

CORPORATE SOCIAL RESPONSIBILITY WITHIN THE EUROPEAN UNION FRAMEWORK*

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In recent years there has been increasing concern about the behavior, or indeed misbehavior, of corporate entities in relation to human rights, social welfare and the environment. As a consequence, corporations are encountering greater scrutiny of their activities on a global level and the idea of encouraging or even requiring companies to adhere to minimum standards of behavior has become enshrined within a concept known as corporate social responsibility (hereinafter “CSR”). This Article examines the European Union’s multi-layered approach to CSR. This approach is at a crucial stage of development, given the globalized operations of many European corporations. This Article describes the development of CSR in the E.U., critiques its current status, and concludes that, while a regional approach to CSR represents positive progress towards the regulation of corporate entities, a formalized, international framework is preferable.

On a regional level, the European Union has been relatively slow to embrace the concept of CSR, despite the long European tradition of “socially responsible initiatives by entrepreneurs.”² However, several voluntary initiatives over the years have regulated corporations in the social sphere, both within the E.U. and externally. Internally, for example, the European Employment Strategy, E.U.-Ecolabels, and the Eco-Management and Audit Scheme (EMAS) all attempt to promote socially responsible business. The E.U.-Ecolabel is a voluntary initiative designed to encourage the production of more environmentally friendly goods

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² *Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, at 5, COM (2002) 347 final (July 2, 2002) [hereinafter *Social Responsibility*].

and services. It also strives to ensure transparency for consumers.³ EMAS “promotes continuous improvements in the environmental performance of industrial activities by committing firms to evaluate and improve their own performance.”⁴

At the external level, the Cotonou Agreement with African, Caribbean, and Pacific nations constitutes a more concrete attempt to promote human rights norms. The Agreement “incorporated a clause defining human rights as a fundamental element of the agreement which serves as the basis for dialogue with a third country government on human rights.”⁵ This clause arguably falls within a “harder norm” category of regulation, because it imposes obligations upon states, rather than the corporate entities themselves.

In 2001, the E.U. clarified its views as regards CSR in two Communications: first, the “Communication on the E.U. role in promoting human rights and democratisation in third countries;”⁶ and second, the “Communication on Promoting Core Labour Standards and Improving Social Governance in the context of Globalisation.”⁷ The Communications make available incentives in the form of trade liberalization “under the E.U.’s Generalised System of Preferences (GSP) where countries comply and apply minimum social and environmental standards.”⁸ Further, the GSP ensures compliance by providing sanctions, in the form of preference withdrawal, when countries “commit serious and systematic violations” of International Labour Organisation (ILO) core labor standards.⁹ The E.U. sees itself as advancing human

³ *Id.* at 15. For more information, see European Union, Eco-label Homepage, http://europa.eu.int/comm/environment/ecolabel/index_en.htm (last visited Oct. 11, 2005).

⁴ *Social Responsibility*, *supra* note 2, at 20.

⁵ *Id.* at 22.

⁶ European Commission, *The European Union’s Role in Promoting Human Rights and Democratisation in Third Countries*, COM (2001) 252 final (May 8, 2001).

⁷ European Commission, *Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation*, COM (2001) 416 final (July 18, 2001).

⁸ *Social Responsibility*, *supra* note 2, at 22.

⁹ *Id.* For more information on the GSP see Press Release, European Comm’n, Generalised Sys. of Preferences (Mar. 1, 2001), <http://europa.eu.int/comm/trade/issues/global/gsp/eba4.htm>. The GSP applies to the Least Developed Countries: Additional preferences are immediately granted to developing countries that have ratified and effectively implemented the 16 core conventions on human and

rights by encouraging businesses operating in developing states to promote human rights values in relation to *inter alia* workers' rights and ethical standards, "particularly where their operations have an influential role in countries with a poor record in this area."¹⁰ Of course, this is precisely why some corporations choose to locate in such countries: to engage in so-called bottom-feeding.

The initiatives outlined in the Communications, however, did not address corporate misbehavior directly. The initial starting point for specific E.U. development of the concept of Corporate Social Responsibility followed publication of the "Manifesto of Enterprises against Social Exclusion," which resulted in the creation of the European Business Network in 1995.¹¹ The manifesto advocated an open dialogue between the relevant actors and the exchange of best practice on CSR.¹² By 2000, the year of the Lisbon Summit of the European Council, CSR was "put at

labour rights and 7 (out of 11) of the conventions related to good governance and the protection of the environment. At the same time beneficiary countries must commit themselves to ratifying and effectively implementing the international conventions which they have not yet ratified. In any case, the 27 conventions have to be ratified by the beneficiary countries by December 31, 2008. European Commission, Generalised System of Preferences, http://europa.eu.int/comm/trade/issues/global/gsp/memo201004_en.htm (last visited Oct. 11, 2005).

