, we may say that the corporate governance debate has emerged from the shareholder side of the larger shareholder versus stakeholder debate, while the CSR movement may be seen as emerging out of the stakeholder side. Entering into the shareholder versus stakeholder debate tends to involve an acceptance, willing or unwilling, tacit or express, that shareholders are the central group, while stakeholders are defined as all the external parties and interests affected by the company's actions.\(^{23}\)

The shareholder focus of the corporate governance debate and the from-the-outside-in perspective of the CSR movement, with its implicit acceptance of the central role of shareholders and its dichotomy between shareholders and (other) stakeholders, represent a problematic analytical approach that has an impact on the legislative and policy solutions adopted. Analytically, the shareholder focus of both sides results in a narrow and one-dimensional view of the company that does not provide a satisfactory starting point for research into the societal role of companies.

The impact of environmental and social issues of this analytical fallacy is evident: in the corporate governance context, a discussion of companies' actions and their environmental and social consequences is restricted by the definition, expressly stated or implicitly understood, of the societal goal of companies being to provide (maximum) profit for shareholders. We find echoes of the same problem in the context of CSR, with its focus on the voluntary basis within the perceived framework of profit maximization for shareholders.\(^{24}\) Here, we may also find the root of the problem with many CSR initiatives, which tend to be viewed as little more than 'greenwashing' and marketing ploys.\(^{25}\) Addressing the environmental and social impact of companies within the confines of the corporate governance debate or the premises of CSR as voluntary will therefore not lead to the necessary changes.

2.2. The Deceptive Delimitation between Legal Obligations and CSR

All companies of some size will claim to have a CSR policy. As has been pointed out by Sir Adrian Cadbury, in fact all companies do have a CSR policy\(^{26}\) but not in the sense that all companies have a strategy and a system for ensuring that the company's business is carried out in an as socially responsible a way as possible. The true CSR policy of some companies is to use CSR as marketing or to have a public relations policy on CSR that aims at misleading the general public as to the true nature of the company. And the fact that the general public is misled is indicative of the problem with CSR.\(^{27}\)

The deceptive delimitation of CSR as that which is not the result of a legal obligation has a number of negative consequences. I will focus on two here: First, the entrenchment of the division between law and ethics and, second, the opening up for CSR as greenwashing through the lack of control and the indifference as to the contents of the CSR actions.

The problem with delimiting CSR against legal obligations is that it may tend to encourage the setting up of a sharp division between (hard) law and the ethics of business, which may lead to a petrification of the contents of legal obligations, promoted by business lobbyists wishing to keep all CSR declarations and policy statements within the free zone of voluntarism. CSR as a

\(^{20}\) See COM (2002) 347 final, Corporate Social Responsibility: A Business Contribution to Sustainable Development, 5; 'CSR is a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.' This is expressly accepted by the Commission in COM (2006) 136 final, Communication from the Commission: Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility, 2; 'Because CSR is fundamentally about voluntary business behaviour, an approach involving additional obligations and administrative requirements for business risks being counter-productive and would be contrary to the principles of better regulation'—which is practically a verbatim repetition of business reaction to the Green Paper referred to in the 2001 Communication.

\(^{21}\) The very concept of voluntarism as its lack of legal requirements may be discussed. In certain situations, companies may, of course, feel strongly obliged to act responsibly, owing to their social license, green consumers, or social investors. See, for example, N. Cunningham & J. Rees, Industry Self-regulation: An Institutional Perspective, Law & Policy (1997): 363-414. This does, however, not resolve the problem with the negative aspects of the regulatory capture of the whole CSR debate by business lobbyists.

\(^{22}\) See Sjöfält, supra n. 14, s. 4.1.2.

\(^{23}\) If the term 'stakeholders' is to be used in a meaningful way, it must, of course, include shareholders and not be seen as opposed to them. See also Lamboy, 2010, supra n. 1, Ch. 2.

\(^{24}\) See also Dine, supra n. 10, 222.


\(^{26}\) Quoted in B.T. Horrigan, '21st Century Corporate Social Responsibility Trends: An Emerging Comparative Body of Law and Regulation on Corporate Responsibility, Governance, and Sustainability,' Macquarie Journal of Business Law (2007): 85–122, at 122, text to n. 135. The quote continues: 'The first issue is whether they recognise the fact, and the second is how far they are alert to changes in what society expects of them in the field.'

