

## **DRAFT – PLEASE DO NOT QUOTE WITHOUT PERMISSION**

### **Corporate Social Responsibility European Style**

By Olivier DE SCHUTTER\*

#### **I. Introduction**

Like all popular notions, Corporate Social Responsibility (CSR) owes much of its success to its ambiguities. It may be used in at least three different ways. First, it may refer to an understanding of the role of business in society : business, it is said, must be ‘socially responsible’, in the sense that it owes duties not only to its shareholders (to whom its profits may accrue), but also to its workers, clients, and to the community in which it develops its activities. Second, CSR may refer to a way of regulating business activities : it manifests a shift from the imposition of top-down obligations under the threat of legal sanctions, to the reliance on incentives, soft law mechanisms, and voluntary initiatives, as a way to orient the activities of corporations in order to maximize their positive impacts and minimize their negative impacts on the community. Third, CSR may be presented – rather than one means to regulate business – as an alternative to the idea of regulation itself : it appears, here, as a codeword for abandoning to market mechanisms certain questions which might otherwise be the target of regulatory approaches, whether or not by the use of hard rules or by other means.

As we move along this chain of meanings, we are led to espouse different understandings of the role of public authorities in the promotion of CSR. CSR, according to the first, original meaning of the concept, may be implemented by regulations defining the legal obligations of companies in order to ensure that they are made accountable for the impact of their activities, where these activities produce negative externalities. If we see CSR as a method through which improve the social responsibility of companies beyond the legal obligations they are imposed, public authorities may have a role in creating the necessary incentives, for instance in encouraging the insertion of social or environmental clauses in public contracts, or in standardizing certain tools such a social reporting, codes of conduct, or social or environmental labelling. At the end of the chain, finally, emerges the idea of the ‘business case’ for CSR, whose mesmerizing power is no less than redoubtable : why should there be any role at all for the public authorities, if the market rewards the best practices and penalizes the worst ? Should the market not take care of itself ? Is law not superfluous ? Should not the role of public authorities consist simply, at most, in organizing learning processes between companies so as to accelerate the diffusion of best practices ?

These different meanings attached to CSR do not flow from another in any logical way. They are not mutually entailed. Corporate social responsibility, in the first meaning of the expression, may well be implemented by hard regulations, whose violation may be backed by penalties. And if we do choose to define CSR, in the second meaning distinguished above, as an incentives-based approach which would be preferred above a more classical regulatory approach, we still may decide that a regulatory framework must be established in order for an incentives-based approach to function, i.e., to achieve the final objective of extending the responsibility of corporations beyond their primary profit-seeking motive. It is the thesis of this article, however, that this polysemy of the concept of CSR has facilitated its instrumentalization in the course of the European-wide debate on its significance, and that the end result has been the diversion of CSR from its original ambition. The concept should be reconstructed, and once reconstructed, we should draw radically different conclusions from its normative implications.

This paper describes how the concept of corporate social responsibility emerged in the official discourse of the EU in 2000, and the stages through which it developed (II.). The sketch of this

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\* Professor at the University of Louvain (Belgium) and at the College of Europe (Natolin); Member of the Global Law School Faculty, New York University.

development leads to the conclusion that, while CSR may have been initially an idea about the scope of the responsibility of businesses towards the environment, it ended up becoming a process, in which the representatives of the business community have come to occupy the central role, and from which politics essentially retreated. The question now, therefore, is whether the so-called ‘business case’ for CSR is strong enough, so that we may hope that the forces of market will suffice to encourage the companies to behave responsibly, over and above their obligation to comply with their legal obligations. The third section of the paper examines this ‘business case’ (III.). It arrives at the conclusion that this case rests on certain presuppositions about markets and the business environment, which cannot be simply assumed, but should be affirmatively created by a regulatory framework for CSR. It is in this respect that the situation of the new Member States is particularly interesting : certain specificities of the EU-10 may imply that, where exclusive reliance on voluntariness and on market mechanisms may work elsewhere, it may not produce similar effects in this environment (IV.). A brief conclusion is finally offered (V.).

## **II. The Development of CSR : From Substance to Process**

Although its roots are of course older, the concept of CSR emerged in the recent official EU discourse with the Conclusions of the Lisbon European Council of March 2000, where the EU set for itself a new strategic goal for 2010: ‘to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion’.<sup>1</sup> As part of the strategies to be mobilized to this effect, the European Council made ‘a special appeal to companies’ corporate sense of social responsibility regarding best practices on lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development’.<sup>2</sup> The idea as it was understood then, very much in line with the other institutional techniques mentioned by the European Council, including the open method of coordination of policies between the Member States and a decentralized approach with a view to identifying best practices and making them into benchmarks for all, was rather innocuous : it was to encourage companies to experiment different ways to implement these shared objectives, and to report back on those practices in order for all to be able to benefit from those experiences and, perhaps, for the best practices to be generalized. But it is no coincidence that CSR emerged in precisely this context, dominated by the fear that the EU was losing out in the global competition to the United States, and that the competitiveness of the European economy was to be restored as a matter of urgency : while best practices were to be developed on lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development, these goals were seen as part of a larger project – that of economic competitiveness and growth – to which they were subordinated. In fact, while in 2000 and 2001<sup>3</sup> the consensus was still that in the long-term, economic growth, social cohesion and sustainable development go hand in hand, since the 2005 mid-term review of the Lisbon strategy, although the three pillars of the original Lisbon strategy have been maintained, the emphasis has shifted to economic growth and the creation of jobs.<sup>4</sup> The transformations which the concept of CSR underwent may be retraced to the transformations endured by the definition of the strategic aims of the EU itself.

### *1. From the initial consultation to the first communication on CSR*

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<sup>1</sup> Conclusions of the Presidency, European Council held in Lisbon, 23-24 March 2000, at para. 5.

<sup>2</sup> Id., para. 38.

<sup>3</sup> The Sustainable Development Strategy for Europe agreed at the Göteborg European Council of June 2001 added sustainable development (and, thus, a concern for the environment) to economic growth and social cohesion as the strategic goals to be pursued in the framework of what came to be called the Lisbon strategy.

<sup>4</sup> The evaluation of the Lisbon strategy, which was strongly influenced by the report of the ‘Kok Group’ appointed by the Council, led to a revised Lisbon Strategy which was agreed at the Spring European Council of 23-24 March 2005. The revised Lisbon Strategy did not change the original intentions of the Lisbon strategy but refocused the strategy on Growth and Jobs. In addition it decided on a new method of governance for the Lisbon Strategy, involving the adoption by the Council of Integrated Guidelines for Growth and Jobs (Integrating the Broad Economic Policy Guidelines, both macroeconomic and microeconomic, and the Employment Guidelines). These Integrated Guidelines become the basis for Member States to produce National Reform Programmes, the first of which were submitted to the Commission in October 2005 for the period 2005 – 2008.

We may start with the Green paper, *Promoting a European Framework for Corporate Social Responsibility*,<sup>5</sup> presented by the European Commission in July 2001 as a way to launch a public consultation on the concept of CSR. This consultation document defines 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’, going therefore beyond their legal obligations.<sup>6</sup> While emphasizing already that it is in the long-term self-interest of companies to act responsibly and, thus, to adopt CSR strategies in their management, the Commission stated then that it envisaged the establishment of a European framework for CSR aimed at ‘promoting quality and coherence of corporate social responsibility practices, through developing broad principles, approaches and tools, and promoting best practice and innovative ideas’, and at ‘supporting best practice approaches to cost-effective evaluation and independent verification of corporate social responsibility practices, ensuring thereby their effectiveness and credibility’. Thus, while CSR, being voluntary in nature, was conceived as something distinct from, and not a substitute to, the adoption where necessary of appropriate legislation,<sup>7</sup> an active role was envisaged for the public authorities in the promotion of CSR.

The public consultation which followed, during the second semester of 2001, led to the expression of a wide range of reactions.<sup>8</sup> The European Round Table of Industrialists (ERT) strongly opposed the idea, floated in the consultation document of the Commission, of standardizing the reporting of social performance: ‘it is not logical on the one hand to acknowledge the benefits of individually tailored voluntary approaches, and then to try to fit these to an externally imposed reporting standard’. Their view was that the effectiveness of voluntary approaches to CSR was amply documented, and that ‘externally imposed regulation would not have the same degree of acceptance and impact. Standardised and mandatory externally imposed regulations would stifle the creativity and richness of existing company procedures and would turn compliance into a sterile exercise with considerable associated administrative costs’. A number of employers’ organizations, including in particular the British Chamber of Commerce, shared this view.

In July 2002, acting on the basis of this consultation, the Commission presented its communication on *Corporate Social Responsibility: A business contribution to Sustainable Development*.<sup>9</sup> In this communication, it justified the need for an initiative to be adopted at EU level by the fact that ‘the proliferation of different CSR instruments (such as management standards, labelling and certification schemes, reporting, etc.) that are difficult to compare, is confusing for business, consumers, investors, other stakeholders and the public and this, in turn, could be a source of market distortion. Therefore, there is a role for Community action to facilitate convergence in the instruments used in the light of the need to ensure a proper functioning of the internal market and the preservation of a level playing field’.<sup>10</sup> By confirming its view that CSR tools would only function effectively if they are transparent and based on clear and verifiable criteria and benchmarks, implying that a public policy was required to lend credibility to such voluntary initiatives, the Commission was in fact stating its disagreement with the position of employers’ organisations referred to above.

The 2002 communication announced a strategy of the Commission in a number of areas. Noting that ‘[s]olid evidence that social and environmental responsibility supports competitiveness and sustainable development, in particular in SMEs, would be the best and most effective argument to encourage the uptake of CSR among enterprises’, it emphasized the need to improve knowledge about the positive impact of CSR on business and societies in Europe and abroad, in particular in developing countries. It

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<sup>5</sup> COM(2001) 366 final, of 28.7.2001.

<sup>6</sup> Id., at para. 20.

<sup>7</sup> The *Green Paper* is very clear that CSR ‘should (...) not be seen as a substitute to regulation or legislation concerning social rights or environmental standards, including the development of new appropriate legislation. In countries where such regulations do not exist, efforts should focus on putting the proper regulatory or legislative framework in place in order to define a level playing field on the basis of which socially responsible practices can be developed’ (para. 22).

<sup>8</sup> The positions are collected on [http://ec.europa.eu/employment\\_social/soc-dial/csr/csr\\_responses.htm#15](http://ec.europa.eu/employment_social/soc-dial/csr/csr_responses.htm#15) (last visited September 8th, 2006).

<sup>9</sup> COM(2002) 347 final, of 2.7.2002.

