

Corporate Social Responsibility, Regulation and Neoliberalism

A comparative study

*Noblesse oblige.*¹

1. Introduction

This essay is about the relation between Corporate Social Responsibility (CSR) and state regulation or ‘hard law’ by means of a comparison of the German and the UK approach. It seeks to assess the thesis that CSR cannot be used as an equal substitute for state regulation. Implicitly it will show how Germany and the UK use the concept differently to complement and indeed to replace state regulation.

CSR – originally a US-American term and concept² – has become prominent throughout the last two decades in Germany³. The UK – although being called a ‘CSR laggard’⁴ – has adopted CSR practices as early as in the 1980s. The Commission of the European Union has defined corporate social responsibility (CSR) 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”⁵. Other definitions – used by NGOs, companies, official bodies or academics – may vary slightly but they all have in common that they refer to social responsibilities that companies define and supervise autonomously and voluntarily⁶.

This essay will not discuss why companies should or should not adopt CSR policies. It will also not discuss what a CSR policy should contain. This essay steps in at an earlier point. It will

¹ De Lévis 86.

² Freeman and Hasnaoui 420; Hiß 289.

³ Hiß 287.

⁴ Aaronson 309.

⁵ COM (2011) 681 final.

⁶ Compare for an overview Crane, Matten and Spence 6-7 and Freeman and Hasnaoui 423. This essay will strictly stick to the understanding of CSR as voluntarily accepted responsibilities – opposed to mandatory state law or hard law or similar terms. In particular, this essay will abstain from the distinction between ‘implicit CSR’ and ‘explicit CSR’. Some authors consider ‘implicit CSR’ those responsibilities accepted by companies on a mandatory basis. This is misleading as Kinderman points out correctly (‘The Political Economy of CSR in Germany’ 7). It is as easy as this: either voluntary CSR or mandatory state provisions.

assess the right balance between state regulation and self-regulation by means of CSR. Why do states abstain from regulating certain areas of the law and instead leave it to companies to ‘auto-regulate’? Does and should CSR replace state regulation? What are the dangers if doing so? Can and should CSR serve to complement state regulation?

Within European legal systems the choice of Germany and the UK as the two compared objects is almost inevitable. Germany has always been trying to provide for high mandatory social standards. Although there might be a decrease in regulation⁷, Germany is still highly regulated – and incidentally restricts entrepreneurial freedom – in many fields of law⁸. This essay will have a closer look at these fields of law – with a focus on employment law – to assess how they create – mandatory – corporate responsibilities. This will be contrasted by an examination of the UK approach. The UK has the highest CSR score among large countries⁹ and is known as a liberal or lightly regulated market in Europe¹⁰.

2. CSR in Germany

This section seeks to explain three things – first how Germany developed as a regulated ‘welfare state’, secondly how Germany creates mandatory social standards for companies and thirdly the ‘attitude’ of the German law and politics towards CSR.

Although the term CSR is relatively new, comparable corporate conduct has been existent in Germany since the beginning of industrialisation. *Hiß* and *Kinderman* both mention a variety of entrepreneurs as examples for such conduct¹¹. And although not all of this early form of CSR

⁷ Ibid 294.

⁸ Ibid 283.

⁹ Gjølberg 614.

¹⁰ Kinderman ‘Free us up so we can be responsible’ 32; Kinderman ‘The Political Economy of CSR in Germany’ ii.

¹¹ Hiß mentions Werner von Siemens, Alfred Krupp and Ernst Abbe, all born in the first half of the 19th century, as three entrepreneurs who created social welfare for their employees that went beyond the mandatory standard. Abbe – a manager of the optician company Carl Zeiss – introduced such social benefits as reduction of working hours and the eight-hour day as well as a company health insurance scheme, paid holidays and compensations after leaving the company (Hiß 290). Kinderman mentions the Fuggers, Krupps and Thyssens as prominent early CSR actors in Germany and describes the *Notgemeinschaft Lennep* (emergency initiative Lennep) as an example for CSR in post-war Germany. The *Notgemeinschaft* was an initiative by local businessmen to provide for help

was entirely selfless, in a time, where the exploitation of workers in order to create the highest possible profit, it was far beyond what most entrepreneurs usually granted their workers¹².

