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Corporate Social Responsibility and the Law:
International Standards, Regulatory Theory and
the Swiss Responsible Business Initiative

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Max Weber Programme

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Business Initiative**

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Abstract

The relationship between corporate social responsibility and the law has changed considerably over time, and even today this relationship is not nearly as stable as it might seem, partly because the concept of corporate social responsibility is still in a state of flux. The main problem with the existing legal framework for transnational companies and the protection of human rights, working conditions and the environment is, however, that there is currently quite a large gap between the state of public international law and national private law. In order to have a consistent and integrated legal system across the globe, which operates under the rule of law and to which states, individuals and companies can rely on, we as a society have to manage to close this gap in a reasonable and appropriate manner. Many scholars have already observed and documented the overall trend from self-regulation and non-binding soft law to state intervention and binding hard law with regard to the protection of human rights, working conditions and the environment by transnational companies. But what is often missing in this picture is that we are certainly not coming from, or currently in, some sort of unregulated wasteland in terms of corporate social responsibility, and that various regulatory approaches have at all times maintained a friendly coexistence.

In this working paper, which is for the main part structured as a survey article, I look at the interaction between different regulatory strategies for transnational companies to protect human rights, working conditions and the environment, and the key challenges regarding the transformation of international soft law standards into national private law rules. This is important because it is no longer a question of whether, but how private law should be brought in accordance with international law, and because we have to make sure that certain legal traditions are respected, while at the same time leave enough room for the development of the law.

Keywords

Corporate Social Responsibility; Business and Human Rights; Working Conditions and Industrial Relations; Business and the Environment; Swiss Popular Initiative on Responsible Business.

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Introduction

Corporate social responsibility is a very broad concept with no clear boundaries. The origins of the corporate social responsibility movement are often traced back to Howard R. Bowen and his 1953 book on social responsibilities of the businessman.¹ Key publications on what will later evolve as the general theme of the business case for corporate social responsibility come from Keith Davis.² Other important work was contributed by R. Edward Freeman and Peter F. Drucker.³ Likewise, the corporate social responsibility pyramid by Archie B. Carroll is still of enormous practical importance today.⁴

One of the strongest critics of corporate social responsibility in earlier times was Nobel laureate Milton Friedman. In his classic 1962 book on capitalism and freedom and in his acclaimed 1970 article on the social responsibility of business, published in *The New York Times Magazine*, he argued that “there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits as long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud”.⁵

The understanding of corporate social responsibility and the definitions of the term have changed a lot over time. The European Commission, for example, defined corporate social responsibility as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis”.⁶ In order to realign its approach to corporate social responsibility with international developments, the Commission has considerably broadened this definition to “the responsibility of enterprises for their impacts on society”.⁷

In addition, the discourse on corporate social responsibility was for a long time restricted to economics, business management, sociology and (in part) political science.⁸ A large amount of research was thereby dedicated to the relationship between corporate social responsibility and firm performance.⁹ It was not until recently that these issues have become more popular in law and legal studies. In a recent survey article, Holger Fleischer therefore calls on legal scholars to put the current discussions on this subject in a broader historical and international context from a legal perspective.¹⁰

¹ Howard R. Bowen, *Social Responsibilities of the Businessman* (New York: Harper, 1953).

² Keith Davis, *Can Business Afford to Ignore Social Responsibilities?*, *California Management Review* 2 (3), 70-76 (1960); Keith Davis, *The Case for and against Business Assumption of Social Responsibilities*, *Academy of Management Journal* 16 (2), 312-322 (1973).

³ R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (Boston: Pitman, 1984). Peter F. Drucker, *Converting Social Problems into Business Opportunities: The New Meaning of Corporate Social Responsibility*, *California Management Review* 26 (2), 53-63 (1984).

⁴ Archie B. Carroll, *A Three-Dimensional Conceptual Model of Corporate Performance*, *Academy of Management Review* 4 (4), 497-505 (1979); Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*, *Business Horizons* 34 (4), 39-48 (1991).

⁵ Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), at 133; Milton Friedman, *The Social Responsibility of Business Is to Increase its Profits*, *New York Times Magazine* of 13 September 1970, at 126.

⁶ European Commission, *Promoting a European Framework for Corporate Social Responsibility*, green paper of 18 July 2001, COM (2001) 366, at 6.

⁷ European Commission, *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, communication of 25 October 2011, COM (2011) 681, at 6.

⁸ See also Marc Amstutz, *The Evolution of Corporate Social Responsibility*, *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 87 (3), 189-198 (2015), at 198.

⁹ See for example Abigail McWilliams & Donald Siegel, *Corporate Social Responsibility and Financial Performance: Correlation or Misspecification?*, *Strategic Management Journal* 21 (5), 603-609 (2000).

¹⁰ Holger Fleischer, *Corporate Social Responsibility: Vermessung eines Forschungsfeldes aus rechtlicher Sicht*, *Die Aktiengesellschaft* 62 (15), 509-525 (2017), at 525.

Against this backdrop, the general theme of this working paper is the role of law in the context of corporate social responsibility. Broadly speaking, the three main regulatory approaches towards the protection of human rights, working conditions and the environment by transnational companies consist of industry self-regulation, international soft law standards and national private law. While these legal strategies coexist in friendly relations at all times, it can be observed that the focus has continuously shifted over the years from a largely self-regulating system to a hybrid legal architecture consisting of non-binding international soft law standards backed-up by some sort of government intervention and eventually to binding private law rules.

Within the scope of this research project on corporate social responsibility and the law, I am interested in three related sets of research questions. I am interested in the origins and further development of the international legal and policy framework on corporate social responsibility; the link between regulatory theory and the existing hybrid legal architectures with regard to different corporate social responsibility issues; and the potential implementation of selected corporate social responsibility elements in national private law rules. Methodologically, I use descriptive legal analysis in discussing the first question, while I look through the theoretical lens of regulatory theory in approaching the second question and take a more normative perspective in addressing the third question.

The aim of this working paper is to provide the reader with a good overview on the research questions of interest in order to facilitate further research on these and other related topics, without providing definitive answers to these questions. For this purpose, the paper is structured as a survey article and organized in three main sections. In the following section I discuss international standards and the global self-regulation approach prevalent in past practice. In the subsequent section I elaborate a bit more on the current system of quasi- and co-regulation from the perspective of regulatory theory. I follow this with a section on private law-based strategies in general and the current developments in Switzerland in particular. The conclusion offers suggestions for further research.

International Standards: A Global Self-Regulation Approach

In this section I very briefly discuss the origins and further development of the international legal and policy framework on corporate social responsibility. In the early years, corporate social responsibility concerns were mainly driven by the market and reputation mechanisms, while the law played no role, or only a minor role, in this context. What can be observed since the mid-1970s is the rise of public and private codes of conduct, but no international legally binding instrument on corporate social responsibility could emerge until today. It is further important to note that national governments were not at all involved in this phase of self-regulation and the respective standard-setting process. What is instead common to all these corporate social responsibility initiatives is that they are entirely voluntary and non-binding from a legal point of view, which is why only the market and reputation mechanisms ensured compliance with these standards.

Public Codes of Conduct and International Organizations

To begin with, there are the codes of conduct that have been developed in international organizations as recommendations and guidelines of the international community for transnational companies. The most important actors are the United Nations (UN), the Organisation for Economic Co-operation and Development (OECD) and the International Labour Organisation (ILO).

The UN Guiding Principles on Business and Human Rights (the UN Guiding Principles) have, arguably, the most prominent position among these public codes of conduct.¹¹ The UN Guiding Principles are the

¹¹ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework of the UN of 2011, available online at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last accessed 28 August 2018).

final result of the work of John Ruggie during his six-year mandate as the special representative on the issue of human rights and transnational corporations and other business enterprises.¹² The framework proposed by John Ruggie is based on the three pillars “protect, respect and remedy”, namely the state duty to protect human rights, the corporate responsibility to respect human rights and access to remedy. The UN Guiding Principles were unanimously endorsed by the UN Human Rights Council on 16 June 2011, making it the first public code of conduct on business and human rights endorsed by the United Nations.¹³ It is further worth noting that the UN Guiding Principles are intended to be implemented by countries and companies, whereas the European Union has already invited its member states to develop national implementation plans and several European countries, including Switzerland, have meanwhile presented such implementation plans.¹⁴

The second important public code of conduct is, conceivably, the OECD Guidelines for Multinational Enterprises (the OECD Guidelines).¹⁵ The OECD Guidelines, which contain voluntary recommendations on human rights, employment, industrial relations, the environment, bribery and consumer interests, were first published in 1976 and most recently updated in 2011. It is important to note that these recommendations only address corporations whose headquarters are in states which adhere to the OECD Guidelines and complaints can therefore only be brought against companies from those countries. What is remarkable, though, is that the OECD Guidelines not only apply to member states, but also to the transnational companies themselves. A recent innovation, which will be discussed later in this paper – in the sub-section on enforcement and the reflexive law theory – in more detail, is the creation of national contact points as some sort of follow-up mechanism.

