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# Good business? The struggles for regulating ESG disclosure

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## Abstract

During the last decade, the regulation of corporate social and environmental disclosure and reporting has gradually but steadily emerged. What explains its emergence at different levels of regulation and through varying modes of governance? Which political and socio-economic actors are involved? Who has benefitted from its emergence? The onset of the current economic and sustainability crisis has shown the need for a more 'regulated capitalism' and called for a re-assessment of dominant ideas about 'CSR' and 'corporate governance'. Better transparency and disclosure have often been indicated as a solution to this impasse.

The paper focuses on the emergence of Environmental, Social and Governance (ESG) disclosure regulation in Europe during the last decade. It is organized in four main sections. After introducing the argument within the literature on the regulation of corporate accountability, the second section offers an historical overview of the recursive emergence of environmental and social disclosure regulation. Thereafter, the paper briefly reviews the current debate over the regulation of ESG disclosure. In particular, it outlines the interests of the main constituencies involved at the EU-level: large corporations, institutional investors, trade unions, NGOs, professional accountants and financial analysts, public authorities. The last part develops an argument suggesting the current emergence of ESG disclosure regulation constitutes an institutional investors' strategy to strengthen, on the one hand, their control over managers and, on the other hand, the legitimacy of their claims over companies resources.

## Key words

Corporate accountability; ESG disclosure; sustainability; reporting.

## Resumen

Durante la última década la regulación de la transparencia social y ambiental ha surgido a un ritmo constante y gradual. ¿Cómo se explica su aparición en los diferentes niveles de regulación y a través de diversos sistemas de gobernanza? ¿Qué actores políticos y socio-económicos están implicados? ¿Quién se ha beneficiado de su aparición? La actual crisis económica y de sostenibilidad ha

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puesto de manifiesto la necesidad de un "capitalismo regulado" y una revisión de las ideas dominantes acerca de la RSE y el gobierno corporativo. A menudo se ha señalado la necesidad de una mayor transparencia y divulgación como una solución ante este punto muerto.

Este artículo se centra en la aparición durante la última década de la regulación de la transparencia ambiental, social y de gobierno (ASG) en Europa. Está organizado en cuatro secciones principales. Después de contextualizar el tema en la literatura sobre la regulación de la responsabilidad corporativa, la segunda sección ofrece un panorama histórico de la aparición recurrente de la regulación de la transparencia ambiental y social. Posteriormente, el documento revisa brevemente el debate actual sobre la regulación de la transparencia ASG. En particular, se exponen los intereses de los principales grupos involucrados a nivel europeo: las grandes corporaciones, inversores institucionales, sindicatos, ONG, los contadores públicos y analistas financieros, autoridades públicas. La última parte sugiere que la aparición actual de la regulación de la transparencia ASG supone una estrategia de los inversores institucionales para fortalecer por un lado su control sobre los directivos, y por otro, la legitimidad de sus demandas sobre los recursos de las empresas.

**Palabras clave**

Responsabilidad empresarial; transparencia ambiental, social y de gobierno; sostenibilidad; revelación.

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## 1. Introduction

> "We need to be able to identify actors pursuing rules that actually contradict those they were using before. This is not just a question of breaking the first set of rules, but of erecting new ones that at certain points prescribe something very different from those followed before. Then a new paradigm has come into existence." Crouch (2005, p. 152)

Widespread anxiety about the state of the Planet and increased global financial instability have revived claims that better regulation of corporate social and environmental accountability is urgently needed (Mason 2005; McBarnet et al. 2007; Utting and Marques 2010). This debate entails a new approach to both Corporate Governance (CG) and Corporate Social Responsibility (CSR) as a way forward to transform our unsustainable economic and financial systems and facilitate the emergence of a more 'just' and 'green' economy (Sjåfjell 2009; Jaeger et al. 2011). Regulating social and environmental transparency and disclosure has been widely accepted as a fundamental first step in the direction of increasing corporate sustainability. In particular, this paper is concerned with the emerging regulation[1] of Environmental, Social and Governance (ESG) disclosure[2].

While the regulation of social and environmental disclosure is hardly a new topic – it has been discussed for over four decades (Unerman et al. 2007; Gray et al. 2009; Gray 2010b)- only during the last decade we are witnessing a rapid development of this field that requires further theoretical and empirical analyses (Mason 2005; Sjåfjell 2009; Kruse and Lundbergh 2010; Vitols and Kluge 2011; Williams and Zumbansen 2011). Traditionally left to corporation's willingness to be socially and environmentally accountable, in the last few years, it has become the object of a remarkable regulatory zeal (KPMG 2008; KPMG. et al. 2010). For instance, the European Commission (EC) has finally announced that by the end of 2011 it will put forward a legislative proposal on non-financial disclosure, after over a decade of discussions. The EC efforts, as we shall see, mirror similar initiatives at national (i.e. France, Denmark, UK, Sweden, Spain) and global levels (i.e. Global Reporting Initiative (GRI); UN Global Compact (UNGC); UN Principle for Responsible Investment (UN PRI); Carbon Disclosure Project (CDP); International Integrating Reporting Committee (IIRC)) and within other regulatory arenas (i.e. US, South Africa and China) that mark the emergence and codification of ESG disclosure regulation.

*What explains the rapid emergence of ESG disclosure at different levels of regulation and through varying modes of governance? Which political and socio-economic actors are involved? Who has benefitted from its emergence?*

Despite its spread among academics, business leaders, NGOs and governments the first revealing feature of 'ESG' disclosure is its lack of a precise definition of this acronym (Bassen and Kovacs 2008). According to the summary of discussion of the EU 'Workshops on disclosure of ESG information': "ESG disclosure takes different forms and can be directed at diverse audiences. It covers, among other things: formal CSR or sustainability reports, chapters integrated in annual accounts, digital disclosure, advertising, information on packaging, internal communication to employees, subject specific publications, and responses to rating agencies or buyers questionnaires." (EC 2009, p. 1) The content of such disclosure might concern matters as diverse as carbon emission; labour rights; biodiversity; water usage; health and safety; employment relations; bribery and corruption. As Rob

[1] *Regulation* here is broadly defined as "all forms of formal and informal rule pertaining to some collective (nation, groups, sectors) where those rules are either binding to the members of that collective or at least significantly constrain their behaviour. This involves both public and private (self-) regulation [...]." (van Appeldoorn et al. 2007, p. 5)
[2] This paper uses the concepts of ESG disclosure and 'sustainability disclosure'; 'non-financial disclosure' and 'social and environmental disclosure' as synonyms. For further discussions see Gray (2010b).