\(^{27}\) It may be interesting to note in this context that the Swedish energy giant Vattenfall, whose vision it is to 'create a strong and diversified European energy portfolio with sustainable and increased profits, significant growth options and (to) be among the leaders in developing environmentally sustainable energy production', <http://www.vattenfall.com/en/index.htm>, 25 Jan. 2011, won the Climate Greenwash Award 2009 for 'its mystification on climate change, portraying itself as a climate champion while lobbying to continue business as usual, using coal, nuclear power, and pseudo-solutions such as agrofuels and carbon capture and storage (CCS)', <wwwclimategreenwash.org/ climate-greenwash-winner-revealed>, 25 Jan. 2011. See also T.P. Lyon & E.-H. Kim, 'Greenhouse Gas Reductions or Greenwash?: The DOE's 1605b Program,' Working Paper, 23 Apr. 2007; <http://ssrn.com/paper=981730>, 25 Jan. 2011, where the authors conclude that the companies' participation in a voluntary greenhouse gas registry has had no impact on their actual emissions performance, indicating that this may be a form of greenwashing.
voluntary concept may, in other words, encourage and exacerbate a false dichotomy between an idea of what the law is and what it should be, and thereby render the law unduly rigid.\textsuperscript{28} True corporate responsibility would, on the other hand, first and foremost focus on the core business of the company and running that in an as responsible a way as possible – responsible to the company, to its employees, its contractual partners including (in a wide sense) its shareholders, other people affected by its business, and the local and global environment.\textsuperscript{29} This means complying with the law to the full and not avoiding legal obligations through technicalities and jurisdictional issues or through abuse of economic or political issues in developing countries.\textsuperscript{30} This also means respecting and complying as far as it is within the realm of the company, with the legal obligations on the state, typically human rights and environmental and climate laws. This further entails taking responsibility for fair and proper treatment of the people involved and affected by its business, also beyond the strict requirement of the law, and in the same way for the protection of the local and global environment, within the realm of its business. When CSR instead is defined as that which is voluntary, and much of the core business of a company is regulated by law to some extent, the voluntary CSR concept also tends to move the CSR focus away from the core business of the company. This leads me to the second main problem.

Much of what companies claim as credit on their CSR account is involvement with issues unrelated to their business, for example, the Norwegian Airport Express Train organizing computer classes for former drug addicts\textsuperscript{31} or Norsk Hydro funding the Oslo Philharmonic Orchestra.\textsuperscript{32} Funding the Orchestra gives no indication at all of how Norsk Hydro is run as a business – how it contributes to or works against the mitigation of climate change, how its employees are treated, and whether it cares about the workers hired by its subcontractors.\textsuperscript{33} Organizing computer classes for the underprivileged or funding cultural activities is not CSR in the true sense; it is Corporate Charity Work (CCW). It could be argued of course that CCW is a part of an extended concept of CSR, but we should distinguish between CSR in the wide sense, including CCW, and the core of true CSR. We should not allow CCW to be used as a substitute for true, core CSR or as a shield against discussing whether the core business of a company is run in a socially responsible manner. If we allow CCW to mislead us, we are allowing the companies to engage in Corporate Greenwashing (CGW), which serves to undermine all efforts and make a mockery of all ideas of transparency, informed choices, and consumer power. Defining CSR as voluntary thereby may promote corporate social irresponsibility through the incentives for using CSR as marketing and even greenwashing in the fully understandable race to win markets and achieve profit. Greenwashing may go beyond misleading CSR reports – in the area of environmental disclosure, research indicates that it is sometimes the worst companies that give the best environmental reports.\textsuperscript{34} Greenwashing may also take place through the practice of transference, with companies apparently acting responsibly in the richer parts of the world, while in fact basing their profits on irresponsible subcontractors that they hope to conceal from their wealthier consumers.\textsuperscript{35}

The problem with voluntary responsibility and the lack of clear legal obligations are obvious in the area of climate change, where the technology is available for the mitigation of climate change on a large scale\textsuperscript{36} but where it does not seem to be possible to get across to business that the risk of climate change is just not worth taking.\textsuperscript{37}

I submit that as long as profit maximization and shareholder primacy are the norm, decision-makers in companies who wish to be truly socially responsible will tend to feel forced to resort to CCW and CGW to give the impression of a responsible business. Truly responsible businesses stand in danger of being competitively disadvantaged to the only ostensibly responsible businesses,

