Corporate Social Responsibility

Identifying what initiatives and instruments at EU level could enhance legal certainty in the field of corporate social responsibility

STUDY

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Abstract
After an analysis of the applicable law, it appears that the ‘Corporate Social Responsibility’ (CSR) approach as it is developing in the European Union calls for proposals for modifying substantive law. In addition to the existing texts, it may also be asked whether a law on CSR might not be enacted in order to protect corporate values and secure new markets relating to the emergence of the sustainable business. Once these values, supported by CSR law, are adopted by a corporate governance system, CSR may even allow the creation of a new type of intangible asset.
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<td>ECHR</td>
<td>European Court of Human Rights</td>
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<td>EMAS</td>
<td>The EU Eco-Management and Audit Scheme</td>
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<td>ESG</td>
<td>Criteria for analysis of the environmental, social and corporate governance policies (ESG criteria)</td>
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<td>GRI</td>
<td>Global Reporting Initiative</td>
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<td>IFAC</td>
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<td>SRI</td>
<td>Socially Responsible Investment</td>
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<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<td>United Nations</td>
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<td>NCP</td>
<td>National Contact Point (in accordance with the OECD guidelines)</td>
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<td>SMEs</td>
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<td><strong>Actionnaire</strong></td>
<td><strong>Shareholder</strong></td>
<td>Person or entity owning shares.</td>
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<td><strong>Ad nutum</strong></td>
<td><strong>Ad nutum</strong></td>
<td>Expression which characterises the right to withdraw the powers given to a board member without having to justify the reasons and without giving advance notice.</td>
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<td><strong>Code de gouvernance d’entreprise</strong></td>
<td><strong>Corporate governance code</strong></td>
<td>Set of recommendations, providing good practices regarding the balance of powers and controls among corporate bodies, enacted by public or private bodies.</td>
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<td><strong>Conflict of interest</strong></td>
<td><strong>Conflict of interests</strong></td>
<td>Situation of a person who has to choose between his/her own personal interest and the overriding interest of the company he/she shall defend, the company of which he/she is a board member or a shareholder.</td>
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<td><strong>Internal control</strong></td>
<td><strong>Internal control</strong></td>
<td>According to the COSO Framework (Committee of Sponsoring Organizations of the Treadway Commission), internal control is a process carried out by the supervisory body, the management and other personnel designed to provide reasonable assurance regarding the achievement of objectives in three areas: - Effective and efficient operations; - Reliable financial reporting; - Compliance with applicable laws and regulations.</td>
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<td><strong>Convention réglementée</strong></td>
<td><strong>Regulated party agreement</strong></td>
<td>Agreement and/or transaction between a company and a board member or a significant shareholder which is authorised by a procedure provided by law.</td>
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<td><strong>Corporate governance</strong></td>
<td><strong>Corporate governance</strong></td>
<td>Refers to the theory of corporate governance, of Anglo-Saxon origin, initially based on the agency theory, which mainly aims at protecting shareholders’ interests. The term may nowadays be defined (OECD source) as a set of procedures and processes according to which an organisation is directed and controlled.</td>
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<td><strong>Directorate</strong></td>
<td><strong>Management</strong></td>
<td>Individual(s) and/or body exercising the executive power.</td>
</tr>
<tr>
<td><strong>Hard law</strong></td>
<td><strong>Hard law</strong></td>
<td>Set of binding rules (laws, regulations, decrees, etc.) enacted by public authorities (democratically elected authorities, national securities and markets authorities, etc.).</td>
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<td><strong>Intérêt social</strong></td>
<td><strong>Corporate benefit</strong></td>
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<td>‘Responsibility of enterprises for their impacts on society’.</td>
<td>Company listed in Annex I to Council Regulation (EC) No 2157/2001.</td>
<td>Company whose securities are admitted to trading on a regulated market.</td>
<td>Company governed by Council Regulation (EC) No 2157/2001 and Council Directive 2001/86/EC.</td>
<td>Private limited liability company whose securities are not admitted to trading on a regulated market which can be composed of one single partner, which can be the president of the company. In this case, the president represents the company vis-à-vis third parties in accordance with the articles of association. The articles of association establish the management rules.</td>
</tr>
<tr>
<td>Power of control</td>
<td>Supervisory power</td>
<td>Pouvoir exercé par l’organe exerçant un pouvoir de surveillance sur l’organe exerçant le pouvoir exécutif.</td>
<td>Power exercised by the body exercising a supervisory power over the body exercising the executive power.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The executive</td>
<td>Executive power</td>
<td>Pouvoir exercé par la direction qui consiste à définir la stratégie de l’entreprise et à la mettre en œuvre.</td>
<td>Power exercised by the management which consists of defining the strategy of the company and implementing it.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pouvoir souverain</td>
<td>Sovereign power</td>
<td>Pouvoir exercé par les actionnaires réunis en assemblée.</td>
<td>Power exercised by the shareholders in a meeting.</td>
<td></td>
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<th>System Type</th>
<th>Type</th>
<th>Description</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Two-tier system</td>
<td>Two-tier system</td>
<td>Système qui distingue et sépare strictement le pouvoir exécutif et le pouvoir de surveillance, qui s’exercent au sein d’organes distincts.</td>
<td>System which strictly distinguishes and separates the executive power and the supervisory power which are exercised through separate bodies.</td>
</tr>
<tr>
<td>Système mixte</td>
<td>Mixed system</td>
<td>Système qui offre aux sociétés un choix entre le système moniste et le système dualiste.</td>
<td>System which gives companies a choice between the one-tier and two-tier systems.</td>
</tr>
<tr>
<td>The one-tier system</td>
<td>One-tier system</td>
<td>Système dans lequel tout ou partie du pouvoir exécutif peut s’exercer au sein de l’organe de surveillance.</td>
<td>System in which all or part of the executive power may be exercised within the supervisory body.</td>
</tr>
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EXECUTIVE SUMMARY

In order to ‘identify what initiatives and instruments at EU level could enhance legal certainty in the field of corporate social responsibility’, it is first necessary to define the notion of corporate social responsibility (CSR).

According to the European Commission, CSR has been understood since 2011 to be ‘the responsibility of enterprises for their impacts on society’ (COM (2011)681).

This definition has the advantage of being federative, as it encompasses the full range of CSR instruments. For the same reason, it also has the disadvantage of inferring an extension of the scope of corporate responsibility. This means that there may be a risk of inhibiting competition.

If we consider that legal certainty corresponds to the relationship between the costs generated by the law and its effectiveness, legal certainty in the field of social responsibility requires a fundamental distinction to be made.

CSR is a normative field, not necessarily a legal one, apprehended by management. CSR law, for its part, is a legal corpus made up of soft law and hard law. This corpus helps businesses to manage their responsibility for the impacts that they have on society. It allows them to warn the key interested parties and stakeholders of those impacts, and — with those parties, if appropriate — to seek the best possible protection.

In order to improve legal certainty in the field of CSR, the legal advantages that may encourage businesses to adopt a CSR approach should be considered. The initiatives and instruments to be envisaged by the EU for promoting CSR should therefore not only be binding and formally incentivising, but should also make it possible, in a practical and substantive manner, to enhance the value of the business and give it a competitive edge on the international market.

It is essential to remember that CSR cannot stop at borders, which commerce and trade dissolve by their very nature. Consequently, all manner of EU initiatives and instruments may be used to ensure the promotion of CSR among businesses (treaty, regulation, directive, book, report, etc.). While respecting the limits imposed by European institutions (principles of competence, subsidiarity, proportionality, etc.), these should be addressed to the States as well as to international or national institutions and businesses.

The current state of affairs must be assessed before considering recommendations. CSR law is therefore firstly presented de lege lata, in other words from the point of view of the existing law (I), and then de lege ferenda, or from the point of view of what the law ought to be (II).

I. CSR substantive law

CSR law cannot be reduced to a homogeneous normative corpus. It is developed in layers, through isolated initiatives (B) overlapping, as far as possible, with federative initiatives (A).

A. Federative initiatives

By definition, CSR touches upon all areas of the law and in different legal orders, because of the international dimension of the largest companies. Outside the inter-State treaty law, it appears impossible to impose a CSR law on international companies whose entities have headquarters in different countries and are subject to different sets of laws. To consider otherwise would mean denying the sovereignty of the States.
This helps to explain the difference between the approach of the United Nations and its specialised agencies and that of the EU. While the EU can legitimately establish a CSR law for its Member States, the structure of the UN allows only for the submission of proposals.

Federative initiatives at international level therefore consist of soft law only, while in the EU they are more composite, with hard law beginning to emerge.

The primary objective of international initiatives is to define principles that could be adopted by companies.

This is the path chosen by the UN Global Compact. Established in the 1990s, it currently brings together more than 8,000 companies in over 100 countries. It aims to promote the social legitimacy of companies and markets. It is based on 10 principles which companies adhere to. By signing up, companies undertake to ensure that their operations and strategies are in line with these 10 principles relating to human rights, labour, environment and anti-corruption. Companies must report their progress on an annual basis. If they fail to publish their report, they are considered to be non-communicating or inactive and may be removed from the list of participants. The Global Compact and CSR law are linked both in terms of their reporting obligation and by the fact that they are based on three axes supported by variable rules of law: ‘protect, respect and remedy’.

The OECD also plays a role in many aspects that are capable of guiding companies along the path of responsible behaviour. This is particularly true in the case of the OECD Convention on Combating Bribery of Foreign Public Officials, and it is also true of the OECD Principles of Corporate Governance. Finally, the OECD Guidelines for Multinational Enterprises, although not binding, encourage reasonable business conduct in a globalised environment, in accordance with applicable laws and internationally accepted standards. The OECD Investment Committee is responsible for overseeing these guidelines. Implementation of the guidelines is supported by National Contact Points (NCPs). These NCPs help companies and their stakeholders to take appropriate measures. They also constitute a pole of mediation and conciliation, allowing the resolution of any practical problems that may arise. The EU could seek a way of offering NCPs the best possible means of coordinating their activities in Europe.

The ILO has adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. This declaration addresses enterprises, governments and social actors. It requires enterprises to respect national and international laws in force. It could be regarded as a universal point of reference for social responsibility in the world of work. However, the Declaration has not gained the same level of visibility as the OECD guidelines. It remains in the shadow of the 1998 ILO Declaration on Fundamental Rights and Principles at Work, and suffers from its specificity.

Secondly, international federative initiatives have also allowed the promotion of indicators for compliance with CSR principles.

Thus, the Global Reporting Initiative (GRI) was introduced at the end of 1997 within the framework of the Coalition for Environmentally Responsible Economies (CERES). Its aim is to measure the performance of organisations in terms of sustainable development, to report on its findings and to communicate them to internal and external stakeholders. Above all, it is a tool to support the preparation of reports relating to sustainable development and CSR.

Similarly, the ISO 26000 standard establishes guidelines on CSR. These guidelines are provided to any organisation, regardless of its legal form or size. This standard excludes any certification. It is a technical standard, with no direct binding force. Although it claims to have no legal mission, this standard may take on some juridical value. On the one hand, non-compliance with the behavioural obligations that derive from it may lead to events that
entail liability. On the other hand, contrary to what it claims, this management standard allows, if necessary, a strengthening of the proof of the existence of an international customary law.

With regard to EU law, we may first of all qualify the presence of CSR due diligence obligations in special instruments. These due diligence obligations, found in the 13 directives under review, are obligations to do (for example, to obtain or provide information), ultimately making it possible, if necessary, to relay information, prepare reports or publish data. They also include the obligation to select partners on the basis of the information received, particularly in relation to tendering for specialist contracts and public procurement contracts. Liability rules may emerge from this obligation in the event of a breach. It therefore seems possible to make a link between the ‘protect, respect and remedy’ axes and the content of the due diligence obligations inherent in CSR. The idea of protection corresponds to the obligation to obtain information, to train, to relay information and to inform; the idea of respect may be associated with the selection of companies, between themselves and during tendering processes; finally, the idea of remedy extends the principles of responsibility.

Analysis of EU law tends to show that a special CSR law is emerging.

We find an initial expression of this trend in Regulation 1221/2009/EC of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS). The purpose of EMAS is to promote improvements in the environmental performance of organisations. This is achieved through organisations establishing and implementing environmental management systems, a systematic, objective and periodic evaluation of the performance of those systems, the provision of information on environmental performance, and an open dialogue with the public and other stakeholders, including employees. When good environmental governance is verified by an accredited organisation, an EMAS logo is issued, thus creating a form of certification. EMAS registration may be suspended, or a company may be removed from the register, if the regulation is not complied with. This regulation concerns itself with companies’ compliance with environmental laws. It also leads them to become informed, to organise their governance, to prevent any breach by means of audits, and to report on their performance. The number of organisations with registered sites in EMAS has risen from 3 300 in 2006 to more than 4 600 in 2011, which is still very few.

However, this CSR law within the EU is still an embryonic law. Indeed, from the Green Paper: ‘Promoting a European Framework for corporate social responsibility’ (2002) to the ‘Roadmap to a resource efficient Europe’ (2011), analysed communications, opinions and recommendations show that CSR has often been deemed by EU bodies as an instrument of economic policy. It is true that the EU had not considered introducing a CSR law before 2011. In the 2011 communication ‘A renewed EU strategy 2011–2014 for Corporate Social Responsibility’ (COM(2011)681), the future is projected in a more pragmatic way. In addition to a modern definition of CSR whose development is left to the impetus of companies, it aims to ‘improve companies’ disclosure of social and environmental information’. It signals the advent of a CSR law promoted by the EU.

B. Isolated initiatives

Firstly, isolated initiatives are created by Member States.

Three lists based on responses to a questionnaire about CSR law and practice have been prepared. The first list contains details of the Member States that do not address CSR law: Cyprus, Estonia, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Czech Republic, Romania, Slovakia and Slovenia. A second list considers the Member States in which CSR law takes the form of specific measures which deserve greater recognition by companies as well as the Member States where no CSR law is in force despite effective business practices.
This is the case in Germany, Bulgaria, Italy, Greece, Luxembourg and Portugal. A third list refers to the Member States where CSR law is established and practised: Austria, Belgium, Denmark, Spain, Finland, France, the Netherlands, the United Kingdom and Sweden. After a brief summary of the existing rules in the Member States, an in-depth study of Germany, Spain, Denmark, France and the United Kingdom was carried out.

This study by country highlights shows the disparity between the national solutions proposed. The countries are ordered from the least regulated to the most regulated. In Germany, self-regulation is the chosen principle. In the United Kingdom, CSR legally depends on good leadership and investor information. In Spain, recent legislation establishes an obligation on public companies to prepare reports on their sustainable development policy and an obligation on limited companies with more than 1,000 employees to submit an annual report on corporate social responsibility to the National CSR Council. In Denmark, the law establishes that large firms submit a CSR report, with the exception of subsidiaries of companies which draw up a report by way of participation in the Global Compact or in the UN Principles for Responsible Investment. Finally, in France, legislation requires limited companies and joint-stock unlisted company with a minimum total balance sheet or turnover of EUR 100 million, and an average of at least 500 permanent employees over the year, to draw up an environmental, social and societal report for publication after verification and comment by an independent third-party body. An environmental exemption is possible if the company has an EMAS logo.

Isolated initiatives are thus the result of normative practices.

These normative practices are above all the work of companies. However, a market seems to be developing around CSR which, despite the lack of regulatory constraints, is nevertheless leading to the development of normative practices.

Self-regulation of a company requires a definition of values promoted by those who control and/or manage it. Cross-border defence of these values takes on a legal dimension with corporate governance in charge of its international representation. The governance of enterprises, companies and groups is therefore dedicated to CSR. The board of directors and the supervisory board are certainly in the best position to take on management’s support mission. These bodies may be assisted in this task by audit committees (or others) and executives assigned to new positions, such as the Director for Sustainable Development.

Specialised legal documentation may also be dedicated to the defence of values. This is the case for businesses within the same sector of activity, trade unions and other entities promoting codes of good conduct. They not only allow for communication in relation to certain general principles, but also enable compliant companies to establish a behavioural framework and references giving them access to more than just international references. This is also the case where companies, in order to avoid reputational risks, provide pre-contractual documentation — CSR questionnaires — allowing them to gather information about the behaviour of their contracting partners and select them where appropriate. Contractual clauses are also included to penalise the violation of statements provided.

Normative practices are also the result of work by non-financial rating agencies as well as the development of Socially Responsible Investment (SRI).

Like financial rating agencies, non-financial rating agencies have developed a new information market. Their work involves the development of non-financial analysis on the basis of methodology and criteria which may differ for each agency, depending on the industry sector and the size of the company. In fact companies would like to see a greater uniformity of the criteria used in rating agencies.

SRI is a form of investment which involves taking into account environmental, social and governance criteria (ESG criteria) in addition to financial criteria. The UN has taken the
initiative of establishing principles for responsible investment (PRI). Non-financial rating that focuses on ESG and PRI criteria enables investors to form an independent opinion about the quality of a company’s non-financial performance. It is sold to the managers of socially responsible investment funds in order to direct their investments. Besides SRI analysis some agencies also offer a thorough assessment of rated companies. The connection between these activities may lead to the risk of conflicts of interest. Furthermore, regulation of these information markets to make them coherent seems necessary in order to avoid any risk of creating financial bubbles in an SRI market which would not be uniform across the Member States.

II. Recommendations

In order to assess the degree of legal efficiency of a potential CSR law (A), the legal and economic impacts this law may have on companies should be projected in the form of recommendations (B).

A. Towards a CSR law in the EU

This European CSR law may be achieved by means of EU recommendations aimed at regulating institutions (namely the EU itself, the Member States and NGOs), socially responsible enterprises and markets.

Firstly, the regulation of institutions may be achieved by taking inspiration from the culture of example.

A communication effort can be made from this perspective.

In this respect, the EU, both as an organisation and a legal entity, could promote the preparation of a CSR report, making particular reference to its own environmental and social impacts.

In the same line of thinking, CSR Europe is the main European business network for corporate social responsibility with the support of approximately 71 multinationals and 33 national partner organisations. SMEs do not seem to be well-represented in it. Furthermore, the EU could promote and also develop the csreurope.org website to make it accessible to SMEs or, failing that, consider creating an equivalent website especially for SMEs.

Leading by example, public policies relating to EU authorities and public enterprises could develop CSR in several respects.

According to the example of Spanish law, it would appear useful to encourage, at EU level, public enterprises and Member States to implement a CSR approach. Therefore, the principles of a CSR approach in public enterprises and Member States need to be defined. This could be done by including in these principles at least one reference to the Global Compact and the OECD Guidelines for Multinational Enterprises.

In terms of the environment, and drawing on Spanish law once again, the EU could encourage public enterprises in Member States to use environmental audits before planning their production processes for goods and services.

In line with this culture of example, the aforementioned logic could be applied to export credit agencies. In accordance with the principles applied to Coface in France, the EU could support the study (by export credit agencies within the EU), of the impact on the environment and local populations of projects they back or finance. Going further still, the EU could promote imposing conditions of cumulative compliance with the standards of the
host country and the adapted international standards, attached to the implementation of funding and/or guarantees.

After all, as part of the 2012 review of guidelines for public contracts, the EU could further acknowledge social and environmental considerations in the conclusion of public procurement contracts in addition to establishing award criteria for the most economically advantageous tender.

In order to regulate responsible enterprises, to the extent that only corporate management may embody its values, responsible behaviour for directors has been defined by UK law. This specifies that, to perform his duties, the director of a public limited liability company must consider the long-term consequences of all decisions, the interests of company employees, the need to maintain business relations — in particular, with suppliers and consumers — the impact of the company’s business on the community and the environment, the need to maintain a high reputation in relation to business conduct, and finally, the obligation to act fairly towards members of the company. The EU could ensure the dissemination of these principles in the Member States by simultaneously promoting management’s obligation to become informed, to inform, to be held accountable, and finally, to select partners on the basis of information received.

In Member States, legal solutions relating to the transparency of environmental, social and societal information concerning corporate activity are mixed. Changes in the directive 78/660/EC can, nevertheless, be projected to include elements of environmental, social and societal information in annual reports on company management by enterprises whose securities are admitted on a financial market. The GRI framework may be used to this effect. Exemptions to this obligation of transparency may also be put forward.

In terms of responsibility, CSR law is a mixture of obligations both on the company management and on company means. Enterprises should be equipped with sufficient government instruments, enabling them to best predict and define the effects that their activity may have on society. Broadening the scope of their responsibility in terms of management, how can these directors be more responsible than those who have not acted in the same way? It must be understood, however, that enterprises without an appropriate system of governance are at risk, along with their managers. These enterprises have not complied with the obligations of best effort. The due diligence procedures have not been carried out. The issue of liability would obviously be raised in the case of any unanticipated risk with negative effects. This is why the EU should recommend that companies and groups of companies in Member States adopt a governance system commensurate with the risks inherent in the foreseeable effects of their activity in terms of CSR.

CSR markets, the non-financial information market and the SRI market are unregulated. SRI market security is closely linked to information market security. Measures to safeguard the legitimacy of non-financial rating agencies should therefore be taken, particularly with regard to promoting the standard ISO/CEI 17021:2006 which sets forth the requirements for audit and certification bodies for management systems. The independence of these agencies should also be ensured, particularly with regard to avoiding conflicts of interest.

With regard to the SRI market, the main Paris-Europlace proposals could be followed to further enhance responsible companies and to harmonise the benchmarks concerning them.

Finally, following the example of French legislation, the EU could take measures to strengthen the transparency of companies and investment funds in SRI. A first step in this direction could be taken by obliging institutional investors to make public the way in which they take social and environmental factors into account in their investment policy.
B. Towards the law in 'sustainable business’

A business can be considered sustainable if it meets current needs without compromising the ability of future generations to meet their own needs. In other words, it is a business managed responsibly in the light of a CSR approach and values supported by an appropriate system of governance. Thanks to corporate governance, its ethical values may have an economic value. Without losing sight of its operational purpose, the sustainable business has, legally speaking, an additional intangible value. From an accounting perspective, the IFRS 3 standards will perhaps enable identification of this intangible asset. Failing this, in terms of assessment, the sustainable business can already project its potential over a longer period than a business that has not adopted a CSR approach.

This is why the EU should recommend that companies and groups of companies in Member States adopt a governance system which allows them to bring together the defence of their own ethical values by a CSR approach and the resulting sustainable creation of economic value.
INTRODUCTION

The subject of the proposal is as follows: ‘Identifying what initiatives and instruments at EU level could enhance legal certainty in the field of corporate social responsibility’ (5).

This topic, by way of introduction, requires a general definition of the notion of corporate social responsibility (CSR). Therefore the EU definition should be prioritised for the purposes of this introduction.

This definition has developed significantly in the sense that the area of CSR has expanded.

Indeed, having initially defined it as ‘a concept (6) whereby companies integrate social and environmental concerns in their business operations and in their interaction with stakeholders on a voluntary basis’ (7), the European Commission recently added that ‘corporate social responsibility concerns actions by companies over and above their legal obligations towards society and the environment’ (8).

In 2011 the Commission extended this definition adopting ‘a modern concept of corporate social responsibility’. According to this modern concept, CSR is now understood to be ‘the responsibility of enterprises for their impacts on society’ (9).

This development demonstrates that CSR represents for the EU an instrument which combines growth and equity. However, the EU’s attention to the global dimension of CSR is growing: Europe is currently considering the international projection of its values as a condition for its internal success and sustainable development is increasingly integrated into all its external policies. But the Union is still a passive and fragmented participant in global aspects of CSR. In order to translate its ambition for excellence in this area into action, the Union needs to fill the missing gaps in its policy (10).

