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**THE TRANSPOSITION OF THE CSR DIRECTIVE
INTO GERMAN COMMERCIAL LAW.
THE PROMOTION OF CORPORATE SOCIAL
RESPONSIBILITY BY MEANS OF NON-FINANCIAL
CORPORATE REPORTING**

ABSTRACT

Through the “Act to Strengthen the Non-financial Reporting by Corporations in their Management and Group Management Reports” (*Gesetz zur Stärkung der nichtfinanziellen Berichterstattung der Unternehmen in ihren Lage- und Konzernlageberichten*) (CSR Directive Transposition Act, CSR-RUG) of 11 April 2017¹, the German Bundestag implemented Directive 2014/95/EU (“CSR Directive”)² into German law. Following the European impetus, the CSR-RUG enriches the traditional repertoire of forms of action under environmental law by a further instrument. Already the regulatory context gives an idea of its atypical nature: The centrepiece of the CSR-RUG is the amendment of and addition to the Third Book of the German Commercial Code (*Handelsgesetzbuch*, “HGB”), which deals with the “trading books” of undertakings, i.e., accounting and reporting requirements. Since the reporting year 2017, large capital market-oriented corporations must report extensively within the framework of their annual management reports on their activities and effects in certain areas of “Corporate Social Responsibility”. This also includes environmental matters. The transparency and publicity this entails is intended to generate positive stimuli for more responsible, sustained and not least of all environmentally friendly entrepreneurial action. Following a brief presentation of the European legal bases and their implementation in Germany (1.), we will classify the provisions within the underlying concept of Corporate Social Responsibility (2.) and analyse and systemise the governance effects of non-financial reporting (3.). A few remarks on selected aspects of the chosen approach and its implementation (4.) as well as an outlook summarising our conclusions (5.) will

¹ Federal Law Gazette, Part I 2017, 802 et seq.

² Directive 2014/95/EU of the European Parliament and of the Council 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ EU No. L 330, p. 1.

complete this article. By detailing the German approach to transposing the CSR Directive, this paper intends to provide an example of the challenges member state legislators face when complying with modern governance concepts such as Corporate Social Responsibility by way of non-financial reporting obligations.

KEYWORDS: Corporate Social Responsibility; Environmental Protection, Directive 2014/95/EU, CSR-RUG, Instrument of Environment Law.

SUMMARY: 1. Subject matter and content of non-financial reporting – 1.1 Background in European law – 1.2 Implementation by the CSR-RUG – 2. Background: Corporate Social Responsibility and environmental protection – 2. 1. Idea of Corporate Social Responsibility – 2.2. Environmental protection as a central concern of Corporate Social Responsibility – 3. Non-financial reporting duties as a novel governance instrument of environmental law – 3.1. (Desired) effect of non-financial reporting duties – 3.2. Inclusion in the instrumental systematics of environmental law – 4. Points of criticism and open questions – 4.1. Inadequate definitiveness of the statutory provision – 4.2. Unclear requirements as to the “policies” for environmental and social issues – 4. 3. Connection of the reporting duty to the business relevance – 5. Summary and outlook

1. Subject Matter and Content of non-Financial Reporting

1. 1. Background in European law

The initiative to achieve ecological, social and other non-commercial goals by way of corporate reporting originated in Brussels. The Commission announced by way of a Communication in the year 2011 that it intended to strengthen the social responsibility of undertakings³. As the method of choice, it identified among others the disclosure of social and ecological information on the business activities of large undertakings⁴.

A prominent result of this programmatic goal is the CSR Directive⁵. The CSR Directive amends Directive 2013/34/EU (“Accounting Directive”)⁶ and

³ Communication of the Commission of 25 October 2011, A new EU Strategy 2011-2014 for Corporate Social Responsibility (CSR), COM(2011) 681 final.

⁴ Communication of the Commission of 25 October 2011, A new EU Strategy 2011-2014 for Corporate Social Responsibility (CSR), COM(2011) 681 final, p. 14.

⁵ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ EU No. L 330, p. 1.

⁶ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament

requires the member states to expand existing reporting duties of large undertakings by «a non-financial statement containing information [...], necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters» (art. 19a Accounting Directive). What is to be understood by this in view of environmental issues is explained in Recital 7 CSR Directive:

«Where undertakings are required to prepare a non-financial statement, that statement should contain, as regards environmental matters, details of the current and foreseeable impacts of the undertaking's operations on the environment and, as appropriate, health and safety, the use of renewable and/or non-renewable energy, green-house gas emissions, water use and air pollution».

With a view to the “relevant, useful and comparable disclosure of non-financial information by undertakings”, the Commission published non-binding guidelines in accordance with art. 2 CSR Directive to further the practical implementation of the new reporting duties (“CSR Guidelines”)⁷.

1.2. Implementation by the CSR-RUG

The detailed provisions of the CSR Directive leave only little leeway for the member states' transposition into national law. Thus, the new secs. 289b to 289e as well as secs. 315b to 315d HGB, implementing the non-financial reporting duties into the German commercial and corporate law, largely constitute an “identical” transposition which may serve to exemplify the goals and mechanisms of the CSR Directive:⁸

a) Undertakings subject to the obligations

The extended reporting duties, which apply for the first time to fiscal years beginning after 31 December 2016, are limited according to sec. 289b para. 1 HGB to corporations, cooperatives as well as limited liability commercial partnerships within the meaning of sec. 264a HGB, which cumula-

and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ EU No. L 182, p. 19.

⁷ Communication of the Commission of 5 July 2017, Guidelines on non-financial reporting (methodology for reporting non-financial information), OJ EU No. C 215, p. 1); see in more detail *Mock*, *Der Betrieb* 2017, 2144 et seq.

⁸ Regarding the deviations of certain points from the minimum standards of the Directive as well as the following on the whole, see *Kajüter*, *Der Betrieb* 2017, 617 et seq.; *Seibt*, *Der Betrieb* 2016, 2707 et seq.

tively (i) qualify as “large” within the meaning of sec. 267 para. 3 sentence 1 HGB (i.e. fulfil at least two of the following criteria: balance-sheet sum of € 20,000,000, annual sales of € 40,000,000, on annual average 250 employees), (ii) are capital market-oriented within the meaning of sec. 264d HGB (use of an organized market for their own securities), (iii) and employ more than 500 people on average per year. Large credit institutions and insurance companies are obliged to perform non-financial reporting regardless of their capital market orientation⁹. At the beginning of the year 2018, 522 German corporations were obliged to report, more than half of which being banks and insurance companies¹⁰.

The German legislator refrained from extending the scope of application of the reporting duty beyond the CSR Directive to corporations below these thresholds in order to spare small and medium-sized enterprises the additional administrative and financial burdens imposed by the reporting duty¹¹.

Consistent with the systematic structure of the HGB, secs. 289b et seq. HGB apply only to the (individual) management report of a corporation. Sections 315b et seq. HGB transfer the duties to the group management reports of parent companies. Section 289b para. 2 HGB therefore exempts subsidiaries which are included in the group management report of the parent company¹².
b) Form and subject matter of the reporting duty.

Non-financial reporting relates within the regulatory system and formally to the management report, which constitutes a separate reporting instrument apart from the annual financial statements (sec. 264 HGB). The management report contains information on the course of business as well as the expected developments, including significant opportunities and risks (sec. 289 HGB)¹³.