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Gray maintains, "to try and talk about 'social accounting' as a singularity is to invite confusion." (Gray et al. 2009, p. 546)

Nevertheless, there are few broad considerations that apply to social and environmental disclosure in general. First of all, non-financial disclosure is about legitimising and delegitimising existing governance structures. As has been pointed out, ESG disclosure has attracted a diverse range of explanations but all have shared some degree of concern "with legitimizing the organization as a social and environmental organism in addition to its dominant role as an economic one." (Gray et al. 2009, p. 548) Secondly, it is also important to highlight that corporate accountability and disclosure is never an end in itself, rather it is a means to an end (Power 1997; Newell 2008). Therefore, it is crucial to assess what is the actual aim of transparency mechanisms and *cui bono* (who benefits) from changes in its regulation. Thirdly, a phenomenon of this type is essentially about power and conflicts among groups of social actors within a specific politico-economic and politico-ideological context. In particular, it concerns the division of rights and responsibilities among states, corporations, managers, investors, civil society, and so on (Pellizzoni 2004; Newell 2008; Mason 2005). Finally, during the last three decades, transparency has emerged as the single most powerful and ever-expanding principle for regulating business-society relations (Power 1997; Braithwaite and Drahos 2000; Braithwaite 2008). Therefore, we should bear in mind that in assessing the current emergence of ESG disclosure the paper is considering just one portion of a broader trend in law and society.

One of the consequences of the complexity and expansion of non-financial disclosure is that the literature on ESG disclosure struggles to deal with such an interdisciplinary topic. The majority of the contributions comes from managerial and accounting studies. They are often rather under-theorized (Unerman et al. 2007) and have been criticized for being subsumed under the dominant *law-and-economics* and business discourse (Gray et al. 2009). However, they offer a rather 'modest' account of corporate responsibilities as aimed to voluntarily internalize negative environmental and social corporate externalities using market-oriented mechanisms (Parkinson 2006). This approach has been increasingly challenged by other accounts. In particular, *critical political-economic* scholars (Matten and Moon 2008; Levy et al. 2009; Spence et al. 2010) have introduced a more analytical approach to sustainability disclosure emergence and CSR in general. The latter underscores the political nature of corporate accountability and considers the emergence of voluntary social and environmental disclosure as a neo-liberal hegemonic strategy to reproduce and legitimise existing power relations. Therefore, they often call for hard(er) regulatory mechanisms and legal obligations aimed to effectively tackle corporate misbehaviour. More recently a new strand of literature has emerged, the *regulatory capitalism*. This approach argues that transparency and disclosure are central legal principles in the emergence of a new division of labor between state and business actors. According to their claims, private governance is increasingly required to take responsibilities for issues that were traditionally left to the public sphere, at the same time the state has not disappeared. On the contrary it maintains its regulatory role and key functions of control (Levy-Faur 2005; Braithwaite 2008).

Despite this mounting academic interest, the relation between corporate accountability and law needs further analysis. In particular, the existing literature struggles to bridge legal and political analyses of corporate accountability. While political scientists are calling for hard(er) regulation, legal and socio-legal scholars increasingly acknowledge the limits of traditional legal mechanisms. Taking into account companies' ability in the art of 'creative compliance', the latter claim we should rather appeal to "some further, extra-legal driver not only to secure a commitment in business to socially responsible policies *beyond* the law, but to secure business's responsible compliance *with* the law" (McBarnet 2007, p. 13) (Teubner et al. 1984; Parker 2002; Picciotto 2011). The aim of this paper is to

contribute to this debate offering a first attempt to bridge this gap. In particular it focuses on the recent emergence of ESG disclosure regulation as one of the most significant developments of this 'new accountability movement' in business regulation (McBarnet et al. 2007). Drawing on both socio-legal and critical political economic analyses the paper aims to contribute to a better understanding of the underlying interests and power relations that are fuelling its emergence.

The paper anchors the analysis of ESG regulation within the long-running debate about corporate ownership and control (Berle and Means 1932; Dodd 1932; Gourevitch and Shinn, 2005; Aglietta and Reberioux 2005; Overbeek et al. 2007; Soederberg 2010). As pointed out by Colin Crouch, it is time to take a "full account of the giant corporation as a form of governance in its own right, and not subsume it within concepts of 'lobbying' states or 'distorting' markets. [...] Once large firms are seen in this way, it is possible to investigate how they behave, not just as market actors, but generally within society. This opens the possibility of studying corporate social responsibility (CSR) in relation to theories of governance." (Crouch 2010, p. 26) In this sense, the study, taking a long-view at the emergence of non-financial disclosure regulation, will put forward the following arguments: 1. After being separated in the 1980s, CG and CSR's policy agendas are converging again; 2. Rather than linear and progressive, corporate accountability has emerged through recursive cycles of regulation; 3. The emergence of non-financial disclosure regulation can be explained, to a significant extent, as the result of attempts to overcome the legitimation/accumulation tension that is central to the reproduction of capitalist societies. 4. The function of the law has been primarily to legitimize the dominant system of accumulation when it has been called into question.

The paper identifies three broad phases in the emergence of non-financial disclosure regulation in Europe. During the 1960s and 1970s, corporate social reporting first emerged on the basis of ideals of 'industrial democracy' and workers participation that were high on the political agendas. During the second period, from the early 1980s until the end of the 1990s, non-financial disclosure disappeared from the political agenda and was left to 'corporate conscience' and self-regulation. Things changed again around 2000 when social and environmental disclosure re-emerged at different levels of regulation and through varying modes of governance. What explains those sudden changes? In particular what explains the re-emergence of non-financial disclosure during the last decade? In order to fully capture the transnational politics that are lying behind its emergence, the next section offers a brief overview of the historical development of non-financial disclosure regulation. The third section considers the role that six key groups of actors - investors; professions (i.e. accountants, financial analysts); public authorities; managers; NGOs; Trade Unions (TUs) – had in shaping the European regulation of sustainability disclosure and in the current regulatory debate (2000 - 2010). The paper focuses in particular on the EU debate as it takes place at a crucial intermediate level between global norm-making and national law-making and exemplifies the multi-level governance that characterizes contemporary ESG regulation. Finally, the last section considers this empirical analysis in the light of the current theoretical debate on the regulation of corporate accountability.