Other important public codes of conduct consist of the relevant ILO declarations, namely the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the ILO Tripartite Declaration), which also makes reference to the Declaration on Fundamental Principles and Rights at Work.¹⁶ The ILO Tripartite Declaration, which contains fundamental principles in the fields of employment, training, working conditions and industrial relations, was first published in 1978 and most recently amended in 2017. The ILO Tripartite Declaration is intended to be non-binding and basically lacks a formal enforcement mechanism for its provisions.

Private Codes of Conduct and Companies or Other Private Actors

In addition, companies or other private actors, such as business organizations and civil society actors, increasingly developed their own benchmark standards for decent and socially responsible business conduct. The mother of all private codes of conduct (so to say) is the UN Global Compact. The UN Global Compact was launched in September 2000 by UN Secretary-General Kofi Annan and since then has grown to almost 13,000 participants, including 4,468 companies and 5,237 small and medium-sized enterprises.¹⁷ The UN Global Compact contains ten principles on human rights, labor standards, environmental protection and fighting corruption. The UN Global Compact was not intended to be a

¹² See John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, report of 21 March 2011, A/HRC/17/31 (2011).

¹³ Resolution A/HRC/RES/17/4 of the UN Human Rights Council of 16 June 2011.

¹⁴ European Commission (fn. 7), at 14; Swiss Federal Council, *Bericht über die Schweizer Strategie zur Umsetzung der UNO-Leitprinzipien für Wirtschaft und Menschenrechte*, report of 9 December 2016, available online at <https://www.news.admin.ch/newsd/message/attachments/46597.pdf> (last accessed 28 August 2018).

¹⁵ OECD Guidelines for Multinational Enterprises of the OECD of 2011, available online at <http://www.oecd.org/daf/inv/mne/48004323.pdf> (last accessed 28 August 2018).

¹⁶ Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of the ILO of 2017, available online at https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf (last accessed 28 August 2018).

¹⁷ See the database on the website of the UN Global Compact, available online at <https://www.unglobalcompact.org/what-is-gc/participants> (last accessed 28 August 2018).

regulatory instrument and was by some commentators not qualified as a code of conduct.¹⁸ In my view, this instrument should nevertheless qualify as a private code of conduct, namely because of its reporting duty under which participating companies are required to submit examples of how they have complied with the principles on a yearly basis. Based on or related to this model code of conduct, a variety of various private codes of conduct by companies, the whole industry or pressure groups such as non-governmental organizations (NGOs) can be distinguished.

A company code of conduct is a document written up voluntarily by a company in which it sets out a set of principles that it commits itself to follow. In some cases, codes of conduct reach suppliers, subcontractors and third parties. The company code of conduct first appeared in the 1970s, but did not become popular until the 1990s. This must be seen against the wave of deregulation of the 1980s. In other words, corporate social responsibility codes are guidelines that companies voluntarily develop and publish with the objective of showing the public their commitment to respect human rights, to improve fundamental workplace standards worldwide and to protect the natural environment. A representative example of this category would be the Code of Business Conduct of the Swiss transnational food and drink company Nestlé.¹⁹

A good example of industry-specific codes of conduct on banking and human rights is the discussion papers of the Thun Group.²⁰ The Thun Group is an informal group of bank representatives working together with the primary purpose of furthering understanding of the UN Guiding Principles within the context of banking and considering how they may be applied across the range of different banking activities. The name of the Thun Group derives from the UBS conference center in Thun, where this group of banks has met regularly since 2011.

Examples of pressure group model codes of conduct are the guidelines for companies by Amnesty International of January 1998 or the multi-stakeholder codes such as the certification schemes of the International Organization for Standardization (ISO), in particular ISO standard ISO 26000 on social responsibility, which was launched in 2010.²¹ ISO 26000 provides guidance on how businesses and organizations can operate in a socially responsible way, that is acting in an ethical and transparent way that contributes to the health and welfare of society.

Legally Binding Policy Instruments and Pressure Groups

For the past half century, many international organizations and similar actors have attempted to create an international legally binding instrument to protect human rights, working conditions and the environment. In the area of business and human rights, this was largely done by the United Nations. Most recently, in 2003, the UN Sub-Commission for the Promotion and Protection of Human Rights published the Norms on the Responsibilities of Transnational Corporations and Other Business

¹⁸ Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006), at 259; Andreas Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Cheltenham: Edward Elgar, 2015), at 14-15.

¹⁹ Nestlé Code of Business Conduct of November 2017, available online at <https://www.nestle.com/investors/corporate-governance/codeofbusinessconduct> (last accessed 28 August 2018).

²⁰ See Thun Group of Banks, *UN Guiding Principles on Business and Human Rights: Discussion Paper for Banks on Implications of Principles 16 to 21*, first discussion paper of October 2013 and Thun Group of Banks, *Discussion Paper on the Implications of UN Guiding Principles 13 & 17 in a Corporate and Investment Banking Context*, second discussion paper of January 2017, both available online at https://www.ubs.com/global/de/about_ubs/ubs-and-society/unser-ansatz/nachhaltigkeit/thun-group.html (last accessed 28 August 2018).

²¹ Human Rights Principles for Companies of Amnesty International of January 1998, available online at <https://www.amnesty.org/download/Documents/148000/act700011998en.pdf> (last accessed 28 August 2018); ISO 26000:2010 – Guidance on Social Responsibility of the ISO of 2010, available online at <https://www.iso.org/iso-26000-social-responsibility.html> (last accessed 28 August 2018).

Enterprises with Regard to Human Rights (the UN Norms).²² But since the UN Norms tried to impose legally binding obligations on transnational companies and because of the opposition of several member states, the UN Commission on Human Rights failed to adopt the document and, in a sense, it became clinically dead.²³ As regards environmental protection, it is in particular worth mentioning the UN Framework Convention on Climate Change and in particular the Kyoto Protocol and the Paris Agreement, which however all apply to nation states and not transnational companies as such.²⁴

Recently, efforts to create a binding instrument for transnational companies were re-established. On 26 June 2014, the Human Rights Council of the United Nations adopted a resolution in which it decided “to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”.²⁵ It remains to be seen whether these efforts will be successful this time.

Regulatory Theory: A System of Quasi- or Co-Regulation

In this section I further elaborate on the link between regulatory theory and the existing hybrid legal architectures with regard to different issues of corporate social responsibility. Under the current legal framework, transnational companies are subject to a set of non-binding international soft law standards, which are often in some way or another backed up by the national government and/or the international community. Because some scholars deny the existence of soft law, while others consider it a new source of international law, a good definition of soft law is difficult to find, but, ultimately, soft law can be defined as “normative provisions contained in non-binding texts”.²⁶ At the one extreme, Richard R. Baxter sees in soft law the infinite variety of international law expressing a “different intensity of agreement”.²⁷ At the other, Prosper Weil is critical of the notion of “relative normativity” and warns us not to blur the distinction between normative and non-normative rules.²⁸ In my view, a body of normative rules should be considered as soft law and thus a manifestation of law, provided that it is in some way or another (i.e., through a monitoring, enforcement or transparency mechanism) backed up by the government. This is what I mean by referring to the system of quasi- or co-regulation. Methodologically, I underpin this statement by referring to certain key ideas of regulatory theory, namely the concept of meta-regulation, the reflexive law theory and the comply-or-explain model.

²² Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights of the UN Sub-Commission for the Promotion and Protection of Human Rights of 26 August 2003, adopted at its 22nd meeting on 13 August 2003, E/CN.4/Sub.2/2003/12/Rev.2.

²³ See David Kinley, Justine Nolan & Natalie Zerial, “*The Norms are Dead! Long Live the Norms!*” *The Politics behind the UN Human Rights Norms for Corporations*, in: Doreen McBarnet, Aurora Voiculescu & Tom Campbell (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, 459-475 (Cambridge: Cambridge University Press, 2007).

²⁴ See United Nations Framework Convention on Climate Change of 9 May 1992; Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997; Paris Agreement of 12 December 2015.

