

# Responsible Corporate Governance

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The Copenhagen negotiations will be concluded by the time this issue of *European Company Law* comes out. At the time of writing (November 2009), the outcome is highly uncertain. United Kingdom's Foreign Secretary David Miliband has declared that we cannot cope with a four degree world, as a comment to the danger of the Copenhagen

negotiations not ending in a binding and sufficiently ambitious agreement. The danger is, of course, not just that of reaching a four degree world if enough is not done, but that of then having reached the point of no return, where nature's CO<sub>2</sub> cycle goes completely out of control.

What has that got to do with company law? Well, probably quite a lot – or rather it should have. As concerns the contribution of companies, the IPCC has stated that: 'Even though a broad range of cost-effective [greenhouse gas] mitigation technologies exist, a variety of [...] barriers prevent their full realization in both developed and developing countries.' Why is this so? Probably for a whole range of reasons – among them the shareholder primacy drive, the externalization of the environmental consequences of companies' production and the use and discarding of their products, and the fragmentation of responsibility for these consequences. A number of regulatory and other initiatives are set into place to attempt to make companies sustainable, but as long as the core, the internal decision-making in companies, is ignored in this process, the effect of what we may call the external regulation will tend to be limited and the scope for 'greenwashing' wide-open. If we are to achieve real change, we must dare to go into the core of company law and not just discuss external support measures, such as reporting requirements. Support measures will tend to be meaningless bureaucracy unless the core is in place. The chasm both in terms of regulatory focus and means and in terms of dialogue and understanding between the mainstream corporate governance debate and much of that which can be placed under the umbrella of so-called corporate social responsibility illustrates

my point – and the problem. Business seems to desire this chasm, through its regulatory capture of defining CSR as a voluntary activity – a definition to which the EU has until very recently adhered whole heartedly. However, in a press release of 11 November 2009, the then Swedish Presidency and the incoming Spanish Presidency do seem to give a first indication of a policy shift. It will be interesting to see what – if anything – happens in the promised follow-up conference in March 2010.

What can be done from a company law perspective? In my view, it is time to propose a good old-fashioned merger between mainstream corporate governance and CSR – a fusion of the best of both worlds. The potential synergy effects should not be underestimated. We can name the new enterprise 'Responsible Corporate Governance'. As in many successful mergers, some people will have to be let go. It will be difficult to find meaningful employment in Responsible Corporate Governance for those from the old CSR who are experts in greenwashing. Nor will the other extreme fit in: those who think that all companies should be run on a charitable non-profit basis and who believe profit-seeking is evil. The old mainstream Corporate Governance crew will suffer cut-downs as well: the fundamentalist shareholder primacy guys, those who believe narrow-focused, short-term shareholder profit is *the* guideline for all companies, will not be of much use in our new Responsible Corporate Governance.

In Responsible Corporate Governance, the guideline that will be sought introduced into all companies will be that of seeking profit within the framework of a sustainable development: a balancing of economic, social and environmental interests with the recognition that this has to be done within the non-negotiable ecological limits of our planet. Responsible Corporate Governance will thus be able to contribute meaningfully to the debate as to how companies should be governed – and as to what kind of regulatory initiatives as well as in-house incentives (in the individual company) are needed to achieve progress. Responsible Corporate Governance would be in line with the finally ratified Lisbon Treaty, with its enhanced focus on global sustainable development as a Union goal and its strengthening of the operationalization of that goal in Article 6 EC, which requires the integration of environmental protection requirements in all areas.

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