The core human rights conventions include *inter alia* the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Convention of the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention Against Torture, the Genocide Convention and the UN Convention on the Rights of the Child. Conventions relating to the environment and good governance include the Convention on Biological Diversity, Kyoto Protocol and the Mexico UN Convention Against Corruption.

Id.

¹⁰ *Social Responsibility*, *supra* note 2, at 23.

¹¹ *Cf. Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility*, at 3, COM (2001) 366 final (July 18, 2001), available at http://europa.eu.int/comm/employment_social/soc-dial/csr/greenpaper_en.pdf [hereinafter *Green Paper*].

¹² *Id.*

the top of the political agenda” within the framework of sustainable development.¹³ The Göteborg Summit in June 2001 specifically considered the role of companies within society and within the context of a “sustainable development strategy” for Europe.¹⁴ Building on the work at the summit, the European Commission published its “Green Paper on Corporate Social Responsibility.”¹⁵ The stated aim of this initiative was to stimulate debate about CSR within the European context rather than “making concrete proposals for action.”¹⁶ In other words, actors selected a clear “soft law” approach.

The Green Paper draws on the concept of the “triple bottom line”¹⁷ and asks several key questions including:

- (1) What is the role of the E.U. in the development of CSR?
- (2) What is the role of CSR in corporate business strategies?
- (3) What is the role of other stakeholders?
- (4) How should CSR strategies be monitored and evaluated?
- (5) What mechanisms are most appropriate for developing CSR, and at what level?¹⁸

There were 261 responses to the Green Paper,¹⁹ with only nine out of fifteen Member States responding.²⁰ Of the forty-nine individual company responses, more than half were from

¹³ Press Release, European Union Comm’n on Employment and Soc. Affairs, Corporate Soc. Responsibility: New Comm’n Strategy to Promote Bus. Contributions to Sustainable Dev. (July 2, 2002), http://europa.eu.int/comm/employment_social/news/2002/jul/131_en.html.

¹⁴ EUROPEAN MULTISTAKEHOLDER FORUM ON CSR, FINAL RESULTS & RECOMMENDATIONS 2 (2004).

¹⁵ *Green Paper*, *supra* note 11. Responses were invited from interested parties and submitted by December 31, 2001.

¹⁶ *Id.* at 23.

¹⁷ This term refers to the concept of “triple bottom line accounting” whereby the traditional company reporting framework takes account of environmental and social performance in addition to the more usual financial matters.

¹⁸ *Green Paper*, *supra* note 11, at 22-23.

¹⁹ See European Commission, Responses to the Consultation on the Green Paper on CSR, http://europa.eu.int/comm/employment_social/soc-dial/csr/csr_responses.htm [hereinafter Green Paper Responses].

²⁰ Belgium, Germany, Finland, France, Ireland, Netherlands, Austria, Sweden, U.K. *Id.*

U.K.-based corporations.²¹ The trade union movement submitted sixteen responses,²² while NGOs submitted thirty-five responses.²³ Unfortunately, the Green Paper constricts the debate by relying on a very limited, and business-oriented, definition of CSR, describing it 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.”²⁴

Unsurprisingly, this emphasis on the voluntary nature of CSR did not find favor with many of the NGOs responding to the Green Paper.²⁵ Likewise, the proposition that CSR should be *integrated* into business operations, as opposed to being the starting platform from which business is conducted, was negatively received. The trade unions and the NGOs advocated a “regulatory framework” that established “minimum standards” and ensured “a level playing field.”²⁶

Another criticism leveled against the Green Paper concerned the intense focus on the “business case,” with little consideration for the interests of the wider constituency of

²¹ 27 individual U.K. corporations responded. *Id.* Another 32 responses were received from networks representing the corporate sector, e.g. International Chamber of Commerce, Law Centres Federation. *Id.* A large number of U.K.-based TNCs responded to the Green Paper. *Id.* It may be that CSR has a high profile in the U.K. in the wake of the RTZ asbestos litigation, and the BP Brent Spar fiasco. This could also explain the relatively large number of U.S. firms responding, e.g. NIKE, Levi Strauss. However, it is surprising that Shell did not submit a response in light of its experiences in Nigeria.