This early form of CSR in Germany led eventually to mandatory state laws. The installation of mandatory state social security schemes under the era of Otto von Bismarck¹³ was the beginning of this shift from CSR to ‘institutionalised’ social responsibilities. At the end of the 19th century von Bismarck was responsible for introducing mandatory state health and accident insurance systems as well as a mandatory state pension scheme, all of whom had to be paid partly by employers¹⁴.

In essence these instruments have not changed. Since the birth of the Federal Republic of Germany in 1949 they have also been replenished by a variety of other legal instruments which set out mandatory standards for social responsibilities that companies have to adhere to. We will have a look at some examples to substantiate this assertion and to explain how the ensemble of these instruments created the idea of a ‘social market economy’.

The German constitution, the *Grundgesetz* (Basic Law), reads in Article 14 (2): ‘Property entails obligations. Its use shall also serve the public good.’¹⁵ The *Bundesverfassungsgericht* (Federal Constitutional Court) pointed out that this provision is a clear denial of a property system in which individual interests prevail unconditionally over public interests¹⁶. We do have to consider though that this provision does not entail a general *leitmotif* demanding that all private – business – actions must be judged by their contribution to public interests. The *Bundesverfassungsgericht* concluded from protocols that the purpose of this constitutional provision was mainly meant for real estate issues. Since the land is naturally limited, it should not serve only individual monetary means. Hence Article 14 (2)(2) of the *Grundgesetz* is a

to those suffering from the effects of the Second World War (Kinderman ‘The Political Economy of CSR in Germany’ 8-9.).

¹² Hiß 291.

¹³ First German chancellor (1871-90).

¹⁴ Ibid 291.

¹⁵ *Bundesministerium der Justiz und für Verbraucherschutz* (Federal Ministry for Justice and Consumer Protection), Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 21 July 2010 (Federal Law Gazette I p. 944). <www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0079> accessed 12 April 2013.

¹⁶ BVerfGE 21, 73, 83.

reminder – mainly to the legislator – to consider public interests when developing property laws.

The field of law that is arguably most influenced by social concerns is employment law. A variety of legal instruments binds employers to rules which protect employees. This protection is not only meant to prevent from discriminatory actions¹⁷ but is deliberately designed to make employers consider social issues when taking decisions which affect their employees. This has become even part of the terminology in German employment law or more precisely in German dismissal protection law. A dismissal is generally void if it is ‘socially unjustified’¹⁸. The social focus of German employment law is also more than obvious when it comes to redundancy dismissals. In such a redundancy situation the employer has to provide for a ‘social selection’. This means that where a redundancy requires the employer to choose the remaining employees, he has to consider years of service, age, obligations to pay maintenance and disabilities in his selection. Otherwise the dismissal would be void¹⁹.

Collective labour law provides for some more examples of institutionalised and mandatory corporate responsibility. The constitutional guarantee to form trade unions and the constitutional provision that declares ‘[a]greements that restrict or impair this right shall be null and void’ are only two of those examples²⁰. The right to elect a *Betriebsrat* (works council) which – by means of a *Betriebsvereinbarung* (works council agreements) – can legally bind the employer to provide for certain working standards, is just another example²¹. But the most striking feature of collective labour law is arguably the uniquely German ‘co-determination’. By means of three different legislative acts²², companies of a certain size have to fill their supervisory board partly with employees. This is unique insofar as certain decisions of the management board in a company can only be made with the consent of the supervisory board and the employees can therefore participate in truly entrepreneurial decision-making

¹⁷ As it is the case for instance in the US-American employment law.

¹⁸ *Kündigungsschutzgesetz* (Dismissal Protection Act), s 1 (1).

¹⁹ *Kündigungsschutzgesetz*, s 1 (3).