## 2. The emergence of non-financial disclosure regulation

The debate about corporate responsibilities and accountability dates back to the late 1920s and 1930s. While these earlier ideas are often portrayed as mere precursors of contemporary ones, offering a rather linear and progressive approach to CSR emergence, this section argues differently for a cyclical account of the emergence of non-financial disclosure regulation. As maintained by socio-legal scholars Ireland and Pillay (2010), "the idea about the 'socially responsible corporation' which emerged in the 1930s and rose to prominence in the decades after the Second World War were markedly more radical than contemporary ideas about CSR." (Ireland and Pillay 2010, p. 77) The earlier version, according to the

authors, entailed fundamental questions concerning the governance of the company; the principle of shareholder primacy; the aim and nature of corporate institutions and directors duties towards employees, consumers, creditors and society as a whole, as well as shareholders. The recent one, by contrast, tends to be premised on the dominant law-and-economics approach to CG within which directors are only accountable to their shareholders and large corporations are private entities just devoted to maximising profits. Using this framework, it is possible to identify three phases in the historical emergence of corporate social and environmental disclosure regulation.

The first phase has its origin in the 1920s and 1930s when, as pointed out by Sir Adrian Cadbury, the governance of business for the first time effectively attracted the attention of politicians, economists, or the wider public (2006, p. 15). The introduction of the legal concept of 'limited liability' in 1862 had created a fundamental problem of separation between ownership and control (Solomon 2006). In fact, on the one hand, it increased directors' responsibilities but, on the other hand, gave them a greater, unchallenged power to control corporations. The appearance of Berle and Means' classic book *The Modern Corporation and Private Property* (1932) offered empirical confirmation that shareholders had become widely dispersed and therefore they had lost control of the day-to-day running of corporations. As explained by Ireland and Pillay (2010, p. 80) by the early 1930s it was widely recognized that the separation of ownership and control involved a fundamental alteration of the character of corporate property rights. Shareholders came to be perceived as passive *rentiers* rather than the actual 'owners' of the company. During the 1950s and 1960s, the heydays of Fordism and 'managerialism', it was commonly argued that shareholders should not be treated as 'proprietors' but equated to 'well secured creditors' or 'bond-holders' (Galbraith 1956; Mason 1959, 1966; Goyder 1961; Wedderburn 1965).

Although first examples of social and environmental disclosure date back to the end of WWI (Blowfield and Murray 2008), the regulatory debate really began at the zenith of Fordism, in the late 1960s, in a politico-economic and politico-ideological context dominated – particularly in Europe – by ideas of 'industrial democracy' and workers participation. In effect, such a debate was much more advanced in the 1970s than in the 1980s and 1990s. For instance, Ullmann (1979) gives an excellent account of the strong normative and political debate on social accounting that was taking place in West Germany. In France, a similar debate resulted in the Law of 7 July 1977 that still mandates all companies with more than 300 employees to publish a social review. In the UK, the Accounting Standards Steering Committee published, back in 1975, the far-reaching *The Corporate Report*, aimed to "re-examine the scope and aims of published financial reports in the lights of modern needs and condition." (ASSC 1975) In the late 1970s, we are also witnessing the emergence of some international frameworks concerned also with corporate social disclosure, in an attempt to regulate the emergent transnationalisation of business. In particular, the OECD issued for the first time its 'Guidelines for Multinational Enterprises' in 1976, as part of the Declaration on International Investment and Multinational Enterprises.

After WWII, given the long period of stable economic growth and the relatively marginal role of investors and financial actors (Reinhart and Rogoff 2009; Turner et al. 2010), in Europe organised labour and the 'working class' exerted a growing influence on political and corporate leadership. This role appears clear also in the first emergence of corporate social regulation. Considering the content of non-financial reporting, in fact, this was particularly concerned with the kind of information relevant to employees and trade unions. For instance, the cutting-edge The Corporate Report (ASSC 1975), abounds with references to employees' wages and benefits, health and safety, human resources and other information relevant to workers. Environmental impact information was largely sacrificed in favour of social aspects. Furthermore, at the end of the 1970s, social reporting became a political

issue, it "entered a phase of general recognition and discussion among established interest groups in society" (Ullmann 1979, p. 123). As noted by Ullmann (1979, p. 132) "on the political level CSR seems to focus more and more on employees affairs, reflecting, thereby, the current economic situation and the relative power of the constituencies involved." Social reporting was seen by corporate owners and management as a means to deal with the growing influence of organised labour and to legitimise managers' position during a period of intensified conflicts. On the other hand, the goal of part of the labour unions' became to orient the discussion of social reporting regulation towards the subject areas for which traditionally they have developed policies. "Therefore, the long-term aim of their strategy is to increase the control of labour unions on business affairs." (Ullmann 1979, p. 130)

Overall, during the post-war period both in the US and, in particular, in Europe the critical mass of organised labour and workers induced law- and policy-makers to progressively introduce social and environmental criteria in the management of corporations in a way that is unthinkable in contemporary large firms (Teubner 1985). As maintained by Ireland and Pillay: "Indeed, during this period it became widely believed not only that corporations *should* be run in the wider social interest but that they *were* in fact increasingly being run in this way." (2010, p. 83)[3]. It is worth to note that, during the 1970s, Anglo-Saxon companies were consistently outperformed by their German and Japanese competitors and pressures for converging toward the stakeholder model increased. For instance, the CBI (Confederation of British Industry) began to suggest that companies "must have functions, duties and moral obligations that go beyond the immediate pursuit of profit and the requirements of the law." (CBI 1973) The Bullock Committee proposed the adoption of a form of employee representation on companies boards (Bullock 1977). The early version of the EC Draft Fifth Directive on Company Law (EC 1972) would even have required all larger European companies to adopt a German-style two-tier board structure and some form of employee participation in corporate decision-making, but it was strongly opposed by the UK government.

In the 1980s and 1990s, as a consequence of a broad politico-economic and politico-ideological transformation (Jessop 2007; Dicken 2007), the first cycle of non-financial regulation was interrupted for over two decades. A detailed discussion of this crucial and highly debated transition would go far beyond the scope of this paper. Nevertheless, as summarised by Colin Crouch: "Partly as a result of changes in technology, it was becoming feasible for major corporations to arrange their sourcing, production, distribution and management systems on a transnational scale in order to maximize economies of different commodity, labour and product markets. To realize the gains of such a scale of organization, firms required a deregulation of national financial regimes, so that they could move money around the world in line with the production activities. This was forthcoming in a series of changes during the 1980s, which quite quickly produced an almost global financial market. This, in turn, made possible the rise of a global financial sector." (2010, p. 32) Indeed, this shift has been labelled as the 'financialization' of the global economy (Aglietta and Riberioux 2005; Reinhart and Rogoff 2009) that has resulted in a dramatic growth in trading volume and the complexity of financial products (Turner et al. 2010). Crucially for our analysis this shift has magnified the economic power of institutional investors: pension funds, mutual funds and insurance companies. While in the 1970s individuals held almost 80% of equity in the US, by the end of the 1990s their holdings had fallen below 45% and institutional