²⁵ See resolution 26/9 of the Human Rights Council of the United Nations of 26 June 2014.

²⁶ This definition is usually attributed to the groundbreaking work of the American Society of International Law that evaluates non-binding norms and discusses compliance with soft law through an assessment of a wide variety of non-binding instruments on key subjects, which is published as Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000).

²⁷ Richard R. Baxter, *International Law in “Her Infinite Variety”*, *International and Comparative Law Quarterly* 29 (4), 549-566 (1980), at 566.

²⁸ Prosper Weil, *Towards Relative Normativity in International Law?*, *American Journal of International Law* 77 (3), 413-442 (1983).

Monitoring and the Concept of Meta-Regulation

One approach that is often used to capture developments at the intersection between self-regulation and state intervention, in particular where the government controls the self-monitoring activities of transnational companies, is the concept of meta-regulation. This concept can be defined as “the state’s oversight of self-regulatory arrangements” or, more generally, as “regulating the regulator, whether they be public agencies, private corporate self-regulators or third-party gatekeepers”.²⁹ By way of meta-regulation, the process of regulation itself rather than the social and individual action behind it becomes regulated.³⁰ Broadly speaking, meta-regulation can in fact entail any form of regulation that regulates any other form of regulation such as legal regulation of self-regulation, non-legal methods of regulating internal corporate self-regulation or the regulation of national law-making by transnational bodies.³¹ FC Simon is particularly critical towards the concept of meta-regulation and in her new book on the topic argues that “meta-regulation may not work as intended, and may actually trigger undesirable side effects”.³² She supports her thesis with both a theoretical alternative, based on Niklas Luhmann’s system theory, and practical issues in connection with her professional experience in the Australian retail market for electricity and gas.

In the corporate social responsibility context, the concept of meta-regulation has been advanced in particular by Christine Parker.³³ Parker argues that meta-regulation in the field of corporate social responsibility must be aimed at making transnational companies put themselves through a corporate social responsibility process aimed at corporate social responsibility outcomes.³⁴ In her understanding, the regulatory technique needed in this area would not need to be in the form of the traditional, hierarchical, legal regulation promulgated by nation states, but might rather include international networks of governance and laws that authorize, empower, co-opt or recognize the regulatory influence of companies themselves, business associations and other industry bodies as well as pressure groups (including civil society) to set and enforce standards for corporate social responsibility processes and outcomes.³⁵ At the same time, other commentators such as Olufemi Amao have pointed out that this concept may be open to criticism because of its indeterminate nature.³⁶ The main critique of such a regulatory approach towards corporate social responsibility is that it would give legal backing to self-regulation and thereby undermine the law itself; by delegating power to transnational companies, it would create a non-transparent governance framework, which might perhaps do very little to improve the achievement of corporate social responsibility objectives.

One example of meta-regulation in the corporate social responsibility context via non-legal methods would consist of the voluntary accreditation to codes of good conduct by the government. The

²⁹ See Bridget Hutter, *Risk, Regulation, and Management*, in: Peter Taylor-Gooby & Jens Zinn (eds.), *Risk in Social Science*, 202-227 (Oxford: Oxford University Press, 2006), at 215 and Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge: Cambridge University Press, 2002), at 15. See also Cary Coglianese & Evan Mendelson, *Meta-Regulation and Self-Regulation*, in: Robert Baldwin, Martin Cave & Martin Lodge (eds.), *The Oxford Handbook of Regulation*, 146-168 (Oxford: Oxford University Press, 2010).

³⁰ See Bronwen Morgan, *The Economisation of Politics: Meta-Regulation as a Form of Nonjudicial Legality*, *Social & Legal Studies* 12 (4), 489-523 (2003), at 490.

³¹ Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility*, in: Doreen McBarnet, Aurora Voiculescu & Tom Campbell (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, 207-237 (Cambridge: Cambridge University Press, 2007), at 211.

³² FC Simon, *Meta-Regulation in Practice: Beyond Normative Views of Morality and Rationality* (London: Routledge, 2017), at 4.

³³ Parker, (fn. 29); Parker (fn. 31).

³⁴ Parker (fn. 31), at 207.

³⁵ Parker (fn. 31), at 208-209.

³⁶ Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (Abingdon: Routledge, 2011), at 75.

government could, for example, say explicitly which public codes of conduct it acknowledges. In this case, the state would name several standards, which are considered to be adequate, and oblige the companies to choose from this set (or menu). It is, however, entirely up to the respective company to choose the standard which it wants to follow. This is somewhat similar to the regulation in accounting law, where the legislator provides a choice (i.e., the IFRS or GAAP international accounting standard) and the company selects the respective international standard. Another example of such regulation is that the government or international organizations only approve(s) such private codes of conduct which incorporate certain core elements considered to be important. This is in fact what the UN Code of Conduct is doing by setting certain minimum standards regarding the content of private codes of conduct; the fact of being a participant would serve as some sort of accreditation.

Enforcement and the Reflexive Law Theory

Another approach situated between traditional law and self-regulation is the so-called reflexive law theory, which goes back to the work of Gunther Teubner.³⁷ The theory of reflexive law applies procedures to those procedures that steer and foster self-regulation within social institutions.³⁸ This theory thus focusses on procedural norms, which concentrate on the development of regulatory mechanisms, which are in turn aimed at achieving intended outcomes, as opposed to substantive formalized rules. Similar to meta-regulation, under this theory, the law avoids the need to directly regulate complex social areas, but focuses on controlling the structure and processes of self-regulation appropriately. Unlike material law and other than meta-regulation, however, reflexive law theory does not dictate any particular outcome, but leaves it to the relevant parties to strike the substantive agreement, provided that certain procedural norms and principles of justice are respected.³⁹ Similar approaches have been put forward by Jürgen Habermas (“procedural law”) and Philip Selznick (“responsive law”).⁴⁰ An early critic of this school of thought was Erhard Blankenburg.⁴¹ Probably the main criticism of this theory is that it unduly delegates authority and decision making to irresponsible powers, undermines the rule of law and democracy and rests on untenable premises.⁴² This theory has also been further criticized for neither establishing formal rules of interaction nor directing substantive outcomes.⁴³

Several scholars have already applied reflexive law theory to corporate social responsibility. Olufemi Amao has written about the relevance of reflexive law to the corporate social responsibility debate in general.⁴⁴ Catherine Barnard, Simon Deakin and Richard Hobbs in particular looked at reflexive law

³⁷ Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, *Law & Society Review* 17 (2), 239-286 (1983); Gunter Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, *Law & Society Review* 18 (2), 291-301 (1984).

³⁸ See Jean L. Cohen, *Regulating Intimacy: A New Legal Paradigm* (New Jersey: Princeton University Press, 2002), at 4.

³⁹ See Cohen (fn. 38), at 4.

⁴⁰ Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Berlin: Suhrkamp, 1992); Jürgen Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996); Philip Selznick, *Sociology and Natural Law*, *Natural Law Forum* 6, 84-108 (1961); Philip Selznick, *Law, Society, and Industrial Justice* (New York: Russel Sage Foundation, 1969); Philippe Nonet & Philip Selznick, *Law and Society in Transition: Towards Responsive Law* (New York: Harper and Row, 1978).

⁴¹ Erhard Blankenburg, *The Poverty of Evolutionism: A Critique of Teubner's Case for "Reflexive Law"*, *Law & Society Review* 18 (2), 273-290 (1984).

⁴² Cohen (fn. 38), at 17; Amao (fn. 36), at 77.

⁴³ Richard B. Stewart, *A New Generation of Environmental Regulation*, *Capital University Law Review* 29 (1), 21-182 (2001), at 130; Warren A. Braunig, *Reflexive Law Solutions for Factory Farm Pollution*, *New York University Law Review* 80 (5), 1505-1548 (2005), at 1525.

⁴⁴ Olufemi Amao, *Reflexive Law and the CSR Debate – Reflexive Law: Does It Have any Relevance to the Corporate Social Responsibility (CSR) Debate?*, *Cork Online Law Review* 6, 55-64 (2007).

and the evolution of labor standards.⁴⁵ Karin Buhmann has recently argued that the Danish reporting requirement on corporate social responsibility is based on an understanding of reflexive law theory.⁴⁶ As far as I can see, however, there is no literature which considers the enforcement process of soft law, in particular the UN Guiding Principles and the OECD Guidelines, from the perspective of reflexive law theory.