The Commission’s definition is certainly very open. Without going into the various elements in detail, the full impact of this extension should be taken into consideration. In this respect, when it comes to questioning EU initiatives and instruments that have the potential

(5) Annex 1 of Order form IP/C/JURI/FWC/2009-064/LOT2/C1/SC3 – Specific terms of reference ad hoc briefing paper on ‘Identifying what initiatives and instruments at EU level could enhance legal certainty in the field of corporate social responsibility.’ Note that legal certainty usually means legal safety; however, it can also mean certainty. Black’s Law Dictionary, 6th Ed., V. Certainty, defines this term as: ‘absence of doubt; accuracy; precision; definite. The quality of being specific, accurate, and distinct’. When CSR is systematically presented by EU bodies as means of balancing value compliance and competitiveness, the term legal efficiency is preferred to that of certainty as it encompasses all terms relating to the subject. The reason why legal efficiency presupposes legal effectiveness is shown below. However, legal effectiveness implies legal certainty. Finally, as shown below, efficiency also implies respect for business competitiveness through the solutions proposed.

(6) From a strict semantic point of view, this is more of a notion than a concept. A notion is in fact part of a known domain (notion, from notum, past participle of noscere ‘to learn about, to know’ V. Dictionnaire Atilif de l’académie Française V. Notion); it involves an immediate, intuitive understanding of something. A concept however is the way of forming something concrete or abstract; through this process this idea may be depicted, conceived and distinguished (taken from the Latin conceptus ‘to take in to receive’ and concipere ‘to conceive’; Dictionnaire Atilif de l’académie Française V. Concept).


(9) Ibid. p. 7.

to improve legal certainty in the field of corporate social responsibility, this definition of CSR covers both the advantages and the disadvantages.

In terms of its advantages, the generic nature of this definition allows for an understanding of most contemporary concepts of CSR and the associated instruments.

Therefore, whether from the perspective of the standard ISO 26000, the OECD Guidelines for Multinational Enterprises or the Global Compact, the definition proposed by the Commission includes principles specific to each of these regulatory instruments for business activities.

Similarly, with such a definition, regardless of the evaluation criteria used, non-financial rating agencies can still measure all business impacts.

Finally, all existing initiatives and instruments with the potential to improve the legal certainty of CSR, whether European or international, must be taken into account within the scope of the definition. In fact this is what is highlighted in the communication COM(2011)681 where adopting a 'balanced multistakeholder approach that takes account of the views of enterprises, non-business stakeholders and Member States' is considered necessary. (11).

This definition, therefore, has the advantage of being federative.

Before going any further, it is a necessary precondition in substantive law. CSR, which is a regulatory area apprehended by management, should be distinguished from CSR law (12) whose measures suggest (soft law) or oblige (hard law) that enterprises identify their responsibilities regarding the impacts they have on society, in order to inform those concerned and use this to protect themselves (for further information see infra, No 148 and s.).

On the basis of this distinction, regardless of whether the enterprise is characterised as responsible or sustainable by the managers or stakeholder citizens, it is generally its integrity — meaning its ability to envisage and define its responsibility for the impacts that it has on society — which is taken into account by stakeholders, rating agencies and by the public.

In this sense, CSR joins business ethics on the margins of law: the enterprise defines values and implements procedures and a governance system in order to defend and promote them (13).


(13) This explains why 'Certain types of enterprise, such as cooperatives, mutuals, and family-owned businesses, have ownership and governance structures that can be especially conducive to responsible business conduct' — COM(2011)681 final section 3.1, p.8. These enterprises have values, governance systems and procedures which are inherent in their nature.
This study is therefore going to look at CSR law.

CSR puts a range of regulatory areas into perspective, but its legal nature is not immediately clear. Some of these regulatory areas including economy, relations with stakeholders, a certain concept of society and ethical principles contain values which are not necessarily encompassed by law. It is for this reason that CSR is usually considered to be a management instrument for standards applicable to businesses. The notion of standard should be understood here in its broadest sense as a rule, a legal or non-legal principle, to be referred to by managers in order to take action. There is no question that CSR has the means to make legal standards more effective and render them legitimate (14).

The efficacy of a standard is measured by the degree of concordance between the effects it produces and the objectives it pursues (15). This measure comes under sociology and economy (16). A distinction must also be made between the efficacy and the effectiveness of the standard. The latter enables measurement of the degree of concordance between the specified requirement and social behaviour (17).

CSR permits any enterprise that adopts the precepts to measure the effectiveness of the standard. Adherence to codes of conduct and to international, transnational, national or sector-specific principles requires enterprises to behave in accordance with these standards. More specifically, CSR will be regarded by enterprises as the lowest normative common denominator they intend to comply with and enforce, which will eventually assume transnational dimensions with local and sector-specific amendments where appropriate. This lowest normative common denominator is therefore identified by businesses, before its action, as upholding its ethical values and, after its action, as determining the resource obligations they intend to impose on themselves in order to achieve socially responsible behaviour. CSR therefore renders the standard effective and in a way it makes it efficacious. The behaviour sought can only be liable if the aims pursued and the effects produced by the standard have been clearly analysed. Risk analysis, projection and mapping are prerequisites in a CSR approach.

CSR therefore reconciles advocates of the efficacy of standards, which generally stem from common law, and those relating to the ethics of law, generally used in Romano-Germanic legal systems. Indeed, the efficacy requirement of the standard is perceived by some as a display of economic imperialism at the expense of certain values on which democratic societies are built. (18) Yet CSR encourages the compliance of business conduct with the aims of the standards to which they adhere.

If CSR is already an element of efficacy and effectiveness relating to the standards applicable to businesses, how can the EU seek to further improve the legal certainty of these standards? In order to answer this question, which is the purpose of this study, the notion of efficiency needs to be defined. When assessing a legal standard or a set of legal standards it is also interesting to note its efficacy — which constitutes a minimum criterion — and its efficiency. The question of efficiency is of secondary importance since it is only raised if the

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operation is not completely inefficacious. In fact the cost-efficacy relationship is of no real interest if there is no efficacy (19). Efficiency therefore stems from the cost-efficacy relationship, hence the balance between the competitiveness of enterprises and their responsible behaviour.

So identifying the initiatives and instruments at EU level that could enhance legal certainty in the field of corporate social responsibility comes down to combining the due diligence obligations inherent in the impact enterprises may have on society, the imperatives of efficaciousness, and competitiveness (20).

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As for the disadvantages, understanding CSR as ‘the responsibility of enterprises for their impacts on society’ raises certain conceptual difficulties. These difficulties raise doubts as to what CSR constitutes beyond a major principle of corporate responsibility. Difficulties also arise in terms of legislative policy.

As for the conceptual issues, adherence by businesses to a CSR approach promotes awareness of the full extent of its impacts and, therefore, its potential liability. This is probably the core of the legal dimension of CSR: what do due diligence obligations constitute for those in charge of an organisation or its managers? Since it is a matter for those in charge, for managers the governance system must therefore allow them to act by firstly using an increasing number of detailed procedures to assess as precisely as possible the effects of the organisation’s practices.

In view of the reaction by some large firms, it is appropriate to question the reception that might be given to the constant creation of new procedures (21). These procedures constitute behavioural obligations since they define the action of companies, managers and the group as promoting risk management. More technically they are due diligence obligations which generally dedicate new means or performance obligations to reducing the impact of

(19) Sibony, A.-L., ‘Du bon usage des notions d’efficacité et d’efficience en droit’, in L’efficacité de la norme juridique – Nouveau vecteur de légitimité?, p. 62, p. 63. Quoting Combenale, the author, following this explanation describes the notion of efficiency using an image: Using a jackhammer to squash a fly may be effective but it is not efficient.

(20) Although this is our understanding of the subject, Professor Sibony’s and even the European Commission’s use of the terms effectiveness and efficiency sometimes changes or is ambiguous. The author mentions COM(2010)608 final, Towards a Single Market Act – For a highly competitive social market economy. V. Sibony, A.-L., Du bon usage des notions d’efficacité et d’efficience en droit, ibid, note 2 and 10.

(21) Flack S., Director of the Organisation and Sustainable Development, Accor Group, speech during ‘Solstices & Equinoxes dinner of 18 January 2012’ dedicated to ‘Extra-financial rating, a solution for making capitalism more ethical?’ http://solsticesetaequinoxes.com/?page_id=37, considers that it is difficult to organise an enterprise around CSR and sustainable development. Management teams are reluctant to adopt new procedures. To this end, a regulation could initially help to change procedures and behaviour but afterwards, the benchmarks of contracting parties or extra-financial rating agencies will increase in such a way that coordinating action will seem difficult.
businesses and their activity on their ecosystem (22). With regards human rights, the idea of a due diligence obligation for businesses is also taking root (23).

The CSR definition does not specify the nature of the effects to be taken into consideration. The effects may be positive as well as negative. This is understandable, since, in order to envisage corporate social responsibility within a multinational enterprise, it is necessary to consider situations whose assessment may vary in operational components, or even — if the diversity of the location of subsidiaries, branches and suppliers or subcontractors is taken into account — from one country to another (24). The criteria for assessment generally evolve over time. This is especially true of the evolution of techniques for protection of the environment or hygiene requirements and security in labour law. It is also true of the continual adaptation of rules on anti-money laundering, countering the financing of terrorism, corruption and tax evasion.

At worst the lack of accuracy in relation to the nature of effects may raise doubts about the purpose of the company and its activity, beyond issues relating to public order and good social behaviour, prompting moral judgments to be made on its role and activities. If that were to happen, according to the different concepts of good social behaviour in the EU, (25) particularly abroad (26), it would be necessary in terms of CSR to deal with businesses differently according to their products or services (27). The regulation on gambling, on the suppression (or the non-suppression) of the use of drugs, the regulation on controlling the sale and consumption of alcohol and the regulation on reckless driving may be held as examples. The enterprise, within the traditional concept of liberal economy, is amoral as a matter of principle; however, within the context of the globalisation of trade the economy is not universally liberal either.

Managers may therefore be overwhelmed by the level of the responsibilities they will undertake by engaging their company in a CSR policy given that the responsibilities they

(22) This concept which comes from natural sciences is used in debates on CSR to facilitate an overall understanding of an enterprise in its economic, sociological, technical, operational, social and ecological environment.

(23) V. Protect, Respect and Remedy: a Framework for Business and Human Rights, HRC report, see points 54 et seq.

(24) In the area of human rights, this geographical fragmentation of the enterprise and its legal consequences have been very well understood and described. Factors such as these make it exceedingly difficult to hold the extended enterprise accountable for human rights harm. Each legally distinct corporate entity is subject to the laws of the countries in which it is based and operates. Yet States, particularly some developing countries, may lack the institutional capacity to enforce national laws and regulations against transnational firms doing business in their territory even when the will is there or they may feel constrained from doing so by having to compete internationally for investment. Home States of transnational firms may be reluctant to regulate against overseas harm by these firms because the permissible scope of national regulation with extraterritorial effect remains poorly understood, or out of concern that those firms might lose investment opportunities or relocate their headquarters. See United Nations, A/HRC/8/5, 7 April 2008, Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement, see points 13 and 14.

(25) For example, value conflicts which may exist from one Member State to another concerning homosexual partnerships or same sex marriage could be considered and, to give a possible CSR dimension to this issue, how this is accommodated within the company.

(26) For example, Sharia law. On the difficulty in reconciling a political regime based on Sharia law with a democratic system, see ECHR, 13 February 2003, Refah Partisi case (the Welfare Party) and others v Turkey, (Application Numbers 41340/98, 41342/98, 41343/98 and 41344/98). Note that issue does not appear to have stopped organisations which are concerned with both SRI and sustainable finance. See in this respect ‘AAOIFI Sharia Standards now available in French. Open the Way to Further Islamic Finance Business Developments In French-Speaking Countries’: http://www.paris-europlace.net/files/Press_Release-AAOIFI-Paris_EUROPLACE.pdf.

(27) Which is not far from SRI, see below, No 141 et seq.
incur *in personam* and with their company may differ from one legal system to another and evolve over time.

This may be a reason fuelling the reluctance of companies to adopt a CSR policy, especially if it entails controlling reputational and liability risks without any other clearly identifiable equivalent.

Going further still, within the framework of this study aiming to identify the initiatives and instruments that could enhance legal certainty in CSR, companies could show further reluctance to adopt the resulting measures, for example, regulations and directives that require different declaration obligations, the submission of reports, transparency, governance and internal control. Such measures specific to CSR law are, in fact, sources of obligations of responsibility, red tape and costs and may therefore be perceived as inhibiting competition and entrepreneurship.

During a meeting, the example was given of a French mining company that wished to obtain a concession in an African State and would respond to a tender by demonstrating its CSR approach. It was competing with a Chinese company which apparently showed no consideration for CSR policy. According to our speaker, given the current state of international trade practices, based on cost, the French company has very little chance of winning the tender.

The definition of CSR provided by the EU has the disadvantage of alarming a number of companies that, within the context of the globalisation of trade, feel that the new adoption of principles or provisions specific to CSR could inhibit competition.

This is why this definition prompts the planning of potential equivalents, i.e. any interests that the companies may gain from adopting a CSR approach.

In response to this negative aspect, therefore, initiatives and instruments which should be considered to promote CSR should not just be binding — for example by imposing a certain level of transparency — and formally incentivising, for example by revealing non-financial ratings on company activity or governance. They should also make it possible, in a practical and substantive manner, to enhance the value of the business and give it a competitive edge on the international market.

A further disadvantage of this broad definition, this time in terms of legislative policy, consists in that, planning EU instruments and initiatives which might be used to promote CSR in companies raises the issue not of the purpose of these initiatives and instruments, but of the type of normative sources which might promote or control them.

In this respect, in early 1995, envisaging the sociological impact of companies, Jean-Pierre Le Goff (28), French sociologist, raised the question as to what the role of stakeholders was in terms of normative production. According to him, companies are linked to city life by the goods that they produce and their activity has a direct impact on employment, the social fabric and the environment. Economic development is now closely integrated with the political power of a nation. The economic crisis has also contributed to strengthening the importance and the role of companies in society. But these realities cannot render legitimate the claims, largely presented in managerial practices and discourses, to regulate the conduct of company employees and make the company an institution which would replace the State in a number of areas. (…) The State must guarantee the freedoms of individuals and citizens in the company and prevent particular groups from taking control of areas of public interest (29).


(29) Ibid, p.156.
This view is shared by the UN (30). First, should the State singlehandedly defend the monopoly of its normative prerogatives against all odds? Can it not encourage the effectiveness of company commitments that would extend their action, particularly in terms of guaranteeing individual freedoms, respect for the environment and social issues? These questions may give rise to discussion at national level. It is clear that law is largely a creation of the State which is already considered capable of offering protection of the weak against the strong.

Second, the perception of CSR cannot stop at a domestic concept of legislative policy. The sovereignty of States stops at borders which commerce and trade dissolve by their very nature. For this reason, a means for enterprises to guarantee cross-border respect for their values can be seen in the definition and ethical conduct of their business at international level. This is due to image, ethics, or a view to best avoiding all types of risks.

Indeed, when an enterprise develops its activity in countries not signatory to the various treaties, particularly in relation to the protection of human rights and the environment, it is difficult to imagine that a business whose parent company headquarters is, for example, in the EU, would not directly guarantee compliance for its branches and subsidiaries or, indirectly, for its co-contracting suppliers, subcontractors or within a distribution network. The same is true of the measures designed to tackle organised crime, money laundering and corruption. Failing this, the enterprise may, at best, suffer a loss of image and, at worst, it and its managers may incur liability.

Consequently, all manner of EU initiatives and instruments may be used to ensure the promotion of CSR among businesses (treaty, regulation, directive, book, report, etc.) and be addressed to the States as well as to international or national institutions (31) and businesses.

In short, CSR may be presented as the set of standards applicable to businesses. With CSR, the uncertainty surrounding the finality of a standard considered in isolation raises questions about the purpose of the law in general (32).

In this regard, the emergence of CSR in management sciences stems from opinion polls which have revealed to enterprises the expectations of the public and stakeholders. These expectations relate to the economic activity of enterprises as well as their ability to respect their ecosystem. Such awareness has primarily made it possible for large firms to restore their image and win back the trust that has been lost (33).

All public and private initiatives were subsequently implemented for this purpose.

(30) V. Protect, Respect and Remedy: a Framework for Business and Human Rights, HRC report, see point 53:
Enterprises may be considered as ‘organs of society’ but these are specialised economic bodies, not public-interest democratic institutions. Therefore, their responsibilities cannot and should not be similar to the duties of Member States.

(31) The EU may not address a Directive or Regulation to an international organisation but certain joint communications and steps may be taken with or by international institutions.

(32) See L’efficacité de la norme juridique, loc. cit., preface, p. 18.

Indeed, as has been mentioned ‘whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations – as part of what is sometimes called a company’s social licence to operate’ (34).

Progress has, therefore, been made over the course of the past 10 years, by sector or by region, with a growing number of enterprises. New multi-stakeholder initiatives have been implemented in the public and private sectors, combining mandatory and voluntary measures as well as the self-regulation of sectors and enterprises. The majority of these measures would not have been possible 10 years ago.

Also, the assumptions of extra-territoriality in relation to corporate liability have spread. ‘Governments have adopted a variety of measures, albeit cautiously to date, to promote a corporate culture respectful of human rights, the environment and employees. Some international institutional provisions exist with similar aims.

‘Without in any manner disparaging these steps, our fundamental problem is that there are too few of them, none has reached a scale commensurate with the challenges at hand, there is little cross-learning, and they do not cohere as parts of a more systematic response with cumulative effects’ (35).

This study cannot include all the laws that come under the field of CSR. It would be too broad. Its purpose is not the definition or the notion of CSR, nor the content of this notion. This standard of management is, essentially, flexible and it should be possible for its normative content to vary according to different factors.

For example, the head office and location of organisations or activity centres abroad — in Europe and beyond — will define the applicable laws in environmental, social, fiscal and criminal matters. Radioactive clouds, the mobility of employees and the use of means of transport will continue to be sources of mobile conflict. Similarly, any company depending on its structure will be forced to apply legal principles and values of reference, international public policy or mandatory laws which vary from one State to another. The laws on human rights may even be subject to conflicting values and laws on an international scale (36). No international treaty or international standard can, bindingly and effectively in the long term, impose on enterprises cross-border solutions conducive to the effectiveness of the normative field of CSR. This is normal: this field is, in essence, highly fragmented and disparate.

To the best of our knowledge there is no law in the Member States which deals with or codifies CSR by itself as an implementing bloc. There is no common CSR law. There should, therefore, be no question of comparing the special regulations in the 27 States, particularly those relating to the environment, labour law or human rights in order to assess public policies.

Such a study would not seem feasible in the designated format, the scope for definition being too broad. Similarly, this type of study would probably be unrealistic in the sense that it would be confined to the EU whereas CSR affects enterprises whose headquarters are located in the EU (or elsewhere) and units (subsidiaries, branches or establishments) or activities (stakeholders) in the rest of the world. CSR naturally assumes an international character.

(34) See Protect, Respect and Remedy: a Framework for Business and Human Rights, HRC report, see point 54.

(35) See Protect, Respect and Remedy: a Framework for Business and Human Rights, HRC report, see points 105 and 106.

Similarly, examples of best business practices or soft law cannot only be qualitative. Contact has been made with large companies in order to gain some of their expertise in relation to CSR; however, if these enterprises invest heavily in these issues and develop real strategies to create values, it is not possible to acquire a complete knowledge of soft law in large corporate groups or SMEs. CSR management remains somewhat in the shadow of trade secrets.

It is for these reasons that this study cannot claim to be exhaustive.

The bias is, therefore, not towards CSR, but towards CSR law (see above), to identify the main normative axes as they are addressed in international principles, as set out in treaties or as expressed in national regulation or self-regulation.

This is usually soft law or in other words incentives calling for corporate self-regulation. CSR law may also be binding. Therefore, it involves hard law. This is particularly the case in some Member States (see below), in terms of accountability and reporting requirements.

The hard and soft laws which make up CSR law will be examined in international texts, EU law and national law (paying particular attention to the law of the Member States).

The focus will be on specific provisions which have caught our attention. The other provisions will be dealt with in more general terms.

With regard to self-regulation, only relevant and/or original corporate practices based on informal interviews and the review of annual reports will be highlighted.

For the purposes of this study it is necessary to identify at EU level the initiatives and instruments with the potential to enhance legal certainty in CSR.

First of all, the current CSR law will be presented. Following a brief outline of the situation in the 27 Member States, 5 of them will be examined in greater detail on account of the specificities of their legal policy: Germany, Denmark, Spain, France and the United Kingdom.

Secondly, with regard to the recommendations, bearing in mind the necessary balance between ethics and competitiveness, it is important to establish what makes CSR attractive to enterprises and the measures which could be implemented in the EU in line with the Commission’s communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, the communication of 25 October 2011 on a renewed EU strategy 2011–14 for Corporate Social Responsibility (37).

In this regard, it is understood that through CSR enterprises may:

- improve social dialogue;
- increase the level of stakeholder trust in the enterprise;
- improve integration of the enterprise in its immediate environment;
- improve its image and communication;
- improve its non-financial rating.

These points will be briefly addressed with some focus on good practice in terms of governance and internal control, which seem to be the only areas with a legal dimension. Indeed, compliance with values and standards is only possible in a business if the governance system can guarantee to bridge the holding company with its sub-subsidiaries.

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(37) COM(2011)681.
and branches located abroad and if the internal control subsequently permits verification of its effectiveness.

It would also be useful to find out if there is a smaller normative common denominator in relation to CSR (within the EU and/or at international level). If this can be clarified, can basic due diligence obligations be identified by enterprises and their managers? If so, is this lowest common denominator incapable of fostering the international common law of business?

If this were the case, the normative practices relating to CSR and its distribution in large groups could be recommended and used to evaluate the liability of enterprises and their managers, particularly before international judicial authorities or in relation to lex mercatoria, particularly in the event of international arbitration. By not adopting a CSR approach, the enterprise or organisation risks being penalised both before a call for tender where it was unsuccessful and afterwards if liable for causing any kind of damage. These questions inevitably build on the issues in this proposal, but they are beyond the scope of this study.

If the possibilities of substantive law are pushed to their limit, CSR and CSR law as they exist in the EU, once supported by governance systems within the enterprise, could thus improve their reputation and also their value. If it were possible to legally characterise the sustainable business, this study could thus be extended by means of an economic and accounting analysis.

**Study Plan**

According to appendix 1 of the invitation to tender IP/C/JURI/FWC/2009-064/LOT2/C1/SC3:

‘The paper will consist of three parts: the first section will briefly touch on the current law in the EU, whether general or sector-specific, as well as future initiatives; the second section will deal with the applicable law and the future initiatives by selected Member States (Germany, Denmark, Spain, France, the United Kingdom), including future initiatives to promote corporate social responsibility, including the measures based on EU legislation and their state of implementation; the third section will contain recommendations for potential EU initiatives, including legislative initiatives, [in terms of corporate social responsibility], specifying the initiatives which could be implemented and may be useful in terms of enhancing corporate social responsibility.’

In accordance with the invitation to tender, these three sections are expressly addressed in this study. However, in order to ensure a balanced presentation, the first two sections of the proposal have been grouped under substantive CSR law (Part One of our Study) while the third section of the proposal concerns our recommendations (Part Two of our Study).
1. POSITIVE CSR LAW

It is far easier to practise CSR than to impose it. This is why CSR law cannot be reduced to a homogeneous body of legislation. The most that is possible is to make it an interconnected collection or to bring together, around common principles, the companies that want it.

