

From Corporate Responsibility to Corporate Accountability

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Abstract

Corporate responsibility or say CSR, which has become a heated topic across the world over recent decades, concerns a wide range of interests than shareholders by focusing on company's voluntary approaches to engage with social/environmental issues. In contrast, corporate accountability is more about confrontational or enforceable framework of influencing corporate behaviour through clear means for sanctioning failure. On the ground that voluntary CSR is inadequate to deliver the necessary change and secure more socially responsible activities, this article proffers a framework of corporate accountability based on existing institutional systems. Different from the neoclassical version of corporate accountability, this article insists stakeholders other than shareholders should also be able to sanction corporate results. The article thereby examines the potential of the mobilisation of the existing legal mechanisms through reward & punishment, along with the market discipline, to assist primary stakeholder groups to enforce social standards. By shifting the focus from seeking the introduction of rights and duties for companies to their effective implementation, this article wishes to serve as a start point of corporate accountability debate for scholars interested in corporate responsibility CSR topics in the future.

Key words: Corporate accountability, corporate responsibility, CSR, enforcement, stakeholder

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I. Introduction

The concept of corporate responsibility or corporate social responsibility (CSR) keeps evolving since it appeared. The emphasis was first placed on business people's social conscience rather than on the company itself, which was well reflected by Howard Bowen's landmark book *Social Responsibilities of the Businessman*.¹ Then CSR was defined as responsibilities to society, which extends beyond economic and legal obligations by corporations.² Since then corporate responsibility is thought to begin where the law ends.³ In other words, legal obedience is largely excluded from the concept of social responsibility. In fact, an analysis of 37 most used definitions of CSR also shows voluntary is one of the most common dimensions.⁴ Put it differently, corporate responsibility reflects the belief that corporations have responsibilities beyond generating profits for their shareholders. Such responsibilities include the negative duty to refrain from causing harm to environment, individuals or communities, as well as positive duties, to actively engage in activities to improve society and environment, for example protecting human rights of workers and communities affected by business activities.

Although corporate accountability is sometimes used interchangeably with corporate responsibility or CSR, the concept of corporate accountability is not synonymous with corporate responsibility. Corporate responsibility is focusing on voluntary approaches to engage with social/environmental issues,⁵ while corporate accountability is more about confrontational or enforceable framework of influencing corporate behaviour.⁶ This means corporate accountability focuses more on establishing institutional mechanisms that hold companies to account rather than simply urging companies

¹ H.R. Bowen, *Social Responsibilities Of The Businessman* (Harper & Row, New York 1953) 7.

² J.W. McGuire, *Business and Society* (McGraw-Hill, New York 1963) 144.

³ For example, see K. Davis, 'The Case For and Against Business Assumption of Social Responsibilities' (1973) 16 *Academy of Management Journal* 312, 313; M.V. Marrewijk and M. Werre, 'Multiple Levels of Corporate Sustainability: Between Agency and Communication' (2003) 44 *Journal of Business Ethics* 107, 107-119.

⁴ A. Dahlsrud, 'How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions' (2008) 15 *Corporate Social Responsibility and Environmental Management* 1-13.

⁵ It is argued that CSR is used to indicate voluntary corporate activities by definition. See M.V. Marrewijk and M. Werre, 'Multiple Levels of Corporate Sustainability: Between Agency and Communication' (2003) 44 *Journal of Business Ethics* 107, 107.

⁶ For example, in international relations and public administration literatures, accountability is about questioning, directing, sanctioning or constraining other's action. K. Macdonald, 'The meaning and purposes of transnational accountability' (2014) 73(4) *Australian Journal of Public Administration* 426, 428.

voluntarily to act toward a socially desirable end.⁷ In this regard, corporate accountability could be understood as corporate control, the ability of those affected by a corporation to control the corporate behaviour. Despite the controversy of the argument claiming the company should be controlled by society, it becomes clearer that today's public companies, especially those large ones with enormous social impact, can hardly be seen as entirely private concerns.⁸ In effect, shareholders have lost much of its *de jure* or *de facto* control in many jurisdictions due to the development of modern corporate law and the separation between ownership and control.⁹

On the ground that voluntary CSR is inadequate to deliver the necessary change and secure more socially responsible activities, corporate accountability will continue to grow. Accordingly, corporate behaviour will be influenced by pressure exerted by social and governmental actors beyond the company itself. Such actors can adopt a range of strategies, including but not limited to the mobilisation of legal mechanisms through reward & punishment to enforce social standards.

This paper is therefore going to propose a framework for corporate accountability that focuses on implementing, in contrast to introducing, rights and duties for companies. Accountability could be referred to "the perception of defending or justifying one's conduct to an audience that has reward or sanction authority, and where rewards or sanctions are perceived to be contingent upon audience evaluation of such conduct."¹⁰ In order to build an enforceable framework for corporate accountability against wider society, it is essential to establish clear means for sanctioning failure amounts to the fundamental element of corporate control. Unlike the neoclassical version of corporate accountability (i.e., companies should be accountable only to shareholders),¹¹ actors other

⁷ C. Valor, 'Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability' (2005) 110 *Business and Society Review* 191, 196.

⁸ It is well argued that these large companies are no longer private organisations as they have the ability to exercise social decision-making power J. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (OUP, Oxford 1993) 22.

⁹ M. Yan, *Beyond Shareholder Wealth Maximisation* (Routledge, London 2018).

¹⁰ D. Beu and M.R. Buckley, 'The Hypothesized Relationship between Accountability and Ethical Behaviour' (2001) 34 *Journal of Business Ethics* 57, 58.

¹¹ Shareholders are neither the sole residual claimant nor the sole residual risk taker. M Yan, 'Agency Theory Re-

than shareholders can sanction corporate results based on the existing institutional framework if the concept of corporate accountability can be adopted. One typical example is that market participants are able to sanction or constrain corporate behaviour through market mechanisms. However, due to the inadequacy of market force (or failure of the market) as will be discussed in the next section, multiple-layers of disciplines are required for an effective corporate accountability framework. In particular, law's ability to frame such an accountability framework becomes extremely important.

Studies have already provided rich empirical evidence on the significant role of different stakeholders on CSR-related activities.¹² This paper will, as a result, focus on how can the primary stakeholder groups, whose continuing participation is essential to the survival of the company as a going concern,¹³ can enforce/ensure corporate accountability through law under the existing institutional framework. And it is important to note that the paper mainly focuses on the corporate irresponsible behaviour that does not necessarily breach the mandatory law.

The remainder of the paper is organised as follows. Section II critically discusses on how market discipline ensures corporate accountability. Section III examines how the primary stakeholder groups including shareholders, employees, customers, suppliers, community, and creditors can potentially employ the existing legal mechanisms¹⁴ to ensure corporate accountability even when company's conduct remains in compliance with law. Section IV then discusses regulations in general serving as side-constraint and improving the bottom line for corporate behaviour. The concluding remark is provided in the end.

examined: An Agency Relationship and Residual Claimant Perspective' (2015) 26 *International Company and Commercial Law Review* 139-144.