\textsuperscript{28} The observation about the false dichotomy is not a new one, and among all contributions to the related debates, reference may be made, inter alia, to I. Bengoetxea, \textit{The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence} (Oxford: Clarendon Press, 1993). 29 Bengoetxea describes the dichotomy between \textit{de lege lata} and \textit{de lege ferenda} in 'traditional legal positivism', and how the distinction between these two types of arguments dwindles in the study of the legal process, especially in 'the hard cases'. This approach (of leaving behind the sharp dichotomy between the law as it is and as it ought to be) may be seen to be in line with that of the European Court of Justice, see, inter alia, T.C. Hartley, \textit{The Foundations of European Community Law}, 6th edn (Oxford: Oxford University Press, 2007), 75. In the field of international trade and environmental law, the approach is illustrated by C. Voigt, \textit{Sustainable Development as a Principle of Integration in International Law: Resolving Potential Conflicts between Climate Measures and WTO Law} (Leiden: Martinus Nijhoff Publishers, 2008), 162, arguing for the force of legal principles (notably that of sustainable development) as correctives to the written law precisely because it can help bridge the gap between the perception of the law 'as it is' and how it 'ought to be'.

\textsuperscript{29} The traditional criticism in company law to proposing that boards should be responsible for promoting more than one interest is briefly discussed in Sjåfør, 2010, supra n. 4.


\textsuperscript{31} Heralded by the Norwegian business newspaper \textit{Dagens Næringsliv} in December 2010 as an example of CSR.


\textsuperscript{33} Norsk Hydro has understood this; see Norsk Hydro's declaration on its website, <www.norskhydro.com/en/Our-commitment/> , 24 Jan. 2011, which addresses these core CSR issues.

\textsuperscript{34} See s. 2.3 below.

\textsuperscript{35} See also Dine, supra n. 10, 12-13.

\textsuperscript{36} Although, of course, the marginal costs of implementing such technology can be high, which means that the short-term perspective promoted by the shareholder primacy drive may constitute a barrier.

\textsuperscript{37} See text accompanying supra n. 7 and n. 8.
with their suppliers, customers, investors, and legislators being unable to tell the difference. The sad thing from a business point of view is that they then also often miss out on opportunities. Taking CSR seriously can be win-win, in a number of different ways, including the potential for saving costs.38

2.3. Reporting: Supportive Initiatives without a Core in Place?

CSR declarations, by companies, non-governmental organizations (NGOs), and various international, regional, and national actors take different forms. What they do have in common is a focus on human rights, labour rights, the environment, and the fight against corruption. The UN initiative 'the Global Compact' is one example of CSR.39 Most, if not all, CSR declarations by companies are intended to be legally non-binding.

National legislative efforts to promote socially responsible business latch on to these declarations and, through an approach that has support in the theory of reflexive law,40 require their companies not to be actually socially responsible but only to report about the extent to which they are or plan to become responsible. The faith in reporting as a way of internalizing externalities, by making decision-makers more conscious about issues on which they have to report, is hard-lived and seems even to be on the rise. We have seen it in Norway, in the environmental reporting rules in our accounting law, and we see it now with the wider CSR goal in the Danish new accounting act rule41 as well as in the Norwegian dominant corporate governance code and in the Dutch corporate governance code.42

The uncritical belief in reporting as a legislative measure that seems to require little or no foresight or research is illustrated by the current Norwegian proposal for a similar requirement to the new CSR reporting rule in the Danish accounting act. Norwegian accounting law already contains requirements for reporting on the working environment, gender equality, and the natural (external) environment.43 In the latter area, Norwegian accounting law on the face of it seems progressive and future-oriented, as it has stated since 1989 that the board's annual report is to include information on 'not insignificant impact on the environment',44 which in 1998 was expanded to include a requirement to report how the environmental impact, that is, the company’s negative effect on the environment, is to be prevented or reduced.45 This is clearly meant to raise the board’s awareness of and sense of responsibility for these issues.46 However, reports indicate quite low compliance rates and suggest that these may be explained by lack of enforcement and lack of political and social drivers.47 The committee appointed by the Ministry of Finance48 that has proposed new CSR reporting requirements to be included in the Norwegian accounting act49 mentions these reports but does not discuss what relevance, if any, low compliance rates should have for considering new reporting requirements of a similar nature. Nor does the committee propose to align the different reporting requirements – that is left to be considered at a later stage instead. As with the environmental reporting requirements, the proposed CSR reporting falls within the scope – in theory – of the auditor’s consistency check of the annual report with the financial accounts.50 This serves to give