Good examples of reflexive law theory are the measures taken by several countries in the area of non-judicial grievance mechanisms. Operational Principle 27 of the UN Guiding Principles requires states to provide effective and appropriate non-judicial grievance mechanisms. Under the OECD Guidelines, participating states are further required to establish a national contact point. The main role of the national contact points is to further the effectiveness of the OECD Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise from the alleged non-observance of the OECD Guidelines in specific instances.⁴⁷ Switzerland, for example, has already established such a national contact point in the year 2000, which since then has been operated by the Swiss State Secretariat for Economic Affairs.⁴⁸ The Swiss national contact point has heard and (successfully) mediated many disputes related to corporate social responsibility.⁴⁹ In addition, in its report on the Swiss strategy for the implementation of the UN Guiding Principles, the Swiss Federal Council underlines that it will continue to support its diplomatic missions in their dispute settlement efforts.⁵⁰ Both of these measures are good examples of how national governments help considerably in enforcing the respective international soft law standards by focusing on the procedure, without dictating any particular outcome.

Transparency and the Comply-or-Explain Model

Yet another approach between the law and the market focusses on transparency and makes use of a comply-or-explain mechanism. The comply-or-explain model has been widely used as a regulatory technique throughout Europe, mostly in the fields of corporate governance and financial supervision. Typical examples of codes of conduct containing this principle include the UK Corporate Governance Code, the German Corporate Governance Code and the Swiss Corporate Governance Code.⁵¹ The UK Financial Reporting Council claims that the comply-or-explain approach is the trademark of corporate governance in the United Kingdom, since it was first introduced after the recommendations of the

⁴⁵ Catherine Barnard, Simon Deakin & Richard Hobbs, *Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time*, ESRC Centre for Business Research, University of Cambridge, Working Paper No. 294, available online at https://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp294.pdf (last accessed 28 August 2018).

⁴⁶ Karin Buhmann, *The Danish CSR Reporting Requirement as Reflexive Law: Employing CSR as a Modality to Promote Public Policy Objectives through Law*, *European Business Law Review* 24 (2), 187-216 (2013).

⁴⁷ See OECD, *National Contact Points*, available online at <http://mneguidelines.oecd.org/ncps> (last accessed 28 August 2018).

⁴⁸ See the Ordinance on the Organisation of the National Contact Point for the OECD Guidelines for Multinational Enterprises and on its Advisory Board of 1 May 2013, SR 946.15.

⁴⁹ See Swiss State Secretariat for Economic Affairs, *Information on Specific Cases*, available online at https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/NKP/Statements_zu_konkreten_Faellen.html (last accessed 28 August 2018).

⁵⁰ Swiss Federal Council, *Report on the Swiss Strategy for the implementation of the UN Guiding Principles on Business and Human Rights*, report of 9 December 2016, available online at <https://www.news.admin.ch/news/message/attachments/48579.pdf> (last accessed 28 August 2018), at 40.

⁵¹ The UK Corporate Governance Code of the Financial Reporting Council of April 2018; German Corporate Governance Code of Regierungskommission Deutscher Corporate Governance Kodex of 7 February 2017; Swiss Code of Best Practice for Corporate Governance of *economiesuisse* of 2016.

Cadbury report in 1992.⁵² This model allows the regulated or supervised entity to choose between compliance and non-compliance, and it must publicly explain its choice in the latter case. The comply-or-explain model provides for some sort of indirect regulation, as it does not follow the command and control attitude to prescribe how companies have to achieve their goals. It does however provide some sort of behavioral control since a company may not want to disclose in its annual report that it is not doing enough in this area or even that it is breaching soft law standards. The purpose of the comply-or-explain paradigm is thus to let the market decide whether a set of standards is appropriate for individual companies. The opposite of this model would be a rather strict one-size-fits-all approach.

In a comply-or-explain model, companies are required to disclose certain aspects, which are considered to be relevant from a corporate social responsibility perspective, as part of their annual report or in a separate company report. It was in fact John Elkington who coined the phrase “the triple bottom line” as early as 1994.⁵³ According to this argument, not only the bottom line of the profit and loss account, but also the bottom line of a company’s people account and a company’s planet account should be taken into consideration for accounting purposes. The triple bottom line thus refers to the reporting of profits, people and the planet. Although the transparency approach seems widely acknowledged in the field of corporate social responsibility, Wim Dubbink, Johan Graafland and Luc van Liedekerke have nevertheless expressed some reservations with this approach.⁵⁴ They argue that both a facilitation policy and a command and control strategy are defective and introduce an alternative government policy, consisting of the development of a self-regulating sub-system in the form of informational intermediate organizations.

There are several good examples of rules and regulations on corporate social responsibility reporting. Denmark and France were certainly the forerunners in this area. Since January 2009, Danish listed and state-owned public limited companies with assets or liabilities of EUR 19.2 million, revenue of EUR 38.5 million and more than 250 employees had a legal obligation to report on corporate social responsibility in a separate sustainability report.⁵⁵ Since December 2011, French listed and unlisted companies with more than 500 employees and EUR 100 million in revenue also had similar reporting obligations within the scope of their annual reports.⁵⁶ Under these regimes, the respective companies must inform the public and its investors about the existence or non-existence of corporate social responsibility strategies, their implementation and their results. A more recent example for this strategy on the supranational level would be the directive of the European Union on the disclosure of non-financial and diversity information by certain large undertakings and groups (the CSR Directive), which was adopted in 2014 and had to be implemented in national law by its member states by 6 December 2016 in order to become effective on companies in the financial year starting on 1 January 2017 or during the calendar year 2017.⁵⁷ The Swiss Institute of Comparative Law has analyzed the implementation of the CSR Directive in selected member states – Denmark, Germany, Belgium,

⁵² See Financial Reporting Council, *Comply or Explain: 20th Anniversary of the UK Corporate Governance Code*, available online at https://www.frc.org.uk/getattachment/06870154-78a0-44f5-a1c5-48b42f860049/FRC-Essays_Comply-or-Explain.pdf (last accessed 28 August 2018). See also Committee on the Financial Aspects of Corporate Governance, report of 1 December 1992, available online at <http://www.ecgi.org/codes/documents/cadbury.pdf> (last accessed 28 August 2018).

⁵³ The Economist of 17 November 2009, *Triple Bottom Line*, available online at <https://www.economist.com/node/14301663> (last accessed 28 August 2018).

⁵⁴ See Wim Dubbink, Johan Graafland & Luc van Liedekerke, *CSR, Transparency and the Role of Intermediate Organisations*, *Journal of Business Ethics* 82 (2), 391-406 (2008).

⁵⁵ See the Grenelle I Act of 3 August 2009 (establishing an action plan on governance issues) and the Grenelle II Act of 12 July 2010 (introducing article 224 on socially responsible investment and article 225 on corporate social responsibility in the French legislation).

⁵⁶ Act amending the Danish Financial Statement Act (Accounting for CSR in large businesses) of 16 December 2008.

⁵⁷ Directive 2014/95/EU regarding the disclosure of non-financial and diversity information by certain large undertakings and groups of 22 October 2014.

Finland, France, the Netherlands, Austria, Sweden and the United Kingdom – and *inter alia* concluded that the comply-or-explain model was more or less word by word implemented into national law.⁵⁸

The Swiss Responsible Business Initiative: Private Law-Based Strategies

In this section I focus on the potential implementation of selected elements of corporate social responsibility in national private law rules. It has often been argued that the existing legal framework is not sufficient to hold transnational companies accountable for human rights abuses and the violation of social and environmental standards. In light of the alleged inadequacy of existing instruments, a growing number of governments, non-government organizations, academics and even business representatives call for legally binding national private law rules on business and human rights, working conditions and environmental protection.⁵⁹ Andreas Rühmkorf, for example, asserts that English private law – namely company, contract, consumer protection and tort law – “has made and can continue to make an important contribution to the promotion of CSR and could make an even better contribution if [the identified limitations of the current system] were addressed”.⁶⁰ Following a similar line of thought, Anna Beckers, in her dissertation, formulates legal policy recommendations that indicate how English and German private law – namely contract, tort and competition law – can, and in fact should, enforce public and private corporate social responsibility codes of conduct as genuine legal obligations.⁶¹ Probably the most aggressive and far-reaching regulatory approach underlies the Swiss popular initiative on responsible business (the Responsible Business Initiative), which was launched by a coalition of Swiss civil society organizations on 21 April 2015 and is currently being discussed in the Swiss Parliament.⁶² In a nutshell, the Responsible Business Initiative aims at introducing a binding framework to protect human rights and the environment abroad by setting common benchmarks for all companies based in Switzerland.⁶³ Under the Responsible Business Initiative, companies would be legally obliged to incorporate respect for human rights and the environment in all their business activities. This mandatory due diligence provision would also be applied to Swiss based companies’ activities abroad and guaranteed through a quite far-reaching liability provision. In its message to the Swiss Parliament, the Swiss Federal Council argues that, in particular, the obligation of due diligence and the liability incurred are going “too far” and could potentially deter multinational companies from headquartering in Switzerland.⁶⁴ More recently, on 14 June 2018, the Swiss House of Representatives approved an indirect counter-proposal

⁵⁸ Swiss Institute of Comparative Law, *Umsetzung der Richtlinie 2014/95/EU (CSR-Richtlinie): Dänemark, Deutschland, Belgien, Finnland, Frankreich, Niederlande, Österreich, Schweden, Vereinigtes Königreich*, report of 30 April 2017, available online at <https://www.isdc.ch/media/1378/e-2017-12-16-173-richtlinie-2014-95-gz.pdf> (last accessed 28 August 2018).