However, CSR is a question of protecting and sharing values, not standards. Companies should therefore still have the greatest possible freedom of initiative and action with regard to defining these values and creating their own standards of behaviour for respecting them and having them respected. Clearly, States have the right to impose on companies certain obligations to respect the laws that they put in place. However, they cannot enact standards on ethics or moral behaviour without ipso facto destroying the principle of free enterprise. This demonstrates one of the reasons why the debate surrounding the advent of CSR law seems to crystallise around one issue: the transparency of information about the social effects of a company’s activities. It is true that there seems to be a need for transparency governance (38).

Aside from this specific point, the debate about ways to make a business virtuous inevitably ends up tackling the suitability and proportionality of the governance system with regard to the risks inherent in the activities of the company or group.

This being the case, CSR law consists of different strata, with isolated initiatives (Chapter II) overlaid, where possible, by federative initiatives (Chapter I).

1.1. FEDERATIVE INITIATIVES

There are various accepted understandings of ‘standard’. There is an increasing amount of work on this idea in order to evaluate, through changes in the standard, the renewal of sources of law (39). There are so many studies on this issue that thinking in this area has come to crystallise around the effectiveness of the legal standard. (40) Following on from this research, a distinction between hard and soft law has become established, particularly for the study of CSR (41), which seems particularly affected by this renewal.

Indeed, the international scale of the largest companies means that, by its very definition, CSR encompasses all areas of law spread across different legal systems. Apart from treaty law, it seems impossible to impose CSR law on international companies whose arms have different registered offices governed by different legal systems (42). Any other concept of CSR amounts to a denial of the Member States’ sovereign right to define

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(38) This is a corporate governance model which, in becoming global, has gained substance over the years. V. Brissy, Y., Guigou, D., and Moutot, A., Gouvernance et communication financière, Eyrolles, 2008, p.17.


the legal compliance values of the companies operating in them. Admittedly, both the internationalist method of resolving conflicts (conflicts of jurisdiction or conflicts of law) and the parent company’s responsibility for its subsidiary companies or entities enable it to exercise some means of coercion. These could concern the parent company, the listed company or, it might be supposed, that which gives the group its strength in economic, administrative or other terms. However, if the constraints of standards were to be tightened, the risk in a globalised economy is that companies in search of greater freedom would respond radically by relocating to another country (43).

Firstly, this explains the difference in approach between the United Nations — including its specialist agencies — and the EU. While the EU has the right to establish CSR law for its Member States, the UN has no actual powers in this regard and can only make suggestions, mainly based on the Universal Declaration of Human Rights. Secondly, it also explains why management or evaluation frameworks created by public or private international agencies, outside any multilateral or bilateral treaty law, can have no direct normative force.

In short, we see that the use of soft law is required to subject companies to CSR law when the issuing authorities do not have the right to act otherwise, or when a lack of uniformity in public policy and in the standards applicable in the States concerned makes it difficult to act otherwise.

Federative initiatives therefore consist solely of soft law at international level, and of a combination of the two approaches within the EU.

**1.1.1. THE ELEMENTS OF AN INTERNATIONAL SOFT LAW**

As regards international standards, there are five main initiatives emanating from international institutions that enable companies to adopt a CSR approach.

The common feature of these initiatives is that they seek companies’ adherence to their core principles. These principles are adopted voluntarily by the companies.

Three key elements identified by John Ruggie (see below) underlie these principles: protect, respect and remedy.

**Protect, because it is a matter of preventing risk.**

**Respect, because the crossing of certain lines — as regards ethical values, the environment or employees’ rights — by businesses whose registered office or parent company is in the EU, must be prevented even when this is not penalised by the law applicable outside the EU.**

**Remedy, because this is the essential purpose of the principle of responsibility, whether the remedy is individual or collective.**

At international level, therefore, CSR law is essentially intended to encourage. However, these principles encourage States and companies to implement standards, which the former

adopt so that the latter either submit to them or, if the standard allows it, arrange their adoption through self-regulation.

These principles (1.1.1.1) are therefore both general, as regards their substance, and specific, as regards their scope of application. This is why frameworks (1.1.1.2) are established to enable companies to ensure that their behaviour complies with the principles.

1.1.1.1. Definition of principles that companies can adopt

A) UN: the Global Compact

The Global Compact (44) was created in the 1990s, on the basis of an idea conceived by the then UN Secretary-General, Kofi Annan. He wanted to create a forum for dialogue between the private sector, international organisations, NGOs and States (45). The Global Compact is a worldwide initiative for privately owned businesses; it has thousands of participants spread across more than 100 countries, and its purpose is to promote the social legitimacy of companies and markets.

The Global Compact is an original initiative which has led to other activities for increasing private-sector social responsibility (see below).

The Compact is imbued with the values of the time of its creation: pragmatism, transparency and dialogue. It has been expanded by legal means: Resolutions 55/215 (2000), 56/76 (2001) and 62/211 (2007) of the General Assembly of the United Nations allowed the Global Compact to gain official recognition from the UN and its Member States. Moreover, the Global Compact has added the control instrument to its means of action, thus supplementing the instruments of dialogue and promotion with an instrument of pressure.

It is an initiative to which companies sign up.

In addition to making a small contribution (USD 500 to 10 000), companies sign up by:

- Sending a letter from the CEO (mentioning, where possible, the approval of the Board of Directors) to the UN Secretary-General; this letter must mention the company’s support for the Global Compact and its principles.

- Registration on the Global Compact website (www.unglobalcompact.org).

By signing up, companies undertake to bring their operations and strategies into line with 10 universally accepted principles (46) regarding human rights, labour standards, the environment and anti-corruption.

These principles, which are divided into categories on the Global Compact website, are as follows:

As regards human rights:

1. Businesses should support and respect the protection of internationally proclaimed human rights; and
2. make sure that they are not complicit in human rights abuses.

(44) See http://www.unglobalcompact.org/index.html. Corporate citizenship complies with the global compact.


(46) How can a parallel with the 10 commandments not be seen?
As regards labour law:

1. Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
2. the elimination of all forms of forced and compulsory labour;
3. the effective abolition of child labour; and
4. the elimination of discrimination in respect of employment and occupation.

As regards the environment:

1. Businesses should support a precautionary approach to environmental challenges;
2. undertake initiatives to promote greater environmental responsibility; and
3. encourage the development and diffusion of environmentally friendly technologies.

Finally, as regards anti-corruption:

1. Businesses should work against corruption in all its forms, including extortion and bribery.

These principles are derived from the following instruments: the Universal Declaration of Human Rights, the International Labour Organisation Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention against Corruption.

These principles form the basis of the Guide to Engagement in the United Nations Global Compact. This guide provides interpretation of the principles of the Global Compact and methods for their application.

Participating companies – there are currently more than 8 000 – must act in accordance with their undertakings and issue an annual communication on the progress they have made.

Companies that do not publish their report are considered non-communicating or inactive and are removed from the list of participants (47).

A company issuing such communication must incorporate it into the established media by which it issues information to its stakeholders, specifically its CSR report or sustainable practices report. A specific Global Compact progress report will be issued only if the company does not have any other medium for reporting on its CSR (48).

There is therefore a link between the Global Compact and CSR law in terms of the reporting obligation.

There is also a link in terms of indicators and analyses. The Global Compact promotes the performance indicators of the Global Reporting Initiative (GRI, see below), so as to give participants suggestions on preparing their annual progress communication or to include elements of their communications in their sustainable development practices reports (49).

(47) Ibid.


(49) See Principles of the Global Compact and GRI Core Indicators
With the Global Compact, the United Nations has set out guidelines for cooperation with the business sector. Only companies that bring their activities and strategies into line with the Global Compact are eligible for such cooperation (50). These guidelines serve as models for the specialised bodies and institutions of the UN. Moreover, the United Nations agencies also make use of the Global Compact to establish their own corporate social responsibility instruments (51). For its part, the United Nations Industrial Development Organisation (UNIDO) has launched a programme called the Responsible Entrepreneurs Achievements Programme (REAP), which is intended to support the efforts of small and medium-sized enterprises to implement corporate social responsibility principles, particularly in developing countries (52). Ban Ki-moon takes the view that the purpose of this initiative is to ‘build the capacity of small and medium-sized enterprises to implement corporate social responsibility-based management approaches and operation methods, aligning economic, social and environmental aspects of business’ (53).

Finally, the inclusion of the Global Compact in the ISO 26000 standard is the fruit of a memorandum of understanding concluded between the Global Compact Office and the Secretary-General of the ISO (54). This demonstrates that the Global Compact is an essential frame of reference for establishing corporate social responsibility standards (55). Stepped-up cooperation between the OECD and the Global Compact is also significant in this regard (56).

The main criticisms of the Global Compact concern the paradox that seems to characterise it. The Global Compact is a worrying change of direction: human rights are proposed to businesses as an optional arrangement when they should not be given a choice, since these rights are, by their very nature, humanity’s common values. By proposing the Global Compact, the UN accepts, indeed encourages, the subordination of the common interest to the interest of the individual (57).

(50) Guidelines on cooperation between the United Nations and the business sector, 20 November 2009, http://business.un.org/en/assets/83f0a197-b3b8-41ba-8843-d8c5b5d59fe1.pdf. See p. 3, ‘a) The UN seeks to engage in mutually beneficial collaborative relationships and partnerships with the Business Sector. b) In considering such collaborations and partnerships, the UN will seek to engage with Business Sector entities that: i) demonstrate responsible citizenship by supporting the core values of the UN and its causes as reflected in the Charter and other relevant conventions and treaties; (ii) demonstrate a commitment to meeting or exceeding the principles of the UN Global Compact by translating them into operational corporate practice within their sphere of influence including and not limited to policies, codes of conduct, management, monitoring and reporting systems. c) human rights abuses, tolerate forced or compulsory labour or the use of child labour, are involved in the sale or manufacture of anti-personnel landmines or cluster bombs, or that otherwise do not meet relevant obligations or responsibilities required by the United Nations. d) The UN will not engage with Business Sector entities violating sanctions established by the UN Security Council. e) The UN should not partner with Business Sector entities that systematically fail to demonstrate commitment to meeting the principles of the UN Global Compact. However, the UN may consider collaboration specifically intended to address this failure of commitment.’


(52) UNIDO Director General’s statement to Industrial Development Board, 14 May 2007, IDB. 33/17, section 30.


However, the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, has put forward ideas to counter this criticism. He did so by skilfully expanding on the work of the Subcommittee on Human Rights on the responsibility of multinational companies (58) and suggesting a new approach to the Global Compact based on the following framework: 'protect, respect and remedy'.

According to Mr Ruggie, 'the root cause of the business and human rights predicament today lies in the governance gaps created by globalization — between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge' (59).

More radically, one author was able to wonder whether, all things considered, promotion by the Compact primarily benefits companies able to put it to use for their communication operations, without running much risk of running into problems (60). It is difficult to accept such an opinion, as the overlap between international CSR-law instruments is so great and, accordingly, the consequences of failure to respect the Compact — with regard to communication and also to responsibilities — are so major (see below).

B) The OECD and responsible behaviour by companies

The OECD was the first international institution to set up divisions covering governance and responsible behaviour. These two divisions deal with both government policy and the activities of companies. It is up to governments to put in place a regulatory framework and measures intended to facilitate and encourage good governance practices in the private sector, in order to bring about responsible behaviour in the context of healthy competition. It falls to companies to establish a body of corporate standards. "It matters little whether or not these standards are of a legal nature. Respect for the law is clearly necessary but, even in the absence of legal constraints; the company’s behaviour is expected to be in line with the universally recognised values and with the recommendations set out in international instruments. (...) It falls to the Board of Directors to ensure that all levels of the company behave responsibly, whether as regards operational matters or management. According to the OECD Principles of Corporate Governance, 'the board should apply high ethical standards. It should take into account the interests of stakeholders'”(61).

The OECD intervenes in numerous areas that can clarify to companies how they can behave responsibly.

The OECD Anti-Bribery Convention proposes a framework to encourage the integrity of commercial transactions. Signed in 1997, it has been ratified by 37 signatories, including all the OECD member states (62). The Convention enables countries to act in a coordinated way


(59) Protect, Respect and Remedy: a Framework for Business and Human Rights, HRC report, see point 3.


on adopting national legislation combating bribery of foreign public officials. It includes a wide-ranging definition of bribery, requiring countries to impose deterrent penalties and agree on mutual judicial cooperation. A stringent multilateral oversight process started in 1999, under the auspices of the OECD. This process aims to oversee conformity with the Convention and to evaluate the measures countries have taken to implement the Convention in their national legislation.

The OECD Principles of Corporate Governance were adopted in 1998 and revised in 2004.

According to the OECD, these Principles ‘represent a common basis that OECD member countries consider essential for the development of good governance practices. They are intended to be concise, understandable and accessible to the international community. They are not intended to substitute for government, semi-government or private sector initiatives to develop more detailed “best practice” in corporate governance’ (63).

Examination of the main areas covered by these OECD Principles demonstrates that their legal dimension essentially concerns shareholder rights and equality, transparency of information and the responsibility of the Board of Directors. In other respects, these principles are, on the whole, very similar to those of CSR.

As such, the foundations of an effective corporate governance system must contribute to market transparency and efficiency, be compatible with the rule of law, and clearly set out the division of responsibilities between the authorities competent for matters of oversight, regulation and application of legislation. It is therefore a question of organising respect for the applicable law. That is also the purpose of CSR.

The role of the various stakeholders in corporate governance is also specified. A corporate governance system must recognise the rights of the various stakeholders established by the law in force or by mutual agreements, and encourage active cooperation between companies and the various stakeholders, so as to create wealth and jobs and to ensure the continuity of financially healthy companies.

Consideration of stakeholders is also characteristic of CSR.

This overlap of the principles characteristic of corporate governance and CSR seems inevitable. Indeed, in order for CSR to be fully effective within a company or a group of companies, corporate governance must be its chosen path, its backbone (64).

Adopted in 1976 and revised in 2000 and then in 2011, the OECD guidelines are ‘recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting’ (65).

All OECD member states and nine non-members (Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru, Romania and Slovenia) have adhered to the Guidelines.


(65) OECD Guidelines for Multinational Enterprises
The OECD Investment Committee is responsible for overseeing the Guidelines, which form part of a wider-ranging OECD investment instrument: the OECD Declaration and Decisions on International Investment and Multinational Enterprises.

‘The Guidelines are supported by a unique implementation mechanism of National Contact Points (NCPs), agencies established by adhering governments to promote and implement the Guidelines. The NCPs assist enterprises and their stakeholders to take appropriate measures to further the implementation of the Guidelines. They also provide a mediation and conciliation platform for resolving practical issues that may arise.’ (66)

One example of this is when the United Kingdom’s National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises ruled against a company for failing to exercise adequate human rights — or ‘due diligence’ — using the term as defined in the Special Representative’s report to the Council in 2008 (A/HRC/8/5), and drew the company’s attention to that report in recommending how to implement an effective corporate responsibility policy (67) (68).

Another example is that ‘the 40 States adhering to the OECD Guidelines for Multinational Enterprises must provide a National Contact Point (NCP) whose tasks include handling grievances. OECD provides procedural guidance, with individual NCPs having flexibility in the application of the Guidelines. The NCPs are potentially an important vehicle for providing remedy. However, with a few exceptions, experience suggests that in practice they have too often failed to meet this potential. The housing of some NCPs primarily or wholly within government departments tasked with promoting business, trade and investment raises questions about conflicts of interest. NCPs often lack the resources to undertake adequate investigation of complaints and the training to provide effective mediation. There are typically no time frames for the commencement or completion of the process, and outcomes are often not publicly reported. (…)

‘Certain NCPs, recognising such shortfalls, have sought innovative solutions. Several have involved multiple government departments and created multi-stakeholder advisory groups. Perhaps most interesting is the decision of the Dutch Government to reorganise its NCP such that a four-person multi-stakeholder group handles grievances independent of, though supported administratively by, the Government. Alternative suggestions have included placing NCPs under the legislative branch or within a NHRI. OECD and adhering States should consider these and other options for addressing current deficits, while preserving the important role of governments in raising awareness of the Guidelines and providing incentives for corporate compliance and learning’ (69).

When examining a request, the German NCF welcomed it and ‘suggested a two-step procedure, to which the Global Compact representatives agreed: first, the Global Compact tries to solve possible problems within its reporting system; second, if the results are not satisfactory, the problem could be presented to the German NCP as a “specific instance”, which would offer its mediation according to the OECD Guidelines and following the

(66) Ibid.


(69) V. Protect, Respect and Remedy: a Framework for Business and Human Rights, HRC report, see points 98 and 99.
standards of the “OECD Procedural Guidance”. The stakeholders of the UN Global Compact Germany have approved and formalised this possibility of co-operation’ (70).

It should definitely be noted that these Guidelines and the very original means of their application are relayed by the Global Compact, particularly John Ruggie’s statement aimed at offering a renewed framework for companies as well as human rights.

The EU could seek a way to offer NCPs the best means for coordinating their missions, by ensuring promotion of the Guidelines and adopting coordinated measures that encourage companies to respect and learn from them.

C) The ILO Tripartite declaration of principles concerning multinational enterprises and social policy

The ILO Tripartite declaration of principles concerning multinational enterprises and social policy (71) was adopted in 1977 and revised in 2000 (72). It is one of the international instruments for legal regulation of companies’ activities (73). Without defining multinational enterprises, the Declaration offers a description of them. ‘Multinational enterprises include enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based.’ In spite of its title and this description, the Declaration applies to both multinational and national companies. It is addressed to companies, governments and social actors.

The ILO text assumes that companies will respect the standards in force. ‘All the parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards. They should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organization and its principles according to which freedom of expression and association are essential to sustained progress. They should contribute to the realization of the ILO Declaration on Fundamental Principles and Rights and Work and its Follow-up, adopted in 1998. They should also honour commitments which they have freely entered into, in conformity with the national law and accepted international obligations.’ This non-binding text includes a procedure for monitoring its implementation and a procedure for settling disputes.

The Declaration could be seen as ‘the universal basic reference point for social responsibility in the world of work’ (74). This is supported by its multilateral nature (184 countries are ILO members), by the fact that it is the only international instrument reflecting substantive labour law, and by the fact that it proposes links with ILO procedures. This makes it the only international text on social responsibility that proposes links between soft law and hard law,


tangible points of contact between the private and public spheres and, as a result, links between private social responsibility standards and workers’ rights. However, the Declaration has not acquired the visibility of the OECD Principles. It remains in the shadow of the 1998 ILO Declaration on Fundamental Principles and Rights at Work and, in particular, suffers from its material’s focus on social rights; whereas corporate social responsibility goes beyond the social question (75).

1.1.1.2. Indicators of respect for the principles adopted by companies

Of the countless general and sectoral reference tools, two stand out: the Global Reporting Initiative (GRI) and the ISO 26000 standard. These constitute standards understood in the same way as the ISO 26000 standard itself. A standard is considered a ‘document established by consensus ... that provides for ... repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context’ (76). This is how technical behaviour standards attempt to renew sources of law. Indeed, in order to ensure that hard law is properly respected, soft law offers a reference tool in the form of the GRI and the ISO standard; an instrument enabling the company to ensure that its effects on society are known, under control and in line with the applicable regulations.

A) Global Reporting Initiative

The Global Reporting Initiative (GRI) was created in late 1997, as part of the Coalition for Environmentally Responsible Economies (CERES), in association with the United Nations Environment Programme (UNEP). It is a networked non-governmental organisation. The GRI’s central office was initially located in Boston, Massachusetts, but it relocated to Amsterdam in 2002. The GRI also has regional offices in Australia, Brazil, China, India and the United States.

Its objective was to measure an organisation’s performance as regards sustainable development, to communicate the results of that measurement, and to report to internal and external stakeholders. The GRI works towards sustainable development and promotes the preparation of reports on the environment, social responsibility and governance.

The Global Reporting Initiative (GRI) sets out a framework for ‘sustainable development’, which seems to be the most used in the world. It is dedicated to greater transparency on the consequences of companies’ activities. It includes the G3 Guidelines, setting out the principles and indicators that organisations can use to measure and record their economic, environmental and societal performance. The GRI campaigns for wider usage of its Guidelines, which are freely available to the public.

‘The GRI Reporting Framework is intended to serve as a generally accepted framework for reporting on an organization’s economic, environmental, and social performance. It is designed for use by organizations of any size, sector, or location. It takes into account the practical considerations faced by a diverse range of organizations — from small enterprises to those with extensive and geographically dispersed operations. The GRI Reporting Framework contains general and sector-specific content that has been agreed by a wide range of stakeholders around the world to be generally applicable for reporting an organization’s sustainability performance.’ (77)


(76) ISO/IEC Guide 2, 2004

(77) See Sustainability Reporting Guidelines,
The GRI enables companies to use a predefined framework for setting out their sustainable development reports. Companies using the GRI Framework have another look at their actions during a given period and their results, as regards the organisation's undertakings, strategy and managerial approach.

These reports can be used for the following purposes, in particular:

- measuring and evaluating performance as regards laws, rules, codes, performance standards and voluntary initiatives;
- demonstrating an organisation’s influence on sustainable development expectations and how such expectations influence it, in turn;
- comparing performance of a single organisation over the period, or of several organisations.

In order to be recognised under the GRI Framework, there must be a level declaration for the editors of all social responsibility and cooperation reports. There are three levels, so as equally to cover the needs of a novice editor (level C), an established editor (level B) and a very experienced editor (level A). Organisations can choose to complete their self-evaluation by submitting it to an expert verification agent for their opinion, or by asking the GRI to verify it.

A report includes a total of 121 indicators, divided up as follows:

**Table 1: GRI indicators:**

<table>
<thead>
<tr>
<th>GRI indicators</th>
<th>Number of Indicators</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strategy and analysis</td>
<td>2 indicators</td>
</tr>
<tr>
<td>Company profile</td>
<td>10 indicators</td>
</tr>
<tr>
<td>Governance</td>
<td>17 indicators</td>
</tr>
<tr>
<td>Economic indicators</td>
<td>9 indicators</td>
</tr>
<tr>
<td>Social performance: labour and decent work practices</td>
<td>14 indicators</td>
</tr>
<tr>
<td>Social performance: human rights and supply</td>
<td>9 indicators</td>
</tr>
<tr>
<td>Social performance: society</td>
<td>8 indicators</td>
</tr>
<tr>
<td>Social performance: product liability</td>
<td>9 indicators</td>
</tr>
</tbody>
</table>


The GRI’s only legal connotations reflect existing legal instruments. It is, above all, a tool to help with drafting sustainable development reports or CSR reports.

Report writing recommendations made by both ISO 26000 and the GRI have been set out in a table showing the overlap between the GRI’s G3 Guidelines and those for the ISO 26000 standard. (78)

**B) ISO standards**

The ISO 9001 universal standard v. 2000 for the quality of products and service provision puts customers at the heart of the strategy and recommends that companies organise their processes and systems for design, production and distribution, with a view to satisfying their customers.

customers and building loyalty. Application of the ISO 9001 standard v. 2000 in a company indicates that a quality management system (QMS) is in place.

The ISO 14001 universal standard v. 1996 for environmental protection is a tool for managing and evaluating a company’s level of environmental responsibility. Its purpose is to ensure that the company responsibly takes into account the environmental challenges linked to its activities. Application of the ISO 14001 standard in a company indicates that an environmental management system (EMS) is in place.