¹² For example, J.G. Frynas, and C. Yamahaki, 'Corporate social responsibility: Review and roadmap of theoretical perspectives' (2016) 25 *Business Ethics: A European Review* 258, 266.

¹³ Although there are different categories of primary stakeholder groups, but generally it includes shareholders, employees, customers, suppliers, community, government and environment. M. Clarkson, 'A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance' (1995) 20 *Academy of Management Review* 92, 106.

¹⁴ For example, using competition law, corporate law, insolvency law, contract law, tort law etc. as binding force to hold companies accountable.

II. Market Mechanism

The contemporary CSR with an essentially voluntary nature has the intellectual roots in neoliberal economics. Neoliberalism as a new economic orthodoxy advocates: “new forms of political-economic governance premised on the extension of market relationships”.¹⁵ Free markets are consequently treated as the best way to ensure the most efficient allocation of resources and hence the maximization of wealth and welfare.¹⁶ Unsurprisingly, corporate control by society under the neoliberalism can only occur through the market, namely only the market can sanction non-compliance or failures.

Market force includes product market discipline, capital market discipline and labour market discipline, which are also used under the conventional corporate responsibility framework as a business case to justify or incentivise companies to behave responsibly. The assumption is the product, capital and labour markets will influence corporate behaviour by penalizing poor performers (i.e., social irresponsibility) and rewarding good ones (i.e., social responsibility).

First, in the product market, or say consumer market, consumer boycott is most visible and acute means of product market response.¹⁷ A more generalized form of product market response is ethical purchase behaviour, namely to purchase products according to the manufacturer’s reputation for socially responsible conduct. Positive reputation may encourage consumers to decide to purchase while negative reputation would more likely to make consumers avoid the product. Empirical studies also show increasing numbers of consumers are prepared to spend more on ethical goods.¹⁸ Secondly, in the capital market, investors could also *prima facie* affect corporate behaviour via

¹⁵ W. Larner, ‘Neo-liberalism, Policy, Ideology, Governmentality’ (2000) 63 *Studies in Political Economy* 5, 5.

¹⁶ P. Ireland and R. Pillay, ‘Corporate Social Responsibility in a Neoliberal Age’ in P. Utting and J.C. Marques (eds) *Corporate Social Responsibility and Regulatory Governance* (Palgrave Macmillan, Basingstoke 2010) 85.

¹⁷ N.C. Smith, *Morality and the Market: Consumer Pressure for Corporate Accountability* (Routledge, London 1990).

¹⁸ For example, see A. Crane and D. Matten. *Business Ethics A European Perspective, Managing Corporate Citizenship and Sustainability in the Age of Globalization* (OUP, Oxford 2003); M. Carrigan, I. Szmigin and J. Wright, ‘Shopping for a Better World? An Interpretive Study of the Potential for Ethical Consumption within the Older Market’ (2004) 21 *Journal of Consumer Marketing* 401-417.

investment policy.¹⁹ The rapid growth of socially responsible investment (SRI) fund is a good example to reflect how the capital market could ensure accountability. For instance, by the end of 2017, the market size of SRI in the US is over \$12.0 trillion, a quarter of all investment under professional management in the US.²⁰ Investors take social (and environmental) performance into consideration and divest in socially irresponsible companies, which would in turn cause adverse effect on share price. Thirdly, in the labour market, companies with poor reputation will find more difficult or costly to recruit and retain employees while images of responsible companies will have a positive impact on the employees' morale and productivity.

Company is to a large extent an economic entity, which determines it needs to survive in the market first. Different markets could accordingly discipline corporate behaviour. The weakness of market discipline must however not be overlooked. For the product market, ethical consideration may easily be outweighed by conventional product attributes such as quality, value for money, and service.²¹ Meanwhile, the scope of issues attracting high levels of consumer interest is limited.²² Empirical evidence suggests consumers are selective ethical.²³ Even sometimes there could be a boycott against products made by irresponsible firms, such momentum is normally difficult to sustain. For those non-consumer-oriented companies (i.e., not selling directly into consumer markets and hence not brand sensitive) or those with monopolistic powers, the disciplinary pressure from product market is inadequate.

¹⁹ P. Brest, R.J. Gilson and M.A. Wolfson, 'How Investors Can (and Can't) Create Social Value' *European Corporate Governance Institute (ECGI) - Law Working Paper No. 394/2018*.

²⁰ US SIF Foundation's 2018 Report on US Sustainable, Responsible and Impact Investing Trends. Available at <<https://www.ussif.org/trends>> (accessed 1 July 2019). Also see A. Connaker and S. Madsbjerg, 'The State of Socially Responsible Investing' (2019) *Harvard Business Review* available at <<https://hbr.org/2019/01/the-state-of-socially-responsible-investing>> (accessed 1 July 2019).

²¹ See R. Cowe and S. William, *Who are the Ethical Consumers?* (The Co-Operative Bank, Manchester 2000).

²² For example, child labor, sweatshops, environmental issue will attract consumers' attention, but wider employment issues such as gender equality and alike may not.

²³ M. Carrigan and A. Attalla, 'The Myth of the Ethical Consumer: Do Ethics Matter in Purchase behaviour?' (2001) 18 *Journal of Consumer Marketing* 560-577. The authors argue that consumers' purchase behaviour is not always influenced by their social criteria.

For the capital market, ethical investment and SRI funds remain small compared with the size of the entire equity market. More importantly, there will always be socially-neutral buyers for shares in companies that ethical funds reject, which implies their share price and cost of capital will be unaffected by the irresponsibility.²⁴ The crucial question is whether institutional investors would wish their investee companies to improve their social performance if it were to the financial detriment. The collective action problem and conflicts of interest would inevitably lead to a general reluctance of the institutional investors to intervene in their investee companies' internal affair though they are encouraged to be more actively involved.

It is argued: “[leaving] corporate control in the hands of the market is a political decision that could be reversed, and should be reversed when evidence shows that markets are not successfully changing corporate practices.”²⁵ In short, markets are able to discipline corporate behaviour to some extent but not always sufficient,²⁶ hence other disciplinary mechanisms are urgently needed to ensure corporate accountability.

III. Legal Mechanism

Law has played an important role in restraining corporate behaviour through its reward and sanction system. In fact, many CSR-related issues concerning environment, health and safety are already regulated by law.²⁷ The challenge here is how to use legal mechanisms to make companies accountable even they do not violate the existing law, and how the primary stakeholder groups could enforce accountability.

²⁴ E.S. Herman, *Corporate Control, Corporate Power* (CUP, Cambridge 1981) 269. It is also argued that in public markets, “any premium in the valuation of shares that results from socially-motivated investors clamoring to own them presents an opportunity for socially-neutral bargain-hunters to profit from selling shares that overprices”. Paul Brest, Ronald J. Gilson and Mark A. Wolfson, ‘How Investors Can (and Can’t) Create Social Value *European Corporate Governance Institute (ECGI) - Law Working Paper No. 394/2018* p.14.