⁵⁹ See for example Jens Martens & Karolin Seitz, *Binding Rules on Business and Human Rights: A Critical Prerequisite to Ensure Sustainable Consumption and Production Patterns*, in: Report by the Civil Society Reflection Group on the 2030 Agenda for Sustainable Developments, *Spotlights on Sustainable Development 2017: Reclaiming Policies for the Public*, available online at https://www.2030spotlight.org/sites/default/files/download/Spotlight2017_2_12_Martens_Seitz.pdf (last accessed 28 August 2018), at 117-123.

⁶⁰ Rühmkorf (fn. 18), at 192.

⁶¹ Anna Beckers, *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law* (Oxford: Hart, 2015).

⁶² For the official initiative text, see BBl 2017 6379. For more information, see the website of the Swiss Coalition for Corporate Justice, available online at <http://konzern-initiative.ch/?lang=en> (last accessed 28 August 2018).

⁶³ For a presentation and assessment of the content of the Responsible Business Initiative in international comparison, see Nicolas Bueno, *The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability*, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125672&download=yes (last accessed 28 August 2018).

⁶⁴ See Swiss Federal Council, *Botschaft zur Volksinitiative „Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt“ vom 15. September 2017*, BBl 2017 6335. See also Federal Office of Justice, *Volksinitiative „Für verantwortungsvolle Unternehmen“: Bundesrat anerkennt Anliegen, geht aber anderen Weg*, available online at https://www.bj.admin.ch/bj/de/home/aktuell/news/2017/ref_2017-09-151.html (last accessed 28 August 2018).

to the Responsible Business Initiative (the Counter-Proposal), which will be further discussed in the Swiss Parliament in the months to come.⁶⁵ In light of these developments, I provide a preliminary assessment of the key concepts of the Swiss Responsible Business Initiative and the respective Counter-Proposal of the Swiss House of Representatives in the following sub-sections. But before I turn to the two main instruments embodied in some form or another in the Responsible Business Initiative or the Counter-Proposal, the supply chain due diligence and corporate liability provisions, I assess whether and to what extent other – namely contractual – private law-based legal strategies can, or should, contribute to, and eventually ensure, the enforcement of corporate social responsibility codes. For the purpose of this analysis, I focus therefore on the role of contract law, company law and tort law in promoting and fostering corporate social responsibility.

Codes of Conduct and Contract Law

As expressed in its renewed strategy on corporate social responsibility, the European Commission believes that the development of corporate social responsibility should be company-led.⁶⁶ The contractual strategy, according to which public and/or private codes of conduct become enforced by the means of national contract law, is entirely in line with this belief. The basic idea behind this strategy is that non-binding codes of conduct may all of a sudden become binding through the force of contract law, as long as they are in some way or another incorporated into a supply chain contract and enforced “down the chain” by the contracting party itself or by a third party. This strategy, which is ultimately based on a contract law approach, has been advocated particularly in the legal writings of Anna Beckers and Andreas Rühmkorf.⁶⁷ The four most urgent issues with this approach, which put some limitations on this strategy, shall be briefly discussed here.

The foremost question is how different codes of conduct can be incorporated into a contract, so that they become contractually enforceable obligations. Probably the most common and also the easiest case is when a corporate code of conduct is incorporated in a given supply chain contract, either directly in the contract clause(s) or indirectly via incorporation by reference.⁶⁸ In this case, the respective corporate social responsibility commitment becomes a valid and legally binding express term of the contract as soon as this contract is concluded and the voluntary code of conduct thus transforms into a legally binding obligation. Another quite common and comparably easy method of incorporating such codes of conduct in a certain contractual relationship is in the form of referencing it in the ancillary documents, such as the general terms and conditions or, in the case of long-term contracts, in an umbrella agreement.⁶⁹ As long as these ancillary documents become contractually binding, the commitments of the underlying code of conduct become enforceable as well. Under Swiss law, for example, the relevant test with regard to general terms and conditions is that such a provision can only become binding upon the weaker party if it does not contain any unusual or uncommon obligations; if this should be the case, the more powerful party would have to bring this clause explicitly to the attention of the less powerful party in order for it to be effective. What if, however, a code of conduct is completely detached from a

⁶⁵ Anträge der Kommission für Rechtsfragen des Nationalrates – Eidgenössische Volksinitiative „Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt“: Indirekter Gegenentwurf, available online at <https://www.parlament.ch/centers/documents/de/dok-gegenentwurf-mm-rk-n-2018-05-04.pdf> (last accessed 28 August 2018); Legal Affairs Committee of the Swiss National Council, *Zusatzbericht der Kommission für Rechtsfragen vom 18. Mai 2018 zu den Anträgen der Kommission für einen indirekten Gegenvorschlag zur Volksinitiative „Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt“ im Rahmen der Revision des Aktienrechts*, available online at https://www.parlament.ch/centers/kb/Documents/2016/Kommissionsbericht_RK-N_16.077_2018-05-18.pdf (last accessed 28 August 2018).

⁶⁶ European Commission (fn. 7), at 7.

⁶⁷ Beckers (fn. 61), at 47-148; Rühmkorf (fn. 18), at 79-125.

⁶⁸ See Beckers (fn. 61), at 48-52; Rühmkorf (fn. 18), at 94.

⁶⁹ See Beckers (fn. 61), at 52-58; Rühmkorf (fn. 18), at 89-94, 96-98.

supply chain contract and merely represents a unilateral declaration to the public? In the US landmark case *Doe v. Wal-Mart Stores*, the United States Court of Appeals for the 9th Circuit dismissed all contract law-based claims of the employees of foreign suppliers, who were relying on Wal-Mart's code of conduct related to minimum workplace standards, in which it communicated its willingness to improve working conditions worldwide to the public.⁷⁰ Anna Beckers discussed several paths as to how publicly declared codes of conduct could eventually become legally binding and thus enforceable obligations under English and German contract law, namely by using contract interpretation and supplementation or the qualification of public declarations as contracts or relied-upon unilateral promises.⁷¹ According to these theories and arguments, it would be possible to qualify public declarations of corporate codes of conduct as pre-contractual public statements that could be enforced as a term in a subsequently concluded contract; publicly declared corporate codes could be related to the rules on contract formation as an offer to the public, which becomes contractually enforceable once accepted by the public; or such public declarations could be viewed as unilateral promises inducing reliance on the side of the public or the beneficiaries, which could be enforced by relying on specific exceptions where private law makes it possible to enforce promises that are not made in a contract.⁷²

Additional complications arise from the fact that transnational companies are literally on the top of the global supply chain, whereas different suppliers are situated further down the supply chain. Another key question thus becomes whether and, if so how, transnational companies might enforce their commitments towards corporate social responsibility against suppliers "down the chain". Probably the main limitation with a contract law approach is the doctrine of privity of contract, pursuant to which non-contracting third parties cannot be subjected to the burden of a contract to which they are not a party.⁷³ The transnational company usually has a contract with its first-tier supplier alone, but not with the other suppliers further down the supply chain. However, this problem could be overcome by including a provision in this contract, which demands that the first-tier supplier concludes the same or similar contractual obligations regarding corporate social responsibility with the other suppliers further down the supply chain. Although this procedure might eventually work in most cases – in particular in light of the fairly large imbalance of power between the transnational company and its mostly local suppliers and subcontractors, which is why the local supplier or subcontractor would in practice have no other choice but to accept the respective provision, if he or she wanted to do business with the transnational company – there is no guarantee that this would always be the case. Under the doctrine of unfair advantage, the injured party might, however, declare within a year that he or she will not honor the contract and might demand restitution of any performance already made if there is a discrepancy between performance and consideration under a contract as a result of one party's exploitation of the other's straitened circumstances, inexperience or thoughtlessness.⁷⁴ This could create additional problems with the contract law approach in a typical global setting.