The OHSAS 18001 standard for occupational health and safety management provides a framework usable for certification purposes, since the system is accompanied by requirements. Companies must therefore implement an occupational health and safety management system (OHSMS) with a view to OHSAS 18001 certification, thereby demonstrating their sound occupational health and safety management.

The SA 8000 standard for good business practice as regards working conditions is a management tool that can help companies to take effective action on working conditions. It can be used for certification purposes.

The objective of the ISO 26000 standard is to provide social responsibility guidance for all organisations, whatever their legal form or size. This guidance is presented in the form of recommendations, opinions, suggestions and guidelines. The document spans 100 pages and is presented as being globally applicable. However, this very specific study subject must be analysed from a legal standpoint.

In this regard, some have seen the ISO 26000 standard as a standard apart (79). In fact, unlike the classic image of ISO standardisation, this standard precludes all certification. In the face of the inertia of the international organisations, the drafting of the ISO 26000 was an experience of a public-policy issue being controlled by the private sector. Since it makes ‘international standards of behaviour’ — mainly, that is, intergovernmental agreements, conventions and treaties — central to its definition, the standard is a means of transferring fundamental rights theoretically aimed at States to organisations, and businesses in particular (80). The ISO 26000 standard is therefore a political standard, in the best sense of the term. It touches on the lives of the public in the context of economic globalisation, but it is also a simple technical standard, without being binding in any other way.

One author was able to conclude that the proposal by Jean Carbonnier, renowned Professor of Civil Law, that the rule of law can be adapted to any other social rule, but the reverse is not true (81), was radically refuted by the ISO 26000 standard on organisations’ social responsibility (82). However, we must take into account that, while procedures can be developed enabling companies to bring the impact of their international activities under control, these procedures cannot change the law itself. Treaties, legislation and all sources of law can be used as conceptual supports for a technical standard. However, the technical standard cannot take on the very substance of legal rules to modify or free itself from them. The Latin adage 'Nemo censetur ignorare legem' (83) loosely translates as 'ignorance of the

(80) Ibid. p. 10.
law is no excuse’. The ISO 26000 standard integrates companies’ international dimension with this, by attempting to remove the shared values of applicable texts and by striving to rationalise organisations’ appropriate ethical behaviour.

Whether adhering to or differentiating itself from it, the ISO 26000 standard has borrowed very widely and freely from legal language and the content of legal rules. The results so far have been troubling. A genetically modified, hybrid standard, resulting from inter-standard phenomena, the ISO 26000 standard has become attractive to international standardisation law. (84)

The impact of this free appropriation of international law by the ISO 26000 standard has been pointed out. "Removed from their original institutional context, these international standards are shorn of their authority, of their meaning and of their scope, and end up being isolated from the verification procedures that are associated with them and that make them effective, even in a limited way" (85). Moreover, obligations relating to oversight or increased resources in situations with specific risks are not followed by effects. Quite the contrary, the standard establishes that ‘an organization should consider the potential consequences of its actions so that the desired objective of respecting human rights is actually achieved. In particular, it is important not to compound or create other abuses. A situation’s complexity should not be used as an excuse for inaction’ (86). As has been written, not only does the ISO 26000 standard prove a total lack of ambition, but has less potential than that offered by tort law through diligence or prudence obligations (87). Finally, as regards grievance resolution through the mechanisms put in place by the organisation, one may wonder whether it would have been advisable or even preferable to make known the law’s unfailing support for a fair and equitable trial (pursuant to Article 6 of the ECHR) or for the justice of the State, rather than suggesting the emergence of private mechanisms which are known, despite all the precautions taken, to be in direct competition with public mechanisms (88).

On the sidelines of this legal opinion, there nevertheless remains an important distinction between organisations’ implementation of the ISO 26000 standard and the opportunity for justiciable parties to defend their rights in the courts when its effects prove harmful to them (89).

The ISO 26000 standard is presented, by supporters of one vigorous criticism, as a reformulation in its own, sometimes opaque, words of legal ideas, concepts and principles. It is a standard that will not prevent certain organisations from choosing elements from within its framework rather than taking the standard as a whole, which was rightly one of the elements of criticisms of the CSR standards drafted by companies. It is a standard that does not set out any procedures for monitoring, accountability or penalties. It is a standard drafted in response to society’s demand for regulation of companies’ activities, but it


(85) Ibid. p. 148.

(86) ISO 26000, POINT 6.3.4.2.


contributes nothing in terms of form or content to existing international-level instruments (90).

This criticism underlines the ISO 26000 standard’s lack of value and legal force (91), but the introduction to the standard itself seems to have responded to it in advance. ‘This International Standard is intended to provide organizations with guidance concerning social responsibility and can be used as part of public policy activities. However, for the purposes of the Marrakech Agreement establishing the World Trade Organisation (WTO), it is not intended to be interpreted as an “international standard”, “guideline” or “recommendation”, nor is it intended to provide a basis for any presumption or finding that a measure is consistent with WTO obligations. Further, it is not intended to provide a basis for legal actions, complaints, defences or other claims in any international, domestic or other proceeding, nor is it intended to be cited as evidence of the evolution of customary international law.’ (92)

This definition is conceptually negative. It specifies what the ISO 26000 standard legally is not. However, can a standard, whether technical or behavioural, rule out its own juridicity? Nothing could be less certain. How could non-droit (non-law), to borrow the term made famous by Carbonnier (93), place limitations on law?

Adopting a technical standard like the ISO 26000 standard obliges us to incorporate an obligation for basic resources into the diligence obligation of a company’s directors and senior management. Failure to meet behaviour obligations resulting from it can constitute an operative event giving rise to liability. At the same time, depending on national principles for interpreting events, the national courts may be induced to refer to this benchmark behaviour to characterise the offence and its severity.

In the same way, to consider that this management standard is not destined to be cited as proof of the evolution of customary international law seems contra legem. A standard can brush aside custom no more than impose it. Recognition of a law with customary value involves recognition of characteristics to which no standard can predispose. Finally, the parallel that can exist between a community of values (94) and common law (95) has been underlined. Consequently, while it seems possible to state that ab initio the ISO 26000 standard has no legal value, it seems very difficult to say it never will.

The basis for this logic is that ECHR case law seems to provide noteworthy support. In the Ferreira Alves case, the view was taken that it can (...) draw inspiration from international instruments that have not yet made use of all their legal effects, particularly as revealers of common denominators amongst the relevant standards of international law (96) a fortiori and


(92) ISO 26000, 1, Scope.


(96) For example, Demir and Baykara v Turkey [GC], No 34503/97, sections 65–68, 12 November 2008.
par excellence when they are already accepted by the majority of states (including, in the case in point, the Respondent State) \(^{(97)}\).

Study of international CSR sources shows that the unanimous verdict from international institutions, states and businesses is that frameworks are proliferating. This proliferation exists despite the coordination between authorities entrusted with producing these standards.

Furthermore, rationalisation is envisaged and has been planned. During the G8 Summit in Heiligendamm, the Heads of State or Government asked ‘the OECD, in cooperation with the Global Compact and the ILO, to compile the most relevant CSR standards in order to give more visibility and more clarity to the various standards and principles’\(^{(98)}\).

**1.1.2. EUROPEAN UNION LAW**

Unlike the preceding international instruments, the EU still has not tackled a project on creating CSR law. It is fairly surprising to note the continued confusion in EU discourse between CSR standards and CSR law. This confusion is perhaps due to the fact that the EU did not wait for the advent of CSR to deal with diligence obligations of organisations or companies with regard to their environmental, social or societal responsibility.

For a long time, a number of special texts, particularly on labour or environmental law, have been considering Directives or Regulations regarding these diligence obligations; they can be seen as nurturing, in a limited and divided way, the beginnings of CSR law and they enable identification of certain recurrent legal obligations (1.1.2.1).

However, an EU CSR law has not been drafted or even planned. Nevertheless, we can see traces of reflection on this subject in certain Directives or Communications (1.1.2.2).

1.1.2.1. The presence of diligence obligations inherent to CSR in certain special texts

Study of the directives (A) that seem most significant as regards CSR makes it possible to discern the main recurrent obligations that could contribute to characterising certain elements of CSR law (B).

A) Directives relating to CSR standards

Environmental and health standards, in particular, are the bread and butter of EU law. For example, manufacturers and resellers of electrical and electronic equipment are subject to the Waste Electrical and Electronic Equipment Directive, to which they must refer when recycling such products (Directive 2002/95/EC and Directive 2002/96/EC). Another example

\(^{(97)}\) See in particular ECHR, section 2, 14 April 2009, Ferreira Alves, No 41870/05. -See also Néau-Leduc, 'RSE et droit social – Présentation?' in Responsabilité sociale des entreprises – Regards croisés Droit et gestion, loc. cit., p. 124 which considers that, ‘c’est le législateur qui fait défaut, sauf à admettre, à l’instar de la lex mercartoria, un lex laboratoria’

\(^{(98)}\) G8 Summit Heiligendamm Declaration (6-7 June 2007), Growth and Responsibility in the World Economy, §26: ‘In order to strengthen the voluntary approach of CSR, we encourage the improvement of the transparency of private companies’ performances with respect to CSR, and clarification of the numerous standards and principles issued in this area by many different public and private actors. We invite the companies listed on our Stock Markets to assess, in their annual reports, the way they comply with CSR standards and principles. We ask the OECD, in cooperation with the Global Compact and the ILO, to compile the most relevant CSR standards in order to give more visibility and more clarity to the various standards and principles.’ See [http://www.g-8.de/Content/EN/Artikel/_g8-summit/anlagen/2007-06-07-gipfeldokument-wirtschaft-eng_templateId=raw.property=publicationFile.pdf/2007-06-07-gipfeldokument-wirtschaft-eng.pdf](http://www.g-8.de/Content/EN/Artikel/_g8-summit/anlagen/2007-06-07-gipfeldokument-wirtschaft-eng_templateId=raw.property=publicationFile.pdf/2007-06-07-gipfeldokument-wirtschaft-eng.pdf)
is Regulation (EC) No 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (known as REACH). The final example comprises all the Directives concerning the transparency and traceability of information on batteries and accumulators (Directive 91/157/EEC, revised in 2008, on the collection and recycling of used batteries and accumulators), end-of life vehicles (Directive 2000/53/EC), electrical and electronic products (Directive 2002/96/EC), or the ecodesign of energy-using products (Directive 2005/32/EC and Regulation (EC) No 642/2009). Not all these texts can be tackled, on the basis that they touch on companies’ social effects, so there follow some examples.

The Directives under consideration are therefore presented in terms of their contribution to bringing to light the legal obligations inherent to CSR. Emphasis is given to the elements of each that could feed diligence obligations; obligations to take actions — specifically, obtaining or providing information — enabling, where necessary, the eventual preparation of a report or even the publication of information. The following Directives establish, inter alia, obligations to obtain or provide information, which seem worth listing.

a) Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora

The aim of this Directive is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

Measures taken are designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of EU interest. They take account of economic, social and cultural requirements, and regional and local characteristics.

This Directive, known as the ‘Habitats Directive’, establishes a system of impact studies often called ‘Appropriate Assessments’ for projects, plans or programmes affecting a Natura 2000 site. The competent national authorities agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned, except for imperative reasons of overriding public interest (including those of a social or economic nature) and in the absence of alternative solutions.

This Directive describes national authorities’ obligations to obtain and provide information.

b) Directive 94/62/EC on packaging and packaging waste

This Directive aims to harmonise national measures concerning the management of packaging and packaging waste in order, on the one hand, to prevent any impact thereof on the environment of all Member States as well as of third countries or to reduce such impact, thus providing a high level of environmental protection, and, on the other hand, to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the EU.

To this end this Directive lays down measures aimed, as a first priority, at preventing the production of packaging waste and, as additional fundamental principles, at reusing packaging, at recycling and other forms of recovering packaging waste and, hence, at reducing the final disposal of such waste.
In particular, this Directive lays down an obligation for Member States to take measures to ensure that users of packaging, particularly consumers, obtain the necessary information about:

- the return, collection and recovery systems available to them,
- their role in contributing to reuse, recovery and recycling of packaging and packaging waste,
- the meaning of markings on packaging already on the market,
- the appropriate elements of the management plans for packaging and packaging waste.

Companies will therefore be obliged to obtain information in order to provide it for consumers.


The objective of this Directive is to provide for a high level of environmental protection and to contribute towards incorporating environmental considerations into the preparation and adoption of plans and programmes aimed at promoting sustainable development, by ensuring that, in accordance with the Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.

This Directive requires an impact study, representing an obligation to obtain information.

It understands ‘environmental assessment’ as: the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations on decision-making and the provision of information on the decision (Article 2b).

The consultation can even be a transboundary one (Article 7).

The impact study must be made available to the public (Article 3(7)).


This Directive establishes an EU scheme for greenhouse gas emission allowance trading within the EU (hereinafter ‘EU scheme’) in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.

It should be noted that ‘Decisions relating to the allocation of allowances and the reports of emissions required under the greenhouse gas emissions permit and held by the competent authority shall be made available to the public by that authority subject to the restrictions laid down in Article 3(3) and Article 4 of Directive 2003/4/EC’ (Article 17).

Moreover, Annex IV of this Directive sets out the principles for monitoring and reporting emissions provided for in Article 14(1).

The current generation of public procurement Directives — Directives 2004/17/EC and 2004/18/EC — are the product of a long evolution that started in 1971 with the adoption of Directive 71/305/EEC. By guaranteeing transparent and non-discriminatory procedures, these Directives principally aim to ensure that economic operators from across the single market benefit fully from fundamental freedoms in competing for public contracts.

European public procurement legislation sets out the conditions that may be required for participation in public contracts. These conditions aim to verify the suitability of economic operators in a market on the basis of criteria relating to economic and financial capacity, or to professional and technical knowledge and skills.

The conditions for participation also aim to combat fraud and corruption effectively. It is a requirement that all economic operators found guilty of participation in a criminal organisation or of corruption, fraud or money laundering be barred from public contracts. A contracting authority may demand from the tenderer any documentation attesting to the morality and/or financial circumstances thereof. To obtain information, it may enquire with the competent national authorities or those of another Member State.

Any economic operator may be excluded from participation in a public contract where that economic operator:

- is bankrupt or is being wound up, where his affairs are being administered by the court;
- has been convicted of any offence concerning his professional conduct;
- has committed serious professional misconduct;
- has not paid his social security contributions or taxes;
- has made false declarations to the contracting authority.

When selecting offers, only technical or professional capacities are taken into account which, 'in appropriate cases', require 'an indication of the environmental management measures that the economic operator will be able to apply when performing the contract' (99). Analysis of these technical capacities refers to the EU Eco-Management and Audit Scheme (EMAS) (Directive 2004/17/EC, Article 50). However, this documentation does not include any CSR criteria (transparency, notation, questionnaire, etc.), particularly as regards qualification criteria for a contract (Directive 2004/17/EC, Article 53).

Directive 2004/18/EC includes a provision, according to which:

'the criteria on which the contracting entities shall base the award of contracts shall be:

- where the contract is awarded on the basis of the most economically advantageous tender from the point of view of the contracting entity, various criteria linked to the subject-matter of the contract in question, such as delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, environmental characteristics, technical merit, after-sales service and technical assistance, commitments with regard to parts, security of supply, and price or otherwise

(99) Directive 2004/17/EC, Art 48(f), for certification and quality assurance see Art 49; See the same in Directive 1004/18/EC, Art 52(3).
the lowest price only’ (Directive 2004/18/EC, Article 55.1).

In fact, according to these texts, criteria that cause social issues to be taken into account may be used to determine the most economically advantageous tender, where they are economically beneficial to whichever contracting authority is linked to the product or service that is the subject of the contract (100).


The purpose of this Directive is to establish a framework of environmental liability based on the ‘polluter-pays’ principle, to prevent and remedy environmental damage.

It should be noted that this Directive lays down:

- an obligation for companies to obtain information, specifically to define baseline condition; that is, ‘the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the best information available’;

- and an obligation to provide the competent authority with information for preventative (Article 5(3)(a)) and remedial (Article 6(2)(c)) purposes.

g) Directive 2005/29/EC concerning unfair commercial practices

The purpose of this Directive is to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection by bringing about convergence between the Member States’ legislative, regulatory and administrative provisions on unfair commercial practices harming consumers’ economic interests.

This Directive bears the stamp of CSR in two regards.

First, it defines unfair commercial practices using two cumulative criteria.

The first criterion concerns professional values: for a practice to be subject to prohibition, it must breach professional diligence requirements. The second takes into account the effects of the practice on consumers. To be subject to prohibition, the practice must also change consumers’ economic behaviour (Article 5).

Second, although penalties are set out for behaviour in breach of this Directive, companies and organisations are encouraged to make use of codes of conduct (Article 10).


(100) See COM(2001)566 final, Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement. This Communication also refers to the Beentjes judgment of 20.9.1998 and the judgement of 26.9.2000 in Case C-225/98, Commission v France ('School buildings – Nord-Pas-de Calais'), Rec. 2000, 1-7445 which allowed the use of an additional criterion. The award of a contract on a condition related to the combating of unemployment According to the Commission, this case law could also be applied to other conditions in social matters.
This Directive lays down rules concerning the statutory audit of annual and consolidated accounts.

It is of interest as regards CSR, in that it makes the creation of audit committees compulsory. In fact, Article 41 of Directive 2006/43/EC of 17 May 2006 on statutory audits of annual accounts and consolidated accounts sets out the principle of compulsory creation of an ‘audit committee’ in certain companies and structures, underlining in its preamble the fact that audit committees and an effective internal control system ‘help to minimise financial, operational and compliance risks’ and ‘enhance the quality of financial reporting (...’).

Audit committees and an effective internal control system help to minimise financial, operational and compliance risks, and enhance the quality of financial reporting. These committees are obliged to use the company’s internal control system to obtain information to be provided to the responsible management body.

Depending on whether this Directive has been transposed, these committees can be obliged to take into consideration the CSR dimension, and to clarify the internal auditor’s relationship with the director in charge of ethical issues and sustainable development or the ethics committee, where applicable.

As such, in France, the French Financial Markets Authority (AMF) has given its view on risk factors and has called on issuers to provide information on the foreseeable consequences of legal, industrial and commercial risks (101).

i) Directive 2008/98/EC on waste

This Directive lays down measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste, and by reducing overall impacts of resource use and improving the efficiency of such use.

It is noteworthy that this Directive lays down that, in order to strengthen the re-use and the prevention, recycling and other recovery of waste, Member States may take measures to ensure that producers have extended producer responsibility. Specifically, these measures may include the obligation to provide publicly available information as to how the product can be re-used or recycled (Article 8).

Member States can therefore lay down an obligation for producers to provide, at their own expense, information on the re-use or recycling of products.

j) Directive 2009/38/EC of 6 May 2009 on the establishment of a European Works Council or a procedure in EU-scale undertakings and EU-scale groups of undertakings for the purposes of informing and consulting employees

Initially from a proposal for a Directive of the European Parliament and of the Council on the establishment of a European Works Council (102), this Directive aims to improve the right to information and ‘consultation of employees in Community-scale undertakings and Community-scale groups of undertakings’.

To that end, ‘a European Works Council or a procedure for informing and consulting employees shall be established in every Community-scale undertaking and every Community-scale group of undertakings, where requested (...)’, with the purpose of informing and consulting employees'.


‘The competence of the European Works Council and the scope of the information and consultation procedure for employees governed by this Directive shall be limited to transnational issues’; that is, ‘matters which concern the Community-scale undertaking or Community-scale group of undertakings as a whole or at least two of its establishments or group undertakings situated in different Member States’.

From a CSR standpoint, this Directive is important because it creates workers’ right to be informed and consulted, which should be strengthened within the EU. It allows workers to receive information across borders, mainly on transnational issues, eventually, with a more global vision of the company.

This Directive improves that of 1994, particularly as regards the ‘consultation’ obligation: a consultation must have a useful effect and enable the company to make decisions effectively. That is the confirmation of a core principle guiding all EU law: the more a company decision has been discussed with staff representatives, the more effective its implementation will be.

The consultation concerns all issues affecting the whole company or group. It must be concluded from this that an important event affecting only one country requires consultation of the European Works Council as soon as there is an effect on the group as a whole (that would be the case, for example, if a decision leading to the transfer of activities and staff had direct transnational effects).


This Directive has as its aim the protection of workers against risks to their health, including the prevention of such risks, arising or likely to arise from exposure to asbestos at work.

It lays down the limit values for such exposure, as well as other specific requirements.

In particular, this Directive provides for an obligation to obtain information (Article 11), an initial evaluation of the risks of exposure (Article 7) and training for employees required to be exposed (Article 14). Penalties for failure to comply with those provisions are set out (Article 20).


This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings. It also introduces common provisions, taking into account the gender perspective, to strengthen the prevention of this crime and the protection of the victims thereof.

This Directive seems important in CSR terms, in that it establishes EU-level international criminal responsibility (Article 10), enabling natural or legal persons to be brought before the courts of the Member States on the following bases:

- a power of representation of the legal person;
- an authority to take decisions on behalf of the legal person; or
- an authority to exercise control within the legal person (Article 5).
m) Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment

This Directive applies to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

This Directive is noteworthy in CSR terms because it obliges Member States to adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects (Article 3).

These projects are defined, very generally, as carrying out construction or installation work and other interventions in the natural environment or landscape, including those aimed at exploitation of mineral resources.

This particular obligation to obtain information therefore constitutes examining the effects on society of the planned activity, specifically in environmental terms, in this case.

Moreover, pursuant to Article 5, the developer has to provide, in an appropriate format, the information specified in Annex IV of the Directive:

1. A description of the project, including in particular:
   a) a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases;

   b) a description of the main characteristics of the production processes, for instance, the nature and quantity of the materials used;

   c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed project.

2. An outline of the main alternatives studied by the developer and an indication of the main reasons for this choice, taking into account the environmental effects.

3. A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including architectural and archaeological heritage, landscape and the interrelationship between the above factors.

   A description (this description should cover the direct effects and any indirect, secondary, cumulative, short-, medium- and long-term, permanent and temporary, positive and negative effects of the project) of the likely significant effects of the proposed project on the environment resulting from:

   a) the existence of the project;

   b) the use of natural resources;

   c) the emission of pollutants, the creation of nuisances and the elimination of waste.

4. The description by the developer of the forecasting methods used to assess the effects on the environment referred to in point 4.
5. A description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment.

6. A non-technical summary of the information provided under headings 1 to 6.

7. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the developer in compiling the required information.

B) Summary: the main CSR obligations in the Directives studied

The provisions emerging from these various texts can be summarised. If, in terms of CSR, it is a case of ‘protect, respect and remedy’ (103), the European legislation studied should include obligations enabling the management of these objectives.

The following Directives detail an obligation to obtain information regarding companies’ effects on society:

- Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora
- Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment

This obligation is particularly noticeable in environmental and social Directives, and in the accounting Directive requiring, inter alia, to set up an audit committee.

The following Directives detail an obligation to provide information regarding companies’ effects on society:

- Directive 94/62/EC on packaging and packaging waste


Directive 2008/98/EC on waste


This obligation to provide information is particularly noticeable in environmental and social directives, and in the accounting Directive requiring, inter alia, the audit committee. It is logical that the obligations to obtain and provide information can be found in the same areas. Indeed, the second is dependent on the first. In order to provide information, it is crucial to obtain and report it. The obligation to provide information can also be respected via the obligation to report, by means of an audit committee or a dedicated management body, Board of Directors or an oversight committee.