⁹ *Kirsch*, in: Hofbauer/Kupsch (eds.), Rechnungslegung, 89. Akt. 2018, § 289b rec. 16 et seq.; *Lerchenmüller*, in: Beck’scher Onlinekommentar HGB, Häublein/Hoffmann/Theinert, 19th ed. 2018, § 289b, rec. 6.

¹⁰ Börsen-Zeitung No. 63 of 20 March 2018, p. 1.

¹¹ As stated in the reasons for the government draft, Parliamentary Document 18/9982, p. 44; regarding the relevance of the CSR for small and medium-sized enterprises, see *Fischer/Neubeck*, in: HGB-Jahresabschluss, 14th ed. 2018, TEIL 1 Systematischer Wegweiser, rec. 263.

¹² The requirements of secs. 315b et seq. HGB correspond to those in secs. 289b et seq. HGB, so that the following will for reasons of readability refer only to the (individual) management report and the respective provisions. The same applies to art. 19a and 29a Accounting Directive. Unless expressly stated otherwise, the explanations apply likewise to the group management report. The term “corporation” refers in the following both to an individual company obliged to report and to a group obliged to report.

¹³ Regarding the functions of the management report in general, see *Tesch*, Nichtfinanzielle Leistungsindikatoren im Lagebericht, in: Freidank/Müller/Wulf (eds.), Controlling und Rechnungslegung, p. 301 (302).

Corporations affected by the CSR-RUG can either “scatter” their “non-financial statement” (sec. 289c HGB) over the management report, assigned according to topic, or bundle it in a separate section. According to sec. 289b para. 3 No. 2 HGB an entirely separate “non-financial report” is also admissible, provided it is published together with the management report in the Federal Gazette (sec. 325 HGB) or on the website of the company within four months of the balance sheet date, and the management report refers to it¹⁴.

The non-financial statement must, according to sec. 289c para. 2 HGB, contain information at least on the following five topics: environmental, employee and social issues, respect for human rights, and anti-corruption issues. To more precisely specify the environmental aspects of relevance in the statement, sec. 289c para. 2 No. 1 HGB refers by way of example to the items named in Recital 7 CSR Directive quoted above (green-house gas emissions, water use, air pollution, the use of energy, biological diversity)¹⁵. The CSR Guidelines further extend the catalogue of possible environmental goals: material disclosures on pollution prevention and control; environmental impact from energy use; direct and indirect atmospheric emissions; use and protection of natural resources (e.g. water, land); waste management; environmental impacts from transportation or from the use and disposal of products and services; development of green products and services¹⁶.

c) Required disclosures

The necessary content of the non-financial declaration is determined by sec. 289c para. 3 HGB. According to this provision, information is to be disclosed on the aspects named in para. 2 which — in accordance with art. 19a Accounting Directive as amended by the CSR Directive — fulfil a two-tier relevance criterion, (i) mainly those necessary to understand the course of business, the business results or the situation of the company *as well as* (ii) to understand the effects on the non-financial aspects. In detail, a non-exhaustive (“including”) list names the following:

1. description of the policies pursued by the corporation and due diligence processes implemented,
2. outcome of those policies,
3. the principal risks related to those matters of the corporation’s

¹⁴ In detail *Mock*, in: Hachmeister/Kahle/Mock/Schüppen (eds.), Bilanzrecht, § 289b, rec. 53 et seq.

¹⁵ The German legislator names in the reasons for the law the aspects of health, environmental safety, ground pollution as well as the global environmental and climate goals, Parliamentary Document 18/9982, p. 47.

¹⁶ CSR Guidelines, point 4.6.

operations which are likely to cause adverse impacts on the non-financial aspects named in para. 2, and how the corporation manages these risks,

4. the principal risks linked to the corporation's operations, its products and services which are very likely to cause adverse impacts on the aspects named in para. 2, insofar as the information is significant and the reporting on these risks is proportionate, and how the corporation manages those risks,

5. the most significant non-financial performance indicators relevant to the business activities,

6. references to and explanations of amounts reported in the annual financial statements, to the extent necessary to understand.

Sec. 289d HGB provides that corporations required to report may be guided entirely or partly by already existing "frameworks" for voluntary self-commitment when drafting the non-financial statement¹⁷. These could be, for example, the OECD Guidelines for Multinational Enterprises, the GRI G4 Sustainability Reporting Guidelines, the European environmental management and audit system EMAS or the Global Compact of the United Nations¹⁸. The corporation must state whether it applied such framework and, if so, why it did not do so. The use of a framework, however, does not suspend the duty to discuss all aspects necessary under sec. 289c para. 3 HGB where these are not (completely) covered by the respective framework¹⁹. In this case, the non-financial statement must provide additional information going beyond the framework concerned. The CSR Guidelines give examples of environmentally relevant "performance indicators" to be taken into consideration: Overall energy performance and improvements in energy performance; energy consumption from non-renewable sources and energy intensity; green-house gas emissions and emissions of other pollutants; extraction of natural resources; impacts and dependences on natural capital and biodiversity; waste management²⁰.

The mandatory content of the non-financial statement reveals a hybrid nature already laid out in the CSR Directive: On the one hand, the non-financial statement is not completely independent from the business information and accounting function of the reporting system under commercial law.

¹⁷ See in detail *Paetzmann* in: Haufe (ed.), HGB Bilanz Kommentar, 8th ed. 2017, § 289d, rec. 1 et seq.

¹⁸ See Parliamentary Document 18/9982, p. 52; see also CSR Guidelines, point 1, 19.

¹⁹ Parliamentary Document 18/9982, p. 52 et seq.; for more details concerning EMAS see III.2.b) below.

²⁰ CSR Guidelines, point 4.6.

Because of the link to the course of business, the business result or the situation of the company which follows from sec. 289 para. 3 HGB, impacts on the matters outside the company named in sec. 289c para. 2 HGB are only a necessary condition, but not sufficient to trigger the reporting duty. Specifically: If business operations have a massive negative impact on environmental aspects, but the information about this is not also necessary to understand the course of business, the business results or the situation of the company, such information need not be included in the non-financial statement, as the unambiguous wording of the law makes clear. However, the reasons for the law point out that, given the interaction between the business situation and environmental impacts, both relevance criteria will typically be fulfilled simultaneously²¹.

If that is the case, sec. 289c para. 3 HGB on the other hand triggers a comprehensive duty to report which is precisely not limited to directly financially relevant information but instead—as the non-exhaustive list shows—requires extensive information on the impacts outside the company on the aspects named in sec. 289c para. 2 HGB²². This represents the crucial difference from sec. 289 para. 3 HGB, which already required large corporations (sec. 267 para. 3 HGB) to also include “non-financial performance indicators” in the analyses of the course of business and the situation of the company. This expressly comprises information on environmental aspects, but only if, in spite of their “non-financial” nature, they can have a major influence on the financial result or the financial status of the corporation concerned²³. In contrast, the extended reporting duty leads to a change of perspective: Whereas the focus so far was on the risks for the company arising from the social environment, the question now also is what dangers emanate from the business operations to issues outside the company, including environmental issues²⁴.

²¹ Parliamentary Document 18/9982, p. 49; see also IV.3. below with regard to the link to the course of business, the business results or the situation of the company.