²⁵ C. Valor, ‘Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability’ (2005) 110 *Business and Society Review* 191, 201.

²⁶ Companies are as a result “likely to fulfill their responsibility in a minimalist and fragmented fashion”. P Utting et al (eds), *Visible Hands: Taking Responsibility for Social Development* (UNRISD Report, Geneva 2000) xv. Moreover, empirical evidence also shows ‘good’ companies do not necessarily prosper and ‘bad’ companies do not necessarily lose out.

²⁷ J.A. Zerk, *Multinationals and Corporate Social Responsibility Limitations and Opportunity in International Law* (CUP, Cambridge 2006) 34.

The first part of this section discusses tort law, which bears a close connection to corporate responsibility and explores the possibility for victims of corporate irresponsible behaviour to use tort law as a weapon against the wrongdoer. The second part discusses the potential of competition law to be used by customers and other market participants such as competitors to hold companies accountable to their behaviour. The third part examines the role of contract law in ensuring accountability by transform voluntary commitments into enforceable obligation such as in supply chain. This part also explores whether employees and other relevant third parties could use contract law to enforce company's voluntary CSR commitments. The fourth part discusses how company can provide both shareholders and non-shareholding stakeholders opportunities to affect corporate accountability. Last but not least, the fifth part focuses on both voluntary and involuntary creditors including tort victims to use insolvency law to hold companies to account to their behaviour.

a. Tort Law

CSR-related issues such as safety and health protection for workers and environmental protection, bear a close connection to tort law.²⁸ When Eilbert and Parket attempted to define CSR, they argued the best way to understand social responsibility is to think of it as 'good neighbourliness.'²⁹ The concept involves two phases. First, it means not doing things that spoil the neighbourhood. Second, it can be expressed as the voluntary assumption of the obligation to help solve neighbourhood problems.³⁰ Therefore, the neighbour principle in tort law is helpful to ensure the corporate accountability.

Lord Atkin famously said in *Donoghue v Stevenson* that "the rule that you are to love your neighbour becomes in law... You must take reasonable care to avoid acts or omissions *which you can*

²⁸ A. Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Edward Elgar, Cheltenham 2015) 164-165.

²⁹ H. Eilbert and I.R. Parket, 'The current status of corporate social responsibility' (1973) 16 *Business Horizons* 5, 5.

³⁰ *Ibid* 7.

reasonably foresee would be likely to injure your neighbour...". Regarding corporate behaviour, it could undoubtedly affect our society in many different ways, so a company should take reasonable care to avoid act or omission which it can reasonably foresee would be likely to injure any part of the society. This is not inconsistent with Waddock's view, which sees "companies need to assume responsibility for the impacts of their practices and processes and the decision that stand behind those practice".³¹

By adopting the tool of tort law, it may be easier to hold companies accountable for their behaviour. A company will have a duty to change its behaviour or adopt preventative measures if a reasonable person would have foreseen acts would affect other parties (i.e., the likelihood of injury). If the company fails to do so which in turn causes any harm to other members of the society, then the victims or their representatives would be allowed to sue the company for damages.

Tort law can be relied upon to provide extra help to victims even though there was no physical or legal proximity between alleged companies and the victims. Especially in the context of group companies, a parent company can be held liable for harms caused to the employees of its subsidiaries despite the principle of corporate separate personality. In other words, a subsidiary company's employee who is a tort victim can possibly claim that the parent company owes a duty of care and thereby recourse to tort law remedies.³² For multinational companies, it becomes possible for local victims of loose safety and health policies, environmental pollution and human right infringement to consider litigation abroad in the state of the parent companies.³³

³¹ S Waddock, *Leading Corporate Citizens* (McGrwa-Hill, Boston 2002) 219.

³² For example, in *Chandler v Cape plc* [2012] EWCA Civ 525, where the claimant was exposed to asbestos when working for a subsidiary brought a claim against its parent company for failure to provide a secure work environment, the Court of Appeal found out that a parent company may owe a duty of care to the employees of its subsidiaries even though subsidiaries are separate legal persons. Though the doctrine of separate corporate personality creates some difficulty in establishing proximity between the parent company and the employee, the court found out that the parent company hired scientific officers who controlled the safety and health policies on behalf of the whole group; this control of a specific issue relevant to this case successfully established proximity.

³³ L. Enneking, *Foreign Direct Liability and Beyond* (Eleven International Publishing 2012) 44.

One good example is the innovative use of the US *Alien Tort Statute* (ATS).³⁴ This statute was used to hold companies accountable for their breaches of duties of human right protection, environmental protection or employees' welfare. It allows a person who is not a US citizen to sue a company, which commits a wrong to the person based on treaties under international law or norms under international customary law.³⁵ Since treaties and norms under international customary law can be seen as part of domestic law, the US gain jurisdiction to hear a wide range of tort law cases.³⁶ As a result, multinational companies may have direct liability to certain victims under ATS. Though after a recent case *Kiobel v. Royal Dutch Petroleum Co*³⁷, the US Supreme Court curbs the universal jurisdiction by requiring that a claim touching or concerning the US territory, the ATS remains a viable alternative redress for tort victims.

Tort law in other jurisdictions can also potentially work as a weapon for victims of human rights infringement or environmental pollution. Besides general tort law doctrines such as negligence, special forms of tort regulation may help reduce evidential burden for victims. Take product liability, a special form of tort, as an example, under Part I of UK *Consumer Protection Act 1987*, traders may be subject to strict liability whereby aggrieved consumers can sue traders producing faulty products without the need to prove the negligence of manufacturers.

In short, due to the duty of care companies owed to the general public to avoid causing harm, victims of corporate irresponsible behaviour can always potentially try the tort law to hold companies to account.

³⁴ 28 U.S.C. § 1350 (2006). It provides that 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'

³⁵ L Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case' (2014) available at <<http://www.utrechtlawreview.org>> (accessed 1 July 2019) p44.

³⁶ E.A. Young, 'Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation after *Kiobel*', (2015) 64 *DUKE L.J.* 1023, 1049.