²² The respondents included the Trade Union Congress. *Id.*

²³ The NGOs that responded included, at the international level, OXFAM, Amnesty International, Save the Children and WWF. *Id.* U.K. NGOs submitting responses were Baby Milk Action IBFAN, Christian Aid, Friends of the Earth, New Economic Foundation (NEF) and the Solicitors Pro Bono Group. *Id.*

²⁴ *Green Paper*, *supra* note 11, at 6.

²⁵ *See, e.g.*, Submission from Amnesty International on The European Commission 2001 Green Paper: Promoting a European Framework for Corporate Social Responsibility, http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/091-NGOINT_Amnesty-International_int_011219_en.htm (§ 1 Definition of CSR). Amnesty International argues that CSR should not be an “add-on to core business activities” and states that the assumption that CSR should be viewed as voluntary is “flawed in that it fails to take account of the reality that voluntary approaches are generally implemented in response to consumer and community pressures, industry peer pressure, competitive pressure or the threat of new regulations or taxes,” i.e., rarely voluntarily. *Id.*

²⁶ *Social Responsibility*, *supra* note 2, at 4.

stakeholders. Critics also argued that the Commission's definition of CSR is flawed.²⁷ In particular, it is not clear *what* the Commission is seeking to protect through the adoption of CSR. The reference to a wide variety of international legal instruments, such as the Universal Declaration on Human Rights, ILO Conventions, and the U.N. Convention on the Rights of the Child, has caused much confusion. Again, there is clear conflict between those who want regulation and those who do not.

This conflict is mirrored in many of the responses to the U.N.'s Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights, in particular the U.S. response, which is vehement in the rejection of a regulatory CSR framework.²⁸ In the responses to the E.U.'s Green Paper, there is a remarkable homogeneity between individual corporate responses and the responses of industry representatives. The responses emphasize self-regulation, while demonstrating a lack of enthusiasm for enforcement mechanisms, temporization of implementation requirements, the voluntary nature of CSR, and good practice. The responses also displayed a general abhorrence of a "one-size fits all" approach to CSR. Published in July 2002, the European Commission's response to the Green Paper is both disappointing and heartening in equal respects. Entitled the "Communication from the Commission concerning Corporate Social Responsibility: a business contribution to Sustainable Development," it clearly adheres to the business case. It refers to frameworks, promotion, assistance, awareness, support, and good practice, but there is no indication

²⁷ *Id.* at 4. See also the individual responses of the NGOs and trade unions to the *Green Paper*, *supra* note 11.

²⁸ U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Promotion and Prot. of Human Rights, Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regards to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003). See also Green Paper Responses, *supra* note 19 (containing adverse responses of the International Chamber of Commerce and others). For more on the UN Norms see David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003).

that formal regulation is a possibility.²⁹ Additionally, the Commission has retained the flawed definition of CSR. No justification is given for the reliance on voluntary measures:³⁰ “In principle, adopting Corporate Social Responsibility is clearly a matter for enterprises themselves. . .”³¹ The Commission continues, “Nevertheless. . . there is a role for public authorities in promoting socially and environmentally responsible practices by enterprises.”³²

On a more positive note, there is firm support for the OECD Guidelines on Multinational Corporations, which may affect the operation of the OECD National Contact Points (NCP) and result in deeper cooperation.³³ Further, utilizing the OECD Guidelines and ILO Conventions encourages convergence between codes of conduct by providing “a common minimum standard of reference.”³⁴

On a practical level, the Commission in the Communication made several proposals. The first proposal advocated the creation of an E.U. Multi-Stakeholder forum on CSR (hereinafter “EMS forum”) with “the aim of promoting transparency and convergence of CSR practices and instruments.”³⁵ To that end, the EMS forum was to be composed of representatives from states, non-governmental organizations, corporations, and wider civil society.³⁶ The EMS forum was formally established in October 2002, and it reported its conclusion in June 2004.³⁷ Second, it was proposed that the EMS forum should consider the integration of CSR into all E.U. policies including employment and social affairs policy, enterprise policy, environmental policy,

²⁹ *Social Responsibility*, *supra* note 2, at 7 (“In principle, adopting CSR is clearly a matter for enterprises themselves. . .”).

³⁰ *Id.* at 5.

³¹ *Id.* at 7.

³² *Id.*

³³ For more on the OECD CSR system see Sorcha MacLeod & Douglas Lewis, *Transnational Corporations: Power, Influence and Responsibility*, 4 GLOBAL SOC. POL'Y 77, 79-83 (2004).

³⁴ *Social Responsibility*, *supra* note 2, at 13-14.