²² In depth *Winkeljohann/Schäfer* in: Grottel et al. (eds.), *Beck'scher Bilanz-Kommentar*, 11th ed. 2018, § 289c, rec. 30 et seq.

²³ *Lange*, in: *Münchener Kommentar HGB*, 3rd ed. 2013, § 289 rec. 129 with further references; *Schaefer/Schröder*, *Die Wirtschaftsprüfung* 2013, 1084 (1087). In view of environmental issues, this may according to a recommendation of the Commission include the recognition, measurement and disclosure of environmentally caused expenditures, liabilities and risks as well as related assets; Recommendation of the Commission of 30 May 2001 on the consideration of environmental aspects in the annual financial statements and the management report of undertakings: Recognition, measurement and disclosure, C(2001) 1495, OJ EC No. L 156, p. 33.

²⁴ Cf. *Regierer/Beckmann*, *Börsen-Zeitung* vom 7 April 2017, p. 10. Although the performance indicators will in the future also be a part of the non-financial statement according to sec. 289c para. 3 No. 5 HGB they will only be one aspect among many.

Section 289c para. 4 HGB adds a duty to explain to the mandatory information: If a corporation pursues no “policy” in relation to one or several reportable matters, it must explain this “clearly and with reasons”²⁵. A similar *comply-or-explain* mechanism is already known from art. 20 Accounting Directive and in Germany, for example, the German Corporate Governance Code (sec. 161 German Stock Corporation Act, *Aktiengesetz*).

Finally, a “protective clause”²⁶ is contained in sec. 289e para. 1 HGB. To avert a “substantial disadvantage”, corporations may refrain from disclosing information required in principle to be disclosed, provided certain extraordinary conditions are fulfilled. It is a prerequisite that these are future developments or issues in respect of which “negotiations are being conducted”. This narrow exception²⁷ is apparently intended to avoid negotiation processes of existential significance to the company being undermined by the reporting duty. As soon as the danger of a substantial disadvantage no longer exists, the suppressed information is to be included in the following non-financial statement (sec. 289e para. 2 HGB). Whether this provision will have any practical significance is yet to be seen.

d) Audit and sanctions

The traditional management report within the meaning of sec. 289 HGB must be audited by the certified auditor in particular as to whether it is consistent with the annual financial statements as well as the findings made in the audit and on the whole accurately presents the situation of the corporation. Sec. 317 para. 2 sentence 4 HGB extends the audit duty to the non-financial information, but only to a limited extent: The auditor must determine the formally accurate presentation of a non-financial statement or, as the case may be, a separate non-financial report together with the management report²⁸. The German legislator refrained in this respect from exercising a right to choose, contained in the CSR Directive, to also require a substantive audit of the contents of the non-financial statement (art. 19a para. 6 Accounting Directive).

²⁵ In contrast, according to the reasons given for the law, the absence of a “due diligence process”, which is also named in sec. 289c para. 3 No. 1 HGB, does not suffice to trigger the duty to explain, provided the company required to report does have a policy, Parliamentary Document 18/9982, p. 52.

²⁶ *Winkeljohann/Schäfer* in: Grottel et al. (eds.), *Beck'scher Bilanz-Kommentar*, 11th ed. 2018, § 289e, rec. 1; *Kajüter*, *Der Betrieb* 2017, 617 (623).

²⁷ Parliamentary Document 18/9982, p. 53.

²⁸ Regarding the scope of the auditor's competence: *Mehring/Hartke/Pieper*, *Die Wirtschaftsprüfung* 2018, 494 (494 et seq.); *Seidler*, *Der Betriebsberater* 2018, 1067; *Kälberer*, *Zeitschrift für Bilanzierung, Rechnungswesen und Controlling* 2018, 194 (198) with further references.

However, if a company required to report voluntarily includes the non-financial information in the substantive audit, the audit results must also be published in accordance with sec. 289 para. 4 HGB²⁹.

There is, however, an interrelation between this apparent relief and the auditing duty of the Supervisory Board according to sec. 171 AktG, which now expressly extends to the non-financial parts of the report. Whereas the Supervisory Board may in principle rely on the auditor's audit opinion in view of the annual financial statements³⁰, this possibility does not exist for the unaudited non-financial information. Sec. 111 para. 2 AktG therefore gives the Supervisory Board the authority to commission an additional substantive audit of the non-financial disclosures. In view of the severe criminal and administrative sanctions in case of untrue reporting (sec. 331 et seq. HGB)³¹, this right should be widely used.

2. Background: Corporate Social Responsibility and Environmental Protection

2. 1. Idea of Corporate Social Responsibility

The introduction of non-financial reporting duties is a cornerstone of the strategy forcefully pursued at the European level to induce undertakings to act “responsibly”. Although the notion of Corporate Social Responsibility increasingly enters the stage in the (economic) policy and legal debate, a generally accepted definition has not emerged³². And this may well not be necessary at all: It is a concept more than a distinctive and subsumable legal term³³. In its Communication from the year 2011 already mentioned above, the Commission describes Corporate Social Responsibility as “the responsibility of enterprises

²⁹ The duty to publish applies according to art. 2, 4 CRS-RUG for the first time to statements regarding fiscal years beginning after 31 December 2018, see for this the report of the Committee for Law and Consumer Protection, Parliamentary Document 18/11450, p. 50.

³⁰ See only *Hoffmann-Becking*, in *Münchener Handbuch des Gesellschaftsrechts*, Vol. 4, 4th ed. 2015, § 45 rec. 15 with further references.

³¹ For details, see *Seibt*, *Der Betrieb* 2016, 2707 (2714).

³² *Schneider*, in: *Schneider/Schmidpeter* (eds.), *Corporate Social Responsibility. Verantwortungsvolle Unternehmensführung in Theorie und Praxis*, 2nd ed. 2015, p. 21 (23).

³³ Illustrative *Klene*, *Wertpapiermitteilungen* (*Zeitschrift für Wirtschafts- und Bankrecht*) 2018, 308.

for their *impacts* on society”³⁴ and thus provides a suitable starting point (if environmental issues in an anthropocentric sense are understood also as a “social” issue). That the keyword (“impacts”) reappears in the central provisions of the CSR Directive and the CSR-RUG is hardly surprising before this backdrop.

There is agreement that an enterprise which is “responsible” within the meaning of Corporate Social Responsibility will not be guided in its actions exclusively by profit maximization but will instead also be aware of the consequences of its business operations for matters of public interest and for parties frequently referred to as “stakeholders” (shareholders, employees, customers, investors etc.) and will consider these in its business decisions³⁵. The undertaking is viewed as an actor integrated in civil society not only with legal commitments but also social ones³⁶.

What goes with this is that behavioural rules for Corporate Social Responsibility are basically legally non-binding; the concept is not an originally legal one, but has its origins in the social, communications and economic sciences³⁷. Especially responsible entrepreneurial action goes by definition beyond the fulfilment of the legal “minimum standard”: Anyone who merely complies with the requirements of a permit to operate a plant under emission control law cannot claim to have any special sense of responsibility, but at best to be in compliance³⁸. In contrast, the installation of an additional pollutant filter which is not legally required can demonstrate actually practiced Corporate Social Responsibility. All the same, “juridification tendencies” are apparent, in particular induced at the European level with the CSR Directive being a prime example³⁹.