<sup>10</sup> Id., at 8.

also announced its intention to support activities, including education and training, aiming at raising awareness and improving knowledge about CSR, insofar as the establishment of an atmosphere of trust in cooperation among all the stakeholders and consumer confidence fostered through CSR ‘can be a major contributor to economic growth’.<sup>11</sup> The Commission also recognized the need to encourage the exchange of experience and good practices about CSR between companies, in order to ‘benchmark their position against competitors and to build up a consensus about [the instruments of CSR], such as reporting standards or verification procedures’. The Commission noted that such exchanges ‘could be particularly beneficial at sectoral level, where they can play an important role in identifying common challenges and options for co-operation between competitors’.<sup>12</sup> Member States too should be encouraged to compare their practices in this field, the Commission announcing that it would conduct ‘a peer review of the CSR practices in Member States, assessing the performance and the value added of regulatory frameworks and monitoring schemes’.<sup>13</sup> The communication further noted the need to promote the development of CSR management skills, especially by education and training in the field of business administration. It recognized the need to foster CSR among SMEs. As the lack of resources within SMEs seems to constitute one significant obstacle to progress in this regard, the communication noted, perhaps somewhat overoptimistically, that ‘the most significant pressure on SMEs to adopt CSR practices is likely to come from their large business customers, which in return could help SMEs cope with these challenges through the provision of training, mentoring schemes and other initiatives’. The Commission therefore saw as one of its roles to facilitate such co-operation between large companies and SMEs to manage their social and environmental responsibility, within the limits imposed by national and EU competition rules.<sup>14</sup>

On perhaps the most delicate and least consensual issue, that of improving convergence and transparency of CSR practices and tools, the Commission noted :

Not all of these tools are comparable in scope, intent, implementation or applicability to particular businesses, sectors or industries. They do not answer to the need for effective transparency about business social and environmental performance. As expectations for CSR become more defined, there is a need for a certain convergence of concepts, instruments, practices, which would increase transparency without stifling innovation, and would offer benefits to all parties. CSR benchmarks should build upon core values and take their starting point in international agreed instruments such as ILO core labour standards and OECD guidelines for multinational enterprises.

This statement unambiguously identifies the need for further convergence of CSR tools, and the risks associated with the proliferation of voluntary initiatives which, however well-intended, may end up creating confusion for the consumers, thus depriving the companies with the best practices from the hope of being rewarded by the market, in the absence of a clear and transparent definition of the benchmarks to be achieved. The need for a greater transparency was acknowledged to exist in a number of fields. First, in order to be credible, codes of conduct should build on the ILO fundamental Conventions and the OECD guidelines for multinational enterprises as a common minimum standard of reference, and they should include appropriate mechanisms for evaluation and verification of their implementation, as well as a system of compliance. The Commission therefore expressed its hope that the European Multistakeholder Forum (EMS Forum) on CSR (which was to be established as a follow-up to the communication) would ‘consider the effectiveness and credibility of existing codes of conducts and how convergence can be promoted at European level’.<sup>15</sup>

Second, the EMS Forum on CSR should also examine whether the EU Eco-Management and Audit Scheme (EMAS) could not be extended, beyond the management of environmental and economic performances of companies, to the management of their social performances. EMAS is a management

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<sup>11</sup> Id., at 9.

<sup>12</sup> Id., p. 10.

<sup>13</sup> Id., p. 10.

<sup>14</sup> Id., p. 12.

<sup>15</sup> Id., p. 13.

tool for companies and other organisations – initially from the industrial sector only,<sup>16</sup> at present extended to all sectors,<sup>17</sup> and open to private and public organisations – to evaluate, report and improve their environmental performance. It is conceived as a voluntary instrument which acknowledges organisations that improve their environmental performance on a continuous basis. EMAS registered organisations undertake to conduct an environmental review considering all environmental aspects of the organisation’s activities, products and services, as well as its policies in place on environmental issues ; on the basis of this review, they establish an environmental management system aimed at achieving the organisation’s environmental policy<sup>18</sup>; they undertake to carry out an environmental audit assessing in particular the management system in place and conformity with the organisation’s policy and programme as well as compliance with relevant environmental regulatory requirements ; and they report on their environmental performance through the publication of an independently verified environmental statement.<sup>19</sup> Under Regulation (EC) No 761/2001, each Member State establishes a system for the accreditation of independent environmental verifiers and for the supervision of their activities, ensuring that they are independent and that they fulfil their tasks impartially.<sup>20</sup> Such tools – certification on the basis of objective criteria, verified through an independent monitoring, encouraging organizations to ask for such certification and the public to have confidence in the logo through which the certification is made visible – could be extended to the performances of the organisations in the social field, for instance as regards the promotion of diversity in the workforce, the efforts made to reconcile family with professional life, or lifelong learning. To examine whether such extension would be desirable and possible was the second task entrusted to the EMS Forum on CSR.

Third, finding that, like in the areas of codes of conduct and of management schemes, more convergence was required in reporting about their social and environmental performance, the Commission also entrusted the EMS Forum on CSR to ‘develop commonly agreed guidelines and criteria for measurement, reporting and assurance’. A similar preoccupation was expressed concerning social or environmental labels : ‘Adherence to commonly agreed criteria for making and assessing social and environmental claims of a self-declaratory character would contribute to improve the effectiveness and credibility of [the claims made by the producer about its social and environmental performances]. Monitoring of claims by Member States and stakeholders is essential’. Putting forward the EU-ecolabel ‘The Flower’, as an example of ‘a transparent and credible label since the compliance with the criteria is certified, verified and monitored by an independent third party’, the Commission expressed its hope that the EMS Forum on CSR would ‘define commonly agreed guidelines for labelling schemes supporting ILO core conventions and environmental standards’.<sup>21</sup> Finally, noting that national laws may require pension funds to disclose whether and how they take account of social, environmental and ethical factors in their investment decisions, the Commission invited the EMS Forum on CSR to consider whether a common EU approach could be adopted on this issue.

On all these issues, therefore – codes of conduct, management schemes, reporting obligations, labels and socially responsible investment –, while clearly stating its conviction that more convergence and transparency was required, the Commission shifted the burden of having to identify solutions on the EMS Forum on CSR. And this, indeed, was the most concrete proposal made in the communication. The establishment of the CSR EMS Forum was explained by the consideration that

The EU success in promoting CSR ultimately depends on widespread “ownership” of the

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<sup>16</sup> See, originally, the Council Regulation (EEC) No 1836/93 of 29 June 1993 allowing voluntary participation by companies in the industrial sector in a Community eco-management and audit scheme, OJ L 168 of 10.7.1993, p. 1.

<sup>17</sup> Regulation (EC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), OJ L 114 of 24.4.2001, p. 1 (and the *corrigendum* in OJ L 327 of 4.12.2002).

<sup>18</sup> The Commission Regulation (EC) No 196/2006 of 3 February 2006 (OJ L 32 of 4.2.2006) amends Annex I to Regulation (EC) No 761/2001 taking account of the European Standard EN ISO 14001:2004, and repeals Decision 97/265/EC on the Standard EN ISO 14001:1996.

<sup>19</sup> See Article 3(2) of Regulation (EC) No 761/2001.

<sup>20</sup> See Article 4(1) of Regulation (EC) No 761/2001.

<sup>21</sup> *Id.*, pp. 15-16.

principles of CSR by businesses, social partners, civil society, including consumer organisations, and public authorities, including from third countries, which should be based on comprehensive partnership with representatives of society at large. The involvement of all affected stakeholders is key to ensure acceptance and credibility of CSR and better compliance with its principles.

The Commission therefore proposed the establishment of the CSE EMS Forum with the aim of

promoting transparency and convergence of CSR practices and instruments, through :

- exchange of experience and good practice between actors at EU level;
- bringing together existing initiatives within the EU, and seeking to establish common EU approach and guiding principles, including as a basis for dialogue in international fora and with third countries;
- identifying and exploring areas where additional action is needed at European level.

## 2. *The CSR European Multistakeholder Forum*

It is widely believed that the setting up of such a forum was originally proposed by the European Parliament in its reaction to the 2001 Green Paper of the Commission. In fact, while the resolution adopted by the Parliament<sup>22</sup> did call for such a platform to be established, the intentions behind the proposal were of an entirely different nature. The Parliament called upon the Council and the Commission to ‘ensure that the EU CSR Forum will offer the opportunity to register voluntary codes of conduct and similar initiatives and verify them against minimum applicable international standards such as the OECD Guidelines for Multinationals and the ILO Core Labour Standards’.<sup>23</sup> What was envisaged was the creation of a multi-stakeholder platform which could inaugurate a form of monitoring of voluntary initiatives, especially the adoption of codes of conduct. Three years earlier, the rapporteur, the British Labour MEP Richard Howitt, had acted as rapporteur behind the resolution adopted on 15 January 1999 on *EU standards for European enterprises operating in developing countries: towards a European Code of Conduct*.<sup>24</sup> That resolution already had advocated the setting up a ‘European Monitoring Platform (EMP) (...) in close collaboration with the social partners, NGOs from North and South and representatives of indigenous and local communities’,<sup>25</sup> and asked the Commission to study the possibility of setting up such a platform. This platform was to act as ‘an independent monitoring and verification body’, composed of ‘highly skilled’ persons, according to appropriate procedures in order to ensure that it would be ‘widely accepted as being objective and impartial’. The Parliament had then recommended that business and industry ‘provide information about their voluntary initiatives and conduct to the monitoring mechanism so that their compliance with a European code of conduct, international standards and private voluntary codes of practice (if adopted) could be properly assessed’, and that ‘the monitoring mechanism promote dialogue on standards met by European enterprises and the identification of best practice, as well as being open to receiving complaints about corporate conduct from community and/or workers’ representatives and the private sector in the host country, NGOs or consumer organisations, from individual victims or from any other source’.<sup>26</sup>

When, in reaction to the 2001 Green Paper of the Commission, the Parliament again put forward the idea of a EMS Forum on CSR, this was not conceived of in a significantly different way. The objective was that, as a way to ensure transparency and to enhance the credibility of codes of conduct and social or environmental reporting, such codes and annual reports as adopted by companies ‘could be registered with a European Forum for CSR’ and thus verified. Indeed, while multi-stakeholder

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<sup>22</sup> European Parliament resolution on the Commission Green Paper on Promoting a European framework for Corporate Social Responsibility (COM(2001) 366 - C5-0161/2002 - 2002/2069(COS)), 30 April 2002 (rapp. R. Howitt).

<sup>23</sup> Para. 14 of the operative part of the resolution (emphasis added).

<sup>24</sup> Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct (EP doc. A4-0508/98), OJ C 104 of 14.4.1999, p. 180.

<sup>25</sup> At para. 14 of the operative part.

<sup>26</sup> At paras. 16 to 18.

dialogue would be the 'first duty' of such of such a platform, it should not stop at this :

... in addition companies and others could be invited to register their codes of conducts with the Platform, which would in turn check that all Codes comprised of basic labour, social and environmental standards, already agreed at an international level. Companies might then register their reports on social and environmental impacts, on an annual basis following appropriate European legislation to make this mandatory.<sup>27</sup>

In contrast, the communication of the Commission envisaged the CSR EMS Forum as a platform for discussion between a variety of stakeholders, in order to seek consensus on whether there was a need for further initiatives on the issue of CSR at European level, and if so, of what nature. The monitoring dimension of such a platform was not even part of the background.