[3] However, as argued by Marens (2012), the way CSR evolved on the two sides of the Atlantic was greatly influenced by the different outcome of the 1920s debate on the regulation of corporate control and responsibilities. Without going into the details of a very complex debate, the author maintains that the American labour movement, on the contrary of the European one, was defeated by the new giant American corporation. As a result, while in Continental Europe regulators allowed a greater control of workers' organisations on the governance of large corporations (stakeholders model), US executives responded by *claiming* to manage according to principles of social responsibilities.

investors' had risen to almost 50%. Similarly in the UK individual ownership dropped from over 50% in the early 1960s to about 15% in 1999. At the same time, institutional ownership rose from 30% to over 50% (Hawley and Williams, 2000). Share prices rather than production became the guiding lights of top managers' activity with a fierce reassertion of the principle of shareholder primacy and of the shareholder-centred model of corporation. The prioritization of shareholders' interests was justified "not so much on the (problematic) grounds of shareholder 'ownership' rights as on the consequentialist grounds that shareholder-oriented corporations are more efficient and deliver higher rates of growth than their rivals. (Ireland and Pillay 2010, p. 86) During the 1990s, the German and Japanese economies slowed down while the US and UK increased their pace. Mainstream CG literature started to treat the Anglo-Saxon shareholder-centred model as the 'standard', claiming that, in the context of growing global competition, this model had "no important competitors" left and predicting that we will witness the "end of history for corporate law". (Hansmann and Kraakman 2001, p. 50)

Following the emergence of this transnational 'corporate-financial nexus' (Soederberg 2010), CSR rapidly dropped from policy agendas. As synthesised by Ireland and Pillay, while the advocates of contemporary CSR struggle to modify corporate behaviour through voluntarism and self-regulation a "ruthlessly shareholder-oriented, Anglo-Saxon model of the corporation which is antithetical to meaningful CSR is being entrenched around the world by legal and other means." (2010, p. 91) Contemporary CSR, in effect, has been labelled as 'modest' (Parkinson 2006) and criticized for having little impact on the world's most pressing problems (Visser 2011). Its paradoxical relation with the law epitomises its weaknesses and is particularly interesting for our research. As pointed out by Jill Solomon (2006, p. 25): "It is almost impossible to pursue ethical business unless it is demonstrated to be profitable, not only because of the attitudes of managers and shareholders but also because of our legal system and corporate governance structures." Kinderman (2012) explicitly shows that in the UK since the late 1970s a modest idea of CSR has become "a quid pro quo for lighter regulation", legitimising unleashed financial capitalism. The key point is that, as a consequence of the global convergence toward (absolute) shareholders primacy in corporate law, mandating social and environmental disclosure became unthinkable because this information was not considered as 'material' by investors and financial analysts. The definition of CSR that emerged during the 1990s as "behaviour by businesses over and above legal requirements, voluntarily adopted" (EC 2002, p. 347) leaves regulators with the puzzle: 'how is it possible for the *law* to make companies accountable for going *beyond the law*?' (Parker 2002) Therefore, ever since the 1980s CSR had to operate very much within the prevailing shareholder-oriented consensus, looking for the 'holy grail' of the 'business case for CSR' as a strategy to create a corporate inner commitment to doing the right thing (Parker 2007).

Given the hegemony of a shareholder-centred CG model and 'modest' voluntary CSR, the sudden re-emergence of social and environmental disclosure regulation around 2000 appeared surprising. Counterintuitively there has been a terrific growth in voluntary corporate sustainability reporting, and the success of global regulatory networks, such as the Global Reporting Initiative (GRI), issuing guidelines and standards for ESG disclosure. Why should transnational mega-corporations generating an output comparable to a nation state decide to voluntarily commit themselves to standards beyond the requirements of law? Something even more surprising happened by the mid-2000s when a growing number of institutional investors, thus far uninterested in any reference to environmental and social 'non-sense' increasingly demanded comparable and reliable non-financial information. According to Doreen McBarnet: "The reality is that describing CSR as voluntary is a little misleading. The adoption of CSR policies by business has taken place in a very specific context. If CSR is self-regulation by business, it is nonetheless self-governance that has received a very firm push from

external social and market forces. From the start, 'voluntary' CSR has been socially and economically driven." (2007, p. 12). In effect, the new consensus for regulating non-financial disclosure emerged in a particular politico-economic and politico-ideological context. The very public contestation by the Seattle movement; the onset of the Asian financial crisis and the Enron and WorldCom scandals delegitimized the public image of large corporations and strengthened the idea that financial-led capitalism was putting profits above people (Klein 2000; Bakan 2004) and were actually 'out-of-control' (Strange 1998). In particular, the Enron case undermined investors and consumers' trust, further promoting the rise of two parallel strands of global normmaking dealing with corporate accountability.

On the one hand, there has been a wave of reforms emphasizing minority shareholders' rights; board independence; accountability to shareholders; maximising long-term returns, and transparency which have been referred to as CG regulation. On the other hand, slowly but steadily emerged a second regulatory strand dealing with corporate social and environmental accountability and concerned with global human rights and environmental and sustainability issues. The former used the strong ideological consensus in favour of the (absolute) shareholder model to obtain the adoption of binding and comprehensive CG guidelines and codes, inspired by the UK Cadbury Report, even in Continental Europe through the Directive 2006/46/EC. Justified by the necessity of avoiding new Enron or Parmalat cases, the codes affirmed the principle that shareholders are ultimately best-placed to effectively monitor CG arrangements made by directors, even in countries characterized by the stakeholder-model. On the other hand, the second strand of corporate accountability regulation was aimed at strengthening companies' sense of corporate social and environmental responsibility. Struggling to overcome the deadlock between voluntary and mandatory rules, it resulted in a number of modest national, European and global norms based on internal corporate responsibility processes. However more recently, in particular after the onset of the 2007 global financial crisis that further delegitimized the current finance-led capitalist system, ESG regulatory initiatives burgeoned again, driven by the growing interest of institutional investors. For instance, in 2008 the Danish Government enacted a new law on CSR reporting, followed by Sweden and Spain (KPMG 2010). Stock exchanges in China and the US introduced the requirement of disclosing non-financial information, while the Johannesburg Stock Exchange even introduced mandatory integrated reporting in 2010. The International Standards Organization (ISO) approved the ISO 26000 standard (ISO 2010); the Global Reporting Initiative (GRI) is working on the fourth version of its influential guidelines on sustainability reporting; the IASB (International Accounting Standards Board) is expected to publish a standard on carbon disclosure by the end of 2011 (Prada 2010, p. 59); the Carbon Disclosure Project (CDP), a global system for reporting on carbon disclosure emissions that has been launched in 2003, received in 2010 information from over 3000 organisations from 60 countries on behalf of 551 institutional investors.