³⁴ Communication of the Commission of 25 October 2011, A new EU strategy 2011-2014 for Corporate Social Responsibility of the undertakings (CSR), COM(2011) 681 final, p. 6 (emphasis added).

³⁵ Green Paper of the European Commission of 18 July 2001, Promoting a European framework for Corporate Social Responsibility, COM(2001) 366 final, para. 24; *Kirsch*, in: Hofbauer/Kupsch (eds.), Rechnungslegung, 89. Akt. 2018, § 289b rec. 1; *Schneider*, in: Schneider/Schmidpeter (eds.), Corporate Social Responsibility. Verantwortungsvolle Unternehmensführung in Theorie und Praxis, 2nd ed. 2015, p. 21 (24).

³⁶ This is intended to be expressed by the also very common term of “Good Corporate Citizenship“, cf. *Spießhofer*, in: Hauschka/Moosmayer/Lösler (eds.), Corporate Compliance, 3rd ed. 2016, § 11 rec. 1 et seq.

³⁷ *Grützner/Jakob*, in: Grützner/Jakob (eds.), Compliance von A-Z, 2nd ed., 2015, Stichwort: „Corporate Social Responsibility“; *Klene*, Wertpapiermitteilungen (Zeitschrift für Wirtschafts- und Bankrecht) 7/2018, 308.

³⁸ For the relationship between Compliance and Corporate Social Responsibility see: *Spießhofer*, Neue Zeitschrift für Gesellschaftsrecht 2018, 441 (442 et seq.).

³⁹ *Schneider*, in: idem/Schmidpeter (ed.), Corporate Social Responsibility. Verantwortungsvolle Unternehmensführung in Theorie und Praxis, 2nd ed. 2015, p. 21 (24 et seq.);

But, as will be shown in more detail later, the substantive requirements of Corporate Social Responsibility remain of a non-binding, persuasive nature⁴⁰.

2. 2. Environmental Protection as a Central Concern of Corporate Social Responsibility

The protection of the environment was and is one of the central concerns and fields of application of Corporate Social Responsibility⁴¹. The call for responsible action is particularly obvious where “hard” external restrictions through legislation or market rules do not lead to optimal results. The consumption of natural resources for the purposes of entrepreneurial activity causes economically negative externalities⁴². The costs involved in this are borne (partly) by the general public and are not (fully) reflected in the price paid by the customers of a company for its goods or services. Price mechanisms fail in this respect as a limiting factor.

Without state intervention, such a market failure threatens to result in the overexploitation of natural resources⁴³. The spectrum of legal measures for the protection of the environment and the volume of environmental laws, which has been growing inexorably for decades, are accordingly vast. The established instruments of environmental law reach from regulatory prohibitions to informal agreements⁴⁴. But legally binding requirements of environmental law are always the result of a political compromise between environmental protection and free (economic) development, and the legal expression of a weighing of conflicting positions based on fundamental rights, which must be balanced by the legislator and the executive. On a case-by-case basis this potentially allows great scope for the reduction of environmental pollution through entrepreneurial action. This is the point where environmentally conscious Corporate Social Responsibility begins.

Spießhofer, in: Hauschka/Moosmayer/Lösler (eds.), *Corporate Compliance*, 3rd ed. 2016, § 11 rec. 2 et seq.; a “gradual” changing of the law through Corporate Social Responsibility is attested by *Altemeier*, *Anwaltsblatt* 2015, 950 (950).

⁴⁰ See III. below.

⁴¹ See for example the empirical analysis by *Zülch/Kretzmann*, *Der Betrieb* 2016, 677 (680).

⁴² See for example *Schäfer/Ott*, *Lehrbuch der ökonomischen Analyse des Zivilrechts*, 5th ed. 2013, p. 81, 594 et seq. Regarding the connection between external effects and Corporate Social Responsibility, see also *Schreyögg*, *Die Aktiengesellschaft* 2009, 757 (762).

⁴³ Fundamentally: *Hardin*, *Science* 162 [1968], p. 1243 et seq. (“tragedy of the commons”).

⁴⁴ Details in II.2 below.

This applies, in particular, to international companies and groups which operate also in countries and regions where far less rigorous environmental standards apply than in Europe. To counteract the deficits founded in this, appeals have been made to undertakings already for some time to consider environmental and social issues throughout the world to a special extent going beyond their obligations and to impose respective obligations upon their business partners. A well-known example is the Global Compact of the United Nations from the year 1999 which companies can accede to in order to commit to protective and preventive environmental standards, among other things. This tradition is continued by the CSR Directive and the CSR-RUG by according a prominent role to environmental issues⁴⁵.

3. Non-financial Reporting Duties as a Novel Governance Instrument of Environmental Law

3. 1. (Desired) Effect of non-Financial Reporting Duties

By incorporating environmental and social issues into the annual management reports of large capital market-oriented corporations, the European Union pursues an ambitious goal: It is said to be no less than a disclosure duty that is *«vital for managing change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection»*⁴⁶. Measured by this, the novelties practically hidden in the German Commercial Code from the perspective of environmental law appear quite nondescript. Accordingly, their mode of action is rather subtle:

a) Indirect influence through information

The starting point of the Directive and the transposing law is the realisation that consumers, investors and other “stakeholders” of an undertaking consider not only the “hard” corporate key figures when taking consumption and investment decisions, but increasingly also “soft” non-financial factors, more particularly the environmental impacts of an undertaking⁴⁷. Already in the year 2001, in a Green Paper on Corporate Social Responsibility, the Commission developed the *triple bottom line* concept according to which *«the overall performance of a company should be measured based on its combined contribution to economic*

⁴⁵ See I.2. above.

⁴⁶ Recital 3 CSR Directive.

⁴⁷ Recital 3 CSR Directive; Parliamentary Document. 18/9982, p. 1.

*prosperity, environmental quality and social capital*⁴⁸. Investors, too, increasingly determine the “true” value of an undertaking in a combination of financial and non-financial factors⁴⁹.

This development is the expression of an evolving environmental awareness and explains why many large undertakings already today publish voluntary “sustainability reports” or similar statements on ecological and social issues, in addition to the obligatory financial reports⁵⁰. These undertakings frequently commit to the observance of the frameworks referred to as guidance in art. 19a para. 1 subpara. 5 Accounting Directive and sec. 289d HGB⁵¹. But the necessity or meaningfulness of a legal obligation to provide non-financial reports is not yet explained by this. If customers and investors in any case demand information on Corporate Social Responsibility and base their commercial decisions on that, undertakings would be forced already by the laws of the market to meet these demands and to use their Corporate Social Responsibility as a «value added instruments»⁵². Apparently both the European and the German legislator see a further need to catch up here.

For this, they chose the path via form to content: The CSR Directive and the transposing laws of the member states do not create any substantive environmental obligations. The undertakings being addressed are not forced to adjust their environmentally relevant business activities, but are only indirectly induced to do so: Anybody would hesitate greatly to attest “serious negative impacts” on the environment from one’s own business. But sec. 289c para. 3 No. 3 HGB now requires this to be done if it is objectively the case and the relevance thresholds are exceeded⁵³. Undertakings will make strenuous efforts—this is at least the apparent belief of the Union and national legisla-

⁴⁸ Green Paper of the European Commission of 18 July 2001, Promoting a European framework for Corporate Social Responsibility, COM(2001) 366 final, p. 30; see also *Fleischer*, in: Hommelhof/Hopt/Werder (eds.), *Handbuch Corporate Governance*, 2nd ed., 2009, 185 (205); *Velte*, *Zeitschrift für Internationale Rechnungslegung* 2017, 325 (325 et seq.) with further references.