³⁵ *Id.* at 17.

³⁶ *Id.*

³⁷ EUROPEAN MULTISTAKEHOLDER FORUM ON CSR, FINAL RESULTS & RECOMMENDATIONS (2004).

consumer policy, and public procurement policy.³⁸ The Commission Communication also specifically addresses external relations policies and advocates, as already discussed within the context of the Green Paper, the promotion of CSR in line with the “Communications on the E.U. role in promoting human rights standards and democratisation in third countries.”³⁹ This promotion of CSR includes “the use of bilateral dialogue with Governments” and “trade incentives” as well as “engaging directly with multinational enterprises.”⁴⁰ Within the context of general support for the OECD Guidelines on Multinational Enterprises, however, it is interesting to note that the Commission suggests that access to subsidies and export credit insurance and access to public procurement could be made “conditional on adherence to and compliance with the guidelines.” Finally, the Commission encourages public administrations, itself included, to “practice CSR principles.”⁴¹ The proposals have been subjected to a fair degree of analysis.

One of the criticisms leveled at the Commission’s Communication by the European Parliament in its Report in April 2003 was that the Parliament was “frozen out of the process in a way that is unacceptable: it is worth noting that the Commission Communication was effectively written before the Parliament’s response to the Green Paper had been absorbed.”⁴² Beyond this general criticism, there appeared to be broad support for the Commission’s strategy, at least in the conclusions reached by the Committee on Employment and Social Affairs. There was, however, clear support among the various reporting committees for at least some mandatory rules. For example, the Committee on the Environment, Public Health, and Consumer Policy emphasized that “companies should be required to contribute to a

³⁸ Some of the suggestions put forward for consideration by the EMS included (1) the incorporation of a framework directive harmonizing the fairness of commercial practices; and (2) the production of a handbook on ‘green’ public procurement. *Social Responsibility*, *supra* note 2, at 21-22.

³⁹ European Commission, *supra* note 6.

⁴⁰ *Social Responsibility*, *supra* note 2, at 22-23.

⁴¹ *Id.* at 24.

⁴² Eur. Parliament Comm. on Employment and Soc. Affairs, *Report on the Communication from the Commission concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development (COM(2002) 347-2002/2261(INI))*, 12 A5-0133/2003 final (Apr. 28, 2003).

cleaner environment by law rather than solely on a voluntary basis” and invited the Commission to “explore ways of establishing a system of corporate accountability to citizens.”⁴³ The Committee on Industry, External Trade, Research, and Energy (CIE-TRE) went even further by demanding a “Global Convention on Corporate Accountability” on the basis that “world society has a right to accountability in terms of environmental, social and human rights from transnational corporations and . . .SMEs.”⁴⁴

The Committee on Development and Cooperation sought to establish the extraterritorial reach of CSR by calling upon the Commission to “create an agency which would be responsible for introducing a system for assessing and monitoring observance of international and national standards on CSR and the environment by E.U. companies operating in developing countries.”⁴⁵ In addition, despite the various committee reports, the Committee for Employment and Social Affairs still came to the conclusion that a voluntary, soft law system was the best model.⁴⁶

Most recently, the European Multi-Stakeholder Forum presented its final report in June 2004,⁴⁷ but despite twenty months of consultation and consideration, it did not move the situation forward. Ultimately, the Report makes lengthy recommendations of a non-binding nature, expressed in terms of “cooperation,” “promotion,” “explore,” and other general statements.⁴⁸ For example, there are recommendations for “increasing awareness” of CSR, encouragement of “cooperation with stakeholders,” support for more empirical research on CSR and stress on the diffusion of information about CSR, and emphasis on cooperation with and between companies.⁴⁹ Notably, the first paragraph of the Foreword states that “[t]here are some

⁴³ *Id.* at 18.

⁴⁴ *Id.* at 16.

⁴⁵ *Id.* at 22.

⁴⁶ *Id.* at 8.

⁴⁷ See EUROPEAN MULTISTAKEHOLDER FORUM ON CSR, *supra* note 37.

⁴⁸ *Id.* at 12-16.