²⁰ *Grundgesetz*, art 9 (3).

²¹ *Betriebsverfassungsgesetz* (Works Council Act), s 77 (2).

²² *Drittelbeteiligungsgesetz* (Third Participation Act), *Mitbestimmungsgesetz* (Codetermination Act), *Montan-Mitbestimmungsgesetz* (Coal and Steel Codetermination Act).

procedures. Therefore *Kinderman* considers this – with drastic words – as ‘symbolically if not actually expropriating capital’²³.

One could mention that the above-mentioned examples are not more than that – examples. And that they are only relicts of a time when Germany as a social market economy existed and that these times are over and Germany is as liberal nowadays as other countries in the EU. But rankings suggest that Germany is still among the most regulative countries in Europe. A study by the German *Institut der deutschen Wirtschaft* or IW (Institute of the German Economy) ranks Germany sixth of 22 OECD countries²⁴.

This still leaves the question if Germany sees CSR fit to deal with political social issues. Both *Kinderman* and *Hiß* have observed a rise of CSR activities in Germany in the last 20 years. One of the most obvious explanations – provided by both – is an ongoing de-regulation in Germany in the same time. The most prominent example for this is the Agenda 2010 – a systematic approach by former chancellor Schröder’s government in 2002 to cut back welfare state institutions and to create a more liberal economy²⁵. Surprisingly enough, CSR was not a topic discussed or mentioned officially in the Agenda 2010²⁶.

And since the German law leaves us with no explicit comment on CSR, our conclusion on the relation and dependence of CSR and regulation in Germany has to be deducted as follows: CSR has been a feature of German economy since the beginning of the industrialisation, Otto von Bismarck and post-war governments have provided for high-mandatory standards in terms of corporate responsibilities. These high standards did not leave much space for voluntary CSR but a liberalisation and de-regulation of many areas of law – not least enhanced and driven by economic actors²⁷ – have provided for spaces where CSR systems could develop. These are not

²³ *Kinderman* ‘The Political Economy of CSR in Germany’ 14.

²⁴ *Ernste and Hardege* 820 making a clear case for de-regulation in Germany in accordance with the agenda of the IW – a lobbyist institution for liberal politics.

²⁵ *Braunthal* 7.

²⁶ *Kinderman* ,The Political Economy of CSR in Germany’ 14.

²⁷ *Hiß* 295.

complementary though because the level of social protection they provide is at best a ‘zero-sum game’. At worst it is a loss of responsibilities by companies²⁸.

3. CSR in the UK

This section will adapt the same three questions as the above section and will answer them for the UK. First it will show the development of the UK as a (neo-) liberal country. Secondly it will assert the thesis that the UK is today one of the most liberal countries in Europe – by means of examples from the UK jurisdiction. And thirdly it will examine how liberalism in the UK enhances or impedes CSR practices.

Modern liberalism or neo-liberalism in the UK is closely linked with former Prime Minister Margaret Thatcher. The neo-liberal idea – in its economic dimension – aimed at creating an economic system where the state would intervene as little as possible in the economy. The state must not ‘dictate to free individuals how to dispose of their property, regulate a free-market economy or interfere with the God-given right to make profits and amass personal wealth’²⁹.

Neo-liberalism has not always been the political ideal in the UK. British politics have long been influenced by the doctrines of John Maynard Keynes, an economist from Cambridge, who dreamt of strong state that would spare the economy from the depression of the 1930s³⁰. And the former Prime Minister Winston Churchill³¹ longed for a ‘bonfire of controls’ in the aftermath of the Second World War³². Only when a crisis caught the UK economy end of the 1960s, neo-liberal politicians saw their opportunity³³. Consequentially Thatcher’s terms in

²⁸ Ibid 299.

²⁹ Hall 706. Or how Margaret Thatcher herself put it: ‘Let me give you my vision: a man’s right to work as he will, to spend what he earns, to own property, to have the State as servant not as master: these are the British inheritance. They are the essence of a free country and on that freedom all our other freedoms depend.’ (Hall 706).