⁴⁹ Empirical study by *Gutsche/Gratwohl/Fauser*, *Zeitschrift für Internationale Rechnungslegung* 2015, 455 et seq. as well as *Gutsche/Gratwohl/Schulz*, *Zeitschrift für Umweltpolitik & Umweltrecht* 2017, 332 (345).

⁵⁰ Communication of the European Commission of 25 October 2011, a new EU strategy 2011-2014 for Corporate Social Responsibility COM(2011) 681 final, p. 14; See for example the report “Unternehmerische Verantwortung Bericht 2016” of Deutsche Bank AG, available at <https://cr-bericht.db.com/2016/de/index.html> (last accessed on 11 May 2018).

⁵¹ See I.2.c) above; specifically for EMAS certification also III.2.b) below.

⁵² *Zühlch/Kretzmann*, *Der Betrieb* 2016, 677 (681).

⁵³ Necessity in order to understand the course of business, the business results or the situation of the company as well as the impacts on environmental and social issues (sec. 289c para. 3 HGB); see I.2.c) above.

tors—to avoid such self-denunciation. Even stakeholders who have so far not focused on the aspects of Corporate Social Responsibility will possibly turn away from a company if negative side effects of its business activities become evident in this way. Some investors are even (self-)committed to participate only in corporations with sustainable business operations⁵⁴.

This indirect effect puts a price tag on inadequate Corporate Social Responsibility which management must take into account in taking business decisions. Efforts to protect the environment which prevent a disadvantageous non-financial statement thereby become comparatively advantageous and thus easier to justify as an entrepreneurial measure. Through this—actual or even only anticipated—reaction of third parties to the non-financial reports, they become an information and market based governance instrument.

This effect is reinforced—at least in the legislator’s intention⁵⁵—by the *comply-or-explain* mechanism in sec. 289c para. 4 HGB, according to which corporations required to report must explain if and why they do not pursue any “policy” in view of environmental and other aspects of Corporate Social Responsibility⁵⁶. Again, the HGB imposes no obligation to implement such policies. But surely no company will want to suffer the ignominy of declaring that it has no “policy” for its actions in relation to environmental and social issues. In view of the criminal and administrative sanctions in secs. 331 et seq. HGB, the untruthful failure to disclose reportable environmental impacts or claiming to have an environmental policy that in actual fact does not exist is in any case not viable in the long term.

b) Dynamisation through periodisation

In addition, there is the periodicity of corporate reporting, which invites a comparison between reporting periods. As in the case of the annual financial statements, the stakeholders will typically want to observe a positive development compared to the previous year’s report. Corporations required to report are therefore compelled to improve not only their business results but also their “environmental balance sheet” compared to the previous year by removing liabilities and reporting new initiatives and successes. In this way, the re-

⁵⁴ A prominent example is the Norwegian state pension fund, which is obliged under the guidelines of the Norwegian Finance Ministry to give up participations in case (among others) of serious environmental damage due to the investment object; the English version of the guidelines is available at https://www.regjeringen.no/contentassets/7c9a364d2d1c474f8220965065695a4a/guidelines_observation_exclusion2016.pdf (last accessed on 11 May 2018).

⁵⁵ Regarding the possibly limited effectivity see IV.2 below.

⁵⁶ See I.2.c) above.

porting duty can generate a continuously dynamic process for the realisation of environmentally and socially comparable entrepreneurship⁵⁷.

c) Indirect extraterritorial effect

For undertakings that operate internationally, which is typically the case for the “large” and “capital market-oriented” companies and groups required to report, the reporting duty can additionally lead to an extraterritorial radiating effect of European social and environmental standards⁵⁸. Whereas the reach of substantive legal requirements generally ends at the national borders because of the principle of territoriality in public international law⁵⁹, the undertakings required to report are also obliged to accurately describe the environmental consequences of their business activities in third countries, including the chain of supply (to the extent reasonable). Whatever may be admissible under local environmental law can at the same time constitute a reportable “serious negative effect” within the meaning of sec. 289c para. 3 no. 3 HGB. To avoid this statement a corporation affected by this must “export” the European standards.

If the legislative expectations are fulfilled, the CSR Directive will lead through the backdoor of commercial law to a higher degree of responsible business management, not least of all with regard to environmental issues.

3. 2. Inclusion in the Instrumental Systematics of Environmental Law

The legislator and the administration permanently face a *regulatory* or *instrumental choice*⁶⁰. For the achievement of a constitutionally, legally and/or politically determined goal, a virtually unlimited number of regulatory and enforcement mechanisms is available and can be used alternatively or combined with each other as an “instrumental mix”⁶¹. The traditional prohibitory law, proto-

⁵⁷ The possibility of a “*virtuous circle*”, i.e. the opposite of a vicious circle, is also described by Häfner/Kiesel/Wirthmann, Zeitschrift für Umweltpolitik und Umweltrecht 2017, 299 as well as Zülch/Kretzmann, Der Betrieb 2016, 677 (681).

⁵⁸ This idea is also suggested in the reasons for the law, Parliamentary Document 18/9982, p. 1.

⁵⁹ See only Herdegen, Völkerrecht, 15th ed. 2016, § 26 rec. 4 et seq.

⁶⁰ Regarding the concept of *regulatory choice*, see Schuppert, Staatswissenschaft, 2003, p. 591 et seq.; see also *idem.*, in: Müller/Schuppert, Corporate Governance im Wandel, 2011, p. 17 (23).

⁶¹ For details see Michael, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), Grundlagen des Verwaltungsrechts, Vol. II, 2nd ed. 2012, § 41.

typically enforced by administrative order, is but one tool among many⁶².

At least in German administrative law, environmental law has established itself as a traditional venue for legislative and administrative creativity and is therefore characterized more than any other legal field by an instrumental variety and diversity⁶³. Apart from the conventional “command-and-control” instruments, steering taxes with financial effects⁶⁴, market-based *cap-and-trade* systems⁶⁵, cooperative forms of action⁶⁶ and information activities of authorities⁶⁷ now exist. In contrast, corporate reporting has so far not been a part of this. This raises the question of how this new instrument relates to the known forms of action of environmental law, i.e. in which compartment of environmental law “toolbox” it has found its place.

a) Non-financial reporting as a “soft” regulatory approach

Different models for the characterization and categorization of regulatory strategies are discussed in the legislative and administrative sciences. A first rough localization of the duty to disclose non-financial reports is made possible for example by a scale developed by the OECD, which groups the forms of state intervention in a total of eight gradations from *free market* to *command-and-control regulation*⁶⁸. This includes the category of *mandatory information disclosure (to enhance consumer choice)*, which corresponds with the information-based functioning of non-financial reporting described in III.1. (insofar as further stakeholders are added to consumers, especially investors). This is the second most liberal form of intervention on the OECD scale.