³⁷ *Kiobel v. Royal Dutch Petroleum Co* 133 S. Ct. 1659 (2013).

b. Competition and unfair commercial practices

The main objective of competition law is to protect the freedom of consumers to make informed and free choices as well as maintains free market competition at a macro level. In addition to antitrust rules, there are also rules governing unfair commercial practices to protect customers from detrimental effect such as unfair competition at a micro-level.³⁸

The US case *Kasky v. Nike*³⁹ discussed below may be a good example of how competition law can be used to hold companies conducting unfair commercial practices accountable. Nike had been actively writing press releases, sending letters to newspapers, athletic directors, and university administrations since the early 1990s, claiming that workers in Nike factories were treated well. In 1997, an employee of Nike leaked a confidential audit by E&Y about Nike's sweatshop and labour practices in Southeast Asia.⁴⁰ The leaked audit showed that Nike's statements in these press releases and letters were either false or misleading. In 1998 Marc Kasky, an activist in California, brought a lawsuit against Nike for unfair and deceptive practices (i.e., issuing false or misleading statements to the people of California) regarding Nike's labour practices under California's Unfair Competition Law and False Advertising Law.⁴¹ The case was finally settled out of the court with Nike paying \$1.5 million to NGO the Fair Labor Association.⁴²

³⁸ B. Keirsbilck, *The new European Law of Unfair commercial practices and competition law* (Hart Publishing, Oxford 2011) 540. The latter part of the law bear close connection to Intellectual property law, as in many cases, the unfair commercial practices may involve infringement of IP rights. D. Geradin, A Layne-Farrar and N Petit, *EU competition law and economics* (OUP 2012) 20-22. On the macro-level, it strives to maintain a fair competition among competitors so that the efficient firms are chosen by the customers and at the same time, social welfare, arising from the competition, is maximised. On the micro-level, the competition law aims to guarantee that customers can obtain a fair share of such maximisation of overall social welfare; a dominant seller in the market may, therefore, have a special responsibility to not abuse its position at the expense of customers' welfare.

³⁹ *Kasky v. Nike* 45 P. 3d 243 (2002 California).

⁴⁰ The audit said that workers in the Nike factory were exposed to toxic chemicals without protection, subjected to physical, verbal and sexual abuse, forced to work illegal excess overtime without proper pay, and suffered from poor ventilation and lack of drinking water. Most people in the factories are women under the age of 24.

⁴¹ California consumer-protection law that allows one person to sue a company on behalf of all the people of California for consumer-protection violations.

⁴² The settlement also involved investments by Nike to strengthen workplace monitoring and factory worker programmes.

It is clear from this case that voluntary CSR reports or codes of conducts may have legal repercussions. There will be recourse to remedies. Put it differently, companies can continue to tell their stories, but they need to be more careful that what they say is accurate. Businesses will find that they may also be held to legally liable for their voluntary disclosure (among other voluntary initiatives). Any voluntary declarations/disclosure may turn out to have legal implications.⁴³

Apart from the public enforcement,⁴⁴ private parties can lodge complaints as an indirect way to initiate an investigation of anti-competitive activities or unfair commercial practices, or initiate litigation to claim a breach of contract in terms of an infringement of competition law.⁴⁵ For example, a market participant is able to initiate a petition under articles 101 and 102 of *Treaty on the Functioning of the European Union* (TFEU) against companies who abuse their market position in a national court and claim compensation.⁴⁶ Consumers and competitors can also choose to complain to relevant national competition authorities or the European Commission to seek remedies under the EU anti-trust law for example.

In the UK, the *Consumer Protection from Unfair Trading Regulations* (CPUT)⁴⁷ was introduced as a response to the *Unfair Commercial Practices Directive*⁴⁸. When customers believe that they are the victims of unfair commercial practices conducted by traders, now it is possible for them to sue the traders based on a new amendment of CPUT, i.e. s.1(3) of the *Consumer Protection (Amendment)*

⁴³ A related example here is that the EU Consumer Sales Directive article 2(2)(d) impose a duty on sellers of goods whereby they need to comply with the public statements with regard to the characteristics of their goods. A. Beckers, 'Legalization under the Premises of Globalization: Why and Where to Enforce Corporate Social Responsibility Codes', (2017) 24 *Ind. J. Global Legal Stud.* 15, 23.

⁴⁴ Given the nature of the anti-competitive practices, public enforcement by public authorities are frequently the main solution to deal with competition law cases. D. Geradin, A. Layne-Farrar and N. Petit, *EU competition law and economics* (OUP 2012) 322, 324-327.

⁴⁵ J. Fairhurst, *Law of the European Union* (10th edn Pearson 2014) 754.

⁴⁶ M.J. Frese, *Sanctions in EU competition law principles and practice* (Hart publishing 2014) 4. Meanwhile, public bodies may also commence public enforcement through a European competition network within the EU. *Ibid* 15. Similarly, article 11 of the EU Directive on Unfair Commercial Practices open the door for both administrative enforcement and private law solutions.

⁴⁷ Consumer Protection from Unfair Trading Regulations (SI 2008/1277).

⁴⁸ Unfair Commercial Practices Directive (2005/29/EC).

Regulations 2014.⁴⁹ For example, where a company fails to keep their words that it has promised in its code of conduct, its behaviour may amount to a misleading action under regulation 5(3)(b) of CPUT.

Accordingly, consumers, who have contracts with the trader, are able to sue traders and require a full or partly repayment of the price of goods and services, provided that traders are or ought to have been aware of their own misleading behaviours that are likely to change average consumers' decisions regarding whether to buy the products from the traders or not.⁵⁰ Unless consumers would like to claim damages arising from inconvenience or certain financial expenses more than the value of the products, consumers have nearly no burden to prove traders' fault like dishonesty and negligence or their losses.⁵¹ The strict liabilities imposed on the traders would have a far-reaching impact on traders regarding their communication of promises to the public.⁵² Therefore, regulations such as CPUT can offer consumers an edge that is not available under traditional common law.

Communication between companies and customers is regulated by *Unfair Commercial Practices Directive* (UCPD).⁵³ It is worth noting that communication-related responsibilities may also be a part of CSRs, as companies frequently prescribe beyond-law responsibilities like human right, environment and consumer protection in their codes of conduct. Apart from the reputation damage caused by breaching of these promises, in some cases, companies are also accountable to customers on the basis of such misleading communication. Therefore, for those traditionally voluntary duties of companies provided by their codes of conduct, which are implemented and made available to the public, consumers can potentially sue companies for the breach if their transactional behaviours are

⁴⁹ Consumer Protection (Amendment) Regulations 2014 (SI 2014/870).

⁵⁰ Part 4 A The Consumer Protection (Amendment) Regulations 2014.

⁵¹ Reg. 27J Damages under Consumer Protection (Amendment) Regulations 2014 (SI 2014/870).

⁵² Misleading and aggressive commercial practices: new private rights for consumers Guidance on the Consumer Protection (Amendment) Regulations 2014 p10.

⁵³ A. Beckers, 'The regulation of market communication and market behaviour: Corporate social responsibility and the Directives on Unfair Commercial Practices and Unfair Contract Terms' (2017) 54 *Common Market Law Review* 475, 481-483.

materially influenced by the codes. In other words, failure to keep these promises in these situations may amount to misleading communication.

c. Contract law

Following the idea behind the previous competition law control, another viable mechanism to ensure accountability is to transform voluntary commitments into enforceable (i.e. legal) obligation. For example, a company could increasingly include CSR commitments in the terms and conditions in the contracts with their suppliers, in order to formalize CSR commitments as legal obligations.⁵⁴ It is also possible to require external suppliers to adopt CSR codes of conduct via the legal mechanism of contract such as procurement contracts to ensure them accountable.