39 "Today, thousands of companies from all regions of the world, international labour and civil society organizations are engaged in the Global Compact, working to advance ten universal principles in the areas of human rights, labour, the environment and anti-corruption", <www.unglobalcompact.org/AboutTheGC/index.html>, 20 Oct. 2007.
41 See the article by K. Buhmann, "Company Law as an Agent for Migration of CSR-Related International Law into Companies' Self-regulation? The Case of the Danish CSR Reporting Requirement", in this ECL Special Issue.
43 The Norwegian Accounting Act s. 3-3a (my translation). An English translation of the Accounting Act is available in print or electronically (for a fee) from the Norwegian Institute of Public Accountants; see <www.revisorforeningen.no/9356038/English/eBooks>, 8 Nov. 2010.
44 The Norwegian Accounting Act s. 3-3a (my translation). Norwegian accounting law thereby goes beyond the requirements of the amended Fourth Companies Directive, which sets out that if relevant for the 'development, performance or position' of the company, environmental matters are to be included. The focus being on the effect for the company, the EU rules are inadequate to fully internalize existing and potential environmental externalities.
45 Ibid.
46 As is clear from the preparatory works, Ot.prp. No. 42 (1997–1998), s. 11.5, emphasizing that this may have a positive effect in that it would heighten the board’s awareness and feeling of responsibility with respect to the environment and make the management more aware of aspects of the business of the company that may have a not insignificant impact on the environment. Norway has also gone beyond the requirements of EU law in the implementation of Directive 2001/44/EC on public access to environmental information. Information can be requested also from companies in the private sector, and this requires a certain level of knowledge on the part of the companies but no general duty for impact assessment; H.C. Bugge, 'Retten til å få og plikten til å gi, miljøinformasjon etter den nye miljøinformasjonsloven ['The Right to Receive, and the Obligation to Give, Environmental Information after the New Environmental Information Act'], Lov og Rett (2005): 492–508.
49 As a new s. 3-3c in the Norwegian Accounting Act, see www.regjeringen.no/upload/FIN/mfa/horingssnot/kv_rapportering_om_samfunnsansvar.pdf, 25 Jan. 2011 (in Norwegian only).
50 Proposed included in the Norwegian Auditing Act, s. 5-1, see ibid.
an impression of reliability. The potentially positive effect of a proposed consistency check is, however, somewhat spoiled when the committee goes on to say that there seldom will be much of a connection between the financial accounts and the proposed CSR reporting and that the consistency check, therefore, should not pose much of a burden for the companies.51 The impression that the committee's proposal gives is one of trying to accommodate political and NGO pressure to 'do something' about CSR, without imposing any burdens or requirements of any relevance on companies.

Generally speaking, if reporting has the effect that its proponents argue that it will have, that would all be very good. And undoubtedly, true environmental accounting and reporting may be beneficial ancillary measures. However, as I have argued elsewhere, when the core duty is not in place – when the decision-makers in companies are not required to integrate environmental concerns into the decisions of how the core business of the company is to be run and there is no hard law stating that companies must be run in a socially responsible manner – we risk that environmental reporting is neither relevant nor reliable.52 There are even studies that indicate 'a negative relation, that is, the more a firm discloses, the worse its environmental performance';53 the uglier the company, the more make-up it uses. Similar problems are reported concerning the disclosure of social issues.54

Reporting may, in other words, serve to pull wool over the eyes of legislators, responsible investors, companies looking for responsible companies to collaborate with, and customers wishing to make socially responsible purchases.55 This is a high price to pay for the possible positive effect that reporting requirements may have on some companies.

3. WHY LAW, AND SPECIFICALLY COMPANY LAW, MATTERS

As this article and many other contributions have argued, the law is necessary to combat the shareholder primacy drive and get access to companies that social responsibility is in its essence, its core, not a voluntary matter. The law is necessary to level the playing field for companies that wish to be responsible and wish to actively contribute to the mitigation of climate change to ensure that their contribution is not limited by the competitive advantage that today's system tends to give irresponsible and short-sighted companies.