When signing specialised contracts and public contracts (Directive 2004/17/EC and Directive 2004/18/EC), demolition or asbestos-removal companies can be selected on the basis of criteria relating to respect for certain civic values, as well as of their proven suitability for the planned works. However, in this specific case, such proof must be in line with national legislation and/or practice (Article 15, Directive 2009/148/EC).

Finally, liability only features in legislation on unfair commercial practices (Directive 2005/29/EC), and in those applicable to preventing and combating trafficking in human beings and protecting its victims (Directive 2011/36/EU). It is only in the context of this struggle to bolster the defence of the most basic human rights that the legal person is made responsible, with jurisdiction rules enabling the applicable rules to take on an international dimension, to an extent.

'Protect, respect and remedy' (104) are therefore three objectives that, in particular areas traditionally considered characteristic of CSR (environmental law, labour law, social and societal ethics), seem to take on a legal dimension.

The legislation studied is, therefore, a favourable setting for the characterisation and emergence of legal principles inherent to CSR. These principles could be:

- Protect: the obligation to obtain information, to train, to report and to provide information;
- Respect: selection of companies, in terms of differentiation and during tenders, on the basis of how they protect others and themselves;
- Remedy: responsibility accompanied by extra-territorial measures, particularly when values are expressed in terms of EU-level international public order or of human-rights defence.

However, EU law seems to go further, at times envisaging elements of a special CSR law.

1.1.2.2. Towards EU CSR law

EU law has already taken the path towards a certain legal normalisation of CSR. However, the terms of the various communications and recommendations on this subject demonstrate that this is still an embryonic area of law.

A) The emergence of EU CSR law

As regards the emergence of CSR law, the example of Regulation (EC) No 1221/2009 is particularly significant in environmental terms. Directives concerning checks on accounting, financial and extra-financial information and the communication thereof are also very important.

a) The example of Regulation (EC) No 1221/2009 of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS)

With this Regulation, which replaces Regulation (EC) No 721/2001, an EU eco-management and audit scheme, hereinafter referred to as 'EMAS', is hereby established, allowing voluntary participation by organisations located inside or outside the EU.

The objective of EMAS, as an important instrument of the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan, is to promote continuous improvements in the environmental performance of organisations by the establishment and implementation of environmental management systems by organisations, the systematic, objective and periodic evaluation of the performance of such systems, the provision of information on environmental performance, an open dialogue with the public and other interested parties and the active involvement of employees in organisations and appropriate training.

The Regulation lays down an obligation for organisations applying for registration with the competent national bodies to obtain information and to set up an environmental governance system (Article 4(1)). The resulting initial environmental review, environment management system, audit procedure and implementation thereof are verified by an accredited or licensed environmental verifier, and the environmental statement is validated by that verifier (Article 4(5)).

An EMAS logo is granted, thereby creating a form of labelling. EMAS registration can be suspended or revoked when the Regulation is not respected.

These obligations suggest the existence of a reflection on CSR law. The Regulation’s annexes give prominence to obligations characteristic of CSR:

- a very detailed environmental analysis (Annex I)
- environmental management system requirements and additional issues to be addressed by organisations implementing EMAS (Annex II)
- an internal environmental audit (Annex III)
- environmental reporting (Annex IV)

Finally, this Regulation, which is implemented on a voluntary basis, takes into account the respect of existing regulation. Indeed, pursuant to items A.3.2. and B.2. of Annex II of the Regulation, first, the national body competent to evaluate and assess observance of EMAS standards, must establish, implement and maintain a procedure(s):
1) to identify and have access to the applicable legal requirements and other requirements to which the organisation subscribes related to its environmental aspects; and

2) to determine how these requirements apply to its environmental aspects.

The organisation must ensure that these applicable legal requirements and other requirements to which the organisation subscribes are taken into account when establishing, implementing and maintaining its environmental management system.

Second, organisations wishing to register with EMAS shall be able to demonstrate that they:

1) have identified and know the implications to the organisation of all applicable legal requirements relating to the environment, identified during the environmental review according to Annex I;

2) provide for legal compliance with environmental legislation, including permits and permit limits; and

3) have procedures in place that enable the organisation to meet these requirements on an ongoing basis.

This Regulation is directly applicable as such to the Member States’ domestic legal systems. In environmental terms, this Regulation is concerned with companies’ respect for the law. It also leads them to obtain information, to organise their governance, to use audits to provide information, and to issue statements regarding their performance. It can play a key role in terms of green growth and socially responsible investment. In fact, a listed company’s compliance with EMAS standards is reassuring for investors.

However, the scope of this Regulation is closely tied to the success of the EMAS logo and, consequently, to companies’ willingness to submit to and benefit from it.

In this regard, it seems that ‘the number of organisations with sites registered under the Environmental Management and Audit Scheme (EMAS) has risen from 3 300 in 2006 to over 4 600 in 2011’. Given that 80 % of the organisations involved are companies (105), this looks rather low.

b) Directives on reporting

The Directives on annual accounts and consolidated accounts contain provisions for taking risks into consideration. We have already considered this as regards Directive 2006/43/EC of the European Parliament and of the Council on statutory audits of annual accounts and consolidated accounts, which institutes audit committees for certain companies. That is also the case for companies with Directive 2003/51/EC, one of whose core objectives is the convergence of international accounting standards.


This Directive proposes that companies disclose in their annual reports environmental and employee-related information to the extent necessary for an understanding of the company’s development, performance or position. All Member States have chosen to exempt SMEs from this requirement.

Pursuant to this Directive, 'Directive 78/660/EEC is hereby amended as follows: (...)

14) Article 46 shall be amended as follows:

a) paragraph 1 shall be replaced by the following:

"1. a) The annual report shall include at least a fair review of the development and performance of the company’s business and of its position, together with a description of the principal risks and uncertainties that it faces. The review shall be a balanced and comprehensive analysis of the development and performance of the company’s business and of its position, consistent with the size and complexity of the business;

b) To the extent necessary for an understanding of the company's development, performance or position, the analysis shall include both financial and, where appropriate, non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters;

c) In providing its analysis, the annual report shall, where appropriate, include references to and additional explanations of amounts reported in the annual accounts”.

This Directive therefore enables Member States to organise non-financial reporting on companies based therein.

2. Directive 2006/46/EC on consolidated accounts

A company whose securities are admitted to trading on a regulated market must include a corporate governance statement in its annual report (Article 1(7), inserting an Article 46a into Directive 78/660/EC).

That statement means that, besides the possibility of referring to a corporate governance code, companies must present, inter alia, a description of the main features of the company’s internal controls and risk management systems, within the framework of the financial reporting process.

This obligation to establish internal checks, risk management and risk analysis could mean that companies have to bring their effects on society under control. However, the scope of this obligation and of the internal checks is not sufficiently specified. It is understood to likely include issues relating to the risks inherent to the company’s activity.

B) Communications, opinions and recommendations: the seeds of CSR law

Although non-legislative, EU communications and documentation can offer ideas for further thought. This documentation tends to demonstrate that two periods should be considered. The first is based on the Green Paper ‘Promoting a European framework for Corporate Social Responsibility’. It covers the period from 2001 to 2011. The second has scarcely begun, with the Communication ‘A renewed EU strategy 2011–14 for Corporate Social Responsibility’ (106). EU law is therefore moving from promoting a framework to a new strategy (107).


This document is the starting point for EU thinking on CSR. It advocates a voluntary approach from companies. They are seen as investing in their future, with the hope that their voluntary commitment will contribute to increased profitability. It seems that an increasing number of European companies are promoting their social responsibility strategies in response to a series of social, environmental and economic pressures. They aim to send a message to the various stakeholders with whom they have dealings: employees, shareholders, consumers, public authorities and NGOs.

This communication offers reminders that:

- as early as 1993, President Delor’s appeal to European business to take part in the fight against social exclusion resulted in a strong mobilisation and in the development of European business networks,
- more recently, in March 2000, the European Council in Lisbon made a special appeal to companies’ sense of social responsibility regarding best practices for lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development.

CSR is then expressed as a desire by companies to go further than the requirements of regulations and agreements to which they must adhere anyway.

With this understanding of CSR, companies make efforts to put in place standards relating to social development, to respect for the environment and to respect for fundamental rights, as well as to adopt an open governance style, reconciling the interests of various stakeholders within a comprehensive approach to quality and sustainable development.

Finally, the Green Paper reprises the strategic objective set out in Lisbon: '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'.

Law is therefore presented in this Communication in terms of companies going beyond simple compliance with the minimum applicable legal standards.


Although it dates from a few years ago, this Recommendation stands out due to its effect on some companies that spontaneously adopted its precepts.

It is limited to information provided in the annual and consolidated accounts and in the annual reports and consolidated annual reports of companies with regard to environmental issues.

(107) It should be noted that the fact that this is a recent strategy suggests that the framework has not yet been promoted.
The recommendation covers requirements for recognition, measurement and disclosure of environmental expenditures, environmental liabilities and risks and related assets that arise from transactions and events that affect, or are likely to affect, the financial position and results of the reporting entity.

The recommendation also identifies the type of environmental information that is appropriate to be disclosed in the annual and consolidated accounts and/or the annual and consolidated annual report with regard to the company's attitude towards the environment and the enterprise’s environmental performance, to the extent that they may have consequences on the financial position of the company.

This Recommendation is therefore very much part of the EU’s CSR policy. It also seeks to bring environmental and financial risk together.

As such, it demonstrates that there is a relationship between a company respecting environmental values and it creating value or, at least, not destroying value. This Recommendation made environmental reporting particularly detailed (specifically, the Annex to the Recommendation).

It was extended in the accounting Directives that we have previously considered.


This Communication pays particular attention to the divergences that emerged after the consultation resulting from the Green Paper. Four of these are worthy of mention, since they underline the difficulties encountered as regards regulating CSR, given the very diverse approaches of the actors and stakeholders.

‘Enterprises stressed the voluntary nature of CSR, its integration in the sustainable development context and that its content should be developed at global level. (...) In the view of businesses, attempts to regulate CSR at EU level would be counterproductive (...)

‘Trade unions and civil society organisations emphasised that voluntary initiatives are not sufficient to protect workers and citizens rights. They advocated a regulatory framework establishing minimum standards and ensuring a level playing field. They also insisted that in order to be credible, CSR practices could not be developed, implemented and evaluated unilaterally by businesses, but rather with the involvement of relevant stakeholders. (...)

‘Investors stressed the need to improve disclosure and transparency of companies’ practices, rating agencies’ methodology and investment management of SRI (socially responsible investment) funds and pension funds;

‘Consumers’ organisations underlined the importance of trustworthy and complete information about the ethical, social and environmental conditions in which goods and services are produced and traded to guide them in their purchase choices (...).’

The Communication then reiterates that CSR is defined 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’.

Next, it returns to the increasingly urgent need for companies to create value by respecting values recognised by stakeholders by stating that CSR is ‘linked to the concept of sustainable development’ and ‘about the way in which businesses are managed’. It then
establishes that ‘the increasing extension of business activities abroad has led to new responsibilities on a global scale, particularly in developing countries’, so CSR should have a global dimension in response to this fact.

It then sketches out a framework for EU action. This framework includes the view that ‘CSR has to build on the core principles laid down in international agreements and (...) facilitate convergence in the instruments used in the light of the need to ensure a proper functioning of the internal market’, thereby preventing the proliferation of instruments difficult to compare with CSR (management standards, labelling and certification schemes, reporting, etc.).

The Communication therefore increased convergence and transparency in the following areas:

(1) Codes of Conduct,
(2) Management standards,
(3) Accounting, auditing and reporting,
(4) Labels,
(5) Socially responsible investment.

Finally, having decided to incorporate CSR into EU policy, the Communication supposes that access to subsidies for international trade promotion, investment and export credit insurance, as well as access to public procurement, could be made conditional on adherence to and compliance with the OECD guidelines for multinational enterprises, in line with EU's international commitments, by EU Member States and by other states adherent to the OECD Declaration on International Investment.


This Communication plans to make Europe a CSR pole of excellence for the purposes of growth and jobs analyses to ensure the promotion of CSR in the EU.

In that Communication, ‘the Commission published a new policy whose centrepiece was strong support for a business-lead initiative called the European Alliance for CSR. The policy also identified eight priority areas for EU action: awareness-raising and best practice exchange; support to multistakeholder initiatives; cooperation with Member States; consumer information and transparency; research; education; small and medium-sized enterprises; and the international dimension of CSR’ (108).


The Communication ‘Europe 2020’ is a statement of general economic and social policy. It is a long-term policy, proposed with targeted objectives and constant monitoring. It aims at ‘promoting a more resource efficient, greener and more competitive economy’ and ‘fostering a high-employment economy delivering social and territorial cohesion’ (p. 12). Without being clearly targeted, the objective of corporate social responsibility is implied by these terms.

Moreover, ‘Europe 2020’ has enabled the retroactive inclusion of CSR in the texts resulting from it. The same is true for the ‘Integrated Industrial Policy for the Globalisation Era’ (109),


‘the European Platform against Poverty and Social Exclusion’ (110), ‘the Agenda for New Skills and Jobs’ (111), ‘Youth on the Move’ (112) and ‘the Single Market Act’ (113).


The Europe 2020 flagship initiative ‘Youth on the Move’ puts young people at the centre of the EU’s agenda to create an economy based on knowledge, research and innovation, high levels of education and skills in line with labour market needs, adaptability and creativity, inclusive labour markets and active participation in society.

This Communication highlights a desire to project the efforts of the EU itself onto future generations. It includes objectives relating to funding, teaching and mobility for young people and students.


With this Communication, the Commission undertook, inter alia, to monitor and report annually on the competitiveness and industrial policies and performance of Member States. This includes industrial aspects of more policies serving more general objectives such as education, research, protection of the environment or climate change.

This new integrated industrial policy aims to help businesses and investors engage in profitable, sustainable and job-creating industrial production in Europe and to improve international competitiveness in productivity and cost terms.

The CSR approach is also proposed here at political level. It consists of coordinating the issues of competitiveness and sustainable development without weighing one against the other, by using the latter to boost the former.


Learning lessons from the crisis and the economic restructuring undergone by companies in recent years, this Communication plans companies’ adaptation to the economic circumstances, also taking into account the consequences of restructuring.

According to the Commission,

‘corporate social responsibility and a transparent approach can encourage all stakeholders, especially employees’ representatives, to cooperate in the search for solutions that satisfy the interests of both parties without creating undue delays and uncertainties’ (114) (p. 19).

(113) COM(2011)206.
CSR appears here as an instrument for dialogue between the stakeholders. This is a presentation of the social dialogue taking place in a company undergoing restructuring that is very neutral, or even neutralising.

CSR is also presented in terms of objectives. In fact, the allocated objectives are ‘minimising the social impact’ (p. 19) and ‘minimising external economic, social, environmental and regional impacts’ (115) (p. 20).

On the basis of this strategy, this adjustment could consist of ‘changes in the company’s activities, e.g. a broader or narrower scope, changing its position on the value chain, spin-offs and internal entrepreneurship, new use of assets, clearing of the balance sheets, improvements in skills and training, and/or organisational changes in the management of the company’ (116).

The effects of this restructuring are then predicted. ‘Long-term corporate strategic planning includes human resources, employment and skills objectives for continuing development of the skills and competences of the workforce.’ (117) (p. 13)

In the specific case of CSR, this 2010 Communication — followed by the Green Paper on ‘Restructuring and anticipation of change’ — demonstrates that social planning presupposes an obligation to obtain information, an obligation to provide information and to put into perspective what has to be respected in the planned project.


On the basis that more than 80 million people across the EU live below the poverty line (118), more than 50 % of whom are women and 20 million children, the EU Commission has put the reduction of poverty at the heart of its economic, employment and social agenda: the Europe 2020 strategy.

The proposed platform is one of the seven flagship initiatives for action in the Europe 2020 strategy which has three priorities aimed at delivering high levels of employment, productivity and social cohesion:

- smart growth;
- sustainable growth;
- inclusive growth.

The characteristics of these priorities suggest that there is an element of the principles of CSR — protect, respect and remedy — in this opinion of the European Economic and Social Committee.


(115) Ibid.

(116) Ibid.

(117) Ibid.

(118) The risk of poverty is set at 60 % of the national median equivalised disposable income after social transfers particular to each Member State.
This Communication sets out a framework intended to ensure that long-term strategies in areas such as energy, climate change, research and innovation, industry, transport, agriculture, fisheries and environment policy produce results on resource efficiency.

This resource-management project remains totally directed at protecting the environment.


CSR is only fleetingly mentioned amongst the 12 levers proposed (through social entrepreneurship, green taxation and social cohesion), without being specifically presented as a value creator for growth and confidence. That may be surprising, but it probably also results from the fact that CSR is not a direct aim of the Europe 2020 strategy.

12. COM(2011)571: ‘Roadmap to a Resource Efficient Europe’

In this Communication, the Commission expresses its desire to transform the economy, with a view to more efficient use of resources.

This roadmap is noteworthy in that it establishes a direct link between the use of natural, social and human resources, and growth. As such, the green economy and green growth are planned, without the Communication expressly mentioning CSR but in a way that is in keeping with it:

**Figure 1: Resource use, according to COM(2011)571**

Source: COM(2011)571
b) Drafting a new strategy?

1. The present: summary of the emergence of EU law suitable for CSR

The Communications, opinions and recommendations analysed show that CSR is sometimes taken into account by the EU authorities as an element that should feed into economic policy in general.

CSR is a recurrent subject. The EU uses the various means at its disposal to communicate with the companies of Member States and with the Member States themselves, so as continually to expand CSR standards. However, this is sometimes without any reference to CSR.

Can it therefore be said that EU law had, by 2011, fully taken up CSR, considered an area of standards apprehended by management \(^{(119)}\)? That could be doubtful if there were not a single thread running through all the texts analysed, consisting of the EU advocating the alliance of good ethical behaviour by companies and their competitiveness, whilst pointing out the route for the Member States to follow in order to support this policy.

What about CSR law? It seems to emerge from certain texts (see No 53 and following, above) and part of its substance can also be extracted — not least with an impressive series of obligations to take action — from various Directives whose subject is, however, very specialised.

Nevertheless, texts on general EU policy (see above) still make no mention of it. It is true that, in 2011, there was no plan for the EU to introduce CSR law.

That probably explains why some of the obligations borne by companies which could constitute the substance of CSR law may seem to be spread out across the environmental field, the social field and society-related issues.

If it had to be left as it is, CSR would, from an EU perspective, be merely a means of guiding its own general policy and it would seem very unrealistic to think of giving any legal effect to this normative area.

Moreover, the promotion initially envisaged for a European corporate responsibility framework does not really emerge from the documentation studied from 2001 to 2011. In fact, if this is not a success for the esteem in which the EMAS logo and the ‘Business Compliance Initiative’ are held, it seems hard to demonstrate scientifically that international indicators enabling the Commission to take the view that its policy in 2001–2011 ‘contributed to progress in the field of CSR’ \(^{(120)}\) would not have developed identically, regardless of the action taken.

That seems normal, since the definition of the legal implications of CSR in the 2001 documentation is particularly vague. In fact, it seemed hard to draw up a framework and legal principles around ‘a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis’ \(^{(121)}\).

\(^{(119)}\) See in this respect, COM(2002)347: Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development. Also, see above on the distinction between CSR and CSR law.

\(^{(120)}\) COM(2011)681, p. 5.

Nevertheless, insofar as the European Parliament is pondering, with this study specifically, the legal efficiency of CSR, this situation can be considered to have changed significantly. This issue suggests that we envisage moving from law controlled by management to management controlled by law.

From this point of view, the Commission has shown remarkable coordination in that, scarcely had this issue been raised, when it issued new elements of its response, this time concerning the future.


With the Communication ‘A renewed EU Strategy 2011–2014 for Corporate Social Responsibility’, can the move from a framework to a strategy for the next three years change things?

This Communication probably marks a turning point for the EU’s understanding of the subject.

The EU takes the view that companies have an interest in getting concerned with CSR. The Commission sees it as an issue of competitiveness, of benefit in terms of risk management, cost savings, access to capital, customer relationships, human resource management, and innovation capacity. It would foster growth and development. Relationships within the company and with third parties would be improved (p. 5).

In order for this strategy to run smoothly, the Commission is proposing to define CSR as ‘the responsibility of enterprises for their impacts on society’ (p. 6). It has been stated that this definition’s broad spectrum had advantages and disadvantages as regards this study.

That would optimise the creation of a community of values for the company’s owners/shareholders and for other stakeholders and the company as a whole, on the one hand, and would record, predict and alleviate the potential negative effects that companies could have, on the other (p. 7).

The fact is that, according to the Commission’s own opinion, CSR ‘at least covers human rights, labour and employment practices (such as training, diversity, gender equality and employee health and well-being), environmental issues (such as biodiversity, climate change, resource efficiency, life-cycle assessment and pollution prevention), and combating bribery and corruption (...) Community involvement and development, the integration of disabled persons, and consumer interests, including privacy, are also part of the CSR agenda’, and the promotion of social and environmental responsibility through the supply-chain, and the disclosure of non-financial information, are also considered ‘important cross-cutting issues’ (p. 8).

It therefore includes areas of standards that the Commission designates as core and others that are simply cross-cutting issues. From a standards perspective, with EU law as it currently is, it is difficult for CSR to designate all the areas of law applicable to companies. CSR cannot be summarised as how a company understands the law applicable to it. CSR comprises values established as standards. Companies must comply with the applicable laws, of course, but they must also comply with their own values.

The Commission is not wrong to take the view that ‘the development of CSR should be led by enterprises themselves. Public authorities should play a supporting role through a smart mix of voluntary policy measures and, where necessary, complementary regulation, for example to promote transparency, create market incentives for responsible business conduct, and ensure corporate accountability’ (p. 9).
In order to make a company take responsibility for the effects of its actions on society, it is first appropriate to identify the actions to which it has a reasonable obligation and how they can be imposed on it or how it can impose them on itself.

It can immediately be seen that ‘improving company disclosure of social and environmental information’ (p. 14) means that the Commission envisages the emergence of a CSR law. In fact, ‘as announced in the Single Market Act the Commission will present a legislative proposal on the transparency of the social and environmental information provided by companies in all sectors’ (p. 14).

Nevertheless, this legislative policy’s approach to CSR law starts at the end. **The transparency of information in CSR is, in fact, an obligation that should, it seems, conclude the process as a whole by enabling:**

- an understanding of the effects and risks on a company;
- the discussion thereof with stakeholders, where applicable;
- the reaching of decisions; and
- the guarantee that they will be followed up.

Direct mention of the obligation of transparency amounts to taking the view that the obligation for general diligence is already established and respected, along with all the resulting obligations to take action. That seems far from being the case for all companies. SMEs and listed companies do not understand the impact of their activity in the same way throughout Europe. Requiring them to provide information without being more specific risks being seen as a brake on competitiveness.

### 1.2. ISOLATED INITIATIVES

The isolated initiatives in creating CSR law can be divided between the law of the Member States (1.2.1) and practices pertaining to standards.

#### 1.2.1. THE LAW OF THE MEMBER STATES

The responses to the consultation show that, except for Denmark and Spain, there has been no national legislation on CSR.

However, a wide variety of measures and solutions have been offered in search of a better approach to CSR. There is no single legislative policy on CSR in the EU. This is true to such an extent that it seemed unrealistic to set out a table for comparison by themes or subjects. The reason for this is probably confusion between CSR and CSR law, which seems impossible to shift. The distinction is only made by some authors, under exceptional and isolated circumstances. It is also due to statements that have already become established and fed with examples by other studies. For example, it seems that ‘rather small economies with a large number of SMEs pursue different goals from those pursued by highly export-oriented economies’. The ‘Member States with a tradition of export-oriented business and a strongly regulated domestic economy tend to focus on CSR abroad’ (122).