Of course, other contractual techniques could be used to make CSR enforceable, such as perpetual clauses. Through a perpetual clause, one party may require another to impose duties on the latter's suppliers to meet the same standards or terms so that all upstream or downstream parties will be bound by the same clause.⁵⁵ However, the success of this mechanism apparently depends on the bargaining power.

Promises made by companies in codes of conduct may add economic value to the companies through fostering mutual trust and long-term relationship, which can be seen as a good justification for those companies to keep their own words. Failure to comply may not only result in unfair commercial practices as explained earlier but also misrepresentation.⁵⁶ Also, equitable doctrines such as promissory estoppels could further stop companies from reneging on their promises. For instance, suppliers and employees may be committed to deliver high quality goods or services to the

⁵⁴ For more discussion see D. McBarnet, A. Voiculescu and T. Campbell, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, New York 2007). Also see A. Beckers, *Enforcing corporate social responsibility codes-on global self-regulation and national private law* (Hart Publishing, Oxford 2015) 48.

⁵⁵ P. Verbruggen, 'Regulatory governance by contract: The rise of regulatory standards in commercial contracts' (2014) 35 *Recht der Werkelijkheid* 89.

⁵⁶ D.A. Farber and J.H. Matheson, 'Beyond Promissory Estoppel: Contract Law and the Invisible Handshake' (1985) 52 *U. Chi. L. Rev.* 903, 925 and 928.

companies and make firm-specific investment based on companies' CSR commitments, stakeholders who detrimentally rely upon company's words deserve more protection and may have claim against the company.⁵⁷

It is also worth noting that many jurisdictions allow third parties to enforce contract terms even if they are not a party.⁵⁸ Contract law could potentially give contracting parties at both domestic and international level the power to give third parties enforceable rights.⁵⁹ This overcomes the limitation brought by the privity of the contract and potentially enables third parties to monitor the implementation of CSR-related promises made by companies

A good attempt from this regard can be seen in *Doe v. Wal-Mart Stores, Inc.*, where the defendant, Wal-Mart wrote a code of conduct into its contract with suppliers whereby the code required suppliers to comply with all relevant employee protection standards and improve their work environment.⁶⁰ Later, it turned out that Wal-wart disregarded its own promises and continued to purchase goods from suppliers who did not meet the standards. The question was whether workers, who claimed themselves to be third-party beneficiaries, were entitled to sue Wal-Mart with recourse to contract law. Under the *US Restatement (Second) of Contracts*, the promise should flow from promisor A to the third party beneficiary rather than from promisee B to the third party.⁶¹ In this case, without sufficient evidence to show Wal-Mart made a contractually-binding promise to workers, the lawyers of overseas workers argued that it was the intent of promisee, i.e. suppliers, to protect overseas workers' interest. Despite this argument was not supported by the court,⁶² its potential cannot be dismissed.

⁵⁷ E.M. Holmes, 'The Four Phases of Promissory Estoppel' (1996) 20 *Seattle U. L. Rev.* 45, 78.

⁵⁸ Contracts (Rights of Third Parties) Act 1999.

⁵⁹ P. Verbruggen 'Regulatory governance by contract: The rise of regulatory standards in commercial contracts' (2014) 35 *Recht der Werkelijkheid* 90.

⁶⁰ *Ibid* 3.

⁶¹ § 304 The US Restatement (Second) of Contracts (1981).

⁶² *Doe v. Wal-Mart Stores, Inc.* 2007 p4.

d. Corporate Law

Directors' duty may be required by corporate law to not only focus on shareholder interests but also wider social and environmental issues when making corporate decisions. If directors' fiduciary duties to a company could be redefined in way to cover the interests of various stakeholders, then a more accountable decision-making process can be expected. For example, the UK *Companies Act 2006* mandates directors to have regard to stakeholders' interests including employees, communities and alike when promoting the long-term interests of the company. Even currently stakeholders other than shareholders do not have a say in internal corporate governance system (e.g., board meeting)⁶³ or external litigation process (e.g., directive action), setting out a list of specific factors requiring consideration can at least "expand the grounds for judicial review of directors' decision-making".⁶⁴

Shareholders could, of course, engage through proposals and their voting power. They could file CSR-related shareholder proposals at the annual general meeting, which would constitute a formal and visible signal of shareholders' discontent about a specific social or environmental issue.⁶⁵ This may be consistent with logic behind SRI funds, for instance driven by financial concerns – associated with traditional shareholders' interests—or by investors' social and environmental moral principles.⁶⁶ However, it should be well noted that shareholder activism could be both positive and negative. It is not uncommon for activist shareholders to use exactly the same way to press directors to push share prices even at the expense of other corporate constituents.⁶⁷

⁶³ Accordingly, a possible solution to further increase corporate accountability to society is to allow representatives of main stakeholder groups.

⁶⁴ G. Morse (ed), *Palmer's Company Law* (Sweet & Maxwell, London 2014) para 8.2613. J.C. Zhao, 'Promoting more socially responsible corporations through a corporate law regulatory framework' (2017) 37 *Legal Studies* 103-136.

⁶⁵ P. David, M. Bloom, and A.J. Hillman, 'Investor activism, managerial responsiveness, and corporate social performance.' (2007) 28 *Strategic Management Journal* 91-100. E.M. Reid, and M.W. Toffel. 'Responding to public and private politics: Corporate disclosure of climate change strategies.' (2009) 30 *Strategic Management Journal* 1157-1178.

⁶⁶ M.L. Goranova and L.V. Ryan. 'Shareholder Activism: A multidisciplinary review' (2014) 40 *Journal of Management* 1230-1268.

⁶⁷ M Yan, *Beyond Shareholder Wealth Maximisation* (Routledge, London 2018) 98-109.

In addition to the role played by directors and shareholders, sufficient, reliable and timely information disclosure can also be employed under the company law to ensure accountability.⁶⁸ Information disclosure can be utilised as part of company law to all relevant stakeholder groups how the company has performed. Take the revised UK *Companies Act 2006* for example, the new Chapter 4A requires directors of a company to prepare a strategic report including information relating to environmental matters and employee matters. Further information about social, community and human rights issues, as well as any policies of the company in relation to those matters and the effectiveness of those policies is required to be disclosed in cases of listed companies.

Despite reporting itself does not prescribe a change in the underlying corporate behaviour and force corporations to be more accountable, it can strengthen the market forces. As Schwartz and Carroll had pointed out, “[for] there to be real accountability, business must engage in a process of providing sufficient, accurate, timely, and verifiable disclosure of all of its activities (e.g. through auditing and reporting) when such activities might affect others.”⁶⁹ Apart from stimulating and strengthening the public pressure on corporations to improve their social and environmental performance, the so-called greenwashing or window-dressing risk can also be mitigated by the increased transparency and more complete information because customers and other members of the society could more easily assess and compare corporate social performance. A clearly defined mandatory CSR reporting framework would at least prevent corporations from providing selective information and concentrating on positive aspects.⁷⁰ Such a framework could also help to establish an atmosphere for businesses to pay more attention to their impact on environment, society and others. After establishing such a reporting

⁶⁸ This may be regulated by securities law in some countries.