If we agree that law matters, the question is what area of the law. From a company law perspective, the argument may be made (and indeed is often made) that environmental concerns, like other 'soft' values, are and should continue to be regulated in the framework legislation to which all companies in the relevant jurisdiction must abide.56 If business is not environment friendly enough, then increased environmental law requirements are the answer. However, the limits of external regulation are well documented and consist of a number of interlinked factors. One is that, for example, while European companies also operate outside of the EU, the environmental legislation of European countries typically only applies within the territory of that country. The external regulation in the state of the companies' activities may be much more lenient or even non-existent, especially in terms of enforcement. A developing country, sorely needing the jobs and revenue that foreign companies bring, may find it difficult to impose strict rules to protect their natural environment.57 Companies may, therefore, be in a position to dictate conditions and generally have the upper hand. Another is that legislatures cannot keep up with everything companies do, whether in Europe or elsewhere, nor can they keep up with the potential environmental consequences of those actions. Third, and closely linked to the second point, companies that are subject to external regulation only may often try to find loopholes, boiler-plate formulas, or other measures to avoid or at least reduce the cost of complying (or appearing to comply) with those regulations.58 This is part of the problem with reporting.59 There is also a regulatory lacuna at an international level relating to companies and their social and environmental conduct. The stalled proposal for the UN Norms governing transnational companies is an example of this regulatory gap.60

Further, sustainable development is also about going further than legal compliance. Environmental law goes typically to prohibiting pollution over certain levels, or of certain types, but detailed ex ante regulation cannot make companies think creatively, independently, and individually about sustainable development.61 While environmental law may be characterized as (anti-)pollution law, focusing on the environmental dimension

51 Ibid.
52 S. Berthelot et al., 'Environmental Disclosure Research: Review and Synthesis', Journal of Accounting Literature 22 (2003): 1–46; 5, 8, 9, especially 15, and 20, and see also 26, 29, 32, and 34.
53 Ibid., 20.
54 Laufer, supra n. 25.
56 As is pointed out in Benjamin Richardson's elegant editorial in this ECL Special Issue.
57 See also Dito, supra n. 10, 20–22 and 24–26.
59 Where box-ticking may tend to be the corporate approach, if the reporting is done at all, see s. 2.3 above.
61 See also B. Richardson's editorial in this ECL Special Issue.
of sustainable development entails going beyond this. Sustainable development is a way of thinking. To get the decision-makers in companies to think in a certain way, we also need an internal company perspective, which arguably entails an internal company law perspective. Therefore, in addition as a contribution in its own right, and to make more effective the external regulation of companies, we need an internal company perspective, with the issue being how to get the decision-makers to think in companies to work towards a sustainable development.

Company law regulates the organization of a company including the division of competence and labour between the company organs and the role and function of each organ. Company law is often understood as setting out the purpose for the company linked to the company law regulation of the duties of the board. Company law thereby regulates the strategy-setting and decision-making in companies and influences (or has the potential to influence) the guidelines according to which the main decisions are made in a company. Company law probably also tends to be seen, psychologically speaking, as more relevant to the core decision-making processes of the board and management of a company than does external regulation such as environmental law or reporting requirements of so-called non-financial information in accounting law.

If we take the mainstream corporate governance position as a starting point, we may ask: if the focus of the board (and, by extension, the management) is to be primarily on ensuring profits for shareholders and keeping the share price high to avoid a takeover, and the whole system encourages the shareholders to focus on their own profits, who then is responsible for the company’s actions, beyond its narrow obligation to comply with the law?

Normatively, the answer seems to be that this is the role of the board. The function of the board is to determine the company’s strategy, supervise and advise management, and, in that context, promote the company’s interests. Although members of the board may have personal interests that they seek to follow, the board as such is not a recognized interest of the company (unlike – depending on one’s perspective – the employees, which would include the management, the shareholders, the creditors, the customers, the environment, or society). The board, therefore, has a unique role and position in balancing the involved interests.

However, the underlying drive of the current corporate governance debate, the shareholder’s primacy focus, encourages market participants to demand further restrictions on the board’s scope of action and suggests additional incentives to align the board’s and management’s interests with the shareholders’ presumed common interest in maximizing profits. That it also would be in the interest of the company, and thereby of all but very short-term shareholders, to have a long-term vision so as to ensure continuity seems to pass many companies by. Often (and in really long-term perspective: always), it is in the best interest of the company to contribute to preserving biodiversity and protecting the local and global ecosystems that provide ecosystem services we all depend on. Instead, negative consequences for the environment arising from the company’s activities tend to be viewed as externalities.