This diversity of responses to the issue of knowing how companies’ respect for their values can be improved by CSR law was stressed, at international level, by John Ruggie. According to him, ‘governments can support and strengthen market pressures on companies to respect rights. Sustainability reporting can enable stakeholders to compare rights-related performance. Several States, subnational authorities, and stock exchanges are calling for such disclosure’ (123). Sweden requires independently certified sustainability reports using Global Reporting Initiative guidelines for its State-owned enterprises, and China recently issued an advisory opinion on this subject (124). Some jurisdictions have gone further by redefining fiduciary duties. The recently revised United Kingdom Companies Act requires directors to “have regard” to such matters as “the impact of the company’s operations on the community and the environment” (125), and regulators are increasingly rejecting company attempts to prevent shareholder proposals regarding human rights issues being considered at annual general meetings (126) (127). Although they are a little old, John Ruggie’s examples highlight the disparity between governments’ actions, including outside the geographic limits of this study. They also demonstrate the permanence of this disparity.

On the basis of responses to questionnaires returned by the correspondents of the law firm Jeantet et Associés in November 2011, the countries have been divided into three broad categories as regards CSR law:

- Those where CSR law does not seem to have been conceptualised (in red);

- Those where CSR is represented by specific measures deserving greater recognition from companies, on the one hand, or where CSR law is not in force despite companies effectively putting it into practice, on the other (in orange);

- Those where CSR law has been conceptualised, is in force and is seemingly being applied by companies (in green).

Although not empirical, the scientific nature of this classification remains very approximate. For obvious reasons of resources and time, it does not seem possible to verify that these categories correspond to the reality of how companies and Member States respect their values. It would seem, on the basis of various conferences and interviews, that there is a huge gap, in Germany at least, between very sparse regulation and the great CSR qualities of a large majority of companies.

(123) Examples include the Johannesburg Securities Exchange which requires a report on sustainable development from enterprises.


(125) Section 172(1)(d) of the United Kingdom Companies Act (2006), which entered into force on 1 October 2007.


(127) Protect, Respect and Remedy: a Framework for Business and Human Rights, HRC report, see point 30.
Cyprus, Estonia, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, the Czech Republic, Romania, Slovakia and Slovenia have not legislated at all to compel companies to commit to a CSR approach. However, the example of the Czech Republic sometimes demonstrates that there is a contagion effect, connected to the presence of major international — particularly US and European — groups anxious about their reputations and all issues linked to their responsibility. Even in the absence of regulation (binding or otherwise), this contagion effect leads companies linked by capital or by their activities, as contracting party, supplier, subcontractor, etc., to adopt a CSR approach and the related declarations. In fact, international companies require declarations from their counterparties, with regard sometimes to sustainable development, sometimes to CSR, in line with the main international instruments linked to these issues (Global Compact, OECD, GRI, etc.).

There does not appear to be any specific regulation of this issue in Ireland; however, numerous companies have committed to a CSR policy.

In Poland, there is legislation relating to specific environmental and social issues. Companies adopt a CSR approach on a voluntary basis. In 2010, only 29 of the largest 500 Polish companies had adopted a CSR approach and published a report.
Corporate governance recommendations exist in Hungary. They concern listed companies and do not tackle CSR issues. As in the Czech Republic, there is a notable contagion effect linked to the presence of major international groups. The US Chamber of Commerce in Hungary encourages Hungarian companies to adopt corporate governance principles and a CSR policy. This implies the establishment of a code of ethics, integrated with the system of internal checks. The company must also have means of verifying the effectiveness of its CSR policy. In 2010, although they were under no obligation to adopt a CSR approach, four state-owned companies had been publishing a ‘sustainable development’ report for several years.

In Germany, Bulgaria, Italy, Greece, Luxembourg and Portugal, the CSR approach is taking off. Numerous companies have already adopted it, but regulatory measures do not seem to have been fully achieved in these countries.

Greece has therefore adopted a huge number of special legal measures aimed at ensuring the transparency of information provided by companies on environmental and social issues and on risk management, more generally. Although it is still the case that no law expressly concerning CSR is applicable to all Greek companies, Article 43(a) of Law 2190/1992 lays down that when these companies, whether or not they are listed, pass certain thresholds they must include in the annual report given to shareholders at the annual general meeting information on environmental and social issues, as well as on the management audit. In practice, there is a noticeable contagion effect, similar to that observed in the Czech Republic: Greek companies themselves adopt a CSR approach because of their commercial relationships with foreign companies.

There have been changes in Portugal since the findings of the Guide to CSR in Europe. In fact, various special measures relating to CSR can be made out for the few state-owned companies, particularly with regard to the equal treatment of women and men, to respect for employees, and to adhesion to or adoption of a code of ethics.

In Luxembourg, a law of 25 June 2004 tackles sustainable development. A national sustainable development plan and a national report on the consequences of a sustainable-development policy have resulted.

The Italian model is similar to that of Greece: there is no law. Nonetheless, around 75% of Italian companies publish a CSR report voluntarily.

Finally, in Bulgaria, there is a national corporate governance code. It uses the ‘comply or explain’ rule and is directed at listed corporations and state-owned companies. There are legal provisions for including in the annual report presented at the general assembly aspects describing corporate governance and specifying how internal checks are carried out. The corporate governance code includes provisions touching on CSR.

Although it is on the orange list, Germany will be one of the Member States studied because of its highly unique situation. In Germany, the absence of CSR law is the result of a consensus. However, companies have adopted a very advanced CSR policy in a very original and, it seems, successful way.

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(129) Guide to CSR in Europe, CSR Europe 2010, p. 35.
The available information shows that Austria, Belgium, Denmark, Spain, Finland, France, the Netherlands, the United Kingdom and Sweden are currently the countries with the most successful CSR regulation systems. It should be noted that there are companies in these same countries that rank amongst the EU’s biggest players in terms of CSR.

The French and Belgian models are very similar. France is concerned about having very dynamic non-financial ratings agencies (Vigéo, etc.). The laws known as *Grenelle de l’environnement* have not yet had all the announced effects, but the ground has already been prepared. Corporate governance codes and the ‘comply or explain’ principle are also in force. The French socially responsible investment (SRI) market is often held up as a model example. Finally, France has many companies promoting specific ethical values: mutual associations, cooperatives and some of the most significant family companies at European level. A significant number of these prioritise incorporating CSR into their system of governance. That seems inevitable, since defence of their mutualistic, family or cooperative values constitute the core purpose of such companies. That is why this study will consider France.

The Netherlands has a system that borrows from both the French and UK models. In the United Kingdom, only state-owned companies and businesses operating in certain fields are bound to respect CSR standards. Otherwise, the UK has always backed a system of self-regulation: already an advocate of a liberal understanding of corporate governance and CSR since the Cadbury report, it leaves companies to determine whether their actions could provide a competitive advantage or not. Nevertheless, this singular approach has led all the companies of the FTSE 100, as well as numerous others, to adopt a CSR policy. The United Kingdom has extended these *laissez faire* principles to the obligation to publish certain information. That is why the United Kingdom will be one of the Member States considered by this study.

The development of Sweden’s CSR policy has slowed in recent years because of, inter alia, the economic crisis (132). Nonetheless, CSR has a cultural dimension in Sweden and the country sets an example, specifically in terms of the public administration leading by example (see No 92, above) and of the presence there of companies with major international influence in this regard (H&M, Volvo Group, Erikson, IKEA, ABB, etc.). There are 112 Swedish companies that have chosen to adhere to the Global Compact.

Austria, Denmark and Finland have fairly complete systems of CSR standards, the logic of which is rather similar. Austria obliges big companies and listed companies to communicate analyses of non-financial performance indicators, including information relating to the environmental and social consequences of their activities. These analyses are communicated to the supervisory board and, possibly, to the shareholders meeting (133).

In Finland, numerous laws make specific mention of CSR. Although a CSR report is not obligatory, accounting regulations require companies to declare environmental risks.

Pursuant to Law 1336/1997 on Finnish accounting practices, under certain conditions, a report must be attached to the annual accounts providing significant information on environmental issues and questions directly affecting the management of staff (e.g. declaration of sick and training days).

Finally, in Denmark, the law relating to annual accounts lays down that companies of a certain size must add a section on CSR to their annual report. It proposes a definition of CSR, according to which CSR means a company voluntarily taking the following into account

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(133) Section 243, point 5 of the Austrian Commercial Code.
in the operational strategy for its economic activities: human rights, social issues, the environment and the climate, and combating climate change.

Since it has successful CSR regulations, Denmark will be the Member State of the three with similar CSR models to be considered by this study.

In Spain, the national Government has undertaken significant reforms that are part of an original CSR policy. These texts are new and their content innovative, so Spain is one of the countries that should be considered by this study.

That is a country-by-country breakdown as regards the mission. However, while it might be emergent and under discussion, there is no CSR law — that is, no genuine body of regulations — emanating from anywhere in the EU. Only Directive 2003/51/EC (Fourth Annual Accounts Directive) suggests that companies disclose in their annual reports environmental and employee-related information to the extent necessary for an understanding of the company’s development, performance or position (see above). All Member States have chosen to exempt SMEs from this requirement. The elements of this Directive that have been transposed will be presented in the studies concerning the countries analysed.

In the end, along with Germany (1.2.1.1.), which is included from the orange list because of its highly unique situation, the Member States included in this study are Denmark (1.2.1.2.), Spain (1.2.1.3.), France (1.2.1.4.) and the United Kingdom (1.2.1.5.).

1.2.1.1. Germany (orange list)

Germany’s position on CSR is remarkable in many respects.

Germany has put in place a national CSR strategy, but the country seems opposed to any regulation of this area. Historically, CSR has always been an open question for employers. This subject has been around for a long time, but under a different name. It is an issue that was not politicised.

In German law the ‘honest trader’ is the legal standard (134) equivalent to the national standards that are, in the countries of the Romano-Germanic tradition, the criteria of the bon père de famille or, in the commercial context, the parfait négociant (135), known as the ‘reasonable man’ in common law.

In the German legal tradition, the ‘honest trader’ fits a popular image that has changed profoundly. We have moved beyond the idea of the company owner who manages his business in a paternalistic way, to a forecast of the challenges for companies and their local or international commitments, which had to be examined in detail from a CSR perspective.

When dealing with this issue, the Confederation of German Employers’ Associations (Bundesvereinigung der Deutschen Arbeitgeberverbände, BDA), which is in charge of relations with unions, rejected state interference in companies. The question has therefore not been approached from a legal standpoint. Nevertheless, a national CSR strategy has been launched. The Government held a national CSR forum with stakeholders. The debates were hard-fought, but the BDA managed, together with the unions, to convince the Government of the need to keep it voluntary, but with a positive approach.

(134) On the standard of the law, see Delmas-Marty, M., Pour un droit commun, loc. cit. p. 123 et seq.

In consequence, a CSR action plan was implemented, with the possibility of CSR coaching. Strategic partnerships have been launched on the basis of issues, sectors and regions of the world. Prizes rewarding good CSR management have been created. The project set up by the Federal Minister for Labour and Social Affairs involves six ministers and is already directly benefiting 75 CSR ‘labelled’ SMEs, collectives or training bodies within regional projects. Indirectly, by means of collaborative projects, 2 000 companies throughout the country will benefit from the federal Gesellschaftliche Verantwortung im Mittelstand (CSR in SMEs) programme, with an allocation of EUR 36 million in financial aid over three years, including EUR 30 million provided by the European Union Solidarity Fund (136).

A Sustainable Development Code was also adopted in late 2011 (137). It represents transparency standards for companies’ sustainable management. Its application is voluntary. It can be implemented by companies of different sizes. It comprises 20 performance indicators (it mentions the indicators of the GRI and the EFFAS, and how they correspond to each indicator).

To declare their respect for the Sustainable Development Code, companies publish a compliance report on their home page. In this report, companies set out how they comply with the Code’s criteria or explain their failures.

All of these initiatives have remained non-binding.

In 2005, companies were offered help with communication. Many SMEs are committed to CSR. They have been offered a communication platform (138). Any company can appear on this platform. CSR commitments are not prioritised: the baker who gives away bread rolls to children appears next to the pharmaceutical company explaining the methods it uses to prevent AIDS in certain countries (139).

The BDA, the BDI (Bundesverband der Deutschen Industrie), and the chambers of commerce and craft (Deutscher Industrie- und Handelskammertag, DIHK, and Zentralverband des Deutschen Handwerks, ZDH) work together on this issue.

Germany’s CSR policy is clear from the following text, taken from the official introduction to CSR Germany:

‘Businesses assume their responsibilities under complex conditions: the responsibility of a multinational enterprise in Bangladesh is completely different from that of an artisan in Europe. The challenges faced by an IT firm in terms of CSR differ from those of a business in the oil industry. The type and structure of a company’s commitment to society depends on its size as well as the sectors and markets in which it operates. The priorities that a business sets for ecological and social activities are geared to the needs of the relevant stakeholders. There can therefore be no harmonised standards or binding framework requirements. Companies must have unrestricted scope for action so that they can develop and


(139) MEDEF, 7 mars 2012, Colloque RSE « Mode d’emploi pour la création de valeurs » organisé par le MEDEF en partenariat avec Ethifinance et MiddleNext, intervention de Julia Haake, directrice du bureau de Paris d’Oekom Research et de Antje Gerstein, déléguée permanente du BDA à Bruxelles: «Regards sur l’étranger, l’exemple de l’Allemagne». 

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implement the best CSR approaches for their individual situation. In this regard, the exchange of experience is particularly important.

‘Through the dissemination of good practice examples, the various possibilities for assuming social and ecological responsibility are demonstrated. Companies should be supported with as little red tape as [sic] possible in their creativity and their quest for the best solutions. The aim is to publicise the diversity of CSR approaches instead of holding back innovation and dynamism in the area of CSR through reference frameworks, certification and regulatory interventions (...)

‘Many companies are actively involved in solving weighty societal problems, especially in emerging and developing countries. Through their CSR activities, companies can make an important contribution to sustainable development, also in partnership with other players in society (...) Companies can complement the efforts of politicians for development of society and social progress through their commitment, but cannot substitute for them (...)

‘This task cannot be delegated to companies. This would amount to a privatisation of law enforcement. The UN Special Representative for human rights and multinationals, John Ruggie, gave concrete expression to this division of roles in a draft endorsed by the UN Human Rights Council and based on three pillars “Protect – Respect – Remedy”. Protect: it is the task of the state to protect the people on its territory from infringements of human rights by non-state players. Respect: it is the duty of companies to respect human rights as enshrined in the relevant national legislation and to build the necessary management structures to that end. Remedy: legal and out-of-court complaint mechanisms need to be developed and strengthened to improve redress for infringements of human rights committed by companies and others.’ (140)

This statement of common CSR policy may explain why Germany, along with Austria notably, abstained from the vote on the final text by members of the ISO 26000 working group (141).

That is why the German approach is profoundly different from those of other Member States and stands out from that classification (see the orange list, above).

There is a significant gap between the exemplary image of German companies and German positive law. In 2010, a European guide to CSR had noted that no regulation on the issue was envisaged in that Member State (142). The correspondents of the law firm Jeantet et Associés uphold this verdict, but add that only internal checks and management checks are subject to specific regulation for unlimited companies. That seems logical, since these are provisions resulting from the transposition of EU law. In late 2011, Germany published a ‘Sustainability Code’ applicable to companies on a voluntary basis.

In short, CSR in Germany is voluntarily kept outside the legal sphere. It is a non-law area. Environmental and social performances are evaluated by non-financial ratings agencies, and some German companies have only recently published annual sustainable development reports.

Despite this self-imposed lack of CSR law, one thing needs to be stated: there is a significant difference in Germany between regulation and companies’ CSR results. Non-


financial evaluation means that German companies achieve very good CSR results, qualitatively and quantitatively (143).

The reason, in short, is that taking environmental and social issues into consideration seems to be part of the culture of German companies. However, a sociological approach demonstrates that the Germans are not the most environmentally conscious people in Europe (144). Nonetheless, a significant difference can be underlined by an economic point of view: green economic growth in Germany is supported by small and medium-sized enterprises; authoritative sources (145) show that to be what sets it apart from the majority of other Member States. Small and medium-sized enterprises represent 80.7 % of the German economy.

Admittedly, SMEs are behind the big companies as regards CSR, but progress is being recorded, particularly on the site CSR Germany.

The figures show, however, that an objective analysis remains lukewarm. For example, three times as many companies are signatories to the Global Compact in France than in Germany and there are four times as many members of CSR Europe in France than in Germany. However, the ratings agency Oekom Research rates Germany first in Europe for the number and quality of companies worthy of socially responsible investment (SRI), with 60 % of DAX companies eligible for SRI. To take the same example, the same agency states that only 50 % of those in France are eligible (146).

### 1.2.1.2. Denmark (green list)

Since 1995, Denmark has invited businesses whose operations pollute the environment to publish an environmental report (147). From 1999, large companies in the construction industry or those whose activities release toxic waste into the environment have been required, in accordance with the Environmental Code, to include information on the environmental impact in their annual management report.

A 2001 law modified the regulations on annual accounts so that companies could add supplementary reports to their general report. These reports include, in particular, the report on corporate social responsibility (CSR). The supplementary reports must comply with the requirements established for management reports.

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(144) During this conference — see previous note — it was highlighted that the average size of the cars manufactured and sold in Germany is one of the largest in the EU, that speed limits do not exist everywhere, that Germans go abroad on holiday and often to far away countries.


(146) Ibid.

(147) Act No 403 of 14 June 1995, Amending the environmental protection act, http://www.ecn.cz/rtk/DK-green-account.htm; Statutory order from the ministry of environment and energy No 975 of 13 December 1995, On the duty of certain listed activities to draw up green accounts, http://www.reportingrse.org/force_document.php?fichier=document_281.pdf&fichier_old=loi_de_d%C3%A9cembre_1995.pdf. This report should include information on the company’s consumptions and emissions as well as policies, goals and results. In December 1995, the Ministry of Environment and Energy laid down the categories of activities affected by this order, the particulars of the environmental statement, the detailed rules on submission and the penalties imposed in the event that the enterprise fails to meet these obligations.
This 2001 law also required Class C companies (those with more than 250 full-time equivalent employees and an annual turnover above DKK 238 million) and Class D companies (listed and state-owned companies) to consider the impact of their activities on the environment and the measures taken to prevent, reduce and remedy any environmental damage.

In May 2008, the Danish Government published its ‘Action Plan on Corporate Social Responsibility’. This has a twofold objective: to promote CSR among Danish companies and to encourage sustainable growth at both national and international level.

The plan comprises 30 initiatives in four key areas: spreading corporate social responsibility; promoting corporate social responsibility through government activities; corporate climate responsibility; and Denmark’s efforts to achieve responsible growth.

This action plan makes Denmark one of the pioneers of CSR strategies. The example set by Denmark clearly highlights the advantages of having one central strategic document. This text helps to bring into focus and emphasise the importance of existing instruments and to establish clear priorities. The Danish action plan has three advantages. Firstly, it presents an intelligent set of CSR instruments, ranging from international online tools, such as the CSR Compass (148), to partnership tools, such as the Danish Council on Corporate Social Responsibility, and legal instruments, such as the hotly debated notification law. Secondly, the Danish plan considers CSR to be a means of increasing companies' competitiveness, and so highlights the relevance of the commercial argument in favour of CSR. Finally, Denmark is a keen supporter of international initiatives in favour of CSR, as shown by, among others, its support for the United Nations Global Compact and its adherence to the United Nations Principles for Responsible Investment, as included in the action plan (149).

The Danish ‘Human Rights and Business’ project has been cited as an ‘example of an instrument of information’. It offers new, relevant tools for managing the supply chain responsibly. With the support of the Danish International Development Agency (Danida), the Council of Europe, the European Commission, the UN and the World Bank, this project initiated by the Danish Institute for Human Rights has put forward a range of new instruments since 2007:

- the Human Rights Compliance Assessment (HRCA) 2.0: the tool and database for evaluating respect for human rights have been updated and restructured. The new functions include automatic tailoring to company sector and operations, country risk matching — since having suppliers in certain States is not without risk — and an intranet expansion module;

- the first test reports for the country risk portal: this free website should help companies to ‘identify, evaluate and manage human rights risks in the countries where they are active or manage supply chains’;

- a Global Compact self-evaluation tool.

(148) The CSR Compass explains how companies can meet client’s requests concerning CSR and how to draft a code of conduct and implement standards in the supply chain. For examples, companies can find detailed explanations on the clauses which could be included in a code of conduct. See Corporate Social Responsibility. National public policies in the European Union: ec.europa.eu/social/BlobServlet?docId=1577&langId=en

In 2008, Article 99(a) was also introduced into the Financial Statements Act. This article is significant because it provides a legal definition of CSR. Under Danish law, CSR means that companies voluntarily include in their strategy and operations certain considerations relating to human rights, social and environmental issues, such as climatic conditions, and anti-corruption.

Under the same Article, large companies must supplement their management report with a report on CSR. Large companies are those in accounting category C, listed companies and those that are publicly owned.

Accounting category C includes those companies that exceed at least two of the following three thresholds: (i) Total assets and liabilities of DKK 143 million; (ii) net revenue of DKK 286 million; (iii) an average of 250 full-time employees.

If necessary, the company is required to mention the fact that it has not applied CSR policies in its management report.

The CSR report must contain the following information:

- the CSR policies, including the rules, guidelines and CSR principles followed by the company;
- elements explaining how the company is implementing these CSR policies, stating the situation with regard to associated systems and procedures;
- a statement of the progress made by the company in the area of CSR during the previous year and a statement of the consequences that might be expected.

The CSR report must be presented at the same time as and in addition to the management report. However, as an alternative, the company can choose to submit its report as part of a statement supplementing its annual report, or on its website.

The Danish Commerce and Companies Agency establishes the publication rules applicable when the CSR report is given as a supplementary statement in the annual report, as well as the due diligence expected of the auditor. The same agency establishes the rules relating to the publication of the CSR report on the company’s website and the rules regarding, firstly, the updating of this information and, secondly, the auditor’s due diligence concerning the information published on the website.

For companies that prepare consolidated financial statements, it is sufficient that they provide information on the group. Similarly, a subsidiary that is part of a group may be exempted from including this information in its management report if the parent company meets the requirements for presenting the CSR report for the entire group. A subsidiary may also be exempted from presenting a CSR report when the parent company prepares a report describing its progress in this area as part of its endorsement of the UN Global Compact or as part of its adherence to the UN Principles for Responsible Investment.

According to Article 99(7), a company whose parent company has prepared a report describing its progress as part of its endorsement of the UN Global Compact or as part of its adherence to the UN Principles for Responsible Investment may also be exempted from presenting a CSR report. In its management report, the company must then specify that it is making use of this exemption and that its report is publicly available.

(150) Danish Act No 1403 of 27 December 2008.
For subsidiaries of a company required to present a report, Danish law balances domestic law with either the UN Global Compact or the UN Principles for Responsible Investment. (see below). A company that meets the requirements for adherence to those principles is not required to oblige its subsidiaries to present a CSR report.

The criteria for implementing Article 99 of the Financial Statements Act oblige more than 1100 Danish companies to carry out CSR reporting. Of these companies, 97% are in compliance with the law and its principles. Feedback from companies with regard to the implementation of these regulations has been generally positive. CSR reporting is perceived, above all, as a tool for development and even for marketing. In this respect, some companies have expressed regret that the CSR report must be included in the management report, particularly for reasons concerning the constant updating of the processed data. The publication and updating of data on the website are ways of responding to these expectations (151).