Although formally established only after the publication by the Commission of its July 2002 communication, the Forum in fact had already been launched on an 'experimental' basis, in order to test the viability of such a formula, following the reactions to the 2001 Green paper of the Commission which called for an improved dialogue between the stakeholders concerned by CSR.<sup>28</sup> Between April and June 2002, three 'experimental' roundtables were convened on specific issues – codes of conduct, CSR instruments and standards, and CSR reporting –. These roundtables<sup>29</sup> were an opportunity to put all the participants at the same level of information, by a number of presentations from external experts who summarized existing CSR practices at European and international level. They were also seen as 'a test to identify the interest, value added and best way of functioning of a Forum at European level', according to the statement attributed to a Commission official<sup>30</sup> opening the first roundtable. Indeed, part of the discussions during these first rounds of exchanges concerned the governance of the Forum. At the second experimental roundtable, held on 27 May 2002, the representative of UNICE emphasized that 'conclusions cannot be already drawn without an open process of consultation with stakeholders' and that 'an evaluation of the three Round Tables should be carried out at the end of the exercise of experimentation, and in the light of the evaluation, a mandate for the Forum should be established'.

UNICE and other employers' organisations saw, of course, that the question of the mandate for the platform was of decisive importance to its future impact. In his intervention at the first high-level meeting of the Forum, at which its mandate was agreed, Philippe de Buck, the secretary general of the UNICE, stated that it would be 'inappropriate to conceive the forum as a place where the participants are expected to negotiate or define guidelines or guiding principles. Businesses should be encouraged and not hindered in their attempts to find dynamic and innovative solutions. Challenges facing business such as calls for convergence, transparency and accountability of their CSR practices will be taken up by business itself. Whereas it is useful to have a debate about these challenges, they will and have to be addressed through market-driven responses. There is no room at this stage for prescriptive approaches'. Wim Philippa, the secretary general of the European Roundtable of industrialists (ERT), emphasized that existing responsible corporate conduct 'should not be placed at risk through development of specifically European standardised approaches, certification procedures or reporting requirements that might frustrate innovation and damage competitiveness, placing EU-based companies at a disadvantage to their competitors in other regions'. It is these views which prevailed. As decided when the CSR EMS Forum was formally established on October 16th, 2002, the new

<sup>27</sup> Report on the Commission Green Paper on Promoting a European framework for Corporate Social Responsibility (COM(2001) 366 - C5-0161/2002 - 2002/2069(COS)) (rapp. R. Howitt), at p. 18.

<sup>28</sup> More details on the CSR EMS Forum may be found on the website of the Forum, hosted by DG Employment and Social Affairs of the Commission : [http://forum.europa.eu.int/irc/empl/csr\\_eu\\_multi\\_stakeholder\\_forum/info/data/en/csr%20ems%20forum.htm](http://forum.europa.eu.int/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/csr%20ems%20forum.htm). Unless indicated otherwise, all the information relating to the CSR EMS Forum is from that website (last visited on September 8th, 2006).

<sup>29</sup> The first roundtable was held on 22 April 2002, days before the formal adoption by the relevant committee of the European Parliament of the resolution based on the Howitt report on the Commission Green Paper on Promoting a European framework for Corporate Social Responsibility. The resolution was adopted in plenary in June 2002.

<sup>30</sup> Jackie Morin, then Head of the D1 Unit, DG Employment and Social Affairs.

mandate of the platform, while largely espousing the wording of the communication published in July 2002, did present one crucial difference : while the references to improving knowledge about CSR and to the establishment of common guiding principles for CSR practices and instruments were retained, the objective of ‘identifying and exploring areas where additional action is needed at European level’ was abandoned.<sup>31</sup> This choice was guided, presumably, by the need to ensure full cooperation of the employers in the process. It would prove decisive for the remainder of the process : a literal understanding of the mandate of the CSR EMS Forum implied, indeed, that it would not be asked to make recommendations on any legislative action to be taken, even if only to ensure transparency and coherence of voluntary initiatives.<sup>32</sup> So, the participants to the CSR EMS Forum found themselves in the paradoxical position that – according to the 2002 communication of the Commission – they were expected to identify solutions to the need for more convergence and transparency on the issues identified by that communication (codes of conduct, management schemes, reporting obligations, labels and socially responsible investment), but that making proposals for Community action was beyond their mandate. To some, it appeared as if the Commission had put all its eggs into the basket of the multistakeholders platform, and now found itself tied to the willingness of the employers to cooperate fairly in the process ; as to the employers, who insisted throughout on the importance of participants retaining ‘ownership’ of the process, they seemed to believe that CSR was too serious an issue to be left in the hands of the public servants of the Commission.

The Forum functioned, during a total of almost two years, with a two-level structure : high level meetings took place in December 2002 and in July 2003 to evaluate progress ; four thematic roundtables, which each met on three occasions between early 2003 and early 2004, were convened.<sup>33</sup> The website of the Commission states that, in the end, ‘findings and conclusions were presented to the Commission on 29th June 2004’. Things are rather more complicated.<sup>34</sup> In fact, no consensus was reached. The Foreword to the final report of the CSR EMS Forum informs us that ‘at the Forum's final meeting on 29 June 2004, the following Report, a fair record of points of consensus identified during the twenty month process and work of the Forum, was presented, discussed and agreed’, adding in a footnote : ‘This endorsement remains subject to further internal consultation led by some NGOs within their constituency’. Such an endorsement never came and, indeed, the report itself acknowledges that ‘there are some differences and debates that remain’. Among the NGOs and trade unions, skepticism was expressed about certain passages of the final report, in particular about the idea that ‘convergence of CSR practices and tools is occurring on a market-led basis through voluntary bottom-up and multi-stakeholder approaches, and other drivers, [which] can achieve quality and a good balance between comparability, consistency and flexibility’.<sup>35</sup> While the final report did include among its recommendations that ‘public authorities ensure that there is both a legal framework and the right economic and social conditions in place to allow companies which wish to go further through CSR, to benefit from this in the market place, both in the EU and globally’ – which constitutes an important recognition of the need for further initiatives of public authorities to support CSR –, it remained unspecific about any role for EU legislation in this regard. Indeed, the final report noted the split which occurred on the issue of reporting between the different participants : ‘the Forum notes that for

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<sup>31</sup> According to the mandate defined in October 2002, the CSR EMS Forum was to : ‘improv[e] knowledge about the relationship between CSR and sustainable development (including its impact on competitiveness, social cohesion and environmental protection) by facilitating the exchange of experience and good practices and bringing together existing CSR instruments and initiatives, with a special emphasis on SME specific aspects’; and ‘explor[e] the appropriateness of establishing common guiding principles for CSR practices and instruments, taking into account existing EU initiatives and legislation and internationally agreed instruments such as OECD Guidelines for multinational enterprises, Council of Europe Social Charter, ILO core labour conventions and the International Bill of Human Rights’.

<sup>32</sup> This may be contrasted with the view expressed at the high-level meeting by Anne-Sophie Parent for the Social Platform – a coalition of 38 European non-governmental organisations in the social sector –, that ‘the Forum must make strong recommendations on how to establish a convergence of standards on CSR, in order to promote credible, verifiable systems of reporting and auditing’.

<sup>33</sup> The roundtables were organized on ‘Improving knowledge about CSR and facilitating the exchange of experience and good practice’; ‘Fostering CSR among SMEs’; ‘Diversity, convergence and transparency of CSR practices and tools’; and on ‘CSR Development aspects’.

<sup>34</sup> This author was present at the final high-level meeting, as the representative of the International Federation for Human Rights (FIDH).

<sup>35</sup> At p. 4.

trade unions and NGOs, transparent CSR reporting is a particularly important process in providing meaningful information, a clear record of CSR development and assessing credibility'.<sup>36</sup> The role envisaged in the final report for the public authorities was understood most restrictively :

...public authorities at different levels (EU, national, regional and local) [should] recognise their contribution to driving CSR, alongside others, and in cooperation with stakeholders, assess and strengthen their role in raising awareness of, providing information on, promoting, and supporting the take-up, development and innovation of effective CSR, and the development of environmentally and socially responsible products and services.

What the experience of the Forum showed, as one NGO participant expressed it, are the limits of a method which consists in bringing together a range of stakeholders with so different views, in the hope that they will arrive at a consensus through discussions facilitated, but in no way preempted or directed, by the Commission. This method, which in theory might be praised for its openness, leads in fact to a situation where any final agreement will be based, not on the outcome of a rational discussion based on the law of the best argument – as communicative ethics *à la* Habermas would have it –, but rather on the few items on which the participants can agree, without betraying the mandate of their respective constituencies.<sup>37</sup> The final report of the CSR EMS Forum, in that sense, represented the lowest common denominator which could be achieved : its results were less than impressive.

### 3. *The second communication on CSR*

Two years elapsed between the final report of the CSR EMS Forum and the presentation by the Commission, on 22 March 2006, of its most recent communication on corporate social responsibility.<sup>38</sup> This delay, and the fact that the publication of the communication was initially announced for the Spring of 2005, illustrate the intensity of the internal debates within the Commission on the issue. In the meantime, the mid-term evaluation of the Lisbon strategy had taken place, leading this ten-year strategy to be redirected towards the objectives of economic growth and the creation of employment, under the umbrella of the relaunched Lisbon Partnership for Growth and Jobs. The idea of the establishment of a regulatory framework for CSR in Europe, which the employers' organisations had already managed to remove almost entirely from the agenda of the CSR EMS Forum, was one of the casualties. The heart of the 2006 communication is best expressed in the following passage of the introduction :

Because CSR is fundamentally about voluntary business behaviour, an approach involving additional obligations and administrative requirements for business risks being counter-productive and would be contrary to the principles of better regulation. Acknowledging that enterprises are the primary actors in CSR, the Commission has decided that it can best achieve its objectives by working more closely with European business (...).<sup>39</sup>

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<sup>36</sup> At p. 15.

<sup>37</sup> It may be useful to recall that the idea of the CSR EMS Forum emerged in a context where there was a strong insistence in European circles on the need, in order to improve both the legitimacy and the efficiency of law- and policy-making of the Union, for more openness and transparency throughout the policy chain, and for a stronger involvement of civil society organisations, including trade unions and employers' organisations. The adoption in July 2001 of the White paper on European governance constitutes the most explicit expression of this development (*European Governance. A White Paper*, COM(2001)428 final, 25.7.2001 ; for the background to this communication, see O. De Schutter, N. Lebessis, and J. Paterson (eds.), *Governance in the European Union*, OOEPEC, Luxembourg, 2001, 318 pages). Much of this approach was influenced by the view that agreement should be established on the basis of an open dialogue between all relevant stakeholders, who are presumed to be able to reach an agreement on the basis of a rational discussion. This view is wrongly attributed to the work of Jürgen Habermas, for whom the ideal speech situation in which norms could be rationally established has always been a counter-factual situation – a tool for critiquing established practices rather than a recipe capable of being implemented in practice. The limits confronting the attempts to involve civil society organisations in the law- and policy-making of the Union have been explored in O. De Schutter, 'Europe in Search of Its Civil Society', *European Law Journal*, vol. 8, n° 2, June 2002, pp. 198-217.