Yet another difficulty in this approach is that it is often a non-contracting third party that has an interest in enforcing certain corporate social responsibility commitments of transnational companies. It is often the employees of third-world country suppliers who experience violations against their human rights and poor working conditions, or it is the general public affected by environmental pollution. Andreas Rühmkorf ascertains that English common law is inadequate in this regard and claims that "[t]hird

⁷⁰ *Jane Doe and others v. Wal-Mart Stores, Inc.*, United States Court of Appeals for the 9th Circuit, 572 F.3d 677 (2009), opinion delivered by Judge Gould.

⁷¹ Beckers (fn. 61), at 63-81 (public declarations in contract interpretation and supplementation), 82-98 (public declarations as contracts), 98-106 (public declarations as relied-upon unilateral promises).

⁷² See Beckers (fn. 61), at 107.

⁷³ For a discussion of English contract law, see Rühmkorf (fn. 18), at 98-101.

⁷⁴ See for example the relevant provision under Swiss law in article 21 paragraph 1 of the Swiss Code of Obligations.

parties, such as the suppliers' employees that are expressly identified in a contractual clause, should have a right to enforce clauses that are beneficial for them".⁷⁵

A last issue that should be mentioned in this context is the transnational company's awareness of breaches.⁷⁶ Transnational companies can only then enforce potential violations against their corporate social responsibility policy, if they become aware that there is a breach of such policy along the supply chain in the first place. Therefore, it is important that transnational companies check their supply chains closely, namely via a corporate due diligence mechanism. This mechanism will be the focus of the next sub-section on supply chain due diligence and company law.

Despite these and other limitations of contract law, it has been argued in the academic literature that contract law could promote corporate social responsibility by making the respective codes of conduct contractually enforceable.⁷⁷ I agree with this statement to some extent. It is widely recognized that codes of conduct have a *de facto* impact on third parties, even if they may not be legally included in the agreement with such a party. However, it is at the same time fair to say that reliance on codes of conduct and contract law alone might not be enough in today's globalized world. Therefore, a call for further safeguards must be made, which brings us to supply chain due diligence and corporate liability.

Supply Chain Due Diligence and Company Law

Going one step further, the concept of supply chain due diligence, which is at the heart of the UN Guiding Principles, and which was later also included in the OECD Guidelines and the ILO Tripartite Declaration, has gained much support over the last few years.⁷⁸ France has, for example, quite recently introduced a law pursuant to which certain large companies with operations abroad must conduct a legal due diligence of their supply chain.⁷⁹ Similarly, this concept is also a key element of the Swiss Responsible Business Initiative and the Counter-Proposal of the Swiss House of Representatives.⁸⁰ Under both of these reform proposals, a human rights and environmental due diligence mechanism of a transnational company would thus need to be implemented into Swiss national private law. In view of these reform proposals, it has been argued by Peter Forstmoser, for example, that a due diligence duty of a transnational company to respect international human rights and environmental standards should not be included in the stock company law rules, but transplanted by way of neutral legal form into the private law system.⁸¹ If the implementation of the due diligence duty in the company law rules should still be the preferred solution, Peter Forstmoser mentions three different sets of rules for this purpose: the general duty of care of the board of directors, the inalienable tasks of the board of directors or the general liability rule of the members of the board of directors and the management.⁸² More generally, three questions in particular have to be asked when discussing a potential implementation of such a

⁷⁵ Rühmkorf (fn. 18), at 102-107, in particular 106.

⁷⁶ For more details on this issue, see Rühmkorf (fn. 18), at 119-122.

⁷⁷ See Rühmkorf (fn. 18), at 122-125. See also Beckers (fn. 61), at 47-148.

⁷⁸ See operational principle 17 of the UN Guiding Principles; paragraph 5 of chapter IV of the OECD Guidelines; the OECD Due Diligence Guidance for Responsible Business Conduct; general policy 10(d) of the ILO Tripartite Declaration.

⁷⁹ See the French Duty of Vigilance Law of 21 February 2017 and 23 March 2017 (*Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*).

⁸⁰ See draft article 101a paragraph 2(b) of the Swiss Federal Constitution; draft article 716a^{bis} of the Swiss Code of Obligations.

⁸¹ Peter Forstmoser, *Corporate Social Responsibility, eine (neue) Rechtspflicht für Publikumsgesellschaften?*, in: Robert Waldburger et al. (eds.), *Law & Economics: Festschrift für Peter Nobel zum 70. Geburtstag*, 157-181 (Bern: Stämpfli, 2015), at 171.

⁸² Forstmoser (fn. 81), at 171-172. See article 717 (the general duty of care of the board of directors), article 716a paragraph 1 (the inalienable tasks of the board of directors) and article 754 paragraph 1 (the general liability rule of the members of the board of directors and the management) of the Swiss Code of Obligations.

corporate due diligence obligation into national private law, namely company law. These questions shall be discussed very briefly in this contribution.

The first question is who within a company is supposed to conduct such supply chain due diligence. The organization of the company and the various tasks of its different bodies are typical questions regulated by company law. It is also rather obvious and therefore should be undisputed that this question is to be addressed by amending the statutory duties of the managing body of a company, of course not only for stock companies, but also for all other corporate forms, where such due diligence might be relevant. This competence question is not further specified in the text of the Responsible Business Initiative, as it is designed as a very broad constitutional provision that still needs to be implemented into national legislation. The Counter-Proposal, however, does so by amending the inalienable tasks of the board of directors of stock companies and limited liability companies.⁸³ What is needed in this regard, to speak in more technical terms, is thus a competence norm for the relevant company body, normally the management body of a company, which is embedded into national company law.

A second question is what exactly the requirements of such supply chain due diligence are as regards substance. Both the Responsible Business Initiative and the Counter-Proposal define the process of due diligence based on the concepts of the relevant international soft law standards such as the UN Guiding Principles or the OECD Guidelines.⁸⁴ This process thus includes the identification, prevention or mitigation and accounting for adverse impacts on human rights and the environment, broadly construed.⁸⁵ Several industry-driven initiatives, such as the UN Guiding Principles Reporting Framework, have emerged in order to assist companies with these issues.⁸⁶ As recent academic discussions on the content and scope of the required due diligence attest, it is however not at all evident how this concept should be implemented in practice.⁸⁷ It is therefore essential that the national legislator provides the necessary guidance in this regard. Moreover, it is further important to note that under both the Responsible Business Initiative and the Counter-Proposal, the scope of such due diligence relates not only to the business activities of the transnational company, but extends to the activities of controlled companies and companies with which the transnational company has business relationships.⁸⁸ According to the Responsible Business Initiative, control may also result through the exercise of power in a business relationship.⁸⁹ This approach has, however, been criticized in the legal literature for overshooting its target because it goes considerably further than the relevant international standards, namely to the extent a supply chain due diligence has to be conducted beyond an existing business

⁸³ See draft article 716a paragraph 1(5) and draft article 810 paragraph 2(4) of the Swiss Code of Obligations. See also the explanatory notes of the Legal Affairs Committee of the Swiss National Council (fn. 65), at 2-3.

⁸⁴ See draft article 101a paragraph 2(b) of the Swiss Federal Constitution; draft article 716a^{bis} paragraph 1 of the Swiss Code of Obligations. See also operations principles 17 to 21 of the UN Guiding Principles; chapter I section A paragraph 10 and paragraph 14 of the commentary on general policies of the OECD Guidelines.

⁸⁵ For the Responsible Business Initiative, see the explanatory notes of the Swiss Federal Council (fn. 64), at 6359, 6362-6364. For the Counter-Proposal, see the explanatory notes of the Legal Affairs Committee of the Swiss National Council (fn. 65), at 5-10.

⁸⁶ See the UN Guiding Principles Reporting Framework with implementation guidance, available online at <https://www.ungpreporting.org/framework-guidance> (last accessed 28 August 2018).