There are many Danish companies that could be singled out for their exemplary conduct in the area of CSR. The following should be mentioned in particular:


The Lego Group:
- http://cache.lego.com/upload/contentTemplating/AboutUsCorporateResponsibilityContent/otherfiles/download01DBFDF522A44DBDEC58BDCAC1739CCE.pdf
- http://cache.lego.com/upload/contentTemplating/AboutUsCorporateResponsibilityContent/otherfiles/downloadEF7733FE56DFDFBC57D0DED578F73612.pdf

1.2.1.3. Spain (green list)

In addition to reforms made in the areas of CSR, gender equality and the integration of disabled people into companies, a non-binding code of corporate governance (hereafter 'the Code') was adopted by the Spanish stock market regulatory authority (CNMV). It contains recommendations aimed at ensuring transparency, protection for minorities, autonomy, integrity and independence of managers, good conduct, compliance with standards, etc. No disciplinary action was taken if a company failed to comply with these provisions.

However, some specific recommendations of the Code are now binding thanks to Law No 2/2011 of 4 March 2011 on the sustainable economy.

In the light of the title given to the above text, it would appear that CSR law — previously incorporated into scattered provisions — is now being developed.

This law requires listed companies — with sanctions to be defined by the regulatory authorities (Law No 2/2011, Art. 27) in the event of any breach — to submit a report on governance for the approval of shareholders at the annual general meeting. The following are some of the most noteworthy of those provisions:

- a statement must be made on the management control system and internal control system;

• categories of managers must be defined, according to their level of independence in particular;

• pay transparency must be guaranteed.

This law establishes an original system with regard to public enterprises. They are required to produce an annual report on their sustainable development policy.

Article 35 of Law No 2/2011 concerns the sustainable management of public enterprises. To summarise, these enterprises are required to:

• submit annual reports on the governance of the enterprise, as well as reports on sustainable development in accordance with generally accepted standards, paying particular attention to gender equality and the full integration of disabled people into companies (Article 35.2(a));

• review their production processes for goods and services by applying criteria for management and environmental auditing (Article 35.2(c));

• promote respect among their suppliers for CSR principles and practices, particularly with regard to promoting the integration of women, gender equality and the full integration of disabled people (Article 35.2(c));

• include conditions regarding greenhouse gas emission levels in their contracting processes, as well as a description of measures for maintaining or improving environmental values that might be implemented during the performance of the contract. Develop contract awarding criteria that take account of the efficient use of water, energy and materials, the environmental cost of the life cycle, procedures and methods of organic production, waste management, and the production or use of recycled and reused materials or of organic matter (Article 35.2(d));

• optimise and reduce water and energy consumption (Article 35.2(e));

• find methods of research, development and innovation in order to obtain technologies that are capable of improving their production processes (Article 35.2(f));

• propose and, if need be, establish, within the framework of collective negotiation, mechanisms that facilitate the mobility of workers in the public sector, and implement a training system that enables workers to become qualified in and adapt to new technologies and the culture of sustainable development (Article 35.2(g));

• a development plan must be drawn up by the relevant institutions (Article 35.2(h)).

In general terms, private institutions are encouraged to develop CSR policies. A National Council for CSR was created in 2009. Its purpose is to promote CSR and receive CSR reports from limited companies with more than 1 000 employees (which represents 426 companies). This threshold of 1 000 employees may seem high. However, companies with less than 1 000 employees can also present their CSR report on a voluntary basis.

Furthermore, since as early as 2007, under Royal Decree 1515/2007, Article 3.2, small and medium-sized Spanish enterprises have been able to include specific statements on their environmental impact in their annual report.
Under Law No 2/2011 (152), Spain introduced measures aimed at guaranteeing the sustainability of its economy. Chapter VI of the first title of this act is devoted to the promotion of corporate social responsibility, introducing the adoption of a set of indicators for self-evaluation in this area in order to facilitate the development of this sector, especially for small and medium-sized enterprises.

Article 39 of this Law is entitled ‘promoting corporate social responsibility’.

According to this text, freely translated:

1. In order to encourage companies, organisations and public or private institutions, especially small and medium-sized enterprises and individual businesses, to integrate or develop CSR policies, the public authorities are undertaking, within the framework of a policy to promote CSR, to spread their knowledge and to report on best practices, encouraging the study and analysis of the impact of CSR policies on companies’ competitiveness.

In particular, the government will provide a series of characteristics and indicators for CSR self-assessment, as well as models or frames of reference to be highlighted, all in accordance with international standards in the field.

2. All of the characteristics, indicators and reference models cited in the preceding paragraph must support, in particular, objectives of transparency in management, good corporate governance, commitment to the environment and the local milieu, respect for human rights, improved labour relations, promoting the integration of gender equality, equal opportunities and universal access for people with disabilities, and sustainable consumption, all in accordance with the recommendations made by a specialised body, in this case the National CSR Council (Consejo Estatal de la Responsabilidad Social Empresarial).

3. Companies can publish their CSR policies and results in a specific report based on the objectives, characteristics, indicators and standards cited in the preceding paragraphs. In any event, this specific report must indicate whether or not it has been verified by a third party.

In the case of limited companies with more than 1 000 employees, this annual CSR report must be presented to the National CSR Council so as to allow proper monitoring of the degree to which CSR policies are being implemented in large Spanish companies.

Finally, any company may request to be voluntarily recognised as a socially responsible enterprise, in accordance with the conditions established by the National CSR Council.

4. The government will allocate the necessary resources so that the National CSR Council can fully carry out its functions.

The frames of reference most commonly used in Spain are the United Nations Global Compact and the Global Reporting Initiative framework. According to a 2004 report, almost all large companies, particularly those listed on the stock market, have published a criteria-based report on sustainable development.

The Spanish Association of Collective Investment Schemes and Pension Funds (INVERCO) has approved an unofficial code of conduct, which in practice is respected by the majority of Spanish companies that work in investment services and pension funds, and, more generally, by financial institutions. On a sectoral basis, a code of conduct is expected to be adopted in 2012 for the energy sector.

The companies put forward as models of good CSR in Spain are:

**Cepsa:**

**Vodafone:**

**Gas Natural SDG:**

**DKV Medical Insurance:**

**Telefónica:**

1.2.1.4. France (green list)

A) A passion for CSR

Since passing the New Economic Regulations Act (NRE) of 15 May 2001, France, along with Denmark, has been one of the first Member States to establish a policy of legal transparency as regards social and environmental relations. However, the concept of social and environmental responsibility has been used very carefully by the legislature (see below). CSR is nevertheless experiencing a surge in popularity among public authorities and companies. Conferences and debates are frequently held on the subject. Social, environmental and human rights issues have become part of the moral standards of French companies, which see them as an instrument with which to manage their relationship with stakeholders, suppliers and subcontractors, and as a tool for communicating with the public.

With regard to so-called ethical approaches, for the last few years France has seen a strengthening of its normative framework with a desire to obligate companies (153) and public authorities (154). This was confirmed by Law No 2011-103 of 27 January 2011 on gender balance on management boards and in supervisory bodies, and on professional equality.

To that end, for listed companies, the management board (Comm. Code, Article L.225-37) or the supervisory board (Comm. Code, Article L.225-68) give particular account, in a report attached to the annual report, of the composition of the board and the application of the principle of equal representation of men and women within it; of the conditions of


(154) See in this respect Article 32 of Law No 2012-1249 of 22 October 2010 on banking and financial regulations which adds a final paragraph to Article L.225-102-1 of the Code of Commerce specifying that 'from January 2013, the Government shall submit a report on the application by enterprises of the provisions set out in paragraph five and on the actions it promotes in France, European and on an international level to encourage corporate social responsibility, every three years'.
preparation and organisation of the board’s work; of the procedures for internal control and risk management put into place by the company, giving particular detail of the conditions of those procedures that relate to the preparation and processing of accounting and financial information for the company financial statements and, where applicable, for consolidated financial statements.

Still according to the same texts, when a company voluntarily consults a corporate governance code, that report is submitted under the principle ‘comply or explain’. Finally, that report is disclosed.

In that respect, the doctrine questioned the issues that result from this combination of mandatory rules on information and non-mandatory substantive rules: the rules that are subject to the principle of ‘implement or explain’. It considers this to be an original regulatory model, particularly in securities law (155).

The obligations placed on French companies are increasing all the time and reforms are continually made to strengthen the legal provisions aimed at making companies and interested parties responsible for protecting the environment and for social and societal issues.

With regard to environmental, social and societal obligations, the reforms come one after the other at a rapid rate (156). The most striking example which illustrates this legislative frenzy relates to the notion of ‘stakeholders’, which had barely entered the Commercial Code before being withdrawn.

Law No 2010-788 of 12 July 2010 on the national commitment to the environment — known as the Grenelle II Act — made provision, in Article 225, for adding a paragraph to Article L225-102-1 of the Commercial Code in order to open up management reports for comments to the institutions representing employees and stakeholders engaged in dialogues with companies. In the field of management, the notion of stakeholders was defined: it is because an economic actor holds a resource that is used by an organisation, and because that resource exposes the holder to the risk taken by the organisation, that the latter becomes a stakeholder in the organisation and acquires a legitimate right to participate in the mechanisms for governing that organisation (157). In law, however, the definition of the institutions representing stakeholders generated doubts in academic theory (158). Following an amendment, Article 32 of Law No 2010-1249 of 22 October 2010 on banking and financial regulations removed the controversial paragraph.

The reason for that removal is made clear in the amendment.

‘The notions of “stakeholders taking part in dialogues with companies” and "corporate social responsibility” have limited legal scope, are particularly weak and potentially even broader because they are not specified by any regulation;

 - the principle of that type of unconditional inclusion may drive the company to “endorse”, in its annual report, evaluations that are unverified or likely to harm its reputation — and financial situation — in a way that is disproportionate to the


(157) See Pigé, B., Ethique et gouvernance des organisations, Gestion Poche, Economica 2010, p. 73 et seq.

initial aim of achieving transparency. The annual management report, a document that is binding for the company, should not become an unlimited “list of grievances”;

- all of the documents disclosed annually at the general meeting have already been communicated to the works committee in accordance with Article L. 2323-8 of the Labour Code. Under that framework, the works committee may comment on the particular social and environmental information contained in the management report. Those comments are then systematically passed on at the shareholders’ general meeting’ (159).

Article 225-102-1 of the Commercial Code therefore no longer refers to the notions of stakeholders or CSR.

Article 14 of the Public Procurement Code provides that ‘the performance conditions of a contract or framework agreement may include social or environmental elements that take into account sustainable development objectives by balancing economic development, protection and enhancement of the environment, and social progress.

Those performance conditions cannot have a discriminatory impact on potential candidates. They are indicated in the competitive public tender or in the consultation documents’.

These provisions nevertheless enable tenders to be focused in such a way that contracts entered into with the State, local authorities and public bodies comply with certain social conditions (see No 44 and following, above).

Strikingly, the legislature again made it possible for environmental action to be taken against the parent company for the actions of one of its subsidiaries or related companies. This reform extended a reflection that was driven by doctrine, particularly during discussions regarding a plan to reform the law of obligations, known as the Catala project. Under Article 1360 of this draft reform of the Civil Code, ‘whoever controls the economic activity or assets of a dependent professional is held responsible, even if acting on his own account, when the victim establishes that the harmful event is linked to the exercise of control. This is particularly the case with parent companies for damage caused by their subsidiaries, or with licensors for damage caused by their licencees’ (160).

Environmental responsibility of the parent company on account of its associated companies was introduced into French law by Article 227 of Law No 2010-788 of 12 July 2010 on the national commitment to the environment. This action can have a contractual basis, where the parent company is committed to ensuring affiliated companies (Comm. Code, Article L.233-5-1,) or may stem from the implementation of insolvency proceedings (Environmental Code, Article L.512-17). On account of those texts which, by reference, define the control of and links between the companies involved from the perspective of French law alone, it appears unlikely that it will be applied internationally.

B) CSR law

Corporate law has recently seen the introduction of various measures aimed at ensuring transparency of information and internal control systems. These aspects are now developing in new directions.


Law No 2010-788 of 12 July 2010 on the national commitment to the environment contained two articles that were presented as heralding the advent of a corporate governance law that would at last make companies accountable (161).

This law introduced a paragraph into Article L214-12 of the Commercial Code, according to which ‘investment companies with variable capital and management companies shall mention, in their annual report and in documents providing information to their subscribers, the means by which they take account of criteria for meeting social, environmental and governance objectives in their investment policy. They specify the nature of these criteria and the way in which they are applied in accordance with a standard presentation established by decree. They indicate how they exercise voting rights attached to the financial instruments resulting from those choices’. This text, which applies to all collective investment undertakings in transferable securities, supports socially responsible investment.

As part of the same law, Article L214-12 of the Commercial Code provides that the management reports of limited stock companies, in addition to information on managers — particularly their mandates, functions and salary — must also include ‘information on the way in which the company takes account of the social and environmental impact of its activity and on its commitment to society, promoting sustainable development, the fight against discrimination, and diversity’ (Comm. Code, Article L.225-102-1, paragraph 4).

This obligation applies to listed companies and unlisted companies whose total assets or turnover and number of employees exceed thresholds which have been fixed by decree in the Council of State (162).

That decree applies to limited stock companies and unlisted partnerships limited by shares, with total minimum assets or turnover of EUR 100 million and an average of at least 500 permanent employees during the financial year.

When the company establishes consolidated accounts, the information provided is consolidated and concerns the company itself as well as all of its subsidiaries and the companies it controls as defined by Article L. 233-3 of the Commercial Code. When that information is published by the company that controls them, providing details of each subsidiary or controlled company, and when those companies specify how to access the information in their own management report, they are not obliged to publish a report. Finally, when the subsidiaries or controlled companies are based in France and have classified facilities that are subject to authorisation or registration, the information provided concerns each one of them when that information cannot be consolidated.

The social and environmental information that appears or should appear next to the legal and regulatory obligations is subject to verification by a third-party body.

The independent third-party body responsible for verifying the information is selected, as appropriate, by the Director General or by the Chairman of the Management Board, for a term that cannot exceed six financial years, from among those bodies accredited by the French Accreditation Committee (Cofrac) or by any other accreditation body signatory to the multilateral recognition agreement established by the European Cooperation for Accreditation.

The verification it carries out includes a statement on the presence in the management report of all the information required by law; a reasoned opinion on, firstly, the accuracy of


the information and, secondly, the explanations provided by the company as regards the absence of certain information and an indication of the procedures it has implemented in order to fulfil its verification mission.

That verification gives rise to an opinion which is disclosed at the meeting of shareholders or of partners, at the same time as the report by the board of directors or the management board.

By way of illustration, as French law is the most recent and, to our knowledge, the most detailed of the countries evaluated, the information to be disclosed for unlisted companies is as follows:

**Table 2: France, Implementing Decree of 26 April 2012, social information**

<table>
<thead>
<tr>
<th>Social information</th>
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<tbody>
<tr>
<td>Employment</td>
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<tr>
<td>• total number of staff and salary distribution by gender, age and geographical area</td>
</tr>
<tr>
<td>• recruitments and dismissals</td>
</tr>
<tr>
<td>• salaries and their development</td>
</tr>
<tr>
<td>Work organisation</td>
</tr>
<tr>
<td>• organisation of working hours</td>
</tr>
<tr>
<td>Social relations</td>
</tr>
<tr>
<td>• organisation of the social dialogue, particularly procedures for informing, consulting, and negotiating with staff</td>
</tr>
<tr>
<td>• overview of collective agreements</td>
</tr>
<tr>
<td>Health and Safety</td>
</tr>
<tr>
<td>• conditions of health and safety at work</td>
</tr>
<tr>
<td>• overview of agreements signed with trade unions or staff representatives in the area of health and safety at work</td>
</tr>
<tr>
<td>Training</td>
</tr>
<tr>
<td>• information policies implemented</td>
</tr>
<tr>
<td>• total number of hours of training</td>
</tr>
<tr>
<td>Equal treatment</td>
</tr>
<tr>
<td>• measures taken to promote gender equality</td>
</tr>
<tr>
<td>• measures taken to promote the employment and integration of people with disabilities</td>
</tr>
<tr>
<td>• anti-discrimination policies</td>
</tr>
</tbody>
</table>

*Source: JeantetAssociés*
**Table 3: France, Implementing Decree of 26 April 2012, environmental information**

<table>
<thead>
<tr>
<th>Environmental information</th>
</tr>
</thead>
<tbody>
<tr>
<td>General environment policy</td>
</tr>
<tr>
<td>- organisation of the company so as to take account of environmental issues and, if need be, the steps required to achieve environmental evaluation or certification.</td>
</tr>
<tr>
<td>- action taken to train and inform employees on environmental protection</td>
</tr>
<tr>
<td>- measures taken to prevent environmental risks and pollution</td>
</tr>
<tr>
<td>Pollution and waste management</td>
</tr>
<tr>
<td>- measures taken to prevent, reduce or compensate for waste in the air, water and ground which seriously harms the environment</td>
</tr>
<tr>
<td>- measures taken to prevent, recycle and eliminate waste</td>
</tr>
<tr>
<td>- consideration of noise pollution and any other form of pollution particular to an activity</td>
</tr>
<tr>
<td>Sustainable use of resources</td>
</tr>
<tr>
<td>- water consumption and water supply according to local conditions</td>
</tr>
<tr>
<td>- consumption of raw materials and measures taken to improve efficiency in their use</td>
</tr>
<tr>
<td>- energy consumption, measures taken to improve energy efficiency and use of renewable energy sources</td>
</tr>
<tr>
<td>Climate change</td>
</tr>
<tr>
<td>Protection of biodiversity</td>
</tr>
</tbody>
</table>

Source: JeantetAssociés

**Table 4: France, Implementing decree of 26 April 2012, information on societal commitments to sustainable development**

<table>
<thead>
<tr>
<th>Information on societal commitments to sustainable development</th>
</tr>
</thead>
<tbody>
<tr>
<td>Territorial, economic and social impact of the company’s activity</td>
</tr>
<tr>
<td>- on employment and regional development</td>
</tr>
<tr>
<td>- on neighbouring or local populations</td>
</tr>
<tr>
<td>Relations with individuals or organisations with an interest in the company’s activity, particularly integration associations, teaching establishments, environmental protection groups, consumer associations and neighbouring populations</td>
</tr>
<tr>
<td>- conditions for dialogue with those individuals or organisations</td>
</tr>
<tr>
<td>- action taken as part of a partnership or patronage</td>
</tr>
<tr>
<td>Subcontracting and suppliers</td>
</tr>
<tr>
<td>- taking account of social and environmental issues in company purchasing policy</td>
</tr>
</tbody>
</table>

Source: JeantetAssociés
Listed companies are required, in addition to the information above, to provide the following information:

**Table 5: France, Implementing Decree of 26 April 2012, social information in listed companies**

<table>
<thead>
<tr>
<th>Social information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Work organisation                                       • absenteeism</td>
</tr>
<tr>
<td>Health and safety                                        • accidents in the workplace, particularly their frequency and seriousness, and occupational diseases</td>
</tr>
<tr>
<td>Promotion and respect for the provisions laid down by the core conventions of the International Labour Organisation relating to • respect for freedom of association and the right to collective bargaining</td>
</tr>
<tr>
<td>• eliminating discrimination in respect of employment and occupation</td>
</tr>
<tr>
<td>• eliminating all forms of forced or compulsory labour</td>
</tr>
<tr>
<td>• the effective abolition of child labour</td>
</tr>
</tbody>
</table>

**Source:** JeantetAssociés

**Table 6: France, Implementing Decree of 26 April 2012, environmental information in listed companies**

<table>
<thead>
<tr>
<th>Environmental information</th>
</tr>
</thead>
<tbody>
<tr>
<td>General environment policy                              • overall provisions and guarantees for environmental risks, provided that such information is not likely to cause serious damage to the company in any ongoing litigation</td>
</tr>
<tr>
<td>Sustainable use of resources                            • land use</td>
</tr>
<tr>
<td>Climate change                                          • adapting to the consequences of climate change</td>
</tr>
</tbody>
</table>

**Source:** JeantetAssociés

**Table 7: France, Implementing decree of 26 April 2012, information on societal commitments to sustainable development in listed companies**

<table>
<thead>
<tr>
<th>Information on societal commitments to sustainable development</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subcontracting and suppliers                                 • the importance of subcontracting and taking account of the social and environmental responsibilities of suppliers and subcontractors in relations with them</td>
</tr>
<tr>
<td>Fair practice                                                • action taken to prevent corruption</td>
</tr>
<tr>
<td>• measures taken to promote consumer health and safety</td>
</tr>
<tr>
<td>Other action taken to promote human rights</td>
</tr>
</tbody>
</table>

**Source:** JeantetAssociés

The implementing decree further provides that where a company voluntarily complies with Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), the declaration signed by the environmental verifier attached to the management report constitutes the opinion of the independent third-party body on the environmental information.
The verification of information on the social impact of the company’s activity and its societal commitments to sustainable development, however, remain the responsibility of the independent third-party body.

Some French groups, including the Total enterprise (163), implemented these principles before the decree was published in the Official Journal of the French Republic, based on the plan that had been widely disseminated.

The laws were applied too recently to be able to evaluate their effectiveness. Nevertheless, despite the limitations of the CSR law that was previously in force in France, which was of very little substance (164), companies listed on the CAC 40 index applied all the international CSR standards, and French companies had and still have a strong international reputation in the area of CSR.

The following are often cited (165) as examples:


**Sanofi-Aventis**: [http://www.sanofi.com](http://www.sanofi.com)


In conclusion, it should again be mentioned that in France, as well as increased awareness among the public authorities, as shown by the creation of a Ministry of Ecology, Sustainable Development, Transport and Housing, national representation is guaranteed on this matter thanks to a CSR ambassador.

**1.2.1.5. United Kingdom (green list)**

In the United Kingdom (UK), a number of government initiatives have contributed to a very noticeable improvement in CSR. The Bribery Act 2010, c. 23, which takes measures against corruption offences, provides criteria for increased powers and an extraterritorial enforcement method. Likewise, the 2010 Equality Act, c. 15, lays down regulations promoting respect for equality in its most varied forms, particularly by requiring some employers to publish information on the gender pay gap.

The Corporate Governance Code UK (hereafter ‘the Code’) is the main source of recommendations in terms of corporate governance, particularly for companies with a premium listing on the London Stock Exchange.

It is governed by the ‘comply or explain’ principle which, since the Cadbury report (166), has characterised corporate governance in the UK. Under that principle, if a company does not

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(163) Interview of 20 April 2012 with Ms Peggy Mouriot-Barbé, Direction Juridique Groupe – Bourses & Sociétés at TOTAL.


(165) In order to avoid any conflict of interests, some companies, from which managers or executives have been interviewed for this study, have been voluntarily excluded from this list of examples, without prejudice to their compliance or otherwise with CSR standards.
comply with the precepts of the Code, it must provide an explanation in its management report.

Even though no part of the Code deals specifically with CSR, it is accepted that the impact of a company’s affairs goes beyond its shareholders.

Under the A1 principle of the Code, the board must define the company’s values and standards and ensure that it meets and respects its obligations to its shareholders and other people (167).

In addition, the Turnbull Report (168) expressly states that risk assessment by the board must not only cover financial risks in the strictest sense but also social and societal risks, including those linked to health, safety and the environment, the company’s reputation and business ethics (169).