⁶⁹ M.S. Schwartz and A.B. Carroll, ‘Integrating and Unifying Competing and Complementary Frameworks: The Search for a Common Core in the Business and Society Field’ (2008) 47 *Business & Society* 148, 171.

⁷⁰ Apparently, mandatorily required reporting may be more effective in ensuring the corporate accountability, but it should be equally borne in mind that disclosure cannot guarantee the success of non-mandatory initiatives.

framework, directors and managers with better information about the effects of their corporate activities might then of their own accord to adopt higher standards.⁷¹

e. Insolvency law

Insolvency law is a meta-law where multiple values and public policies need to be weighed in on. Company's responsibility to society does also play an important role in insolvency law context.⁷² Non-shareholding stakeholders can also use insolvency law to protect their interests and hold companies to account for their behaviour. It is indeed the main objective for insolvency laws to pursue various values including preserving jobs, protecting stakeholders other than creditors and protecting local community's interests.⁷³

To begin with, creditors can protect themselves by initiating a creditors' voluntary winding-up procedure or apply to courts to initiate a compulsory winding-up procedure. A positive account of insolvency law provides that it distributes losses incurred from debtors' default by considering creditors' respective abilities of losses and risks bearing.⁷⁴ The availability of the right to make a petition to liquidate a company gives creditors and others leverage to protect themselves.

⁷¹ J. Parkinson, 'Disclosure and Corporate Social and Environmental Performance: Competitiveness and Enterprise in a Broader Social Frame.' (2003) 3 *Journal of Corporate Law Studies* 3, 32.

⁷² For example, certain banks are said too big to fail as their failure may give rise to systemic risks to the whole state or beyond. K. Bauer and J. Krasodomska, 'The premises for corporate social responsibility in insolvency proceedings', edited by M. Rojek-Nowosielska in *Social Responsibility of Organizations Directions of Changes* (Publishing House of Wrocław University of Economics 2015) 26.

⁷³ D.G. Baird, 'Bankruptcy's Uncontested Axioms' (1999) 108 *Yale L.J.* 573, 577. Some insolvency law scholars, who are called 'traditionalists', believe that economic value is not the only value that insolvency law should pursue; other stakeholders' interest should also be respected. D.R. Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 *Columbia Law Review* 717, 764.

⁷⁴ For example, certain employees except for managers do not have access to the financial information of the companies so that they have difficulties to predict the risks of the companies they are working; they also suffer severe hardship when they lost their jobs and thus incomes. Furthermore, employees are not experts to shield their risks, and rarely do they have more than one job to spread the risk of layoff. E Warren 'Bankruptcy Policy' (1987) 54 *U. Chi. L. Rev.* 775, 777 and 790; In D.R. Korobkin, 'Employee interests in bankruptcy' (1996) 4 *Am. Bankr. Inst. L. Rev.* 5, 12, the author argued that the reason why company internalises employees is to reduce the cost, as employees may accept a lower than the market remuneration to conduct certain works. They may expect the other informal benefits from the company such as promotion opportunities. When a company is wound up, the direct affect to the employees, among other things is they heavily rely on their owed income to go by, and it is not easy for them to immediately find out another job. Bankruptcy law was described as 'dirty complex elastic and interconnected policies'. Also see Elizabeth Warren 'Bankruptcy Policy' (1987) 54 *U. Chi. L. Rev.* 775, 811; D.R. Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 *Columbia Law Review* 717, 766.

Tort victims, employees among other voluntary and non-voluntary creditors will equally participate into the framework of negotiation and consider whether certain protective mechanisms, not limited to absolute priority, cross-class cram-down mechanism and fair and equitable doctrine, are ignored or misused by liquidators and administrators.⁷⁵ In other words, when mulling over a reorganisation plan, creditors can protect their rights by fastening the conscience of administrators and liquidators, who in turn investigate the conduct of business of the insolvent companies. Furthermore, insolvency law makes companies accountable to tort creditors who are either employees or victims of faulty products or pollution. Those creditors are categorised as future contingent creditors whose debts are recognised by insolvency proceedings.⁷⁶ For instance, in a famous mass tort case, the Johns-Manville Corporation had to file a bankruptcy proceeding in the US due to its significant tort liabilities arising from asbestos exposure of its employees.⁷⁷ The court appointed a legal representative for victims whose identities were yet to be identified and asked the company to set up a trust fund to settle future potential claims.⁷⁸

Stakeholders are also passively protected by miscellaneous tools under the insolvency law. In the UK for example, administration requires administrators, who are the officers of courts, to rescue a company for a broad range of stakeholders.⁷⁹ It has been made clear that the priority of administration is to rescue the insolvent companies themselves, as opposed to the interests of some secured creditors; only when this goal cannot be achieved, administrators may consider other goals, such as achieving a better result than that of winding-up for all creditors.⁸⁰ Another important aspect of the reform of insolvency law was that insolvency law ring-fenced a prescribed portion of assets of a debtor on behalf of unsecured creditors. As a result, assets subject to floating charges are available to unsecured creditors to the extent of this 'prescribed part requirement'. It means that secured

⁷⁵ K.N. Klee, 'Cram Down II' (1990) 64 *Am. Bankr. L.J.* 229, 229.

⁷⁶ Y. Listokin and K. Ayotte, 'Protecting Future Claimants in Mass Tort Bankruptcies', (2004) 98 *NW. U. L. REV.* 1435, 1443.

⁷⁷ *Re Johns-Manville Corp.*, 36 B.R. (Bankr. S.D.N.Y. 1984).

⁷⁸ Y. Listokin and K. Ayotte, 'Protecting Future Claimants in Mass Tort Bankruptcies', (2004) 98 *NW. U. L. REV.* 1435, 1443.

⁷⁹ Insolvency Act Schedule B1 s 3.

⁸⁰ S. 3(1)(a) of Schedule B1, IA 1986.

floating charge holders have to give up a percentage of debtor companies' assets for the sake of a wide range of unsecured creditors. Insolvency law also provides certain weak categories of creditors with preferential creditor status,⁸¹ including employees' wages.⁸² The law makes it clear that the liquidator, administrator or receiver—'shall make a prescribed part of the company's net property available for the satisfaction of unsecured debts.'⁸³

Under certain circumstances, courts would allow stakeholders to sue debtors to seek a relief.⁸⁴ Secured creditors who are unable to be fully protected by the insolvency proceedings are able to seek a leave of stay and take further actions, as long as the purpose of administration will not be frustrated.⁸⁵ Such design shows that it remains possible for private enforcement to be conducted within an insolvency proceedings so that creditors can protect themselves and make the debtor companies accountable to their conducts.