If true internalization of environmental responsibility is to take place, the first and most crucial step, therefore, seems to be to expressly redefine the societal role of the company and the role and the position of the board. Although shareholder primacy in many jurisdictions is a product of culture rather than law, the focus of the corporate governance debate appears to have made shareholder primacy so entrenched that to achieve any change it would be necessary to resort to the law expressly to redefine the societal role of the company and the role of the board. Company law is, in any jurisdiction, the natural starting point to do this.

This focus on the board does not mean that we should ignore the main group within the company, namely the employees, from the management level down. Quite the contrary, in the daily running of the company, it is the attitudes and the actions of all of the company’s employees that de facto determine and execute company policy. And there are indications that the bottom-up approach of employee involvement may be a significant contribution to ensuring responsible business.

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62 And the support of other disciplines, such as legal-economic theory, sociology, and management and organizational theory.
63 See B. Sjøfell, 'The Possibilities and Barriers for Sustainable Companies in Norwegian Company Law', Draft mapping paper presented at Sustainable Companies Workshop (November/December 2010), draft on file with author.
64 Even this obligation may be set aside in the search for ways to maximize profit, if the goal of profit maximization is sufficiently maximized, so that the social and financial consequences of being caught out for not following the law are seen as possible (deductible) costs and not prohibitions in themselves.
65 See Sjøfell, supra n. 14, s. 4.2.2.1.
66 Although ensuring stability of the board may clearly be important for the company.
68 That is, as something the company can ignore, as it is not legally bound to consider. The classical example of external costs is production externalities, for example, pollution from a factory. Very simply put, if these costs are not internalized (voluntarily or by force of law), the factory will produce more than it should or in an unnecessarily environmentally harmful manner, because of the difference between the 'private marginal cost and social marginal cost', R. Cooter & T. Ulen, Law and Economics, 4th edn (Boston, MA: Addison-Wesley, 2004), 44–45. Product externalities is discussed in Sachs, supra n. 58.
As a matter of law, it is the board that is responsible for the actions of the company and where the potential is for responsibility also towards interests other than the shareholders. Likewise, as a matter of law, the board has the competence (in most, if not all, jurisdictions) to make decisions guiding the strategy and the policies of the business of the company. Therefore, assuming that it is necessary to have a company organ that is responsible for the actions of the company also beyond the narrow responsibility for legal compliance as it is per today, the board is the right place to start.

If internalization of externalities is achieved at the board level, this should, through the board's setting of company policy and the board's responsibility to oversee the management of the company, influence the employees, from the management level down. This is in line with the board's role and responsibility according to company law as it is also reflected in corporate governance codes. What needs to be clarified and expressly stated is that it is part of the responsibility of the board to ensure that the internalization of externalities is effectively made part of the company policy in practice. The corporate governance codes that include references to CSR tend to do this a non-demanding manner, where CSR is not integrated into that which is regarded as corporate governance proper.

Company law changes would need to go beyond the UK company law reform that promotes 'enlightened' shareholder value, which is nowhere near enough to challenge the domination of shareholder interest over other interests. Although such changes could be seen as going in the right direction by expressly stating that notably environmental concerns are to be taken into account by the board, this may serve to conceal the fact that no real change is made – only to the extent that it is of benefit to the shareholders may environmental concerns be considered.

The presentation of the argument for the inclusion of company law as a societal tool to achieve sustainable companies should not be understood as a dismissal of the contribution of accounting and reporting or the contribution of employee involvement, nor of the theory of reflexive law. Quite the opposite, all forces need to pull in the same direction if we are to achieve the required change. The combination, of first, the top-down approach of changing the company law-defined purpose of companies and the role and position of boards, second, the bottom-up involvement of employees, and third, the supportive contribution of well-designed reporting requirements and environmental accounting taken seriously would arguably constitute crucial contributions to getting us onto the road to sustainability.

As to the reflexive law perspective: getting companies to work towards a sustainable development in the ecological sense is difficult to achieve only through rules functioning in the all-or-nothing sense of the typical rule. While, for example, the prohibition of certain substances needs to be done in the form of clear-cut rules, the transition from 'business as usual' to sustainable business, requiring a long-term vision with continuous improvement of the environmental performance of companies, should probably be set out in a principle-based manner. However, this should be done within the realm of the law so that it is not a voluntary, comply-or-explain-based system rather provisions of company law constituting a legal standard for the environmental performance of companies. This would need to be formulated in such a manner that it could not be obtained through checking a box, while not presenting rigid rules that would over-regulate some companies and under-regulate others. Environmental concerns would need to be integrated into the internal decision-making in companies in such a manner as to release the potential, often considerable, in each individual company to contribute to a sustainable development and notably in mitigating climate change and avoiding the loss of biodiversity. Company law reform containing such a legal standard could spark such a development in a manner that would involve increasing demands to the environmental quality of business over time and foster a race to the top.