<sup>38</sup> Communication of the Commission, *Implementing the Partnership for Growth and Jobs: Making Europe a pole of excellence on CSR*, COM(2006)136 final of 22.03.2006.

<sup>39</sup> At p. 1.

The main result of the communication was to announce the establishment of the European Alliance on CSR, conceived of as a new forum for the promotion of learning about CSR – a Global Compact writ small, open to the participation, on a purely voluntary basis, of business enterprises only. The political message was particularly damaging. First, by establishing the European Alliance on CSR, and despite lipservice being paid to the continuation in the future of a multi-stakeholder dialogue,<sup>40</sup> the European Commission was perceived as expressing a clear preference for one category of stakeholders – business – over the others – unions and NGOs –, thus breaking with the at least formal equality of standing between these parties which had been maintained throughout the CSR EMS Forum process. Second, CSR was effectively presented as to be driven purely by market mechanisms, without there being any need for a regulatory framework to ensure its adequate functioning – viz., to reward the best practices, and sanction the worst forms of behaviour.<sup>41</sup> As expressed by a leaked internal memo of UNICE, the communication thus represented a true victory for business.<sup>42</sup> Third, the almost complete turnover of the Commission between 2001 and 2006, coinciding as it did with the silent revision of the objectives of the Lisbon strategy, conveyed the impression that, despite all the talk on the ‘business case’ for CSR, there was a tension between the promotion of CSR and competitiveness. Indeed, the position of the Commission may be seen as self-contradictory : either the market mechanisms will reward CSR practices, one would think, in which case it made little sense to state that promoting CSR (for instance, by imposing reporting requirements, by certifying and monitoring labels or codes of conduct, or by adopting a policy on public procurement taking into account social and environmental performances of companies) will inhibit economic growth and threaten the competitiveness of European undertakings ; or it will not, and then an active role for the public authorities should be allowed for in the promotion of CSR, in the name of the ‘values case’ for CSR – as this was referred to during the CSR EMS Forum –. In stating that CSR would take care of itself (or, more appropriately, that it would be taken care of by business), while acknowledging at the same time that any intervention to promote CSR might be economically counter-productive, the Commission was effectively closing the parenthesis opened in 2001. A briefing paper by Richard Howitt published on the same day of the communication listed the ten ‘broken promises’ of the Commission ; it also listed ‘what’s exactly the same’ since the Green Paper of 2001, implying that on a number of issues, ranging from promoting knowledge and awareness about CSR to promoting the OECD Guidelines on multinational enterprises, the Commission had made no progress in five years.

### III. The ‘business case’ for CSR

In the current predicament, the question whether CSR practices are indeed, as it has been asserted, ‘good for business’, takes on an increased importance. It is only a slight exaggeration to say that the credibility of the current approach has come to depend on the question whether the economic actors will be sufficiently incentivized by the market to act in a socially responsible manner. Since its inception, the European discourse on CSR has emphasized the positive impact of CSR practice on the economic performance of companies itself.<sup>43</sup> Excellent reports have been prepared on this mutually

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<sup>40</sup> As a last-minute add-on to the communication after an intervention from the European Trade Unions Confederation (ETUC), the Commission states that it ‘recognises that without the active support and constructive criticism of nonbusiness stakeholders, CSR will not flourish. The Commission’s backing of the Alliance is not a substitute for further dialogue with all stakeholders. The Commission remains committed to facilitating such dialogue, including through regular review meetings of the Multistakeholder Forum’.

<sup>41</sup> It is ironic that, under the heading of ‘ensuring an enabling environment for CSR’ – as one of the objectives of the European Alliance on CSR –, the communication states that ‘With the new European Strategy for Growth and Jobs and through its initiative on better regulation, the European Commission and EU Member States have committed themselves to set up and strengthen a business-friendly environment in which entrepreneurs and enterprises can flourish and grow’ (at p. 12). The ‘enabling environment for CSR’, thus, is one which is business-friendly, rather than one including a regulatory framework for CSR to be rewarded.

<sup>42</sup> According to a press release from MEP Richard Howitt from March 22nd, 2006, a leaked internal memo from the European Employers Organisation UNICE described the draft communication as a ‘true success’ because ‘concessions to other stakeholders... will have no real impact’.

<sup>43</sup> See the 2001 *Green Paper on Corporate Social Responsibility*, at para. 24.

beneficial relationship.<sup>44</sup> The argument may be briefly summarized thus.

### *1. The argument*

A first series of arguments on which the ‘business case’ is built focus on the impact of CSR policies on the internal workings of the company. A socially responsible conduct contributes to improving the working environment, and thus to ensure that the workforce remains loyal, committed and productive. The companies with the best reputation will find it easier to attract the best employees and to retain them within the company, and enterprises today have a higher interest in retaining highly skilled and competent personnel, as knowledge and innovation become increasingly important for competitiveness. Second, a conduct environmentally responsible – avoiding, in particular, unnecessary waste –, ensures the most efficient use of resources. It is this intuition which is referred to as ‘eco-efficiency’. As noted in the 2001 Green Paper on Corporate Social Responsibility, ‘reducing the consumption of resources or reducing polluting emissions and waste can reduce environmental impact. It can also be good for the business by reducing energy and waste disposal bills and lowering input and de-pollution costs’.<sup>45</sup> Third, to the extent that CSR includes a commitment to engage in dialogue with a variety of stakeholders beyond the firm, including civil society organizations and the representatives of the local communities where the undertaking operates, this may serve to build a relationship of trust with those stakeholders, increasing in turn the ‘licence to operate’ of companies and the chance that they will be supported in the long term by the community.<sup>46</sup>

A second series of arguments is based on the idea that the market will increasingly reward socially responsible practices, as the business partners of the company will pay more attention to this dimension. Consumers may be attracted to the products of the company if its image is positive. There is a rising tendency among institutional investors to select the companies in which they invest according to criteria which take into account their social and environmental performances, along with their economic profitability. In fact, whether because they are motivated by ethical concerns or on the basis of evidence that the financial performances of companies which embrace CSR are on the average better than their competitors, a number of funds now integrate CSR criteria into their selection processes, and thus seek to screen out companies who do not meet certain environmental or social standards.<sup>47</sup> In that important sense, an adequate CSR policy may improve the stock market valuation of a company and its capacity to access capital. More generally, shareholder activism is growing in importance, as part of a wider insistence on improved corporate governance and as a result of the development of pension funds. This may oblige companies to a greater transparency than previously, in particular on their social and environmental performances. Finally, the public authorities may increasingly choose to award public contracts to companies who respect certain conditions, including conditions relating to their behavior towards their workforce or to the environment.

### *2. The ambiguities*

This ‘business case’ in favor of the adoption of CSR policies by companies is, at first impression, highly convincing. Evidence in favor of such a positive relationship is growing every day. However, this discourse performs, in practice, a highly ambiguous function. It is meant as an argument to

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<sup>44</sup> See, in particular, the report prepared by Vicky Kemp for WWF-UK and Cable & Wireless plc, *To Whose Profit? Building a Business Case for Sustainability*, 2001.

<sup>45</sup> *Green Paper on Corporate Social Responsibility*, at para. 39.

<sup>46</sup> *Green Paper on Corporate Social Responsibility*, at para. 45-46.

<sup>47</sup> See for instance the list compiled on the Social Investment Forum, <http://www.socialinvest.org/> (last visited September 8th, 2006). The Domini European Social Equity Fund for example, a mutual fund for U.S. investors seeking to invest in socially responsible European companies, states that it avoids investing in corporations ‘that derive significant revenues from the manufacture of tobacco products or alcoholic beverages, derive significant benefit from the operation of gambling enterprises, (...) have a significant direct ownership share in, operate, or design nuclear power plants, [manufacture] firearms [or are] major military contractors. It may also exclude companies with poor performance in the following areas: corporate governance, community and corporate citizenship, employee relations and diversity, environment and sustainability, labor and other human rights, and product and consumer issues’ (see <http://www.domini.com/domini-funds/Domini-European-Social-Equity-Fund/index.htm>, last visited September 8th, 2006).

encourage companies to engage themselves in favor of CSR, by pointing at the economic rewards such a commitment may bring to them. But it has its own problems. First, it creates a dependency of CSR on such economic returns that may produce perverse consequences. Indeed, it may imply – or be understood to imply – that where it is not profitable to invest into CSR policies, companies should not do so : they should not go further in the implementation of such policies, in other terms, than what appears economically sound. CSR might come to be treated like an investment decision among others : before engaging into CSR, the company will seek to assess the anticipated benefits and related revenues relative to the costs, in the same way that it makes such assessments for other investment proposals.

Second, the argument is a fragile one.<sup>48</sup> Any credible demonstration that there exists a ‘business case’ for socially responsible practice would need to carefully distinguish between the different initiatives which might be adopted by a company to improve its CSR balance, and according to the different segments of the market. It would also have to consider the cost of such policies being implemented in the first place, as such implementation may impose, for instance, burdens of a bureaucratic nature on the company, require training of the human resources personnel, or expose the company to more searching scrutiny by civil society organisations, as when a code of conduct is adopted and publicized. It would have to distinguish between the short term impact of such initiatives and the longer term impact. More importantly, to a large extent, the ‘business case’ builds on certain presuppositions about the motivations of consumers, employees or candidate employees, investors or public authorities, which may or may not be widespread, and which – in any particular setting – may or may not translate into a behaviour which rewards the best practices and sanctions the worst. It is clear that the books are full of ‘success stories’, of innovative, even audacious, initiatives adopted in the CSR field which have been beneficial to the company concerned. But these successes are attributable, not to any particular practice considered in isolation, but to the responses of the environment : therefore, any lessons to be drawn from such experiences per necessity are highly context-specific. Moreover, while good CSR practices may benefit greatly to the ‘best in class’ in reputational terms, these benefits become less and less tangible as the best practices become widely adopted, and make it impossible to distinguish the companies adopting them from their competitors : the reputational gain in adopting a code of conduct, for instance, while it may have been significant even a few years ago, has become minimal today. While this in itself is not necessarily an argument against the ‘business case’ for CSR – indeed, companies who have not adopted a code of conduct may suffer reputational loss as a result, precisely because it has become common to do so –, it does serve to illustrate the context dependency of any argument built on the economic rewards accruing to the companies acting most responsibly.

Potentially most important of all, however, is the fact that the ‘business case’ for CSR produces, at the rhetorical level, a powerful consequence : it serves to create the impression that the development of CSR will make natural progress, in a sort of evolutionary growth driven by market mechanisms, without such progress having to be encouraged or artificially produced by an intervention of public authorities. There is a very thin line between the idea that ‘CSR is profitable for business’ and the idea that ‘CSR may take care of itself’. This consequence should be avoided at all costs. There is a need, clearly identifiable, for a regulatory framework to be established, if CSR is to work. This is not in contradiction with the voluntary character of CSR. On the contrary : it attaches its meaning to voluntary commitments.