As we shall see in the next section, both strands of regulation are hinged on improving transparency and disclosure of information that are relevant in particular to investors. Moreover, they are both based on the expansion of the 'fiduciary capitalism' that characterised the Anglo-Saxon approach to CSR *vis-à-vis* the Continental Europe one (Teubner 1985). However, it is rather paradoxical that, while a series of financial crises is challenging investors' claims of creating more efficient and less risky capital markets, the new social and environmental disclosure regulation is increasingly relying on investors to monitor corporate behaviour. This paper develops an argument suggesting that investors' commitment to sustainability has the effect of legitimising on a new basis their control over the company's resources in a context in which their role had been called into question. The next section will focus on the recursive EU debate on ESG disclosure during the 2000s. In particular, it will consider the role that key groups of actors - investors;

professions (i.e. accountants, financial analysts); public authorities; managers; NGOs; Trade Unions – had in shaping the EU regulatory debate on sustainability disclosure.

## 3. Accounting for sustainability: power, conflicts and rules

The analysis of the emergence of social and environmental disclosure regulation in the last decade can benefit on the one hand from the socio-legal literature on recursivity of global normmaking (Braithwaite and Drahos 2000; Halliday 2009) and on the other hand from the substantial literature on the regulation of CG (Aguilera and Jackson 2003; Hopner 2003; Gourevitch and Shinn 2005).

According to Halliday (2009) recursive cycles of norm-making evolve dynamically, through iterations among transnational state and non-state organizations and actors operating at different levels of regulation. This norm-making process has a beginning (Time I), when either there are too few or too many conflicting norms. It also has an ending (Time II), "when the normative framework has a qualitatively different character, when behaviour of individuals, groups, and nations is constrained in relatively routinized, orderly, and predictable ways by norms widely held to be legitimate and authoritative." (Halliday 2009, p. 16.12) Between Time I and Time II there can be quick or slow norm-making cycles or episodes that produce each time a new set of norms. An Episode begins when the problem attracts public attention and it appears in the regulatory agenda. As maintained by Halliday, the beginning of the episode requires the building up of an underlying set of policy problems and the initiative of charismatic norms-entrepreneurs "who mobilize organisations to institutionalise norms that cascade across states, IOs, and networks, eventually to be internalised and taken for granted." (2009, p. 16.12) In effect, in our case, given the absence of strong political leadership, throughout the 1990s, a handful of initiatives – often tiny and lacking economic and organizational means - began to promote regulatory initiatives like the CERES Principles; the GRI guidelines; AccountAbility standards; Hermes Principles; etc. marking the regulatory debate for many years to come. However, the current phase of non-financial disclosure in the European regulatory arena, really began only in 2000, with the launch of the so-called Lisbon Agenda (O'Riordan and De Smedt 2009) and can be divided into two episodes. As we shall see, the first episode dates from 2000 until 2006, while the second one started after the onset of the current financial crisis and it is not over yet.

Drawing on the political-economic analysis of CG regulation elaborated in particular by Aguilera and Jackson (2003) and Gourevitch and Shinn (2005), we can observe, between the two episodes, a clear shift in terms of coalitions of constituencies organising and mobilising themselves to shape ESG disclosure regulation. The authors proposed a dynamic analysis of systems of corporate governance based on a coalitional approach to institutional change. It highlights the full range of coalitions that can feasibly emerge among capital, labour and management. Aguilera and Jackson (2003) outline in particular three possible kinds of coalitions. The 'class coalition' arises when interests of capital and management oppose the interests of labour. The 'insider-outsider' coalition pits labour and management against owners. Finally, the 'accountability' or 'transparency' coalition concerns the common interests of shareholders and labour vis-à-vis management. Subsequently, Gourevitch and Shinn (2005) have enriched the typology, adding in particular a fourth relevant type called a 'corporatist coalition' among managers, workers and block-holding owners against minority shareholders. Applying this framework to the recursive emergence of ESG regulation in Europe, we can identify the first episode in the 1960s and 1970s, the first emergence of social and environmental reporting, as driven by a 'corporatist coalition', while the current cycle of regulation is driven by a 'transparency coalition'.

Analysing the EU debate on ESG disclosure that followed the launch of the Lisbon Agenda, we can observe that initially it revived the kind of dynamics that characterized the 'corporatist era' in a difficult attempt to reach an agreement between TUs and managers. In effect, the Agenda generated among TUs and NGOs the hope for a strong European legal framework on corporate social and environmental accountability. Around 2000, in fact, both Norway and France had approved new accounting laws mandating companies to include detailed non-financial information in their management reports. Although motivated by the need to restore customers and investors trust after the Enron scandals, the Commission soon scaled down its ambitions facing hard and fast opposition by BusinessEurope and other business organizations. Already in 2001, the Green Paper that had to translate the Lisbon commitment for CSR into policies opted for a 'modest' definition of 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." (EC 2001, p. 366) In the subsequent 2002 Communication, the Commission confirmed that CSR is "behaviour by businesses over and above legal requirements, voluntarily adopted." (EC 2002, p. 347) Following this framework the DG Employment, charged with the task to elaborate an ambitious EU framework on CSR, had to exclude *a priori* any proposal entailing direct legal obligations on companies. The DG faced the usual dilemma: how to enforce CSR by law if it is not law? As a solution, it was agreed to focus on meta-regulatory mechanisms of corporate accountability (Parker 2002 and 2007) based on what was already the dominant regulatory principle in business regulation: transparency and disclosure. In fact, as explained by Parkinson (2006) "while CSR refers to conduct that is voluntary, the techniques relied on to promote it might themselves involve the imposition of binding obligations." (Parkinson 2006, p. 6) The idea, therefore, became to create a European regulatory framework that would *encourage* corporations, through transparency and disclosure, to become accountable to their stakeholders. In October 2002, the Commission launched an EU Multi-Stakeholder Forum (MSF) on CSR open to all parties involved: NGOs, TUs, companies, investors, etc. However, negotiations within the MSF proved to be very tough. The corporate side (i.e. BusinessEurope), in fact, on the basis of the Green Paper and Communication on CSR, stressed the voluntary nature of non-financial disclosure. TUs and NGOs, on the other side, blamed the Commission for failing to ensure that the EU would directly tackle the real issues of companies' misbehaviour within and outside the Union. For them transparency and disclosure talks were already perceived as a renunciation of the option of direct legal obligations. Therefore they insisted on obtaining at least binding and detailed disclosure rules that had to be independently monitored. The debate resulted in a deadlock on the issue of mandatory versus voluntary rules. The main result of this phase has been the Directive 2003/51/EC that introduced into EU Law the requirement on companies to include "both financial and, where appropriate, non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters."