Neither should the focus on company law be understood as delimitation against financial market and investment law. The shareholder demand for profits, especially on a short-term basis, may seriously hinder the board and management of companies from focusing on sustainable long-term and socially beneficial development. The financial market and investment law dimension of this complex issue, therefore, needs to be included as well.

The main point that I seek to make in this section is that company law, as a core discipline in the regulation of decision-making in companies, should not be excluded from the discussion, as has been the tendency until now. The ongoing research project

72 See, for example, the Norwegian Corporate Governance Code, s. 9, available in an English translation at <www.mnes.no/filestore/Anbefaling_Eng_2010.pdf>, 28 Jan. 2011.
73 See Sjøfjell, supra n. 42, s. 5.3. Concerning the Dutch code, see Lambooy, 2010, supra n. 1, Ch. 3.
75 Horrigan, supra n. 26, 95–96, where he discusses several examples of company law acknowledgement of CSR issues. In addition, Horrigan arrives at the conclusion that ‘even these areas of reform show no sign yet of leading to a paradigm shift in corporate law and regulation’, ibid., 96.
76 Villiers, supra n. 74.
78 As Dworkin explains: principles are norms of law that set a standard that is to be observed’, ibid., 22.
80 Richardson, supra n. 12.
Sustainable Companies deals, inter alia, with how such a reform of company law may be designed, including which incentives and sanctions would be required as ancillary measures.82

4. CSR FOR THE TWENTY-FIRST CENTURY

With all the problems associated with the vague and conflicting CSR concept and the complexity of the CSR debate, one may be tempted to wish to start with a clean slate instead of basing one’s research on the premises of the CSR contribution to the shareholder versus stakeholder debate. That was my starting point in earlier research on the purpose of companies and the barriers and possibilities in EU company law in encouraging companies to contribute to the overarching goals of our societies.83 However, as CSR increasingly wins acceptance as a concept in business communities84 and has entered the ‘spotlight as a primary international policy issue of the same order as climate change, international security, sustainable development, and free trade and investment’;85 a better strategy for a way forward may be to try to recapture the concept of CSR.

Whether we prefer to call it true CSR, Corporate Citizenship, or Responsible Corporate Governance, we need to clarify the contents of each concept. If we would like CSR to be equivalent with responsible business and a contribution to be a part of the solution to our major challenges, we must make it clear that true CSR is different from Corporate Charity Work (CCW) and Corporate Green-Washing (CGW). CCW and CCW are the antithesis of authentic CSR and undermine the CSR idea of information and transparency combined with consumer power. Let us insist that we use the term CSR only when addressing the socially responsible way of managing the core business of a company, including the discussion of how we can make the necessary enabling legal changes. Then, voluntary do-good-ism can return to being the area in which corporate gifts to the local concert hall or football team are discussed as a separate topic belonging in the company’s sponsoring and marketing department and not used as a substitute for or a shield against talking about how the business of the company should be run. And our debate can continue to be about how to achieve truly responsible business.

82 See the project website at <www.jus.uio.no/ifp/english/research/projects/sustainable-companies/>., 25 Jan. 2011. The project is not limited to company law, rather it includes all the aspects and perspectives touched upon in this article, including notably financial market and investment law, accounting and auditing law, labour law, and law and economics. Sjøfjell, 2011, supra n. 42 indicates the direction of a tentative proposal within the framework of Norwegian law.

83 See, for example, Sjøfjell, Towards a Sustainable European Company Law, supra n. 14, s. 4.1, where I introduce a new structure for the discussion in my book.

84 ‘In the past decade [CSR] has become the norm in the boardrooms of companies in rich countries, and increasingly in developing economies too.’ ‘In Search of the Good Company’, The Economist, 7 Sep. 2007 [online]. Whatever the basis for that may be – whether true acceptance of the necessity of responsible business or of the inevitability of dealing with the topic as a reputational and marketing aspect, or a desire to greenwash and pull the wool over the eyes of customers, contractual partners, and regulators alike.

85 Horrigan, supra n. 26, 90.