Public authorities other than courts may also play a role under insolvency law, normally on the basis of public interest protection.⁸⁶ The authorities are able to punish companies, which conduct illegal businesses, such as Ponzi schemes, illegal lotteries or insurance contracts.⁸⁷ In short, companies have to consider the welfare of stakeholders and this is clearly defined under most insolvency laws 1986. Breach of these obligations may lead to remedies clearly prescribed by insolvency law.

⁸¹ S.386 of Insolvency Act 1986 Preferential debts include contributions to occupational pension schemes; remuneration, &c. of employees; levies on coal and steel production and so on.

⁸² Schedule 6 of Insolvency Act 1986.

⁸³ S 176 A of Insolvency Act 1986.

⁸⁴ *Re Atlantic Computer Systems plc*, [1990] B.C.C. 859. Although the general rule is that, litigations against insolvent companies are normally not allowed in administration and liquidation proceedings, creditors may, subject to the discretion of the court, require the court to lift the moratorium and seek individual remedies. For example, see paragraph 43(7), Schedule B1, IA 1986

⁸⁵ *Re Atlantic Computer Systems plc*, [1990] B.C.C. 859.

⁸⁶ For example, see S.124A of UK Insolvency Act.

⁸⁷ D. French, *Mayson, French & Ryan on Company Law* (OUP, Oxford 2018) 597.

IV. Multi-layers of enforcement

A typical way to ensure the accountability is to use mandatory laws to control companies' negative externalities by elevating the social and environmental bottom line for companies.⁸⁸ For example, consumer protection laws, employment laws, anti-discrimination laws, environmental protection laws and so on, the regulatory regimes are about telling corporations not to do harm to the society through banning certain behaviour. It can either involve public enforcement where regulations confer investigation power to authorities and allow them to punish certain business activities, or offer new remedies to private parties and allow them to seek remedies by suing companies under certain circumstances.⁸⁹

Elevating the minimum voluntary obligations of corporations to the level of legal duties and providing incentives/disincentives through the threat of liability can fill the governance void. Although the mandatory minimum standards may account for only a small part of the total set of mechanisms to hold companies accountable, they are undoubtedly the core of the overall framework of control. Companies as a result will either actively or passively change their original conduct of business to comply with the requirements. When some parts of originally voluntary CSRs become enforceable under the accountability regimes, the states are also able to learn from the processes of implementation and the results so achieved.⁹⁰ Their ability to regulate social, environmental and economic affairs can also be improved as a result, which would further encourage them more justly advance development.⁹¹

Nevertheless, there are some limitations of regulatory gap. First of all, the hysteresis nature of the laws and legislative process is self-evident. It takes time for legislators or policy-makers to react to

⁸⁸ There is an emerging body of literature on regulating CSR. For example, see A.L. Abah, 'Legal Regulation of CSR: The Case of Social Media and Gender-Based Harassment' (2016) 5 *U. Balt. J. Media L. & Ethics* 38; O. Osuji, 'Fluidity of regulation-CSR nexus: The multinational corporate corruption example' (2011) 103 *Journal of Business Ethics* 31-57.

⁸⁹ These private enforcement tools based on private litigations or public enforcement tools based on regulatory sanctions will largely deter companies' irresponsible behaviour and thereby increase the corporate accountability.

⁹⁰ T. McInerney, 'Putting Regulation before Responsibility: Towards Binding Norms of Corporate Social Responsibility' (2007) 40 *Cornell Int'l L.J.* 171, 190.

⁹¹ *Ibid* 194.

the new sources of harm. Secondly, according to Professors Armour and Gordon, the “regulatory slack”,⁹² such as under-specification of regulatory terms and under-enforcement of regulations, would be exploited by the company in order to lower costs. Indeed, it may be more reasonable from an economic point of view to exploit the slack or even seek to lobby the regulator than to amend the original behaviour for reducing regulatory costs.⁹³ In contrast to the under-specification, there will also be a problem of over-specification (over-inclusiveness).⁹⁴ Rather than failing to catch all forms of harmful conducts, over-inclusive regulation may interfere with legitimate activities. Moreover, as summarized by Parkinson, apart from the technical limitation, there are jurisdictional and politico-economic limitations on the conventional regulation.⁹⁵ For example, regulatory standards on the same activity will vary among different countries, in particular between developed and developing countries. It may be difficult for developing countries to raise the standards to match the ones in the West due to the concern that tougher regulations will make them less attractive for inward investment. Another point worth mentioning is that NGOs and other parties who advocate CSRs may themselves be interested groups which seek rents through lobbying within the current legal institutional framework with the aim of obtaining what they may not be easily or cheaply obtain in the market.⁹⁶ The new regulations, in the form of new CSR statutes, may be the products of their influence.⁹⁷ Therefore, whether the so-called CSR regulatory initiatives are truly in the interests of wider society may be taken with a pinch of salt in some cases.

The foregoing discussions demonstrate that in addition to the market forces, legal forces can also be used to tackle corporate irresponsibility. Affected parties may use innovative manners to hold the

⁹² J. Armour and J. Gordon, ‘Systematic Harms and Shareholder Value’ (2014) 6 *Journal of Legal Analysis* 35, 48.

⁹³ For example, to “exercise political influence to achieve a lower rate of regulatory tax” rather than seeking “innovation that reduces the social costs of one’s activities in accordance with regulatory strictures”. Ibid 38.

⁹⁴ R. Baldwin and M. Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP, Oxford 1999) 103-106.

⁹⁵ J. Parkinson, ‘Disclosure and Corporate Social and Environmental Performance: Competitiveness and Enterprise in a Broader Social Frame’ (2003) 3 *Journal of Corporate Law Studies* 3, 29-31.

⁹⁶ D.J. Kochan, ‘Corporate Social Responsibility in a Remedy-Seeking Society: A Public Choice Perspective’ (2014) 17 *Chap. L. Rev.* 413, 441.

⁹⁷ Ibid 436.

company accountable.⁹⁸ However, it is not the purpose of this paper to encourage mandating CSR-related requirements or incorporating all of them into the mandatory legal system under the current neo-liberal context where the emphasis is deregulation.⁹⁹ Rather the discussion above simply shows the potential of traditional corporate responsibility, which was regarded as intrinsically voluntary, to be enforceable. Law as a well-established system¹⁰⁰ could facilitate the development of corporate responsibility as well as corporate accountability.

Admittedly, it would be difficult to hold companies accountable beyond the law. Apart from the moral restraint and market forces, an innovative application of existing legal mechanisms as explored above proffers a potential solution. For example, companies' CSR commitments can not only be viewed as a type of self-constraint from a social-legal perspective to reduce the externalities,¹⁰¹ but also potentially controlled by competition law or contract law with a legal impact.