⁸⁷ See Jonathan Bonnitcha & Robert McCorquodale, *The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights*, *European Journal of International Law* 28 (3), 899-919 (2017); John Gerald Ruggie & John F. Shermann, III, *The Concept of "Due Diligence in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, *European Journal of International Law* 28 (3), 921-928 (2017); Jonathan Bonnitcha & Robert McCorquodale, *The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerald Ruggie and John F. Shermann, III*, *European Journal of International Law* 28 (3), 929-933 (2017).

⁸⁸ See draft article 101a paragraph 2(b) of the Swiss Federal Constitution; draft article 716a^{bis} paragraph 1 of the Swiss Code of Obligations.

⁸⁹ See draft article 101a paragraph 2(a) of the Swiss Federal Constitution. See also the explanatory notes of the Swiss Federal Council (fn. 64), at 6357-6358.

relationship.⁹⁰ The Counter-Proposal instead clarifies and imposes that a company does not control another company simply because the latter is economically dependent on that company.⁹¹ Besides the concept of controlled company, an implementation law should in my view also define when two companies are supposed to be in business relationships.

The third question is how a supply chain due diligence is generally supposed to happen from a procedural point of view. At first it should be noted that there is, in my view, no legitimate reason to expressly stress this due diligence duty in the context of the general duty of care, while other aspects – for example the duty of care of board members in connection with the determination of executive compensation – are not included in this norm.⁹² In my understanding, the main task of any implementing legislation on human rights and environment due diligence would arguably be to stipulate and specify certain general principles of such a due diligence process. According to one principle, which is in line with international soft law standards such as the UN Guiding Principles and the OECD Guidelines and contained in both the Responsible Business Initiative and the Counter-Proposal, the scope of due diligence must depend on the risks to human rights and the environment.⁹³ This also implies that the needs of small and medium-sized companies must always be taken into account.⁹⁴ The Counter-Proposal further clarifies that the management body is primarily concerned with the most severe adverse impacts on human rights and the environment and thereby has to respect the principle of appropriateness.⁹⁵ Another general principle, embodied in the Counter-Proposal, prescribes that the transnational company's ability to exert influence must be taken into account in the course of prevention and mitigation of potential or actual risks.⁹⁶

Corporate Liability and Tort Law

As it would arguably not be effective to provide for a mandatory human rights and environmental due diligence without any enforcement mechanism, both the Swiss Responsible Business Initiative and the Counter-Proposal of the Swiss House of Representatives contain certain principles and rules regarding corporate civil liability.⁹⁷ These principles and rules aim to hold transnational companies liable for human rights breaches and violations of environmental standards, which are conducted abroad, typically

⁹⁰ See Christine Kaufmann, *Menschen- und umweltrechtliche Sorgfaltsprüfung im internationalen Vergleich*, Aktuelle Juristische Praxis 26 (8), 967-977 (2017), at 976.

⁹¹ See draft article 55 paragraph 1^{er} of the Swiss Code of Obligations. See also the explanatory notes of the Legal Affairs Committee of the Swiss National Council (fn. 65), at 14-15.

⁹² On the proposed amendment to the fiduciary duties of the board of directors with regard to the determination of management compensation, see draft article 717 paragraph 1^{bis} of the Swiss Code of Obligations; Christoph B. Bühler, *Showdown in der Vergütungsfrage: Volksinitiative "gegen die Abzockerei" oder indirekter Gegenentwurf des Parlaments*, Schweizerische Zeitschrift für Gesellschafts- und Kapitalmarktrecht sowie Umstrukturierungen, online contribution 1 of 2012, available online at https://www.dike.ch/image/data/zeitschriften/GesKR/GesKR-Plus/Buehler_Onlinebeitrag.pdf (last accessed 28 August 2018), at 12. On a potential amendment of the fiduciary duties of the board of directors regarding corporate social responsibility, see Forstmoser (fn. 81), at 171-172.

⁹³ See draft article 101a paragraph 2(b) of the Swiss Federal Constitution; draft article 716a^{bis} paragraph 4 of the Swiss Code of Obligations. See also the explanatory notes of the Legal Affairs Committee of the Swiss National Council (fn. 65), at 8.

⁹⁴ See draft article 101a paragraph 2(b) of the Swiss Federal Constitution; draft article 716a^{bis} paragraph 4 of the Swiss Code of Obligations.

⁹⁵ See draft article 716a^{bis} paragraph 2 of the Swiss Code of Obligations. See also the explanatory notes of the Legal Affairs Committee of the Swiss National Council (fn. 65), at 8-9.

⁹⁶ See draft article 716a^{bis} paragraph 1 of the Swiss Code of Obligations. See also the explanatory notes of the Legal Affairs Committee of the Swiss National Council (fn. 65), at 7-8.

⁹⁷ See draft article 101a paragraph 2(c) of the Swiss Federal Constitution; draft article 55 paragraph 1^{bis} of the Swiss Code of Obligations.

in third-world countries.⁹⁸ While certain basic question as to the key characteristics of such corporate liability are no longer disputed, other questions, namely those in which the Responsible Business Initiative and the Counter-Proposal differ from each other, are still open. Gregor Geisser, for example, would favor an implementation of the Responsible Business Initiative by way of a separate tort law-based framework law in order to best meet the initiative's aim.⁹⁹ For one thing, today it seems largely recognized that corporate liability should be structured along the lines of the duty of care doctrine and not based on the doctrine of piercing the corporate veil.¹⁰⁰ For another thing, it seems widely acknowledged today that the liability of employers according to article 55 of the Swiss Code of Obligations should serve as the basis of this kind of corporate liability.¹⁰¹ Therefore, the transnational company is only liable if the other company is acting "in the course of business" or "in the performance of their official or business activities", a liability requirement that will not be discussed here.¹⁰² Also not discussed will be the potential liability of directors or managers of the transnational company and related problems.¹⁰³ There are still, however, a couple of important questions open for further discussion, which I briefly sketch out in the next few paragraphs.

The first question currently under discussion is for whom (i.e., for which foreign companies) would the transnational company be liable. While the Responsible Business Initiative wants to extend liability to all subsidiaries and economically controlled entities, the Counter-Proposal would like to extend such liability only to (legally controlled) subsidiaries and only when control is really exercised.¹⁰⁴ It is also not entirely clear in legal scholarship where the relevant lines of civil liability would need to be drawn with regard to these reform proposals, at least with regard to the Responsible Business Initiative.¹⁰⁵ It does, however, go without saying that it is very important to have clear-cut liability rules, which provide a high degree of foreseeability for the respective companies and other actors, whether and under what

⁹⁸ For the criminal liability of the parent company for human rights violations and other criminal acts by subsidiaries abroad, see for example Mark Pieth, *Die strafrechtliche Haftung der schweizerischen Muttergesellschaft für Straftaten in ausländischen Tochterunternehmen*, in: Roland Fankhauser et al. (eds.), *Das Zivilrecht und seine Durchsetzung: Festschrift für Professor Thomas Sutter-Somm*, 1135-1147 (Zurich: Schulthess, 2016) or Mark Pieth, *Die strafrechtliche Haftung für Menschenrechtsverletzungen im Ausland*, *Aktuelle Juristische Praxis* 26 (8), 1005-1014 (2017).

⁹⁹ Gregor Geisser, *Die Konzernverantwortungsinitiative: Darstellung, rechtliche Würdigung und mögliche Umsetzung*, *Aktuelle Juristische Praxis* 26 (8), 943-966 (2017), at 963-966.

¹⁰⁰ See Rolf H. Weber/Rainer Baisch, *Liability of Parent Companies for Human Rights Violations of Subsidiaries*, *European Business Law Review* 27 (5), 669-695 (2016), at 684-693; Geisser (fn. 99), at 953-954.

¹⁰¹ See Geisser (fn. 99), at 954-955. See also the different view of Andreas Bohrer, *Haftung schweizerischer Unternehmen für Menschenrechtsverletzungen im Ausland?*, *Schweizerische Zeitschrift für Gesellschafts- und Kapitalmarktrecht sowie Umstrukturierungen* 12 (3), 323-332 (2017), at 326-330 (arguing that the Responsible Business Initiative is based on article 56 of the Swiss Code of Obligations on the liability for animals).

¹⁰² See draft article 101a paragraph 2(c) of the Swiss Federal Constitution; draft article 55 paragraph 1^{bis} of the Swiss Code of Obligations. See also article 55 paragraph 1 of the Swiss Code of Obligations.