On the four-stage⁶⁹ scale proposed by *Hoffmann/Riem*, ranging from “imperative government regulation” to “private self-regulation”, the reporting duty

⁶² For the background of the so-called governance approach, see for example *Vofskuhle*, *Verwaltungsarchiv* 92 (2001), 184 (194 et seq.); *Schulze-Fielitz*, in: idem (ed.), *Staatsrechtslehre als Wissenschaft*, Deutsche Verwaltung-Beiheft 7, p. 11 (43 et seq.); *Bumke*, in: Schmidt-Aßmann/Hoffmann-Riem (eds.), *Methoden der Verwaltungsrechtswissenschaft*, p. 73 (103 et seq.).

⁶³ Thus, the description and systemization of the instruments of environmental law in *Kloepfer*, *Umweltrecht*, 4th ed. 2016, § 5, occupies no less than 1.800 paragraphs.

⁶⁴ E.g. the taxation of fossile energy carriers in accordance with the German Energy Tax Law.

⁶⁵ E.g. the European emissions trading scheme.

⁶⁶ E.g. remediation agreements in accordance with sec. 13 para. 4 Federal Soil Protection Act.

⁶⁷ E.g. the location register in accordance with sec. 16a para 1, 4 Law on Genetically Modified Organisms.

⁶⁸ Presented and commented on by *Schuppert*, *Governance und Rechtsetzung*, 2011, p. 128 et seq.

⁶⁹ *Hoffmann-Riem*, in: idem./Schmidt-Aßmann (eds.), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen*, 1996, p. 261 (300 et seq.).

also appears near the liberal end, namely in the category “government induced self-regulation”. This is characterized by the fact that only a legal framework is created within which societal forces ideally achieve the desired regulatory aim themselves⁷⁰. That is done here through the legal reporting duty, which provides an incentive system intended to motivate the undertaking in an interaction with other actors to raise environmental and social standards without any requirements being specified by the authorities.

This influencing effect also allows the obligation to provide non-financial reports to be interpreted as a form of so-called *nudging*. This concept, which is inspired by behavioural economics and is currently being controversially discussed, describes governance mechanisms which achieve regulatory goals merely through skilfully conceived stimuli and incentives without having to resort to orders and coercive action, which interfere to a greater extent and require stronger justification⁷¹. Governmental nudging does not directly restrict the objective freedom of the party affected, but instead provides an external impetus to influence the conduct of the party in its (actual or presumed)⁷² own interest⁷³. Especially in the mind of the European Commission, according to which undertakings themselves benefit at least in the medium term from efforts for Corporate Social Responsibility⁷⁴, the enforced self-reflection by way of the extended reporting duty constitutes precisely such “decision-making assistance”⁷⁵.

b) Non-financial reporting compared to conventional instruments of environmental law

The classification of non-financial reporting duties as an information and market-based form of influencing regulation allows a systematizing comparison with the known instruments of environmental law, which share certain features

⁷⁰ Detailed description and definition for example by *Eijfert*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), *Grundlagen des Verwaltungsrechts*, Vol. I, 2nd ed. 2012, § 19 rec. 52.

⁷¹ Fundamentally *Thaler/Sunstein*, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, 2nd ed., 2009, in particular p. 74 et seq.; introduction from the perspective of administrative law in *G. Kirchhof*, *Zeitschrift für Rechtspolitik* 2015, 136 et seq.; in view of the CSR-URG also *Seibt*, *Der Betrieb* 2016, 2707 (2708).

⁷² Because of the pedagogical characteristics of the approach of *nudging*, *Thaler/Sunstein* themselves coined the term of “libertarian paternalism”.

⁷³ Examples in *G. Kirchhof*, *Zeitschrift für Rechtspolitik* 2015, 136 (136).

⁷⁴ See III.1 above.

⁷⁵ However, whether the legislator and the administration are able and called upon to help private individuals and undertakings to take “better” decisions is disputed. The status of the discussion about “freedom and dirigisme”, see for example *Smeddinck*, *Zeitschrift für Rechtspolitik* 2014, 245 (246).

with the duty to provide non-financial reports. The atypical guise of commercial law itself does not rule out structural parallels with the form and effect of the established forms of action. At the same time, contrasting with other instruments can sharpen the eye for the characteristic features of non-financial reporting.

EMAS certification

Looking for such parallels, one first comes across the European *eco-management and audit scheme* EMAS. Its current version, based on Regulation (EC) No. 1221/2009 (“EMAS III”)⁷⁶, EMAS gives undertakings and other organizations the possibility to submit to a comprehensive monitoring and reporting system for environmental impacts and to have its implementation certified by an external environmental auditor. A central building block of EMAS is the so-called environmental statement in which the EMAS-certified organisation prepares and publishes the environmentally relevant company information (art. 4 para. 1 d EMAS III). The necessary contents also include, according to art. 2 No. 18 EMAS III, information on environmental policies and environmental management systems, environmental aspects and impacts and on environmental programs and goals. This shows clear overlaps with the list in sec. 289c para. 3 HGB. The EMAS environmental statement is thus also one of the international frameworks referred to in the CSR Directive, CSR Guidelines and the CSR-RUG, which corporations can use as guidance for the preparation of their non-financial statement (art. 19a para. 4 Accounting Directive; point 1, 19 CSR Guidelines, sec. 289d HGB)⁷⁷.

Accordingly, the mode of action of the EMAS that is hoped for is similar to that of non-financial reporting: The Commission expects EMAS certification to «*encourage companies voluntarily to set up site or company-wide environmental management and audit systems that promote continuous environmental performance improvements*»⁷⁸. EMAS can thus be considered, with respect to environmental disclosures, as a model for the duty to provide non-financial reports.

However, a closer look reveals structural differences. Foremost among them, the EMAS certification with the accompanying environmental statement

⁷⁶ Regulation (EC) No. 1221/2009 of the European Parliament and of the Council of 25 November 2009 allowing voluntary participation by organizations in a Community eco-management and audit scheme and repealing regulation (EC) No. 761/2001 and Commission decisions 2001/681/EC and 2006/193/EC, OJ EU No. L 342, p. 1.

⁷⁷ See also Recital 9 CSR Directive and Parliamentary Document 18/9982, p. 52.

⁷⁸ Green Paper of the Commission of 18 July 2001, European framework for Corporate Social Responsibility, COM(2001) 366 final, para. 40; in depth regarding the functioning of “regulated self-regulation” through EMAS *Leijer*, Das europäische Umweltmanagementsystem EMAS als Element gesellschaftlicher Selbstregulierung, p. 85 et seq.

is legally entirely non-binding. The facultative EMAS certification is merely “rewarded” through partial deregulation, in addition to possible reputational gains, for example in the form of facilitations in the permit proceedings under emission control law in accordance with sec. 58e of the German Federal Emissions Control Act. In contrast, the special feature of the non-financial reporting introduced through the CSR Directive consists precisely of the binding nature for the undertakings within its scope of application.

Elsewhere, the EMAS certification goes beyond the duty to provide non-financial reports: It is not limited to the informative environmental statement but also sets substantive standards, for example for setting up an internal environmental management (art. 4 para. 1 b EMAS III) and for continuous improvements beyond the legal minimum standard (art. 2 No. 1, art. 18 para. 2 c EMAS III). If an undertaking fails to satisfy these requirements, the certification fails likewise. Reporting for the purposes of commercial law is purely information-based; from a legal point of view it is either “right” or “wrong”, but never inadequate in substance.