While the EU Directive was meant to be the first step towards the creation of a EU framework on ESG disclosure, it has turned out to be the only one so far. In fact, in 2005 the Barroso Commission replaced Prodi's, and the EU initiative on CSR lost momentum. In particular Barroso decided to transfer from the DG Employment to the (more business-oriented) DG Enterprise the mandate for elaborating CSR policies. This political decision – described as 'brutal' by one of my key informants - was followed by a second Communication published on 22 March 2006 in which the new Commission strongly re-affirmed the voluntary nature of CSR (EC 2006). In response, the EU Parliament passed, by a large majority in plenary, a resolution urging the EU executive to extend legal obligations to some key aspects of corporate accountability, such as directors' duties, foreign direct liability and mandatory disclosure for lobbyists (European Parliament 2007). The EU executive's reaction was to reaffirm once again that CSR is a uniquely voluntary measure which

"should not be regulated at the EU level." The MSF soon became a privileged partnership between companies and the DG Enterprises and, as a result, NGOs and TUs started to boycott and, finally, abandon the Forum. On 1st March 2008 a European Alliance for CSR led by corporate representatives was created by the EU Commission: managers had succeeded in keeping European ESG disclosure within a self-governance regulatory scheme. As requested by BusinessEurope, the Commission explicitly suggested that non-financial disclosure should be regulated through voluntary guidelines, principles and standards that had been created by global voluntary regulatory networks, such as the UN Global Compact and the GRI.

The outcome at the EU level mirrors what was taking place at the national level. In particular in the UK where, in 1997, the Labour Party obtained an historic victory, after years of Thatcherism, this created great expectations for fundamental reforms that would take into consideration corporate responsibilities. In effect in 2000 the first drafts of the Modern Company Law Review appeared to extend company law to tackle social, ethical and environmental issues broadening directors' responsibilities. However, in the final draft of the Review (UK Parliament 2002, Section 3.3) any reference to stakeholder accountability, directors' responsibility and non-financial disclosure was subordinated to a materiality constraint. This means that company directors would not be liable for disclosing social and environmental information unless they were material. Unfortunately, 'materiality' is such an intangible and abstract notion that the new legislation became unenforceable in this area (Solomon 2006, p. 232). The Review, however, recommended the introduction of a mandatory Operating and Financial Review (OFR) meant as a vehicle for directors' consideration of environmental and community issues. Significantly, after three exhausting years of debates the bill was eventually withdrawn at the very last minute by the government, and replaced by a new version with a more modest Business Review, which met only the minimum European requirements (Villers 2006). Eventually a mandatory OFR was introduced for government entities only[4]. This regulatory outcome confirmed the weakness of organised labour compared to the Fordist era: even in the UK, where the Labour had a comfortable majority, they had little influence on the policy agenda.

A few years later, however, the financial crisis and rising anxiety about the state of the Planet revitalised the European regulatory debate on non-financial disclosure. This time, though, the content and mode of its regulation were different from the previous Episode as was also the coalition supporting its emergence. On the one hand, corporations had to face growing criticism for their ruthless impact on the environment and responsibilities for global warming. As has been pointed out, in fact, if we consider the global processes through which emissions are generated "multinational corporations and consumers had a more significant role to play in reducing emissions of GHG than the countries in which particular goods were produced" suggesting a "very different geography of responsibility". (Bulkeley and Newell 2010, p. 2) On the other hand, the 2007 financial collapse struck at the heart of the Anglo-Saxon capitalist model and clearly showed that the finance-led capitalist model is, in the long term, dangerously unsustainable (Wade 2008). In 2009, the economist Adair Turner, charged with saving the UK banking system from catastrophe as chief of the Financial Services Authority (FSA), argued that a large part of the City is "socially useless" and called for draconian regulations for the financial sector (Inmann 2009; Turner 2009). The link between economic and environmental (un)sustainability was echoed, among others, by the UN Secretary General warning that "the current world's economic model is environmental suicide" and asking political and business leaders to embrace economic innovation in order to save the Planet. (Associated Press 2011).

Without going into the details of this broad debate, the main point is that the finance-led capitalist system that emerged in the 1980s has been for the first time

[4] The British Company Act 2006

radically called into question. In particular the principle of shareholders' primacy was fundamentally shaken. For instance, the UK Treasury Minister Lord Myners blamed shareholders for not exercising their monitoring and enforcement responsibilities diligently, describing them as 'absentee landlords' (Myners 2009). More recently, in July 2010 the UK Stewardship Code, pointing at short-term investments as responsible for the disastrous financial collapse, mandated institutional investors to 'disclose-or-explain' their social and environmental investment policies. On July 2011, the EU released a new Green Paper on Corporate Governance, reviewing the Directive 2006/46/EC, explicitly warning that shareholders have to be more involved in CG issues if they want to be recognised as the owners of the company and they should also take an interest in sustainable returns and the long-term performance of companies. Overall, the 'market efficiency' hypothesis that underpinned shareholders' claims for controlling companies' management and resources is now widely recognised as fundamentally flawed (Turner et al. 2010). Currently, institutional investors have no strong theoretical or empirical argument to justify the pre-eminence of the shareholder-centred CG model and there is a growing debate concerning the opportunity of reducing the excessive power of the financial sector (Wade 2008; Turner et al. 2010; Williams and Zumbansen 2011) or, at least, promoting 'green investments' (Perez 2007; Richardson 2011).

As a consequence of the external pressures for changing what is increasingly recognised as an obsolete and harmful economic model, 'sustainability' and long-term investment are becoming the key principles that frame newly emerging ESG regulation. Companies started in the early 2000s to voluntarily issue 'sustainability reports' in which environmental, social and economic (ESG) aspects were all included and that followed the 'triple bottom line' approach popularised by John Elkington (1997), the founder of AccountAbility.