³⁰ Harvey 21.

³¹ UK Prime Minister from 1940-45 and 1951-55.

³² Hall 707.

³³ Hall 707.

office³⁴ were a time of privatisation of state companies³⁵, cut-backs in of welfare state institutions³⁶ and de-regulation.

When looking for examples to illustrate the fact that the UK is liberal country – especially in comparison to the above described situation in Germany – we just need to compare the legal situation with the above-mentioned German examples. The fact alone that the UK jurisdiction does not dispose of such prominent – yet practically more symbolic – provisions as Article 14 (2) *Grundgesetz* may be explained with the non-existence of a single constitutional document in the UK. But if we look into employment law we will find that the Employment Rights Act 1996 neither provides for terminological nor for practical social standards as in the German law.

But neo-liberal politics and especially Margaret Thatcher's mark is most notable in collective labour law. It is not the fact alone that the UK jurisdiction does not provide for a statutory works council system or co-determination as the German law does. Many states do not provide for works councils and the German co-determination is unique. But the way in which Margaret Thatcher has changed the law regulating the labour relations is characteristic for neo-liberalism. *Harvey* puts it in very precise words by describing that 'the neoliberal state is necessarily hostile to all forms of social solidarity that put restraints on capital accumulation'³⁷. Therefore we can consider Margaret Thatcher's legislative amendments to make trade unions liable for unlawful industrial action and to have ballots before such actions as detrimental for the right to strike and hence a compelling example for neoliberal politics³⁸.

And here one could also argue that these are only single pictures out of a bigger frame. But if we focus on the above-mentioned³⁹ ranking of regulated countries, we clearly see that the UK is one the most de-regulated countries. Among the 22 countries that formed part of the study,

³⁴ Margaret Thatcher ruled the United Kingdom as Prime Minister from 1979 to 1990.

³⁵ Symbolically represented by the privatisation of British Telecom (Prasad 121).

³⁶ Such as the council house sales described by Prasad 136.

³⁷ Harvey 75.

³⁸ Newman 10.

³⁹ Text to n 24.

the UK finished third from bottom scoring only 26 out of 100 possible ‘regulation points’ (half of the German result)⁴⁰.

But how does UK neo-liberalism affect CSR? Just as in Germany, there is no direct legal framework to define and regulate CSR⁴¹, which is more than logical considering that CSR is a merely voluntary concept. David Cameron, the current UK Prime Minister, defined CSR as ‘deregulation in exchange for responsibility’⁴². This statement supports *Kinderman*’s thesis that CSR is a result of neo-liberalism. He is also able to prove this thesis by having a look at the number of members in BITC⁴³, UK’s biggest business association supporting CSR in UK’s business environment⁴⁴.

We conclude that neo-liberalism in the UK, mainly a product of the Thatcher era, is meant to and able to enhance CSR systems but the price for this is a lower level of mandatory provisions. The next chapter will assert the initial thesis that regulation should prevail over CSR.

4. Conclusion

As we have seen both in Germany and the UK, CSR is a product of de-regulation. In Germany, although still densely regulated, de-regulation and liberalism in the last 20 years led to a rise of CSR⁴⁵. The same applies for the UK, although the UK has had a liberal system and – almost subsequently – a higher level of CSR for a longer period before⁴⁶. Our first conclusion – not very surprisingly – is that liberal systems enhance CSR while highly regulated countries tend to have a lower level of CSR practises⁴⁷.

⁴⁰ Ernste und Hardegge 820.

⁴¹ Freeman and Hasnaoui 426.

⁴² Kinderman ‘Free us up so we can be responsible’ 47.

⁴³ Business in the Community.

⁴⁴ Kinderman ‘Free us up so we can be responsible’ 33.

⁴⁵ Hiß 288; Kinderman ‘The Political Economy of CSR in Germany’ 12 alleging that ‘the moves towards the Liberal Market since the 1990s have increased both the opportunities and the inclinations of actors to embrace CR.’