The parallelism with the EMAS certification consequently exists primarily in the form of the statement on environmental issues and in the basic approach of creating indirect incentives for environmentally friendly action (also) through the transparency of the environmental impacts of business activities.

Governmental information activity

The duty to provide non-financial reports shares its information-based mechanism with the various manifestations of governmental information activities. Public institutions can influence the consumption and investment behaviour of third parties through tips and recommendations, thereby indirectly controlling and influencing the environmentally relevant conduct of undertakings. The recommendation when purchasing electrical devices to check their energy efficiency⁷⁹ is intended for example to induce consumers to choose economical products – and inversely to motivate producers to offer more such models.

As in the case of the non-financial statement, the persuasive effect on the market players here occurs only indirectly, namely through the actual or anticipated reaction of third parties to the information (consumers, investors, other stakeholders). Binding requirements are imposed neither upon the parties directly addressed nor upon the parties indirectly affected⁸⁰. However, a struc-

⁷⁹ Example in *Kloepfer*, Umweltrecht, 4th ed. 2016, § 5 rec. 1304 (footnote 1500 there).

⁸⁰ But it does not follow from this that such informative action has as a matter of principle no intervening character. In depth with regard to the requirements of the (basic) law, in particular before the background of the prerogative of the law, see *Schoch*, Die Schwierigkeiten

tural difference from non-financial reporting does exist in terms of the author of the information. The undertakings subject to a reporting duty themselves provide information, albeit on the basis and within the framework of a legal requirement, about their major environmental impacts and the policies relating thereto, whereas governmental information activity is characterized by the triangle consisting of the informing entity, the mediator being addressed and the indirect (“actual”) subject of regulation. The undertaking required to report therefore itself controls, within the legal framework, whether and how to take an influence on the content of the information by adjusting its environmental policies. The party exposed to governmental information activities, in contrast, typically has no influence on the contents of the communication. Moreover, the reporting duty technically follows directly from the law, whereas informative activities represent an act of administrative enforcement.

Information and labelling duties

The characteristic of non-financial reporting obligations that the issuer of the information is at the same time the subject matter of the regulation is shared with the governance instrument of environment-related information and labelling duties⁸¹. Thus, for example, the producers of certain electrical devices are obliged under the German Energy Consumption Disclosure Ordinance (*Energieverbrauchs-kennzeichnungsverordnung*) to indicate the energy efficiency of their products in a standardized format. Here, too, market players are thus obliged to make a “self-declaration” in order to enable in particular consumers to make purchase decisions on the basis of environmentally relevant information and preferences. This is entirely consistent with the fundamental mechanism of non-financial reporting, so that the greatest structural parallels exist with such environment-related information and labelling duties.

But the crucial difference is the reference object of the information. Labelling duties are product-related, whereas the obligatory disclosures of environmental impacts according to secs. 289b et seq. HGB comprise the entire company or group required to report. This global view is immanent in the basic approach of Corporate Social Responsibility which understands the undertaking in its entirety as a social actor⁸².

The comparison with established instruments of environmental law thus

des BVerfG mit der Bewältigung staatlichen Informationshandelns, *Neue Zeitschrift für Verwaltungsrecht* 2011, 193 et seq.

⁸¹ Regarding this category in general, see for example *Kloepfer*, *Umweltrecht*, 4th ed. 2016, § 5 rec. 458.

⁸² For this, see already II. above.

highlights partial commonalities, but on the whole confirms the novelty of the governance approach in the framework of corporate reporting in accordance with commercial law. The basic principle of indirect behavioural influencing through information is, however, well known and comprehensively researched⁸³. Therefore, in the future analysis of the legal and factual effects of non-financial reporting, reference will have to be made partly to the findings developed in the case law and the literature with regard to these related forms of action. A simple transfer of familiar patterns would, however, ignore the special features of non-financial reporting as a company-related information-mediated and market-based governance instrument.

4. Points of Criticism and Open Questions

Whether the duty to report on environmental and social issues will prove to be an efficient and suitable means to enhance responsible entrepreneurial action will have to be observed in future reporting periods. The management reports already published for the fiscal year 2017 do not allow any final evaluation in this respect, in particular as the dynamisation effect⁸⁴ described above can begin to occur no earlier than in the next reporting period. It therefore remains to be seen whether the desired persuasive effects will outweigh the expenditures for the company-wide generation and aggregation of information, and whether the stakeholders will in actual fact sensibly react as expected to non-financial disclosures. It is therefore to be welcomed that the CSR Directive provides in art. 3 for an evaluation of the results by 6 December 2018.

At this point and at this time we will therefore only briefly discuss some of the aspects raised by the CSR Directive and the CSR-RUG.

4. 1. Inadequate Definitiveness of the Statutory Provision

According to sec. 289c para. 2, 3 no. 4 HGB, which transposes art. 19a para. 1 Accounting Directive into national law, a corporation subject to the duty of non-financial reporting must disclose information regarding, among other matters, environmental issues, provided that is *necessary* to understand the *course of business* of the company as well as the effects of the business activities, in-

⁸³ For example *Kloepfer*, Staatliche Informationen als Lenkungsmittel, 1998, p. 14 et seq.; *Hochbuth*, Neue Zeitschrift für Verwaltungsrecht 2003, 30 (30).

⁸⁴ See III. 1.b) above.

cluding the *principal risks involved* in the business activities which *very probably* have or will have *serious negative effects*, insofar as the information *is material* and the reports as well as the *handling* of these risks by the company is *proportionate*. This accumulation of vague legal terms throws doubt on the operability of the prohibitions. The fact that the criterion of “materiality” is a well-established concept in corporate reporting hardly alleviates the situation in this respect, as non-financial reporting concerns the materiality of the effects on matters of Corporate Social Responsibility and not the materiality for the course of business of the company⁸⁵. The lack of definitiveness of the provisions was thus also emphatically criticized in the German legislative process⁸⁶.

Especially in view of the fines and criminal penalties provided for in secs. 331 et seq. HGB and the rule of law principle of *nulla poena sine lege (stricta)* (art. 49 of the Charter of Fundamental Rights, art. 103 para. 2 of the German basic law), this legislative technique is questionable, even where the use of indeterminate legal terms is not entirely avoidable in the necessary abstract description of reportable information. Certain practical guidance can be provided by the CSR Guidelines, which can be expected to shape the interpretation and application of the new provisions. However, because of their formally non-binding nature, the CSR Guidelines cannot determine the objective normative content of sec. 289b et seq. HGB as well as the accessory criminal and administrative penal provisions. The CSR Guidelines even expressly point out that one cannot legally rely on compliance with them⁸⁷. All the same, consistent orientation by the CSR Guidelines should significantly minimize any risk of sanctions: On the one hand, it is to be expected that the courts will also be guided by the interpretation offered by the Commission when they apply the law, and on the other hand, the *bona fide* observance of “official” interpretations can have an exonerating effect under German criminal law⁸⁸.

A further consequence of the provisions’ ambiguity should be that the corporations concerned will for the purpose of risk minimization also have the non-financial statement audited in substance, either within the framework of

⁸⁵ As proposed, however, by *Fink/Schmidt*, *Der Betrieb* 2015, 2157 (2163); regarding the “change of perspective” of non-financial reporting, see also *Hinze/Freidank*, *ZfU* 2018, 21 (42) with further references.