### *3. The need for a regulatory framework for CSR*

Probably no single example illustrates this better than the development of the EU Eco-Management and Audit Scheme (EMAS), since it was first launched in 1995. As expressed by the Preamble of the Regulation under which the Eco-Management and Audit Scheme is currently established, the objective of this scheme is to enhance the transparency and credibility of organisations implementing

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<sup>48</sup> It is no wonder that, in the 2001 Green Paper on Corporate Social Responsibility, the Commission adopts a cautious attitude towards the relationship of socially responsible practice and economic benefits : ‘There is a need’, they write, ‘for a better knowledge and further studies on the impact of corporate social responsibility on business performance’ (para. 27).

environmental management systems, by ensuring that ‘their management system, audit programme and environmental statement are examined to verify that they meet the relevant requirements of this Regulation’ and that ‘the environmental statement and its subsequent updates are validated by accredited environmental verifiers’.<sup>49</sup> The EMAS logo serves to signal EMAS registration to the outside world, and should thus lend credibility to the commitments of the organisation to monitoring and improving its environmental performance<sup>50</sup>: the efficacy of the logo as an incentive to join the scheme is strengthened by the obligation imposed on the Member States to inform the public about the objectives and the components of the EMAS scheme, in particular by promotion campaigns to raise awareness about the scheme, which the States are encouraged to conduct in cooperation with consumer organizations, trade unions, of local institutions.<sup>51</sup>

The lessons from this scheme may be generalized. As noted by the authors of the *Responsible Competitiveness* report published in December 2005 following two years of research on the relationship between responsible business behavior and competitiveness, ‘individual businesses cannot go against the grain of the market. Being responsible sometimes does and sometimes does not pay. (...) While the growing significance of intangible assets has created opportunities for leveraging responsible business practices, the intensification of competition and the short-termism of investors constrain such practices’.<sup>52</sup> What is required therefore is what the authors call ‘responsible competitiveness’, the title of their report: ‘markets where businesses are systematically and comprehensively rewarded for more responsible practices, and penalised for the converse’. In fact, it can be easily shown in most cases why the ‘business case’ for socially responsible behaviour presupposes a framework without which such a behaviour may not necessarily be profitable to the individual business. Two examples may suffice here.

The ‘business case’ for reducing the consumption of resources or reducing polluting emissions is, it will be recalled, that such behaviour ‘reduc[es] energy and waste disposal bills and lowering input and de-pollution costs’. Whether this is true, of course, depends on the balance, in any particular setting, between the costs of using less energy (which may require, for instance, the acquisition of new, cleaner technologies) or producing less waste (which may require changing the production processes), on the one hand, and the price of energy and the disposal of waste, on the other; and whether it will be economically rational to prevent pollution rather than to accept the risk of having to meet de-pollution costs will depend on the system of property rights in place and, in particular, the risk that the company will be imposed an obligation to de-pollute. This not only highlights the danger that CSR, thus conceived, will be downgraded to a prescription to act simply as an enlightened (but still self-interested) rational economic actor. It also shows that, for a government, the most direct solution to environmentally responsible conduct is simply to let the price of energy go up, to collect high fees for waste disposal (calculated according to volume), and to oblige companies to internalize the costs of the pollution they create. There would simply be no ground on which to build the business case for CSR, if we bracket these public interventions away.

The hopes put into the behavior of consumers provide us with a second example. As highlighted by a recent report on ‘ethical consumerism’ in the United Kingdom, which illustrated both its promises and its limits, governments have a crucial role to play in order to ensure that the choices of consumers effectively serve as an incentive for companies to improve the CSR performance.<sup>53</sup> Consumers need to be empowered to make ‘better’ choices; and companies can hardly create trust alone. Not only do companies require the collaborative partnership of consumer organisations, NGOs, or specialist certifiers, in order to convince individual consumers that their ethical way of doing business should

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<sup>49</sup> Regulation (EC) No 761/2001, 12th Recital of the Preamble.

<sup>50</sup> On the conditions for the use of the logo, see Article 8 of Regulation (EC) No 761/2001.

<sup>51</sup> See Article 12(1) of Regulation (EC) No 761/2001.

<sup>52</sup> *Responsible Competitiveness. Reshaping Global Markets through Responsible Business Practices*, Accountability in association with Fundação Dom Cabral, prepared by Simon Zadek, Peter Raynard and Cristiano Oliveira, December 2005.

<sup>53</sup> See *What Assures Consumers?*, Accountability and National Consumers Council Report, prepared by Maya Forstater and Jeannette Oelschaegel with Maria Sillanpää, July 2006, available from <http://www.accountability.org.uk/> (last visited September 8th, 2006).

matter to the consumers' choices ; they also require an active role of governments. Governments should certify the standards which companies use to promote their CSR policies, by building certification schemes. They should also lead by example : by using social and environmental standards in the awardance of public contracts, they should contribute to making the individual consumer conscious of the implications of his or her own behaviour. And they should, more broadly, educate consumers to ethical consumerism by information campaigns.

As this last example already illustrates, the need for the establishment of a regulatory framework for CSR concerns both the system of incentives, either positive or negative, required for the best practices to be rewarded and the worst practices weeded out, and the instruments of CSR. With respect to codes of conduct, for instance, the European Commission has acknowledged that 'Monitoring, which should involve stakeholders such as public authorities, trade unions and NGOs, is important to secure the credibility of codes of conduct. A balance between internal and external verification schemes could improve their cost-effectiveness, in particular for SMEs. As a result there is a need to ensure greater transparency and improved reporting mechanisms in codes of conduct'.<sup>54</sup>

The need for some form of certification of the codes of conduct voluntarily adopted by companies, either individually or in whole sectors, and the need for securing the credibility of codes of conduct by ensuring that they will be effectively monitored by an independent third party, are both widely recognized. In the absence of some form of certification, either by non-governmental organisations or – preferably – by the public authorities, it will be impossible for the individual consumer to make the difference between a credible code of conduct, which effectively guarantees that the product he or she buys is produced according to certain standards, and codes of conduct which are adopted only for decorative purposes, and which either do not respect certain minimum standards, or are not subject to any kind of verification. The labelling initiatives which have recently been proliferating seek to respond to the risks associated with initiatives adopted at the level of the individual company, as such labels certify – for the range of companies to which the label is afforded – that their commitment is a genuine one and bears onto their practice. However, this only shifts the problem one step further : as noted by the European Commission in 2001, 'the growing number of social labels schemes in Europe may be detrimental to their effectiveness as confusion may arise among consumers, from the conflicting diversity of criteria used and lack of clarity of meaning among various labels'.<sup>55</sup>

As a result of this lack of coordination – either in order to verify the quality of codes of conduct adopted by the individual company, or at the next level, in order to certify the credibility of labelling schemes –, even assuming that the consumer wants to make his or her choices 'ethically', he or she will not be able to do so. The end result may be that the less credible codes of conduct or labelling schemes will drive out the more reliable ones : since the latter are costly to comply with and expose the company to a greater risk of its insufficiencies being brought to light, the rational choice is for the company to opt for a code of conduct or labelling scheme which imposes as few obligations as possible. Only if the companies choosing to adhere to codes of conduct or labels which are reliable – by the standards they include and by the monitoring they will be subjected to – are rewarded, will they be encouraged to do so.

Another reason why a framework needs to be established which will ensure the adequate functioning of codes of conduct is because of the cost of monitoring. It may be prohibitively expensive for any particular business, in particular for a SME, to pay for a monitoring performed by an independent auditing company. Of course, the companies of one sector may wish to join their efforts to establish one monitoring mechanism, preferably based on one single agreed set of standards. Such a solution presents clear advantages : in particular, it encourages the adoption of codes of conduct well tailored to the specificities of the sector concerned, and provided all or almost all the companies of the sector participate, it ensures that certain companies will not be undercut by less scrupulous competitors from the same sector, having chosen less requiring standards of conduct. However, such a pooling of

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<sup>54</sup> *Green Paper on Corporate Social Responsibility*, para. 58.

<sup>55</sup> *Green Paper on Corporate Social Responsibility*, para. 82.

companies will only be a partial answer. In less well-organized sectors, such a solution may be confronted with insurmountable collective action problems. Moreover, if such a solution is to be workable, it presupposes a relative homogeneity of the work processes and of the standards adopted by each individual firm – or, of course, the adoption of a sector-wide code of conduct –, in the absence of which the monitoring by one auditing firm or other independent party will have to be segmented in too many different parts, and hardly any economies of scale will be possible. In many cases therefore, governments should step in. They should provide the possibility for companies voluntarily adopting a code of conduct, or accepting an existing or a ‘model’ code of conduct, to rely on a monitoring mechanism, set up by the government as a public good, which would lend credibility to their commitment to the standards they embrace.

In fact, there are good reasons for defining such a ‘Model Code of Conduct’ and for setting up such a monitoring mechanism at the European level, rather than leaving this to be provided at the level of each Member State.<sup>56</sup> First, the degree of integration of the internal market is such that European firms compete with firms located in other Member States, and not only with other firms located in the same country. This is true not only for the larger, multinational companies, but increasingly also for smaller enterprises. As the very idea of a Model Code of Conduct and a common monitoring mechanism is based on the need to level the playing field between competing firms – but whose competition against one another should not be at the expense of certain social and environmental values –, it would make little sense to have each Member State define standards on the basis of which to certify codes of conduct, and set up monitoring systems, whose content and strength may differ from those established in the other Member States. Second, insofar as the objective is to encourage companies to voluntarily comply with the Model Code of Conduct which is proposed, and accept the monitoring by which it is backed up, the companies concerned must be convinced that the rewards – in terms of reputational gains and access to markets – will be worth at least the costs involved with such a commitment.<sup>57</sup> Therefore, the markets in which the ‘labelling’ associated with the acceptance of the Model Code of Conduct should be important enough to justify such an investment. But many national markets will be seen as too limited in size by individual undertakings to justify much efforts being made in order to acquire a reputational gain on those markets. Finally, for any kind of labelling to work as an incentive for companies, consumers must be educated, through promotional campaigns, to recognize the label, and to behave accordingly in their choices on the marketplace. Such wide-scale campaigns are prohibitively expensive, unless significant economies of scale are made : their organization at the European level, rather than at the national level, will be much easier to finance. Moreover, since consumers increasingly buy across borders, they should not be led into confusion by the coexistence of different labelling schemes, defined by each Member State : this would recreate the very confusion the establishment of model codes of conduct – or labelling – intended to respond to in the first place.

In sum, CSR practices and public intervention are not opposed to one another : instead, they may be mutually supportive. If it is to be attractive to companies, CSR should be sustained by a framework, including a legal framework, which not only enables them to voluntarily develop such practices, but which also ensures that such practices will be rewarded by the market. Companies will move CSR ahead to the extent that it pays – no less, but also no more. And whether it pays or not depends on the environment which is created for CSR. It depends on how the ‘market’ is institutionalized. Modify the institutional setting, and the risks and opportunities of developing CSR practices for the individual company may be radically different. The steps which have been taken recently towards the establishment of a CSR framework in the EU illustrate this. They also show something else : the extent to which the capacity for such tools to modify the behaviour of companies depends on a range of sociological, cultural and economic factors, which operate in combination with the strictly legal factors constituting the regulatory framework for CSR. Because of their highly context-specific dimension, CSR policies are confronted with a new challenge in the enlarged Union, due to the

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<sup>56</sup> The experience of Belgium with its 2002 Law on Social Labelling may serve to illustrate the limitations encountered by the adoption of such initiatives at the national level.