After the onset of the current financial crisis, however the debate changed in three major ways (KPMG et al. 2010). First of all, we are witnessing a shift toward *codification* of ESG disclosure. In particular, there is a renewed pressure for a stronger role of the state in its regulatory role, to ensure a minimum level of disclosure and risk prevention. While in the 1990s and early 2000s the debate had been focused on the deadlock between mandatory and voluntary disclosure, there is now a strong tendency to build a multi-arena regulatory regime that goes beyond this dichotomy and is structured as a combination of both. A recent survey, limited to 30 countries around the world, already detected 142 country standards and/or laws with some form of ESG-related disclosure requirement or guidance. Approximately two thirds (65%) of them can be classified as mandatory and one third (35%) as voluntary (KPMG et al. 2010, p. 4). There is therefore a case for harmonization, especially at the European level. Secondly, there is a trend towards *integrating* ESG and financial reporting and issuing only one report. This represents both a sign of maturity of ESG reporting and a recognition of the limits of the traditional financial reporting. Although this development is still in its infancy, it is strongly supported by influential organizations such as the GRI and the International Network for Corporate Governance (INCG). The latter is an association of institutional investors, representing assets of over US $15 trillion, that has contributed to shaping global CG 'best practice' during the last two decades and has created a 'Non-Financial Business Reporting Committee' aiming to influence regulatory proposals for integrated reporting. In particular, an International Integrated Reporting Committee (IIRC) has been set up in 2010, which aimed to "create a globally accepted integrated reporting framework which brings together financial, environmental, social and governance information in a clear, concise, consistent and comparable format." Integrating financial with social and environmental reporting marks the recognition that, by any realistic vision of markets and corporations, social and environmental considerations have a material impact (KPMG 2008; IIRC 2011). Lastly, the rise of sustainability as the main

challenge that public and private governance are currently facing has not just broadened the issues that are covered in the reports (biodiversity, climate change, etc.) but crucially widened the potential audience and issuers of reporting. In fact, although corporations are still the main disclosers, there are other public and private actors that are experimenting with sustainability reports. Reports from municipalities (such as the city of Amsterdam), public offices, NGOs, trade unions and even the US Army are bringing innovative practices and perspectives into sustainability reporting. At the same time the explosion of reporting represents a challenge for its codification, coherence and regulation.

At the EU level, this new phase was articulated in the February 2009 speech of the EU Commissioner on Enterprises and Industries, Gunter Verheugen, that for the first time since the Barroso Commission, openly highlighted the need for talks among all stakeholders on ESG disclosure. As a consequence, in September 2009, DG Enterprise took the initiative of hosting a series of workshops on ESG disclosure each exploring the position of six groups of stakeholders: enterprises, investors, TUs, NGOs, public authorities and professions (accountants, etc). Significantly, in the summary of discussion of the last workshop, it emerged that "a decision not to change EU policy would send a strong political message to enterprises and other stakeholders that the European Union believes business-as-usual is desirable and feasible, whereas the multiple sustainability challenges we face demand fundamental change. (…) ESG disclosure is a political issue not just a technical issue. Tinkering is not a political message". (EC 2009c, p. 3) The conclusions of these workshops have been discussed during the conference organised by the Spanish Presidency on 25-26 March 2010 and further debated in a plenary meeting of the European MSF on CSR in November 2010, confirming the broadening interest for reviewing the existing regulation on non-financial disclosure. Thereafter, the DG Internal Market launched a consultation open to all interested stakeholders "with the view of improving existing policies on disclosure of corporate social and environmental information, and respect for human rights, including possible proposals for new initiatives and/or revised legislative measures." (EC 2011, p. 2) The consultation attracted an extraordinary number of responses - over 300 - and in April 2011 the Commission officially announced that it will put forward a legislative proposal by the end of the year on non-financial disclosure. This outcome represents a U-turn compared to June 2007 when it explicitly excluded the need for further legislative initiatives ("CSR should not be regulated at the EU level"). The contradiction is even more apparent if we bear in mind that the Commission has changed neither its political majority nor its President, José Barroso. What explains therefore the urgency to regulate ESG disclosure?

According to a series of preliminary interviews that have been conducted at the EU Commission and with some of the main stakeholders involved, institutional investors and financial analysts have been the driving force behind this change. A top EC official at DG Enterprises, in particular, recalled that the turning point came at the MSF in 2009 as financial analysts and not just the 'usual suspects' (i.e. TUs and NGOs) came to demand better ESG information. In effect, the Federation of European Financial Analysts has been very active in promoting ESG disclosure and in particular has elaborated "a guideline for the integration of ESG into financial analysis and corporate valuation" (EFFAS 2010). 'Long-term risks' and 'non-physical or tangible capital' are the two key concepts to understand this shift. Financial analysts argue that it is very likely that most industrial sectors will be affected directly or indirectly by the consequences of climate change policies and changes related to sustainability in general. Advocates of investors' involvement in non-financial disclosure argue that in 1980 some 80% of the market value of companies could be explained in traditional accounting terms, but by 2009 only 19% (Ocean Tomo 2010 in IIRC 2011). The expansion of the financial market as a means for corporate capitalization has resulted in a very large increase in the average price-earnings ratio – the ratio of stock price to earnings per share – over the period.

Therefore nowadays the valuation of a company is based much more on estimated future earnings and not necessarily related to its physical or tangible capital (EC 2009b, p. 3). The ability to forecast long-term risks is becoming crucial as investors are making decisions on a 20-30 year view of future earnings potential. Unfortunately, using traditional accounting information this is impossible, resulting in a huge gap between market value and underlying asset value (UNEP FI 2009). In particular, EFFAS argues that in the case of long and medium-term institutional investors – which in Europe are around 80% of the total – ESG disclosure is becoming a vital piece of information (2010). There is an ongoing debate whether ESG information and, in particular, carbon disclosure might help to fill this gap. For instance a recent German study argues that, under the current financial wisdom, investors have the wrong incentives about the investment strategy for replacing the German power plants which are reaching the end of their life cycle. Information about their carbon impact, they argue, would provide them with a more adequate picture (Garz et al. 2009). The inability of investors to evaluate ESG information is therefore having consequences that go beyond asset managers' portfolios and stock market performance and might create systemic market risks.

At the same time, it is important to remember that European institutional investors are changing. In particular as the result of pensions reforms in many EU countries, private pensions and investment funds are increasing in size and power. Crucially, they have been severely hit by the recent financial crises and are under pressure from clients and governments who want to make sure that their investment strategy is safe and long-term oriented. The growing relevance of non-financial information within the investor community is mainly related to greater external pressure following financial losses and calls to change their strategies towards long-term investments. However, investors' interests in mandatory ESG disclosure do not necessarily coincide with those of NGOs and TUs. The former tend to frame it as a problem of 'risk management', focusing on quantitative data that are considered as 'material' and that can be 'gamed' as financial products. NGOs and TUS, instead, focus on more qualitative information concerning labour and human rights protection, asking for legal enforcement and independent verification. Therefore investors' involvement would represent a shift both in terms of the mode and content of non-financial disclosure compared to the traditional approach to social and environmental disclosure that, since the 1970s, has been driven only by TUs and NGOs.