⁴⁶ Kinderman ‘Free us up so we can be responsible’ 33; Kinderman ‘The Political Economy of CSR in Germany’

⁴⁷ This is also very important to notice if one intends to examine the CSR performance of companies on an international comparative basis. Whole for instance in the USA workplace safety would be a topic of CSR, it is

This leads almost inevitably to the question if a liberally regulated system with high CSR scores is better than a system with highly regulated standards and low CSR performance. Although there might be allegations that CSR leads to higher obedience because CSR standards are *deliberately* set standards and CSR systems might be more flexible and more innovative, I have two basic objections. First, as we have seen in the German example, the level of CSR replacing mandatory norms arguably does not reach the level of the former regulated standards and possibly even stays below the standards⁴⁸. Secondly, every state who de-regulates in exchange for CSR is aware of the fact that CSR is voluntary and therefore cannot be demanded. Hard law is called hard law for a reason. Because it is strict and it has means and methods to be enforced. CSR on the other side might be abolished by companies as soon as economic circumstances ask for this⁴⁹.

If social responsibilities of companies – mandatory or voluntarily accepted – are ‘not simply charitable acts, but rather [...] legitimate expectations of citizens’⁵⁰, then consequently these expectations have to be defined democratically and this is only possible by the elected representatives of the people. And the instrument to do so is nothing but a law. Nobody would ever argue that – for instance – it can be left to a driver to decide by himself whether or not to drive drunk. Why should regulation in the economy which is affecting peoples’ life on a day-to-day basis immensely be different?

Now we have to acknowledge that liberal governments are – mostly – democratically elected and therefore the liberal economy is democratically justified. And there is no problem with a government that simply acknowledges the fact to abstain from regulation when there are good

regulated by hard law in Germany (Kinderman ‘The Political Economy of CSR in Germany’ 12). Still somebody who would only focus on CSR practices, would assume that US-American companies provide for better workplace safety. Hence it is important not to forget to consider hard law as well when assessing CSR standards in certain countries.

⁴⁸ Hiß 299. It has to be noticed that this thesis is not beyond doubt but – considering the restricted scope of this essay – has to stay as vague as it is presented here. In order to fully assert the thesis, a comparison of all de-regulated areas and all replacing CSR practices would be necessary which this essay simply cannot provide.

⁴⁹ Regulation on the other hand can provide for standards that simply cannot be negotiated. It is as if a country would say: ‘If you are not able to run your business profitably with the mandatory norms we demand, than you just can’t do it.’

⁵⁰ Amaeshi, Nndodim and Osuji 99.

reasons for that. The situation is inherently more complicated when states simply absolve itself of the obligation to manage the state affairs by pointing out the possibility that companies could *instead* define their own responsibilities.

A very prominent example for this is the referral to ‘consumer power’ by state authorities. The EU Commission in its Consumer Policy Strategy intends to put the consumer in the ‘driving seat’ in order to influence business decision and to strengthen economy⁵¹. The problem about these expectations is that they overestimate the consumer power because it presupposes consumer awareness which all too often might stop with a glance at the price tag. And on the other side companies will often only assume CSR policies if they also entail a minimum of PR advantages.

All these reasons ask for regulation instead of CSR. But Globalisation is the reason why state regulation might sometimes fail to solve economic issues. When companies can escape mandatory regulations by simply changing their seat or headquarters, it cannot be denied that CSR is better than nothing. This becomes most notable in corporate tax law, since multinationals increasingly take advantage of the almost indefinite opportunities to slash their tax rates by moving headquarters to countries with lower corporate tax rates and thereby evading their arguably most important contribution to society – the financial contribution in order to maintain social state functions⁵². The often-heard term of ‘uncompetitive tax systems’ is highly cynical because increasing tax competition - and an inevitable downward spiral – is not at all desirable.