<sup>57</sup> While such costs may be minimal in certain cases, it is difficult to conceive of a system where they would be nil. At a minimum – where the company already complies entirely in its practices with the requirements laid down in the code of conduct –, reporting obligations will impose certain bureaucratic burdens and will require the training of personnel.

differences which exist, across these factors, across the 25 Member States. The next section seeks to explain why.

#### **IV. The Parallel Initiatives**

It may appear, in certain respects, that the Commission has deliberately chosen to relegate to the fringes a process on which, because it relied heavily on the participation of external stakeholders, it could exercise little control, in order to address the same issues through legislative initiatives. It is indeed striking that, during the same period of time, a number of regulatory developments took place, which contribute, albeit partially, to establishing a regulatory environment for CSR in Europe. It is not easy to provide a political interpretation for these developments, especially as they have their origin in legislative proposals made by the Commission under the previous legislature. What these examples do seem to illustrate is this : disappointing as this may be to the those, like this author, who support the development of more open and participatory modes of governance in the law- and policy-making of the Union, processes too strongly dependent on the willingness of all stakeholders to reach a consensus may led, in effect, to allowing each of the stakeholders involved to veto any result attained through discussion. Three examples illustrate the virtues of what might be called a regulatory (i.e., non-procedural) approach to the establishment of a framework for CSR.

##### *1. Environmental and social clauses in public contracts*

A first example is in the field of public contracts. The White paper of the Commission on Corporate Social Responsibility already mentioned that ‘access to public procurement, conditional on adherence to and compliance with the OECD guidelines for multinational enterprises, while respecting international commitments, could be considered by EU Member States and by other States adherent to the OECD Declaration on International Investment’<sup>58</sup>. Indeed, if sufficiently widespread, the use by States of their economic muscle as purchasers of public goods may have a significant impact on businesses, considering the weight of the public sector in our developed Welfare States.<sup>59</sup>

The allowability of taking into account non-economic considerations in the awardance of public contracts was first confirmed by the European Court of Justice, in four cases it decided between 1988 and 2003.<sup>60</sup> In the second of these cases, which the Court decided on 26 September 2000, the Commission of the European Communities had lodged an application against France, seeking a declaration that France had violated its obligations under European Community law by setting forth as an award criterion in a number of contract notices for the construction and maintenance of school buildings by the Nord-Pas-de-Calais Region and the Département du Nord a condition relating to employment linked to a local project to combat unemployment.<sup>61</sup> The Court considered that although, under Article 30(1) of Directive 93/37<sup>62</sup>, the criteria on which the contracting authorities are to base the award of contracts are either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability, technical merit, ‘that provision does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services’, at least as long as the

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<sup>58</sup> Communication of the Commission on Corporate Social Responsibility: A business contribution to Sustainable Development, COM(2002) 347 final, at 23.

<sup>59</sup> In 2000, the acquisition by the public authorities of goods, services and works, represented 14 % of the GDP (Gross Domestic Product) in the EU: see *Single Market News*, March 2000, cited by P. Lefèvre, ‘Les considérations sociales et environnementales dans les marchés publics européens’, *Journal des tribunaux – Droit européen* (2000), at 245.

<sup>60</sup> Case C-31/87, *Beentjes*, [1988] ECR 4635 ; Case C-255/98, *Commission v. France*, [2000] ECR I-7445 ; Case C-513/99, *Concordia Bus Finland*, [2002] ECR I-XXX ; Case C-448/01, *EVN AG and Wienstrom GmbH*, [2003] ECR I-XXX.

<sup>61</sup> Case C-225/98, *Commission of the European Communities v. France*, [2000] ECR I-7445 (judgment of 26 September 2000)

<sup>62</sup> Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ 1993 L 199/54.

criterion is ‘applied in conformity with all the procedural rules laid down in [Directive 93/37], in particular the rules on advertising’.<sup>63</sup> Read in combination with the previous case-law of the European Court of Justice,<sup>64</sup> the judgment implied that it could be extended, beyond social clauses, to environmental conditions. Following the judgment, the European Commission therefore presented interpretative communications on the Community law applicable to public procurement and the possibilities for integrating both social<sup>65</sup> and environmental<sup>66</sup> considerations into public procurement, in order to offer its reading of the implications of these cases, and thus to contribute to legal certainty in this field of the law.

The two later cases decided by the European Court of Justice followed these interpretative communications. In its judgment of 17 September 2002 in the case of *Concordia Bus Finland* – where a Finnish municipality took into account the environmental performances which could be satisfied in the execution of the contract to be awarded –, the European Court of Justice considered that ‘where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, in accordance with Article 36(1)(a) of Directive 92/50<sup>67</sup>, it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination’<sup>68</sup>. The Court based its reasoning, in part, on the fact that, under Article 6 EC, environmental protection is to be integrated into the definition and implementation of Community policies and activities : according to the Court, this would justify a reading of Article 36(1) of Directive 92/50 favorable to the States wishing to take into account environmental criteria in the assessment of the economically most advantageous tender.

Finally, in Case C-448/01, the Court was confronted with the legality, under Community law, of the awardance of a public contract for the supply of electricity to the Land of Kärnten (Carinthia), which included an environmental criterion relating to the impact of the services on the environment : the electricity supplier had to undertake to supply the Federal offices with electricity produced from renewable energy sources, subject to any technical limitations, and in any case not knowingly to supply those offices with electricity generated by nuclear fission. In its judgment of 4 December 2003, the Court confirmed its view already expressed in *Concordia Bus Finland*, according to which ‘the Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources, provided that that criterion is linked to the subject-matter of the contract, does not confer an unrestricted freedom of choice on the authority, is expressly mentioned in the contract documents or the contract notice, and complies with all the fundamental principles of Community law, in particular the principle of non-discrimination’.<sup>69</sup>

Since the referring court expressed concerns about the fact that the environmental criterion was given a weighting of 45% , implying that the award decision would be very significantly influenced by an element which is not capable of being assigned a direct economic value, the Court moreover considered that having regard to the importance of the objective pursued by the criterion at issue, such

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<sup>63</sup> Case C-225/98, *Commission of the European Communities v. France*, para. 50-51. France, however, was found to have violated its Community obligations for a number of other reasons.

<sup>64</sup> Case 31/87 *Beentjes*, [1988] ECR 4635, paragraphs 28 and 37.

<sup>65</sup> COM(2001) 566 final of 15.10.2001.

<sup>66</sup> COM(2001) 274 final of 4.7.2001.

<sup>67</sup> Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209/1) (defining the criteria on which the contracting authority may base the award of contracts where the award is made to the ‘economically most advantageous tender’, as ‘various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price’).

<sup>68</sup> Case C-513/99, *Concordia Bus Finland*, para. 64 (judgment of 17 September 2002).

<sup>69</sup> At para. 34.

a weighting ‘does not appear to present an obstacle to an overall evaluation of the criteria applied in order to identify the most economically advantageous tender’.<sup>70</sup>

It is in this context that, on 31 March 2004, Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts was adopted,<sup>71</sup> along with its companion directive, Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.<sup>72</sup> The directives confirm the existing case-law of the European Court of Justice, based on , according to which environmental and social clauses may be included as criteria for the awardance of public contracts :

In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs - defined in the specifications of the contract - of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.<sup>73</sup>

In addition, the directives provide that in the selection of tenderers, certain disqualification clauses will apply, or may apply if the public authorities so choose. Article 45(1) of Directive 2004/18/EC provides that any candidate or tenderer who has been the subject of a conviction by final judgment for participation in a criminal organisation, corruption, fraud , money laundering, as defined in the relevant EU instruments, shall be excluded from participation in a public contract. Under Article 45(2), any economic operator *may* be excluded from participation in a contract, *inter alia*, where that economic operator ‘has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct’. If national law contains provisions to this effect, this may include non-compliance with environmental legislation, or the non-observance of national provisions implementing the Council Directives 2000/78/EC<sup>74</sup> and 76/207/EEC<sup>75</sup> concerning equal treatment of workers, where such non-compliance has been the subject of a final judgment or a decision having equivalent effect.<sup>76</sup>

Finally, both directives anticipate that, insofar as the nature of the works and/or services justifies applying environmental management measures or schemes during the performance of a contract, the application of such measures or schemes may be required.<sup>77</sup> The adoption by the tenderer of environmental management schemes can demonstrate that the economic operator has the technical capability to perform the contract. If the adoption of such a scheme is required, the economic operator should be allowed to describe the measures implemented to ensure an adequate level of environmental protection, without having necessarily to join an environmental management registration scheme such,

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<sup>70</sup> At para. 42.

<sup>71</sup> OJ L 134 of 30.4.2004, p. 114. See also Directive 2005/75/EC of the European Parliament and of the Council of 16 November 2005 correcting Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 323 of 9.12.2005, p. 55.

<sup>72</sup> OJ L 134 of 30.4.2004, p. 1.

<sup>73</sup> 46th Recital of the Preamble of Directive 2004/18/EC ; and 55th Recital of the Preamble of Directive 2004/17/EC.

<sup>74</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16).

<sup>75</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, (OJ L 39 of 14.2.1976, p. 40). Directive as amended by Directive 2002/73/EC of the European Parliament and of the Council (OJ L 269, 5.10.2002, p. 15).

<sup>76</sup> 45th Recital of the Preamble of Directive 2004/18/EC ; and 54th Recital of the Preamble of Directive 2004/17/EC.

<sup>77</sup> See Article 50 of Directive 2004/18/EC, and the 44th Recital of the Preamble ; and Article 34(2)(b), and (6) of Directive 2004/17/EC, and the 53d Recital of the Preamble.

in particular, the Eco-Management and Audit Scheme (EMAS) set up under Regulation (EC) No 761/2001.

## 2. Social and Environmental Reporting under the modernized Accounting Directives

The second example is one of failure. In 2001-2002, the discussion was launched on the modernisation of the Accounting Directives in the implementation of the Commission's Financial Services Action Plan. On 28 May 2002, the Commission presented its proposals for the modernisation of the Fourth (78/660/EEC) and Seventh (83/349/EEC) Council Directives, which set out the requirements as regards, respectively, the preparation of the annual accounts of companies and the preparation of consolidated accounts.<sup>78</sup> Those proposals comprised the inclusion, in the annual review, of non-financial information relevant to the understanding of the performance of the business and its position at the year end. Consistent with the earlier Commission Recommendation of 30 May 2001 on the recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies (2001/453/EC),<sup>79</sup> the Commission proposed that the information included in the annual review should comprise an analysis of environmental, social and other aspects relevant to an understanding of the company's development and position.<sup>80</sup> Its suggestion was to replace Article 46(1) of the Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies<sup>81</sup> by a provision stating that :

The annual report must include at least a fair review of the development of the company's business and of its position.