⁴⁹ *Id.*

differences and debates that remain. Members of the Forum expressed their views about the merits and limitations of this Report in their speeches and statements made on the occasion of the plenary meeting of the Forum.”⁵⁰

The traditional battle lines have been drawn, with business on one side and NGOs, trade unions, and other stakeholders on the other. Some authors urge a move away from this dichotomy, arguing that it is unhelpful.⁵¹ More importantly, this viewpoint has been adopted wholesale by E.U. entities such as the Directorate General for Trade, which described CSR in the following manner:

CSR is not a substitute, but a complement to hard law. As such it must not be detrimental to public authorities’ task to establish binding rules, at domestic and/or at international level, for the respect of certain minimum social and environmental standards. The focus of the debate in this respect has now moved on from a simple dichotomy between voluntary and binding instruments, towards the overarching challenge of devising reporting tools and verification mechanisms to ensure proper compliance with CSR commitments.⁵²

Yet the fact remains that the NGOs and others still want to create a concrete legal CSR framework, with all that such a framework would entail. From their perspective, the key limitation of the Report is the failure to recommend any form of monitoring or compliance procedure. A letter from the NGOs to the Commission and Council commented on the necessary steps for future progress:

Taken together, the recommendations, if they are fully implemented by the relevant actors, will help to generate a significant advance. For that to happen, it will be necessary to develop them into a proper framework that complements the voluntary commitment of a steadily growing number of companies with proactive and consistent public

⁵⁰ EUROPEAN MULTISTAKEHOLDER FORUM ON CSR, *supra* note 37, Foreword.

⁵¹ See e.g., HALINA WARD, LEGAL ISSUES IN CORPORATE CITIZENSHIP (2003), available at http://psicondec.rediris.es/RSC/legalissues_corporate.pdf.

⁵² Julie Raynal, *Corporate Social Responsibility*, July 2002, http://europa.eu.int/comm/trade/csr/index_en.htm.

policies to create the right enabling environment and ultimately to ensure accountability by ALL companies.⁵³

Whether in the context of the E.U., the United Nations (the Norms or the Global Compact), the OECD, or on the national level, the soft norm approach always triumphs despite substantial opposition from NGOs, trade unions, politicians, and civil society. Is the “business case” really so persuasive? Or is it simply that transnational businesses wield more power than the other stakeholders? Where is the power located? There appears to be an inherent contradiction in the “business case.” If voluntary adherence to CSR standards is “good for business,” what do business entities have to fear from legally-binding obligations to respect human rights and environmental standards? Surely, it would be advantageous. As Mary Robinson, the former High Commissioner for Human Rights, has noted,

It’s not a simple case of choosing between voluntary or regulatory systems to induce corporate responsibility. . . . Regulation is crucial to minimise abuses and to enforce compliance with minimum norms but it alone will not establish the business case for making the necessary changes. To do so we must provide incentives, so that doing the right thing also makes good business sense.⁵⁴

This “middle way” seems an obvious solution to the tension between the proponents of regulation and those who oppose it.

There is no question that the primary responsibility for ensuring the protection of human rights and the environment rests with states. However, as the U.N. Norms point out, the principles contained within the Universal Declaration on Human Rights are applicable to “other organs of society and individuals.”⁵⁵ Yet the two-pronged basis on which corporations resist

⁵³ Letter from Anne-Sophie Parent, President, Soc. Platform, et al., to Comm’r Liikanen, et al. (June 29, 2004), *available at* <http://europa.eu.int/comm/enterprise/csr/documents/29062004/ngocs.pdf>.

⁵⁴ Mary Robinson, United Nations High Comm’r for Human Rights, RSA World Leaders Lecture, *Beyond Good Intentions: Corporate Citizenship For A New Century* (May 7, 2002). This would accord with the notion that the implementation of broad regulatory instruments eases the negotiation of regulatory detail.

⁵⁵ Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12 (Aug. 26, 2003) pmbl.

the imposition of legally-binding norms is first, that they are not subjects of international law, and second, that to do so would shift responsibility from states to private actors. In the absence of voluntary corporate compliance with CSR norms, what is the solution? As Amnesty International said in its final comments about the European Multi-Stakeholder Forum, “The vision is good, but it needs more than dialogue to make it happen.”⁵⁶ In an increasingly globalized world, more businesses are operating transnationally “in a way that exceeds the regulatory capacities of any one national system.”⁵⁷ While a regional approach is one way to achieve compliance with CSR norms, an international tactic would be a superior choice.

⁵⁶ Statement by Dick Oosting, Director, Amnesty Int’l EU Office, on EU Multi Stakeholder Forum on CSR (June 29, 2004), *available at* http://europa.eu.int/comm/employment_social/soc-dial/csr/index.htm (follow “European Multi-Stakeholder Forum on CSR” hyperlink; then follow “High Level Meetings” hyperlink; then follow “Final High Level Meeting (29 June 2004)” hyperlink; then follow “Amnesty International Statement” hyperlink).

⁵⁷ *Id.*