⁸⁶ Statement No. 19/2016 of the German Lawyers Association on the government draft act to strengthen non-financial reporting by corporations in their management and group management reports, p. 11.

⁸⁷ CSR Guidelines, point 1; regarding the non-binding nature, see also *Mock*, *Der Betrieb* 2018, 2144 (2145 et seq.).

⁸⁸ Regarding these effects of formally non-binding statements, see *Schramm*, *Einseitiges informelles Verwaltungshandeln im Regulierungsrecht*, p. 109 et seq. and 106 et seq.

the annual financial statements by the auditor (cf. sec. 289b para. 4 HGB) or subsequently by order of the Supervisory Board (sec. 111 para. 2 AktG)⁸⁹.

4. 2. Unclear Requirements as to the “Policies” for Environmental and Social Issues

The room for interpretation the new provision provide has another effect: As an important element of the intended persuasive effect through reporting, the *comply-or-explain* mechanism of sec. 289c para. 4 HGB was identified. Under this provision, a corporation within the scope of the non-financial reporting obligations must explain when and why it pursues no special policy for handling the impacts of its business activities on the environmental and social issues named in sec. 289c para. 2 HGB⁹⁰. The CSR Directive and the CSR-RUG do not specify what requirements a “policy” must satisfy in order to suspend the duty to explain pursuant to sec. 289c para. 4 HGB. The reasons for the law merely state that these are *«explanations regarding the goals defined by the corporation in respect of a non-financial aspect, what measures it wants to take in that respect and the time period for this, how management is involved in these measures, and what processes [...] it wants to carry out»*⁹¹. The CSR Directive simply takes the meaning of the term for granted and the CSR Guidelines also remain quite vague on this point: For example, it is said that undertakings can disclose information on who in their organization is responsible for monitoring a specific concept or on strategies for the reduction of hazardous chemicals⁹².

Given the terminological openness of the CSR Directive and the CSR-RUG, undertakings should easily be exposed to the suspicion that, in anticipation of the reporting duty, some ineffective form of process has been installed in order to be able to refer to a policy. Such formal “sham policies” are not intended by the reporting duty⁹³, but can hardly be prevented through the nebu-

⁸⁹ For this, see I.2.d) above. It is telling that the provision of sec. 111 para. 2 AktG was only subsequently inserted into the CSR-RUG as a reaction to criticism of the proposed legislation, in this respect see *Kajüter*, *Der Betrieb* 2017, 617 (624).

⁹⁰ For this, see I.2.c) above.

⁹¹ Parliamentary Document. 18/9982, p. 49.

⁹² CRS Guidelines, point 4.2.

⁹³ See *Kajüter*, *Der Betrieb* 2017, 617 (621), whose assessment that the development and adjustment of policies only for the purposes of reporting is *per se* contrary to the legislative intention, is, however, not convincing. Where a policy is effective in terms of the minimization of disadvantageous impacts of the business activities, that achieves precisely the intended steering effect of the reporting duty. This fails only in case of purely formal sham policies for the purpose of evading the obligation to make an explanatory statement in accordance with sec. 289c para. 4 HGB.

lous term “policy”. Given this fact, the *comply-or-explain* may not be able to fully be effective as intended and of allowing “greenwashing” with little substance⁹⁴.

4.3. Connection of the Reporting Duty to the Business Relevance

As already explained⁹⁵, the core concern and the essential novelty of the CSR Directive and the CSR-RUG compared to the earlier reporting regime consists of the extension of corporate reporting to the consequences of business activities for external environmental and social issues. In accordance with this objective, the list of reportable aspects named as examples in sec. 289c para. 3 HGB mostly contains impacts of the business activities outside the corporation and only quite incidentally relates to financial reporting through the «*most significant non-financial indicators*» (No. 5) and the possibility of referring to «*amounts disclosed in the annual financial statements*» (No. 6).

Before this backdrop, it is surprising that, according to the filter in sec. 289c para. 3 HGB information is reportable only if that is necessary to understand the course of business, the business results or the situation of the company. This relevance criterion (partly) takes up the wording of art. 19 para. 1 subpara. 3 Accounting Directive (sec. 289 para. 3 HGB) which, however, as a provision regulating the management report, has as its subject matter precisely the performance indicators of significance to the business activities and thus any impacts within the undertaking⁹⁶.

The connection to the course, result and situation of the business in sec. 289c para. 3 HGB can therefore be understood as a concession to the traditional reporting regime. But in view of the goals of non-financial reporting on Corporate Social Responsibility, this restriction is not convincing: If stakeholders of a corporation are to be enabled to gain the most complete picture possible of the relevant impacts of the business operations on environmental and social issues, then this must logically also comprise impacts which, although significant, are not necessary to understand the course and results of the business or the business situation.

Whether and to what extent undertakings will actually exclude relevant issues from their non-financial reporting on the ground that these are supposedly not necessary to understand the course, results or situation of the business

⁹⁴For this, *Hinze/Freidank*, *Zeitschrift für Umweltpolitik & Umweltrecht* 2018, 21 (42) with further references.

⁹⁵ See III.1 above.

⁹⁶ Regarding the content of the management report, see I.2.c) above.

remains to be seen in the actual reporting practice. However, such a manner of proceeding should rarely be risk-free, as particularly significant environmental impacts will typically be relevant also to the understanding of the business, as already mentioned⁹⁷. This, however, does not close the apparently intended gap in the non-financial reporting.

5. Summary and Outlook

The extension of the annual management report through the additional requirements introduced by the CSR Directive and the CSR-RUG, which comprises a non-financial statement on aspects of Corporate Social Responsibility, is a novel kind of governance instrument to achieve environmental and social goals. The obligation of large capital market-oriented corporations to disclose the impacts of their business operations on matters outside the company to shareholders, customers, investors and other stakeholders is intended to provide an indirect incentive for “more responsible” business policies.

Such comparably subtle instruments of indirect governance are common and familiar especially in the field of environmental law. However, in terms of its concrete form and (desired) mode of action, the reporting duty is a novelty, not least of all because of its incorporation into corporate law.

The wording of the provisions of the CSR Directive and the CSR-RUG reveals drafting deficiencies in view of the accumulation of indeterminate legal terms which can at best be rudimentarily compensated for in the legal practice by way of the CSR Guidelines of the Commission. Moreover, the exclusion of impacts, the knowledge of which is not necessary to understand the course of business, the business results or the situation of the corporation, contradicts the purpose of non-financial reporting.

Whether the desired persuasive effects can be achieved by means of corporate reporting and will in particular justify the extra expenditures for the companies and groups concerned will transpire in the coming business years, in particular through a comparison of successive management reports. First empirical studies have so far shown greatly divergent results; only in few cases a detailed and transparent overview could be confirmed⁹⁸. Nonetheless, the innovative regulatory approach deserves further observation and support, ideally in a fruitful dialogue between environmental and corporate law.

⁹⁷ See I.2.c) above.

⁹⁸ Analysis of a great number of the DAX 30 undertakings first required to report (for the area of human rights) by *Wiedmann/Greubel*, *Der Betriebsberater* 2018, 1027, 1028.