## 4. From efficient to sustainable investments? Legitimacy and accumulation in contemporary capitalism

As noted by Rob Gray, the traditional *raison d'être* for social and environmental accounting has always been the growing concern over the power and influence of corporations on our model of economic and social development. "Enquiry into social accounting offers, *inter alia*, the promise (however idealized) of an international corporate, institutional and financial complex held substantially accountable to civil society for its activities. Such an accountability – if applied successfully – would expose much duplicity; it would make transparent the essential and unavoidable conflicts that a global, astonishingly successful (and probably essentially rapacious) capitalism generates." (2010, p. 550) It is too early to say whether and how this inherent 'combative element' will be transferred into a more coherent regime of ESG regulation. However, considering its current emergence, institutional investors are likely to keep and even strengthen their central position of control over company's resources and management. Considering the content of recent ESG regulation, there is more interest in climate rather than social information. The former is considered to produce more 'material' and 'quantifiable' Key Performance Indicators (KPIs), in particular relating to carbon disclosure. Considering changes in the mode of ESG disclosure regulation, the adoption of a 'comply-or-explain' approach to ESG disclosure adopted in Denmark (Danish Government 2008) has

been inspired by the CG reforms of the 1990s driven by institutional investors. As pointed out by Stephen Bottomley (2007), we are unlikely to see the 'stakeholder model' replacing the 'shareholder one'. It is more likely that the contemporary modest CSR will evolve into a more mature multi-faced system of corporate accountability resulting from a mix of the two models. As the efficiency markets hypothesis underpinning shareholder primacy appears fundamentally shaken by corporate scandals and financial crises, institutional investors are increasingly required to assume their responsibilities towards the environment and society. As showed by the burgeoning numbers of pension funds and asset managers signing up to initiatives such as the UN PRI or the CDP, they need to picture themselves as 'enlightened shareholders', reviving old ideas of 'shareholders democracy' (Soederberg 2010).

On the other hand, the newly emerging regime of ESG disclosure represents an opportunity but also a threat for NGOs and TUs. In fact they can use this legal framework to strengthen their role as stakeholders and highlight the relevance of social and environmental issues. However, they have to accept an half-empty glass. In fact, emerging mandatory ESG disclosure would not 'hold the corporate-financial complex substantially accountable to civil society for its activities', as promised by traditional ideas of social accounting. NGOs and TUs pay for their economic and political weakness and have to rely on investors' support to get mandatory ESG disclosure approved. The price to be paid is a legal framework that largely legitimises and re-produces existing power relations. Rather than using mandatory disclosure to delegitimise the financial sector, the financial sector would be able to use sustainability disclosure to legitimise its increasingly contested role.

Considering this development in the light of the existing theoretical debate on corporate accountability regulation, it is possible to affirm that, rather paradoxically, law-and-economics scholars are currently the most enthusiastic about the emergence of ESG disclosure (Hawley, J. and A. Williams 2000 and 2007). For instance, Davis et al. (2006), in *The New Capitalists. How Citizen Investors are Reshaping the Corporate Agenda*, state: "Thanks to the rise of mutual funds and retirement plans, the actual owners of the world's corporate giants are no longer a few wealthy families. Rather, they're the huge majority of working people who have their pensions and life savings invested in shares of today's largest companies." Hawley and Williams' analyse 'the rise of fiduciary capitalism' and consider institutional investors as 'universal owners' (2000 and 2007). According to their argument, due to their size, which has immensely grown in the last three decades, large institutional investors have become 'universal owners'. This means that they have developed a natural interest in macro-economic performance of the economy as a whole, including infrastructures, fiscal and health policies, education and climate change. As they actually own a cross section of the whole world economy, they internalized both pecuniary and non-pecuniary externalities generated by individual companies that are in their portfolio. Therefore, it is argued, universal owners have now a financial interest in reducing social and environmental negative externalities.

On the other side, *critical legal and political theories*, tend to expose the 'marketization' and 'capture' of the social and environmental accountability movement (Shamir 2005), heavily criticizing regulatory initiatives such as the GRI (Levy et al. 2009) or the CDP (Newell and Paterson 2010). In particular, they are worried about the expansion of Anglo-Saxon fiduciary capitalism and CSR that risks to gradually dismantle stakeholder-oriented Continental European approaches to corporate accountability (Overbeek et al. 2007). Eventually, as we already mentioned, *the regulatory capitalism* approach argues that transparency and disclosure are central legal principles in the emergence of a new division of labour between state and business actors (Braithwaite 2008). According to their claims, private governance is increasingly required to take responsibilities for issues that

were traditionally left to the public sphere at the same time the state has not disappeared maintaining a strong regulatory role and key functions of control.

Instead of treating the three approaches as mere accounts of newly emerging corporate accountability regulation, this paper suggests to consider them as competing projects or visions of business-society relations, underpinning and interpreting existing conflicts of interest among the different constituencies. Drawing on Paterson's analysis of climate change governance (2010), ESG can be understood as a crucial field of legitimation and delegitimation of the dominant regime of capitalist accumulation, which in the 1970s was Fordism and nowadays, in Western societies at least, is financial capitalism. The law-and-economics solution would legitimize the dominant role of the financial sector. It is based on the Anglo-Saxon 'explicit' approach to CSR, expanding fiduciary duties, and argues that disclosing 'material' information would lead to long-term investments and green growth. On the other side, critical legal and political theories attempt to delegitimize finance-led capitalism supporting the 'implicit', stakeholder-oriented Central European approach to CSR (Matten and Moon 2008). However, stakeholders have little power to influence European policy-makers and TUs are often more interested in defending what is left of the European Social Model than fighting for a new dawn (Hyman 2004). Lastly, the idea of 'regulatory capitalism' represents an attempt to find a compromise between the two opposed approaches, overcoming this theoretical and political deadlock.

Overall, we are witnessing the rise of a 'transparency coalition' including not just the 'usual suspects', TUs and NGOs, but also long-term investors, such as pension funds and responsible investors. The origin of this coalition is in the European CG reforms that strengthened the rights of minority shareholders and transparency and disclosure requirements across Europe (Hopner 2003; Gourevitch and Shinn 2005). However, this perspective entails a number of theoretical and legal challenges that need further analyses. We may mention here only three issues. First of all, more empirical research should be conducted on changes in the content and mode of ESG regulation. Second, the actor-centred political-economic analysis of CG regulation (Aguilera and Jackson 2003; Gourevitch and Shinn 2005) has to be adapted to the issue of CSR and sustainability. In particular, some actors, such as NGOs and local communities have to be considered. Lastly, the emergence of a more 'sustainable' regime of accumulation' requires the definition of a new theoretical model of 'sustainable companies' (Sjåfjell 2009; Kruse and Lundbergh 2010; Vitols and Kluge 2011; Williams and Zumbansen 2011).

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