The review shall include a balanced and comprehensive analysis of the development of the company's business and of its position. *The information included shall not be restricted to the financial aspects of the company's business.* (...) [emphasis added]

A similar amendment was proposed to Article 36(1) of The Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts.<sup>82</sup> Social and environmental reporting, thus conceived, was also supported by the European Parliament.<sup>83</sup> However, Directive 2006/46/EC of 14 June 2006 does not include those proposals.<sup>84</sup> While it does impose an obligation on companies whose securities are admitted to trading on a regulated market and which have their registered office in the Community to disclose an annual corporate governance statement as a section of their annual report, they 'may also',

<sup>78</sup> COM(2002)259 final, of 28.5.2002.

<sup>79</sup> OJ L 156 of 13.6.2001, p. 33. The Recommendation was based on the finding that 'The lack of explicit rules has contributed to a situation where different stakeholders, including regulatory authorities, investors, financial analysts and the public in general may consider the environmental information disclosed by companies to be either inadequate or unreliable. (...) voluntary disclosure of environmental data in the annual accounts and annual reports of companies is still running at low levels (...) In the absence of harmonised authoritative guidelines in relation to environmental issues and financial reporting, comparability between companies becomes difficult. When companies do disclose environmental information it is often the case that the value of the information is seriously handicapped by the absence of a common and recognised set of disclosures that includes the necessary definitions and concepts with regard to environmental issues. The information is often disclosed in a variety of non-harmonised ways among companies and/or reporting periods, rather than being presented in an integrated and consistent manner throughout the annual accounts and the annual report' (4th and 5th Recitals of the Preamble). The Commission accordingly recommended that companies covered by the fourth and seventh Company Law Directives (Directives 78/660/EEC and 83/349/EEC respectively) apply the provisions contained in the Annex to the recommendation in the preparation of the annual and consolidated accounts and the annual report and consolidated annual report.

<sup>80</sup> See the 7th Recital of the Preamble in the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC, 83/349/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies and insurance undertakings.

<sup>81</sup> OJ L 222, 14. 8. 1978, p. 11, Directive as last amended at the time by Directive 2001/65/EEC, OJ L 283, 27.10. 2001, p. 28.

<sup>82</sup> OJ L 193, 18. 7. 1983, p. 1, Directive as last amended by Directive 2001/65/EEC, OJ L 283, 27.10. 2001, p. 28.

<sup>83</sup> In its resolution, 'Invites the Commission to bring forward a proposal in the appropriate Directive (The Fourth Company Law Directive) for social and environmental reporting to be included alongside financial reporting requirements' (para. 6 of the operative part of the resolution).

<sup>84</sup> Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings, OJ L 224, 16.8.2006, p. 1.

‘where relevant’, ‘provide an analysis of environmental and social aspects necessary for an understanding of the company's development, performance and position’.<sup>85</sup> Any obligation to report on non-financial matters was excluded.

### 3. Codes of conduct as potentially misleading advertising

A third example concerns the impact, on the adoption of voluntary initiatives adopted by companies as part of their CSR policies, of the rules concerning misleading advertising. In its May 2002 Resolution on the Commission Green Paper on promoting a European framework for corporate social responsibility, the European Parliament ‘calls on the Commission to enforce strong consumer protection measures to uphold the credibility of corporate information in relation to environmentally and socially responsible business practice, in particular applying the provisions regarding misleading advertising’.<sup>86</sup> There is a clear logic in this proposition. Codes of conduct primarily serve as a message to the consumers that the goods or services they are acquiring are produced in socially, ethically or environmentally acceptable conditions. In that sense, such codes advertise the practices of the company to its customers, whose choices are increasingly guided by non purely economic considerations.<sup>87</sup> The Council Directive of 10 September 1984 concerning misleading and comparative advertising defines ‘advertising’ in the broadest fashion possible, as ‘the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services ...’.<sup>88</sup> Codes of Conduct are covered by this definition. The information misleading to the consumers which, ‘by reason of its deceptive nature, is likely to affect their economic behaviour’, includes in particular the method of manufacture or the geographical origin<sup>89</sup>: thus, whenever codes refer to the working conditions in which the advertised goods were produced, or – as may be justified when certain boycott campaigns are launched – to the countries in which the production took place, this information, if deceptive, should be sanctioned, and Member States are under an obligation ensure that adequate and effective means exist to combat advertising referring to it. The Directive details the procedural safeguards which must be provided by national legislations of the Member States, for the consumer to be effectively protected against misleading advertising. In particular, organizations regarded under national law as having a legitimate interest in prohibiting

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<sup>85</sup> 10th Recital of the Preamble. See Article 46a of Council Directive 78/660/EEC on the annual accounts of certain types of companies, as inserted by Article 1 of Directive 2006/46/EC ; and the amendment to Article 36(2) of 83/349/EEC on consolidated accounts by Article 2(1) of Directive 2006/46/EC.

<sup>86</sup> European Parliament resolution on the Commission Green Paper on Promoting a European framework for Corporate Social Responsibility (COM(2001) 366 - C5-0161/2002 - 2002/2069(COS)), para. 33 of the operative part of the resolution. Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250/17) is mentioned in the Preamble of the Resolution.

<sup>87</sup> This was recognized by the California Supreme Court in the case of *Kasky v. Nike, Inc.* Marc Kasky, a California resident, sued Nike for unfair and deceptive practices under California's Unfair Competition Law, Cal. Bus. & Prof. Code Ann. §17200 et seq. (West 1997), and False Advertising Law, §17500 et seq. The Unfair Competition Law creates a private right of action to remedy ‘any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by’ California’s false advertising law. The Californian False Advertising Law makes a criminal misdemeanor, and creates a private right of action to remedy, any statement ‘which is untrue or misleading’ and is made or disseminated ‘before the public in this state (...) in any newspaper or other publication (...) or in any other manner or means whatever’. The argument of Kasky was that ‘in order to maintain and/or increase its sales’, Nike made a number of ‘false statements and/or material omissions of fact’ concerning the working conditions under which Nike products are manufactured by its suppliers, in factories in Southeastern Asia. The California Supreme Court took the view that California unfair trade practice and false advertising law applied to Nike’s statements, notwithstanding that those statements were not made in product advertisements and included no product references : such statements were classified as ‘commercial speech’, subject to strict governmental regulation, although they did not constitute product advertising per se (*Kasky v. Nike*, 27 Cal. 4th 939 (2002), cert. granted, 123 S. Ct. 817, and cert. dismissed, 123 S. Ct. 2254 (2003)). In a decision adopted on 26 June 2003 by 6 votes to 3, the United States Supreme Court dismissed the request for *certiorari* filed by Nike. It considered that Nike could be sued for violating state consumer-protection laws concerning allegedly false advertising when such statements were made in response to charges by Nike’s critics and concerned wages, treatment and safety conditions of Nike’s workers at overseas factories, without this constituting a violation of the freedom of expression guaranteed under the First Amendment to the Constitution (*Nike, Inc. v. Kasky*, 539 US 654 (2003)).

<sup>88</sup> Article 2 of Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, as amended by Directive 97/55/EC of European Parliament and of the Council of 6 October 1997, OJ 1997 L 290/18, corrigendum OJ 1998 L 194/54.

<sup>89</sup> Article 3 of Council Directive 84/450/EEC.

misleading advertising should be able to take legal or administrative action<sup>90</sup>; and, perhaps even more important, in such proceedings courts or administrative authorities should have the power ‘to require the advertiser to furnish evidence as to the accuracy of factual claims in advertising if, taking into account the legitimate interest of the advertiser and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case’, and ‘to consider factual claims as inaccurate’ if the evidence thus demanded ‘is not furnished or is deemed insufficient by the court or administrative authority’<sup>91</sup>.

The recent amendments to Directive 84/450/EC<sup>92</sup> confirm what was already implicit in the original text. The Unfair Commercial Practices Directive (2005/29/EC) now explicitly notes that

It is appropriate to provide a role for codes of conduct [<sup>93</sup>], which enable traders to apply the principles of this Directive effectively in specific economic fields. In sectors where there are specific mandatory requirements regulating the behaviour of traders, it is appropriate that these will also provide evidence as to the requirements of professional diligence in that sector. The control exercised by code owners [responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it] at national or Community level to eliminate unfair commercial practices may avoid the need for recourse to administrative or judicial action and should therefore be encouraged. With the aim of pursuing a high level of consumer protection, consumers' organisations could be informed and involved in the drafting of codes of conduct.<sup>94</sup>

The Unfair Commercial Practices Directive, which seeks to harmonize the rules on misleading advertising beyond the minimum requirements initially set forth in the 1984 Directives, provides that a misleading commercial practice may consist in practice which ‘contains false information and is therefore untruthful or in any way, (...) deceives or is likely to deceive the average consumer’, in relation, *inter alia*, to ‘the main characteristics of the product, such as its (...) method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use (...)’.<sup>95</sup> Article 6(2)(b) of the Directive moreover explicitly defines as constituting a misleading commercial practice

non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:

- (i) the commitment is not aspirational but is firm and is capable of being verified, and
- (ii) the trader indicates in a commercial practice that he is bound by the code.

In addition, the Directive mentions the possibility for the Member States to encourage the control of unfair commercial practices of companies bound by a code of conduct, by the bodies – the ‘code owners’ – monitoring compliance with the code. Proceedings before such bodies, we are told, should be encouraged ‘in addition to the court or administrative proceedings’ which, under Article 11 of the Directive, the States are to set up, although they should not become a substitute for such judicial or administrative proceedings.

#### 4. The regulatory framework for CSR and the level playing field in the internal market

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<sup>90</sup> Article 4 § 1 of Council Directive 84/450/EEC.

<sup>91</sup> Article 6 of Council Directive 84/450/EEC.

<sup>92</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), OJ L 149, 11.6.2005, p. 22.

<sup>93</sup> These are defined as ‘an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors’ (Article 2, f) of the Unfair Commercial Practices Directive).

<sup>94</sup> 20th Recital of the Preamble.

<sup>95</sup> Article 6(1)(b) of the Directive.

These developments have been disorderly, rather than guided by a clear strategy for the mainstreaming of CSR in different policy fields ; there have been clear setbacks, as in the field of social or environmental reporting ; but they also send encouraging signals. While they have not met all the expectations of the European Parliament as expressed in its successive resolutions on CSR, they are the first, albeit still modest, steps towards the establishment of a regulatory framework for CSR in the European Union. Like all initiatives guided by CSR however, they also rely on the behaviour of individual consumers, on the vigilance of civil society organisations, and on the specific shape of market institutions, for their effectiveness. As such, they suffer a basic flaw : they are insufficient to establish a level playing field throughout the internal market, precisely because those behaviours, the state of civil society, and the structure of the market, are not uniform throughout the Union. The situation in the Central and Eastern European countries, especially in the 10 states having acceded to the European Union on 1 May 2004, illustrates this.