¹⁰³ See for example Rolf Weber, *Auf dem Weg zu einem neuen Konzept der Unternehmensverantwortlichkeit?*, *Schweizerische Juristen-Zeitung* 112 (2), 25-28 (2016), at 27 (arguing that due to their extensive supply chain due diligence obligations, the directors and managers of the transnational company would become *de facto* corporate bodies of the foreign companies with a corresponding liability exposure). See also draft articles 759a and 918a of the Swiss Code of Obligations and draft article 69a^{bis} of the Swiss Civil Code.

¹⁰⁴ See draft article 101a paragraphs 2(a) and 2(c) of the Swiss Federal Constitution; draft article 55 paragraphs 1^{bis} and 1^{ter} of the Swiss Code of Obligations. See also the explanatory notes of the Swiss Federal Council (fn. 64), at 6357-6358 and the explanatory notes of the Legal Affairs Committee of the Swiss National Council (fn. 65), at 14-15.

¹⁰⁵ See Geisser (fn. 99), at 951-952 (arguing that a transnational company may under the Responsible Business Initiative only be liable for a breach of the duty of care with regard to its own actions and for the supervision of subsidiaries or other controlled companies, but not beyond that for other violations along the supply chain); Christine Kaufmann, *Konzernverantwortungsinitiative: Grenzenlose Verantwortlichkeit?*, *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 88 (1), 45-54 (2016), at 52-53 (arguing that transnational companies would under the Responsible Business Initiative not only be liable for act and omissions of their group companies, but also for other factual relationships in which they exercise some sort of control).

conditions a transnational company could eventually be liable under a certain provision. It is thus very important for legal certainty and the rule of law to impose a clear and unambiguous liability regime on transnational companies.

A second question for further discussion is under what conditions and for which human rights and environmental abuses the transnational company would be liable. The Responsible Business Initiative, in a principle-based approach, refers only to internationally recognized human rights and international environmental standards.¹⁰⁶ It would thus be the task of the national legislator to define what “internationally recognized human rights” and “international environmental standards” are. While the initiative committee seeks quite a broad definition of these terms in their non-authoritative explanations to the initiative, the Swiss Federal Council was proposing a much narrower definition in its message to the Swiss Parliament.¹⁰⁷ The Counter-Proposal, in turn, specifies that the transnational company is only liable for the damage caused to life and limb or property and only for violations of international human rights and environmental standards, which are ratified by and thus binding for Switzerland.¹⁰⁸ The implementing private law in any case has to be clear in this respect as well.

The third question under discussion is when and under what circumstances the transnational company could be exempted from liability. Both the Responsible Business Initiative and the Counter-Proposal provide that the transnational company is not liable, if it can prove that it took all due care in conducting the required supply chain due diligence in order to avoid the loss or damage.¹⁰⁹ It has in particular been criticized in legal scholarship that it is not entirely clear how a transnational company is supposed to deliver such exonerating evidence in practice.¹¹⁰ In addition, the Counter-Proposal further provides that the transnational company is not liable in case it has not been able to influence the conduct of the controlled company in connection with the alleged infringements.¹¹¹ In any of those cases, it must be ensured that these exemptions and possibilities of exonerating evidence are well-defined and closely aligned with the due diligence mechanism as outlined in the preceding sub-section on supply chain due diligence and company law.

Conclusion

The main contribution of this working paper has been to provide a good overview on some of the most pressing research questions on corporate social responsibility and the law. These questions relate to the origins and further development of the international legal and policy framework, the link between regulatory theory and the existing hybrid legal architectures with regard to these issues and the potential implementation of a selection of those elements in national private law rules.

¹⁰⁶ See draft article 101a paragraphs 2(a) and 2(c) of the Swiss Federal Constitution.

¹⁰⁷ See in particular the explanatory notes of the Swiss Federal Council (fn. 64), at 6356-6357. See also Swiss Coalition for Corporate Justice, *The Initiative Text with Explanations*, available online at https://corporatejustice.ch/wp-content/uploads/2018/06/KVI_Factsheet_5_E.pdf (last accessed 28 August 2018); Verein Konzernverantwortungsinitiative, *Erläuterungen zur Eidgenössischen Volksinitiative „Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt“*, available online at https://konzern-initiative.ch/wp-content/uploads/2018/05/20170915_Erlaeuterungen-DE.pdf (last accessed 28 August 2016).

¹⁰⁸ See draft article 55 paragraphs 1^{bis} and draft article 716a paragraph 6 of the Swiss Code of Obligations. See also the explanatory notes of the Legal Affairs Committee of the Swiss National Council (fn. 65), at 9-10 (indicative list of international human rights and environmental standards ratified by Switzerland), 15 (short description of damage caused to life or limb and property).

¹⁰⁹ See draft article 101a paragraph 2(c) of the Swiss Federal Constitution; draft article 55 paragraph 1^{bis} of the Swiss Code of Obligations.

¹¹⁰ See Kaufmann (fn. 105), at 53.

¹¹¹ See draft article 55 paragraph 1^{bis} of the Swiss Code of Obligations. See also the explanatory notes of the Legal Affairs Committee of the Swiss National Council (fn. 65), at 15.

The international legal and policy framework on corporate social responsibility has steadily developed over the past 50 years or so. Today, it consists mainly of public codes of conduct that have been developed in international organizations and private codes of conduct developed by companies and other private actors, such as business organizations and civil society actors. The UN Guiding Principles, the OECD Guidelines and the ILO Tripartite Declaration I have described are arguably the most important international instruments when it comes to the protection of human rights, working conditions and the environment by a transnational company. Although all these instruments are in fact non-binding for transnational companies, they can still be considered some sort of international standard (without further qualifying their legal nature) with regard to these questions.

In my view, the existing hybrid legal architectures on different corporate social responsibility issues can be best explained by drawing on certain insights from regulatory theory. Using relevant concepts, theories and models from regulatory theory, I focus on three distinct mechanisms of how the government today facilitates and ultimately ensures the effectiveness of the international soft law standards on these issues. The concept of meta-regulation is for example very useful in explaining how the government monitors self-regulating arrangements of the industry, such as the private codes of conduct of transnational companies, and thereby indirectly regulates corporate social responsibility outcomes. Similarly, reflexive law theory might provide powerful explanations as to how international soft law standards are enforced in practice, just by focusing on the respective procedures, without dictating any particular outcome. Finally, the comply-or-explain model, which is widely used in corporate governance and financial supervision, is arguably an important regulatory tool, through which important policy goals – also with regard to the protection of human rights, working conditions and the environment – can be achieved indirectly through a transparency mechanism.

Probably the most intensively discussed private law-based legal strategies aimed at promoting and fostering corporate social responsibility include the enforcement of public and private codes of conduct by the means of contract law, as well as the implementation of supply chain due diligence and corporate liability instruments into national company and tort law. While the contract law approach certainly has some potential, it has at the same time quite obvious limitations, which were discussed in the relevant section of this paper. Therefore, further safeguarding instruments such as human rights and environmental due diligence and corporate civil liability come to the fore. Both of these instruments are at the core of the Swiss Responsible Business Initiative and the respective Counter-Proposal of the Swiss House of Representatives. Given the current developments in Switzerland in this regard, the most important similarities and differences of these two reform proposals have been discussed at a glance in this paper and some of the still open key questions have been addressed, without, of course, providing definitive answers to these questions.

Referring to international standards, regulatory theory and the Swiss Responsible Business Initiative, I show in this paper how the interaction between corporate social responsibility and the law has changed over time. In the past, we lived in a world governed by global self-regulation and non-binding international standards. More recently, international soft law standards have been upgraded to a system of quasi- or co-regulation with additional monitoring, enforcement and/or transparency mechanisms. Although the future is of course uncertain, it can be expected that private law-based legal strategies will further gain in importance and that contract, company and tort law might thus play an even more important role when it comes to corporate social responsibility.

As already observed by other researchers and scholars, the trend therefore clearly runs from self-regulation to regulation, from soft law to hard law, and from non-binding rules to binding rules. What however has not been pictured particularly clearly in previous research, at least in my perception, is that we are not coming from and are certainly not now in a regulatory vacuum when it comes to corporate social responsibility. Even in the past, the international legal and policy framework was not entirely self-regulating and the present case is also more of a system of quasi- or co-regulation with some sort of government involvement.

In this context, it not only has to be acknowledged, but also anticipated that national private law will play a more important role when it comes to the implementation of elements of corporate social responsibility in the future. Based on the analysis of this paper, however, I tend to conclude that while the contractual approach certainly has some potential with regard to the enforcement of public and private corporate social responsibility codes of conduct, both corporate and tort law are, in my view, probably the more appropriate instruments to address these – without question very important – issues of our time.