The underlying question of all the discussed is the one that confronts liberalism and social market economies. In a social market economy the society is in the main focus and business actions are always – at least *inter alia* – judged by their contribution to society. In liberal countries this is inherently different. It is not the society but the individual and his freedoms that are in the main focus of the state. A liberal system *would* indeed argue that CSR is a merely

⁵¹ COM (2007) 99 final.

⁵² Houlder, Boland and Politi focussing on the Irish approach to attract multinationals from the US with the Irish corporate tax of 12.5 percent compared to the US-American 32.8 percent.

charitable act and that the society is in no position to expect it. We need to ask ourselves if we agree with Ms Thatcher's famous – yet alarming – words:

*There is no such thing as the society. There is only the individual and his family.*⁵³

⁵³ Hall 707; Harvey 23.

Bibliography

1. Books and Articles

Aaronson S, 'Corporate Responsibility in the Global Village: The British Role Model and the American Laggard' (2003) 3 *Business and Society Review* 309.

Amaeshi K, Nnodim P and Osuji O, *Corporate Social Responsibility, Entrepreneurship, and Innovation* (Routledge 2013).

Braunthal G, 'The SPD, the Welfare State and Agenda 2010' (2003) 21 *German Politics and Society* 1.

Crane A, Matten D and Spence L, *Corporate Social Responsibility – Readings and cases in a global context* (2nd edn, Routledge 2008).

Ernste D and Hardege S, 'Regulierung und Beschäftigung – eine empirische Wirkungsanalyse für 22 OECD-Länder' (2008) 4 *Wirtschaftspolitische Blätter* 819.

Freeman I and Hasnaoui A, 'The Meaning of Corporate Social Responsibility: The Vision of Four Nations' (2011) 100 *Journal of Business Ethics* 419.

Gjølberg M, 'The Origin of Corporate Social Responsibility: Global Forces or National Legacies' (2009) 7 *Socio-Economic Review* 605.

Harvey D, *A Brief History of Neoliberalism* (Oxford University Press 2005).

Hall S, 'The Neo-Liberal Revolution' (2011) 6 Cultural Studies 705.

Hiß S, 'Corporate Social Responsibility – Innovation oder Tradition? – Zum Wandel der gesellschaftlichen Verantwortung in Deutschland' (2009) 10/3 Zeitschrift für Wirtschafts- und Unternehmensethik 287.

Houlder V, Boland V and Politi J, 'Tax avoidance: The Irish inversion' *Financial Times* (London, 29 April 2014) <www.ft.com/intl/cms/s/0/d9b4fd34-ca3f-11e3-8a31-00144feabdc0.html#axzz30MN4UNye> accessed 30 April 2014.

Irvin G, 'Inequality and Recession in Britain and the USA' (2011) 1 Development and Change 154.

Kinderman D, "'Free us up so we can be responsible!'" The co-evolution of Corporate Social Responsibility and neo-liberalism in the UK, 1977-2010' (2012) 10 Socio-Economic Review 29.

Kinderman D, 'The Political Economy of Corporate Social Responsibility in Germany, 1995-2008 – Part Five of the Germany in Global Economic Governance Series' (2008) 5 Mario Einaudi Center for International Studies – Working Paper Series.

De Lévis P, *Maximes, Perceptes et Réflexions – Sur différents sujets de Morale et de Politique* (5th edn, Charles Gosselin 1825).

Matten D and Moon J, "'Implicit" and "Explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility' (2008) 2 Academy of Management Review 404.

Newman D, 'Perspective: The impact of the Thatcher Government on the Workplace.' (2013)
5 Employers Law 10.

Prasad M, *The politics of free markets – the rise of neoliberal economic policies in Britain, France, German and the United States* (The University of Chicago Press 2006).

2. Cases

BverfGE 21, 73.

3. Government inquiries and reports

Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A renewed EU strategy 2011-14 for Corporate Social Responsibility' COM (2011) 681 final.

Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU Consumer Policy Strategy 2007-13 – Empowering consumers, enhancing their welfare, effectively protecting them' COM (2007) 99 final.