The specific position of Central and Eastern European countries in the CSR debate is defined by three characteristics.<sup>96</sup> First, these countries present a specific relationship to the flow of foreign direct investments. As fast-growing economies, they have attracted important levels of FDI during the recent years, especially as a result of the massive privatizations during the 1990s.<sup>97</sup> This attractiveness may be attributed to a number of factors,<sup>98</sup> including in particular the fact that, while the workers are highly skilled, the wages are comparatively low and thus the productivity relatively high ; that, due to growing consumer demand supported by rising wages and important inflows of foreign investment, the markets are fastly growing, and strongly integrated with the neighbouring economies<sup>99</sup> ; and that the EU-10 provide a number of incentives to attract potential investors, including a low level of taxation on corporate benefits,<sup>100</sup> tax holidays for firms making new investments, job-creation grants and re-training grants, or access to low-cost land.<sup>101</sup>

This development – the conditions, in sum, under which a market economy was created in the new EU Member States in the years preceding their accession to the EU – has had two major consequences. First, although studies seem to indicate that the FDI inflows in the new EU Member States are primarily market-driven – i.e., attracted by a fast-growing consumer demand –, rather than efficiency-driven or resource-driven,<sup>102</sup> these countries have been behaving as if they were competing against one another, and with the Western European countries, for FDI, on which they are

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<sup>96</sup> Some of these remarks have been inspired by the report recently released by the FIDH, *An overview of Corporate Social Responsibility in Hungary*, September 2006, prepared by Philippe Kalfayan and Ludovic Hennebel.

<sup>97</sup> The privatizations of the 1990s led to major inflows of FDI in CEE countries. The accession of 10 CEE countries to the EU in 2004 has been a comparatively less significant factor in their attractiveness. On average, the market share of FDI of the new member states increased following their accession to the EU, with the majority of FDI coming from EU-15 states. At the same time, 'not all of the new Member states have benefited from increased levels of FDI, with both Czech Republic and Hungary losing market share. Poland has out performed the rest of the new member states, overtaking Hungary as the leading destination for FDI. Slovakia plus the three Baltic States, Estonia, Latvia and Lithuania, have all recorded an increase in FDI post accession' (*FDI Quarterly*, OCO Consulting, Issue 1, Qtr. 1, 2006, at p. 12).

<sup>98</sup> See generally Alessandrini, S. (ed.), *The EU Foreign Direct Investment in Central and Eastern Europe*, Giuffrè Editore, Milan, 2000.

<sup>99</sup> See Carlo Altomonte and Claudia Guagliano, 'Competing Locations? Market Potential and FDI in Central and Eastern Europe vs the Mediterranean', *LICOS Discussion paper* n° 108/2001, available at [www.econ.kuleuven.ac.be/LICOS/DP/Dp2001/DP1082001Altomonte.pdf](http://www.econ.kuleuven.ac.be/LICOS/DP/Dp2001/DP1082001Altomonte.pdf) (last visited on September 9th, 2006). These authors highlight the importance of this factor in the location of FDI, building on the work pioneered by C. Harris, "The Market as a Factor in the Localization of Industry in the United States", *Annals of the Association of American Geographers*, vol. 64, 1954, pp. 315-348 ; and K. Head and T. Mayer, "Market Potential and the Location of Japanese Investment in the European Union", *CEPR Workshop on the Economic Geography of Europe: Measurement, Testing and Policy Simulations*, Villars, 12-13 January 2001.

<sup>100</sup> See the comment in the 2005 Foreign Direct Investment Confidence Index that 'Despite rising costs and more regulations, new EU members are relatively more attractive to global companies. This is due to higher levels of productivity and better tax rates. The average corporate tax rate among the new EU members is 20 percent, but reaches 31 percent for the EU-15' (<http://www.atkearney.com/>, last consulted on September 8th, 2006).

<sup>101</sup> An overview of these policies is provided by J.S. Mah, and D. Tamulaitis, 'Investment incentives in the Central and Eastern European transition economies', *The Journal of World Investment*, vol. 1(1) (2000), 225-241.

<sup>102</sup> See A. Johnson, 'FDI Inflows to the Transition Economies in Eastern Europe : Magnitude and Determinants', in S. Hacker, B. Johansson and C. Karlsson (eds.), *Emerging Market economies and European Economic Integration*, Edward Elgar, 2004, and in a longer, more technical version, *CESIS Electronic Working Paper Series*, n° 59, January 2006.

highly dependent.<sup>103</sup> These countries may thus be reluctant to impose far-reaching obligations on private investors. On the other hand however, the significant inflow of foreign investment since the early 1990s seems to have led to the importation within the countries concerned of the CSR mechanisms, policies and model of the multinationals present within their economies, who have transmitted their best practices to the local firms.<sup>104</sup> The net result may be the emergence of a two-tiered approach on CSR : on the one hand, certain highly visible companies, who have an important interest in preserving their reputational capital, will seek to replicate best practices already developed elsewhere ; on the other hand, certain firms who are less dependant on their brand image, may simply seek to squeeze out the most from a regulatory environment shaped in order to be hospitable to business. There is no reason to believe that the former will crowd out the latter, or that the latter will be driven out of business : the two sets of firms simply have different competitive advantages, which they seek to maximize each in their own ways.

Second, there are the specific historic circumstances of CEE countries. These countries have been massively restructuring their economies since the breakdown of the Eastern block in 1989-1990, leading in particular to the large-scale privatization of previously public services. The cultural consequences of this, while difficult to measure, seem to be that the local actors are generally hesitant about the imposition of excessive regulations on economic activity, which they perceive as a recolonization by politics of the sphere of the market. Moreover, the social context presents certain differences with the countries of EU-15. Consumers appear to be even less driven by the need to 'buy ethically' than in Western Europe. Due to their need to be funded, civil society organizations in CEE countries are occasionally led to provide consultancy services to companies about CSR practices, which may threaten their independence and their ability to act as watchdogs about corporate abuses, implying that an important incentive to implement CSR practices – in order to avoid the risk of being denounced for such abuses – may be lacking.

Third, the stock market capitalisation in the new Member States is generally low in comparison to the situation in the EU-15, and most corporations are not listed on the local stock exchange. It has been noted that 'the average market capitalisation of the CEECs-10 amounts to 16 percent of GDP, compared to the euro area average of 84 percent. The turnover of the stock exchanges in the Czech Republic, Hungary and Poland *per year* is roughly equivalent to 2, 3 and 5 *days* of turnover at the stock exchanges of Paris or Frankfurt, respectively. One reason for the low market capitalisation is the feeble income levels, another is the low level of institutional savings (e.g., pension funds, insurance companies)'.<sup>105</sup> The impact for CSR is that one of its main drivers – stakeholder activism, understood in the broad sense to include socially responsible investment – will be almost absent for local firms. The importance of the presence of multinationals in the EU-10 does not compensate for this, since these companies will be listed on foreign stock exchanges, which will typically pay scant attention to the activities of these companies abroad, even assuming the information about the non-financial aspects of these activities is available.

For all these reasons, the new EU Member States may put to the test the ability of CSR policies, even with certain incentives from the public authorities, to deliver what they promise. The possibility left to Member States to include social and environmental considerations in their public procurement policies or, as envisaged under the Unfair Business Practices Directive, to encourage the setting up of bodies monitoring compliance with voluntarily adopted codes of conduct, presupposes a willingness of the States to travel along this route, which in turn depends on a public opinion paying sufficient attention

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<sup>103</sup> For instance, following several waves of privatization of formerly state-owned companies since 1989, more than eighty percent of the Czech economy is now in private hands. Privatization programs have been open to foreign investors, resulting in a situation where major state-owned companies have been privatized with foreign participation.

<sup>104</sup> J.-P. Segal, A. Sobczak and C.-E. Triomphe, *Corporate Social Responsibility and Working Conditions*, European Foundation for the Improvement of Living and Working Conditions, 2003, at p. 68.

<sup>105</sup> György Szapáry, 'Comment on Henk Brouwer, Ralph de Haas and Bas Kiviet', in 'Financial Stability and Growth in Emerging Economies', FONDAD, September 2003, [www.fondad.org](http://www.fondad.org), referring in turn to an earlier study : European Central Bank, "Financial Sector Development and Convergence in Accession Countries: An Overview", Background Paper for the Eurosystem Seminar with Accession Countries' Central Banks, Berlin, December 2001.

to these issues. More importantly, the benefits for any company of adopting CSR policies depend on the activism of consumers, consumer organisations or non-governmental groups monitoring the behaviour of companies : where such activism is absent, CSR will not pay, and there will be few incentives for companies to behave according to our idealistic expectations of the role of business in society, and move beyond compliance with the minimum requirements set forth by law. Thus, in the field of CSR as in other areas of European integration, the impact of enlargement may be to make visible the need for more convergence, once we recognize that the alternative may be, instead, further dilution.

## **V. Conclusion**

Since the spectacular emergence of CSR as a European concern in 2000, the concept has undergone a silent, but deep transformation, as a result of its uses by the relevant actors. Two shifts have occurred. One is from substance to process. In 2001 and 2002, when the Commission first presented its views on the subject, CSR was an objective to be achieved : the question was how to incentivize companies to act beyond their legal obligations, by voluntarily contributing to the protection of the environment and to greater social cohesion. But the establishment, in the Fall of 2002, of the CSR European Multistakeholder Forum – as the privileged method through which to identify the answers –, implied a proceduralization of CSR : the CSR policy of the Community soon was reduced to the facilitation of a dialogue about CSR between all relevant stakeholders. A second shift, then, resulted from this, this time at the level of the definition of CSR itself : whereas, initially, the hope was that a regulatory framework would sustain and encourage CSR practices, create the ‘enabling environment’ it required in order to expand, CSR now was seen as inimical to any form of regulatory framework, as the establishment of such a framework, for instance on the registration and certification of codes of conduct or of labels, on reporting obligations concerning the non-financial aspects of the companies’ performances, or on socially responsible investment, was denounced as bridling the creativity of the economic actors, and – especially – as bad for business.

There are two explanations for what happened. One view is that, by its choice of method in the establishment of the CSR EMS Forum, the European Commission made itself hostage to a process which it lost control of – and which the business partners, then, hijacked. Under this view, the Commission acted naively : it did not see, or it saw too late, the risks associated with the proceduralization of CSR. Confronted with this development – with the inability to ensure that a consensus be reached among the different partners of the CSR EMS Forum going beyond a lowest-common-denominator approach –, the Commission may have preferred to reinvest its efforts into a more classical regulatory approach, as exemplified to some extent in the fields of public procurement or the regulating of unfair business practices. Another view however is that CSR simply followed the path of the Lisbon strategy itself : whereas, until 2004-2005, a balance was sought between the parallel objectives of economic growth and job creation, environmental sustainability and social cohesion, CSR constituting one instrument among others in achieving such a balance, after 2005, all the efforts were refocused on growth and employment, and the two other pillars suffer since, in comparison, a relative neglect. According to this reading, both the reluctance of the Commission to implicate itself actively in the discussions of the CSR EMS Forum, and the follow-up given by the Commission to the results of the Forum – the establishment of a European Alliance of CSR limited to business, and even more importantly, the dismissal of the idea that any initiative should be taken to establish a regulatory framework for CSR –, are the outcome of political calculations, and a shift of mood of the Commission, linked of course to the coming into office of the new Commission in November 2004. These views are not necessarily contradictory.