It has been identified that enforcement on the basis of private law has a structural role to play in the system of public regulation in that private litigations may fill in some gaps left by the public enforcement regimes.¹⁰² The effectiveness of public or private enforcement may depend on their respective informational advantages in a particular setting. In some cases, employees and suppliers may have first-hand information due to their direct losses or harms caused by corporate irresponsibility. Therefore, the private litigations brought by those parties may facilitate regulators to

⁹⁸ Particularly for small and medium-sized companies who may not have a strong incentive to comply with voluntary CSR responsibilities, due to the limited reputational and financial gains from compliance as suggested by Doreen McBarnet, legal mechanism would become the only route for aggrieved parties to seek remedies against companies.

⁹⁹ G.J. Ikenberry, 'Liberal Internationalism 3.0: America and the Dilemmas of Liberal World Order' (2009) 7 *Perspectives on Politics* 71, 71. It could also be argued that such an option may not be an economically attractive. Sean D. Murphy, Taking Multinational Corporate Codes of Conduct to the Next Level, (2005) 43 *Colum. J. Transnat'l L.* 389, 390. Moreover, sometimes a voluntary motive may be a more effective way to promote compliance, compared to the fear of legal sanctions under the mandatory legal system. M.T. Kawakami, 'Pitfalls of over-Legalization: When the Law Crowds out and Spills over' (2017) 24 *Ind. J. Global Legal Stud.* 147, 155.

¹⁰⁰ J.M. Smits, 'Enforcing Corporate Social Responsibility Codes under Private Law: On the Disciplining Power of Legal Doctrine' (2017) 24 *IND. J. GLOBAL LEGAL STUD.* 99, 106. But of course, not all CSR-related issues can be enforced or solved under the relatively closed system of law. *Ibid* 107.

¹⁰¹ A. Beckers, 'Legalization under the Premises of Globalization: Why and Where to Enforce Corporate Social Responsibility Codes' (2017) 24 *Ind. J. Global Legal Stud* 15, 26.

¹⁰² J.M. Glover, 'The Structural Role of Private Enforcement Mechanism in Public Law' (2012) 53 *Wm. & Mary L. Rev.* 1137, 1176.

supervise certain activities of companies. Private enforcement mechanisms of CSR do not necessarily mean to replace voluntary mechanisms or public enforcement regimes; rather, the relationship between private enforcement mechanisms and public ones can be complementary.

Corporate accountability could exist at the international level, however, it is still under-developed and there is no effective international enforcement court or mechanisms available.¹⁰³ As a result, enforcement mechanisms, based on national law, seem to be attractive options at the time being.¹⁰⁴ One may point out that private law, including contract law and tort law are malleable materials, which can be used to adapt to new changes in the social and economic context. If legislators believe that there is a strong social need to regulate CSR-related issues, formal regulation may be enacted and implemented either by public authorities or private parties.

In practice, one may be difficult to draw a clear line between voluntary CSR enforcement, private enforcement and public enforcement as they may be mixed together. According to the degree of involvement of private parties and harshness of the regulation, the regulation can be categorised into self-regulation by private parties, hard law regulation by states, non-binding soft law regulation which aim to persuade corporates to do something, civil regulation where NGOs play an important role and co-regulation where public and private work together to regulate a certain area or industry.¹⁰⁵

Many NGOs, administrative agencies and private parties have already started to creatively enforce the voluntary CSR responsibilities on the basis of private law, including contract and tort law.¹⁰⁶

NGOs, after becoming shareholders, are able to influence companies' internal governance through

¹⁰³ A. Beckers and M.T. Kawakami, 'Why Domestic Enforcement of Private Regulation Is (Not) the Answer: Making and Questioning the Case of Corporate Social Responsibility Codes' (2017) 24 *Ind. J. Global Legal Stud.* 1, 4.

¹⁰⁴ *Ibid* 6.

¹⁰⁵ R. Steurer, 'CSR and governments: public policies on CSR in Europe' in E. Pedersen (ed), *Corporate social responsibility* (SAGE Publications 2015) 254-259.

¹⁰⁶ D. McBarnet, 'Corporate social responsibility beyond law, thorough law and for law' (2009) U. of Edinburgh School of Law Working Paper No. 2009/03 available at <<http://ssrn.com/abstract=1369305>> (accessed 1 July 2019) p30.

shareholder meetings or resolutions.¹⁰⁷ Self-regulation in certain industries and public regulation are not easily separated as they may have a relationship of mutual influence or collaborative rulemaking.¹⁰⁸ For example, public regulations may be made by public organisations while the supervision is implemented by private agencies. It is equally possible to have a process where both public and private parties are involved in regulation-making meetings.¹⁰⁹

To transpose corporate responsibility which is intrinsically voluntary to corporate accountability which is legally implementable, both process and outcomes of such transposition worth our attention. Some has argued that the accountability regimes of corporate responsibility should be based on substantive values and mechanisms that are implementable, while the process should be able to subject internal corporate governance to external stakeholders and their influence.¹¹⁰ There is a need to maintain a balance between accountability of companies and the efficiency of managers' decision-making.¹¹¹ It is true to assert that a high level of corporate accountability, especially in a case where directors need to consider a variety of stakeholders' interests, may slow down the efficiency of decision-making and blur the focus of management team. However, without implementable external monitoring from affected stakeholders, companies may not be responsible for their externalities.

V. Conclusion

Compared with corporate responsibility, which focuses on the introduction of rights and duties, corporate accountability is more focusing on their implementation. The legal mechanisms discussed in this paper demonstrate the possibility to have a more enforceable framework to ensure corporate accountability and implement the corresponding rights and duties without any sea changes to the current legal environment. Primary stakeholder groups who are most likely to be affected by

¹⁰⁷ Ibid 38

¹⁰⁸ M.W. Scheltema, 'Assessing Effectiveness of International Private Regulation in the CSR Arena' (2014) 13 *Rich. J. Global L. & Bus.* 263, 271-272.

¹⁰⁹ Ibid 271-272.

¹¹⁰ C. Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility?' available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=942157> (accessed 1 July 2019) p 48.

¹¹¹ A. Keay, *Board accountability in corporate governance* (Routledge, London 2015) para 16.30.

corporate behaviour are able to recourse to the existing laws to seek remedies in an innovative manner in addition to the traditional form of boycott, strike etc.

It is, however, important to bear in mind that no single mechanism is sufficient to tackle all accountability concerns alone due to its own weakness in one way or another. Multiple layers of legal tools should be included in holding companies to account. Meanwhile, legal intervention does not necessarily make market force redundant. For example, some legal mechanisms such as disclosure requirement under corporate law may largely strengthen the market force in disciplining corporate behaviour.

From lawyers' eyes, enforceability is itself an important topic. Responsibility as a duty to perform or refrain from performing would be inefficiently affected if it does not come with accountability for failure of compliance. Discussing corporate social responsibility without an enforceable framework sounds less convincing especially when the voluntary adoption or engagement of truly responsible behaviour is problematic at the moment. By shifting the focus from seeking the introduction of rights and duties to their effective implementation, this paper wishes to serve as a start point of corporate accountability debate for scholars interested in CSR topics in the future.