The Companies Act 2006 supplemented these good practices with certain responsibilities for directors of limited stock companies. Those responsibilities are behavioural. They lay down what is good conduct for a sensible director. This may also be interpreted as a 'best effort' obligation.

In order to promote the success of the company, directors must have regard to social, environmental and societal issues, particularly: the consequences of any decision in the long term; the interests of the company’s employees; the need to foster the company’s business relationships with suppliers, customers and others; the impact of the company’s operations on the community and on the environment; the desirability of the company maintaining a reputation for high standards of business conduct; and the need to act fairly as between members of the company (Companies Act 2006, Article 172). Those same principles apply to the directors’ report (Companies Act 2006, Article 417).

Increasingly, in the UK, CSR is regarded as ‘best practice’ by the City and the Government. The Association of British Insurers, whose members own more than 20 % of companies on the London Stock Exchange, publishes advice on issues related to CSR for companies and investors.

Its 2007 guidelines on socially responsible investment (SRI) recommend, in particular, that the annual report should disclose environmental, social and governance risks. According to the guidelines, the remuneration committee should also take into consideration the performance of the company in environmental, social and governance matters when setting remuneration of executive directors.

(166) It should be recalled that the Cadbury report facilitated the implementation of the first corporate governance code in 1992. This report was the result of the work of a committee jointly set up by the London Stock Exchange and the Financial Reporting Council (a public-private organisation setting accounting standards in the UK) and the UK accountancy profession in order to restore the confidence of investors which was severely undermined by various financial scandals.


(169) Turnbull Guidance, Five, Appendix, Assessing the effectiveness of the company’s risk and control processes, p. 13 et seq.
The British Government sponsors a CSR website on which it states that it has ‘an ambitious vision for UK businesses to consider the economic, social and environmental impacts of their activities, wherever they operate in the world’ (170).

Most large companies in the UK deal with social and environmental issues in their annual reports, and many of them believe that complying with CSR guidelines has become a business necessity. At the very least, the growing number of ‘green’ and ethical investment funds must find companies with corresponding activities.

More than 850 companies from among the largest British businesses are committed to enhancing their impact on society. They publish a responsibility index which measures companies’ performance in CSR terms (171).

Finally, all the companies in the FTSE 100 index have adopted best practices in CSR terms.

The following companies are often cited as examples:

**United Utilities Plc:**
http://corporateresponsibility2009.unitedutilities.com/ and
http://www.unitedutilities.com/Documents/Interactive_AnnualReport_FINAL.pdf

**British Airways Plc:**

**Rolls Royce Plc:**
http://www.rolls-royce.com/about/publications/annual_report/index.jsp

**Unilever Plc:**
http://www.unilever.co.uk/sustainability/ and

**Co-operative Group:**
http://www.co-operative.coop/corporate/sustainability/overview/ and
http://www.co-operative.coop/Corporate/PDFs/Annual_Report_2010.pdf

1.2.1.6. Comparative conclusion on the initiatives taken by Member States

While common features can be found in CSR law as initiated in the Member States, the solutions proposed are noticeably heterogeneous. While avoiding a comparison of Germany’s normative rejection with the meticulousness of French regulation, for the countries analysed one can observe a progression from self-regulation as a principle to systematised control.


(171) See http://www.bitc.org.uk/
Overall consistency thus seems difficult to establish, particularly given that it appears difficult to legislate in an area where companies and an emerging market seem to be masters of the game in terms of normative practice.

1.2.2. NORMATIVE PRACTICES

Normative practices are essentially isolated. In the area of CSR, practice is first and foremost the work of companies. However, a market seems to be growing around CSR. This requires very close analysis insofar as it not only affects the companies whose image it conveys, but also the financial products that are intended for the general public.

Paradoxically, the self-regulation of companies is carried out within a predefined framework, whereas the CSR markets — an information market and a financial products market relying on those companies — seems to be lacking any regulatory control.

1.2.2.1. Self-regulation of companies

The starting point for CSR lies in the fact that companies are able to define their values. These values are both tools for companies to communicate, as well as to define their conduct.

However, even though it seems possible to expect sensible conduct from a director in terms of good faith, good morals and respect for public order, it is public order alone that shapes the enterprise into a company, and, in a fragmented way, an international group of companies. The power of public order is not homogeneous. It can be subdivided into as many public orders as there are relevant legal systems. A company or a group have values and types of conduct which may only be identified through the conduct of their legal representatives, their management and their senior executives. In order to discuss the question of a company’s values, it is therefore necessary to establish a close link between legal persons and the units that make up the company and its governance (172).

(172) Otherwise, it should be considered that according to Professor Boyer 'where an enterprise is a mere professional domain which does not foster its own values, it is not up to the enterprise to take charge of ethics but
Indeed, the way in which a company is governed (173) means that it is not simply focused on itself and its own development (174), but also on its human, geographical, cultural and social environment.

From this perspective, the use of the constitutional concept of ‘governance’ takes on its full meaning. To speak of ‘corporate governance’ presupposes the existence of legal representation.

Addressing this issue through the prism of legal theory, constitutionalist doctrine recalled the origins of representation, origins that can be usefully mentioned here (175). At the beginning, German political philosophy distinguished two paradoxical notions: representation and mandate. Representation (Repräsentation) is noble. It makes an invisible being visible, present for all to see: a divinity, a State or a legal person (176). Representation makes something public; it implies that the representative defends values for all to see. Mandate (Stellvertretung) remains part of the private sphere: the Civil Code uses it in order to arrange for one person to take charge of the interests of another, acting in his or her name (177). When characterising the management of a company, it therefore makes a great deal of sense to speak of the transition from company management to corporate governance (178). It makes it possible to identify the shift from a representation of interests towards a representation of values (179). Acting alone, the company’s legal representative will have difficulty defending both the values and interests of the company.

Defending the company’s values may contradict its interests. In the same way, the director’s own interests and those of the company may clash. From this comes the key idea that it is vital to guarantee the best possible representation of the interests present within the company management by instituting, if applicable, counter-balancing powers (180) and by avoiding the risk of conflicts of interest. This type of corporate governance thus guarantees the promotion and defence of shared values — those of the company (181). Managers no longer run the company alone; instead they become part of the company’s governance in order to represent its values.


(173) This concept, here in its wider sense, is that of management duties. See Troper, M., ‘L’émergence du gouvernement’, in. Mélanges P. Gélar, Montchrestien 1999, p. 133 et seq.

(174) Or, in French law, on its savings, see Civil Code Article 1832.


(177) To quote the distinction made by political philosophy, according to Jürgen Habermas, the monarch is not a representative ‘for the people’ but ‘before the people’ - Habermas, J., L’espace public, Paris, Payot, 1978, p. 20.

(178) One author has seen the expression of the democratic ideal here. V. Gomez, P.-Y., La République des Actionnaires, Syros 2002. - More recently from the same author, see L’entreprise dans la démocratie, Une théorie politique du gouvernement des entreprises, éd. de Boeck 2009.


(180) See in a similar way marking a move from a representation in private law which favours individualist ideology to a representation which favours the solidarity of private organisations, Gaillard, E.,’ La représentation et ses idéologies en droit privé français’, in La représentation, loc. cit., p. 91 et seq.

In a practical way, in terms of self-regulation this results in the establishment of governance, in other words — to follow the distinction used by the management sciences — in the establishment of means that enable management control, that is, the company’s operational management (182). This governance should be at least partly devoted (A) to CSR and integrated into corporate governance. If those conditions are fulfilled, it will be possible to draw up a document in which the company’s values are defined (B).

**A) Governance devoted to CSR**

Increasingly, large family, cooperative or mutual companies in all sectors (retail, insurance, transport, banking, etc.) have a type of constitution that defines their values. There are a number of terms used to refer to these texts. These include charter, framework agreement (183), book, pact, code of conduct (184), declaration, convention and regulation. The aim of these documents is to define the founding principles by which, generally speaking, the majority shareholders who write them identify themselves, either alone — as is sometimes the case with family companies — with the company directors, senior executives and staff representatives, or (far less often, although it may be the case with mutual funds that have members rather than partners linked to their social capital) with some external stakeholders. Those principles then govern the selection, role and functions of the company systems, management policy and terms relating to internal control and decision-making, in view of the values being promoted. Within these companies and these families, cooperative or mutual groups, the charter of values is generally effective, because it serves as a basis for understanding between family partners, members of cooperatives and affiliates who, in principle, are intended to succeed to one another. The document contains the means to make the company more durable in the light of a shared interest, a family interest, or a cooperative or mutualist interest.

In enterprises other than family, cooperative or mutual companies, the situation may be different.

The managing director, who is the company’s legal representative (for a limited stock company with a board of directors), must promote these values along with his team. He must give account to the board and, where applicable, to the remuneration committee of how those values have been promoted throughout his term in office. The managing director must therefore be the driving force behind the company in terms of CSR. However, despite the creation of an economic value system that appears to be part of a CSR approach (185), it would seem that in companies there is often a certain separation between the company’s managing bodies and governing bodies when it comes to taking CSR into consideration. The organisational principles behind German limited stock companies (where there is a predominantly dualist model with institutional and cultural participation of employees on the supervisory board) tend to show that they are less prone to such criticism. The operational

(182) Duval-Hamel, J., et Germain, M., ‘Gouvernement des entreprises, qui dirige?’, in Mélanges D. Tricot, Litec / Dalloz 2011, p. 657 et seq. and references quoted. However, these authors note that the move from management to legal concepts and vice versa is not easy.


management of the company seeks the company's greatest profitability, in the short term. This is why these charters of values are rarely used (186) and, when they are established, they have a varied and often weakened impact.

It is therefore imperative that the company and group of companies dispose of a dedicated governance system and of the means necessary to ensure that their values are defined and defended. The management board or the supervisory body are certainly best placed to fulfil this goal to support the company’s managers.

Directive No 2006/43/EC of 17 May 2006 on statutory audits of accounts made it compulsory to establish audit committees (see No 47 and following, above). These committees, particularly in listed companies and for regulated activities, may have to take into account the company’s approach to CSR. However, generally speaking they are not a place for reflecting on the company’s values. In practice, companies establish other committees for that purpose: ethical committees to define values; risk committees to anticipate the company’s impact on society; and CSR committees. Each of those committees may also be given powers enabling them to ensure the effectiveness of the measures proposed, particularly through audits or by collaborating with the audit committee (187).

Executive positions have been created which, in addition to the traditional operational divisions, have given rise to a new profession: director of sustainable development. This individual is responsible for defining the company’s CSR or sustainable development policy, building and leading a dialogue with stakeholders related to the company, and answering for the company’s CSR approach (188).

Those companies that are most concerned about the effectiveness of their CSR approach coordinate action between dedicated bodies and posts and ensure their operational monitoring through internal control.

(186) See however, in Luxembourg, the Corporate Charter for social responsibility and sustainable development http://www.adt-center.lu/charteentreprise.pdf, drawn up by five enterprises in Luxembourg (Arcelor Mittal, Banque et Caisse d'Epargne de l'Etat Luxembourg, Cargolux, Confédération Caritas Luxembourg and SES GLOBAL), and which 'formalises the mutual desire of the signatory enterprises to commit to governance principles which monitor the impact on their activity on the economic environment, the staff they employ, the natural environment and the local community in which they are based. The Charter is open to any enterprise that wishes to join', http://www.guichet.public.lu/fr/entreprises/exploitation-environnement/energie-environnement/resp-sociale-entreprise/entreprise-socialement-responsable/index.html.


(188) See Raes, T., Laville, B., Lambert, S., Sainteny, G., Développement durable, loc. cit., p. 352 et seq., No 570 et seq.
Danone, a group created in 1973, has become a major international player in the production and marketing of fresh dairy products, packaged water, child nutrition and medical nutrition.

The company’s Registration Document 2011 shows, on one hand, stronger action taken by the committees as well as posts dedicated to CSR and sustainable development and, on the other hand, a closer relationship between the Social Responsibility Committee, whose motivation is essentially non-financial, and the Audit Committee, whose motivation is strictly financial. Therefore, within the company, links have therefore been established between an analysis of the non-financial impact and the financial risks and control.

At Danone, the Social Responsibility Committee is a committee of the Board of Directors responsible for clarifying all these issues to the Board. The Committee is made up of directors, and issues an opinion on the general guidelines to be adopted, the projects and their impact, and in particular keeps a close watch for potential conflicts of interest.

It is important to mention that the Social Responsibility Committee, albeit linked to the board of directors, has grown closer to the company’s Audit Committee.

Following an assessment made in 2009, the decision was taken to (i) improve coordination with the Audit Committee in reviewing the Group’s risks and (ii) provide a more specific account of its work to the Board. The Committee’s tasks have been supplemented so that the Committee can ensure (iii) the implementation of the four pillars of the Group’s societal approach and the effect of the transformation processes on the company’s management, and (iv) the honesty and reliability of the Group’s non-financial communication.

This dedicated governance, whether or not it is exemplary, is due to furthering its action by means of documentation devoted to the respect for and defence of the company’s values.

B) Documentation devoted to defending values

Documentation devoted to defending companies’ values has been drawn up, in addition to the charters of companies, with frames of reference relating to different sectors of activity or based on companies’ precontractual or contractual documentation.

a) Sectoral codes of conduct

As has been mentioned previously, corporate social responsibility is not a new concept (189). Taking a deeply historical view of the issue of sectoral codes of conduct, Michel Doucin, French Ambassador for Bioethics and Corporate Social Responsibility, has highlighted the often very pragmatic origin of these codes of conduct.

In the late 1980s and early 1990s, many of these codes were the result of growing public awareness about the environmental and human disasters that the activities of companies in certain sectors could bring about. Customer losses and even product boycotts resulted in associations or their equivalents drawing up these codes. The codes are sectoral in that they concern sectors of activity.

The Fair Labor Association adopted a code of conduct, a ‘voluntary’ international standard that has been broadly adopted by the textile industry. This text was drawn up under pressure from the Clinton administration, through a negotiation between the major American companies in the sector and consumer representatives, including students in the USA and Canada who formed a group including more than 100 universities. The students had discovered that the clothing designed for their universities was made by children, particularly in South America (190).

Other scandals, according to the same senior official, had similar results. The discovery by NGOs of child labour in the electronic industry resulted in the Electronic Industry Citizenship Coalition (EICC) drawing up a code of conduct, which was also negotiated under pressure from the Clinton administration. The involvement of American and British companies in financing bloody civil wars in Sierra Leone and Liberia in the 1990s gave rise to the Voluntary Guidelines on Security and Human Rights adopted under the influence of Bill Clinton and Tony Blair (191).

However, sectoral codes of conduct are no longer just a way to restore the tarnished image of a sector of activity. For those companies that subscribe to them, they have become a means of establishing a framework of conduct and guidelines with the benefit of being more nuanced than international guidelines (Global Compact, Global Reporting Initiative, etc., see above). Indeed, when sectoral particularities are not taken into consideration, the general nature of international guidelines proves to be inadequate, and, according to those interviewed, there is an impact on the accuracy of the non-financial rating system and the potential difficulties of contractual relationships which may come up. This is the reason why codes of conduct thrive on a sectoral basis.

The European Union would probably respond to companies’ expectations by supporting or initiating this type of code, at least to bring certain sectors of activity together on these issues within Member States. If that were to be the case, the sectoral code and associated guidelines would have to conform to current international criteria as closely as possible.

At the initiative of the European Committee of Sugar Manufacturers (CEFS) (192) and the European Federation of Food, Agriculture and Tourism (EFFAT) (193), a joint declaration issued on 14 December 2001, entitled ‘Social Responsibility and the Social Model in the Sugar Industry’ preceded the signing of a European Sugar Industry Code of Conduct by almost 14 months. A standard international framework agreement was proposed by the International Metalworkers’ Federation (194). The Code of Business Practice was adopted in June 2001 by the International Council of Toy Industries (ICTI). This is a group of national associations representing specialised companies in the toy industry. The code has a primarily social and societal purpose, and contains appendices that demonstrate a genuine CSR approach: Appendix I: Methodology for Evaluating Compliance; Appendix II: Audit


(192) The Comité Européen des Fabricants de Sucre (CEFS) represents all sugar manufacturers and refiners (Employers): its members are national trade associations or the sugar undertakings themselves, when there are only one or two in a Member State.

(193) European trade union representing workers in the agricultural, food and tourism sectors.

Checklist; Appendix IIa: Guidance Document for Appendix II; Appendix III: Corrective Action Plan (195).

The IFAC (196) is the International Federation of Accountants. It endeavours to strengthen the profession and foster the development of a strong international economy. The IFAC is made up of 157 members and partners in 122 countries and territories, representing more than 2.5 million accountants engaged in public practice, education, government services, trade and industry. The organisation, through its independent standardisation committees, defines accounts standards and international ethics. It also publishes advice for accountants in business.

The IFAC has drawn up a comprehensive sustainable development framework to help accountants and their organisations to incorporate a means of thinking and working sustainably into all management processes. This framework illustrates the way in which a commitment to sustainability can improve a company’s products and services, motivate staff, reduce costs and enhance its reputation.

More generally, it is worth noting that expert accountants and auditors become highly specialised in CSR (197).

The degree to which these soft law instruments are effective in the field of CSR is difficult to assess, particularly because no evaluation criteria seem relevant. When these codes are drawn up by companies, they are often perceived as marketing tools (198). It seems that sectoral negotiation of these codes would give them greater legitimacy (199). However, given their regionalisation and the existence of several codes for one sector of activity, it is possible to identify a veritable ‘war of standards’ between companies and sectors (200).

b) Precontractual or contractual documentation of companies

1. Precontractual Documentation: CSR questionnaires

A company’s precontractual documentation is vital for defending its values and CSR principles. Indeed, if a company’s supplier or sub-contractor fails to observe those principles, it can be disastrous. In the luxury goods sector, in which the brand holds most of the company’s value, the risk to their reputation can be enormous. Company applications are therefore analysed in great detail, using questionnaires that are reminiscent of tendering.


(197) PriceWaterhouseCoopers has thus put together a well researched book on the subject which demonstrates the interconnections in CSR between the world of management and finance, Raes, T., Laville, B., Lambert, S., Sainteny, G., Développement durable, Editions Francis Lefebvre, PWC, 2010.


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procedures. Company purchasing divisions, in collaboration with the legal department and even general management, sometimes deal with the reviewing of sensitive files.

The content of these questionnaires can vary from one company to another, which makes contract negotiation particularly complex. Some companies say no, so as to avoid the risk of contracting companies whose headquarters are located in countries considered ‘at risk’ (201).

On the other hand, some organisations provide standard questionnaires. Since 2001, the Carbon Disclosure Project, on behalf of the world’s largest institutional investors, has requested information on climate change and its incorporation into company strategies. The Carbon Disclosure Project provides a very thorough online questionnaire model (202).

Sometimes, these questionnaires are greatly simplified and may appear lacking in concern (203). However, as well as responses, supporting documents are expected from the purchasing department which thereby specifies its expectations.

(201) MEDEG, 7 March 2012, CSR Conference 'Mode d’emploi pour la création de valeurs' organised by MEDEG in partnership with EthiFinance and MiddleNext, speech by Mr Xavier Drago, Sustainable Development Manager, Air Liquide.


Table 8: Guidance on making a better response to the CSR questionnaire

<table>
<thead>
<tr>
<th>Questions</th>
<th>Required supporting documents</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Has your company implemented a policy and goals for environmental protection?</td>
<td>All documents proving the implementation of CSR actions: directives, e-mails, CSR brochures, invoices, photos, etc.</td>
</tr>
<tr>
<td>2 Does your company have a human resources policy with principles and procedures regarding:</td>
<td>Invoices from employment centres for the disabled or similar, internal announcements, right to training, trade union statements, etc.</td>
</tr>
<tr>
<td>2.1 Equal opportunities</td>
<td></td>
</tr>
<tr>
<td>2.2 Integration of people with disabilities</td>
<td></td>
</tr>
<tr>
<td>2.3 Employee training</td>
<td></td>
</tr>
<tr>
<td>2.4 Non-discrimination</td>
<td></td>
</tr>
<tr>
<td>2.5 Freedom of association</td>
<td></td>
</tr>
<tr>
<td>2.6 Collective negotiations</td>
<td></td>
</tr>
<tr>
<td>3 Has your company adopted and implemented a charter or internal professional code of ethics?</td>
<td>Charters and codes of ethics, excerpts from internal regulations relating to this issue</td>
</tr>
<tr>
<td>4 Do you incorporate CSR criteria when choosing your suppliers and sub-contractors?</td>
<td>Suppliers’ rating framework, contracts entered into with ‘green suppliers’</td>
</tr>
<tr>
<td>5 Has your company implemented an internal performance dashboard for all data relating to CSR?</td>
<td>CSR dashboards, CSR indicators, etc.</td>
</tr>
<tr>
<td>6 Has your company subscribed to an initiative in the field of environment and social and human rights?</td>
<td>Letter of commitment to the Global Compact, proof of a partnership or act of sponsorship with an association and/or NGO</td>
</tr>
<tr>
<td>7 Does your company regularly give an overview/report on its actions to support sustainable development and/or the environment?</td>
<td>Annual CSR report, press release, press article, written communication or internal emails</td>
</tr>
<tr>
<td>8 Has your company requested external certification or an audit report on its overall CSR approach?</td>
<td>Audit report, contract or invoice from an audit firm</td>
</tr>
<tr>
<td>9 Has your company obtained certification (SA8000®, ISO 14001, etc.) or a label in support of sustainable development particular to your activity?</td>
<td>Certificates, labels, etc. Care should be taken, because the ISO 9001 standard is not accepted as a supporting document insofaras it is only a quality standard</td>
</tr>
<tr>
<td>10 If your company is evaluated by non-financial rating agencies (e.g. Vigeo, SAM, EIRIS, etc.) does it feature on a sustainable development index (ASPI Eurozone®, DJSI World, DJSI Stoxx, FTSE4Good, etc.)? If your company does not undergo such evaluations, please ignore the question.</td>
<td>Documents issued by non-financial rating agencies: Staff reports, rating frameworks, etc.</td>
</tr>
</tbody>
</table>
Naturally, this obligation to keep oneself informed through questionnaires may be supplemented by impact assessments, discussions with stakeholders and, if necessary, a restructuring of the original project, particularly through a protocol agreement, so that it may be adapted to the circumstances that arise.

At this precontractual stage, the principle of proportionality does not always seem to be appreciated by companies. Under this principle, the riskier their activities and operational sites, the greater the need to strengthen their impact assessments and obligation to remain informed. The obligation to be informed is an obligation to act, a 'best effort' obligation, which as such must be adapted to suit the circumstances. Certainly, among professionals, traders and a fortiori large companies, one might think that a questionnaire is sufficient. The basic principle is still the presumption of good faith. The difficulty stems from the fact that the same questions are often asked without any distinction being made with regard to the size of the contractual partner or their location in the world and the necessary adaptations that such details would demand.

On the other hand, when there is an economic imbalance between the parties, some international companies wishing to contract small and medium-sized enterprises abroad have no hesitation in providing support and assisting them with their impact assessment. This is also the case for national companies which contract small local carriers and then help them, sometimes logistically and financially, to make progress with their CSR approach.

On this matter, practice would benefit if questionnaires with at least an intra-EU purpose were proposed by sector, specifying the conditions and adaptation limits that are likely to be considered.

2. Contractual provisions

Information provided by contractual partners in questionnaires must be factually correct. The obligation to keep informed corresponds with the information provider's obligation to do so in good faith. The contract is generally an extension of that good faith, making contractual provisions to keep the information provided up to date.

To that end, for example, ‘LVMH is committed to maintaining equitable and loyal relationships with its partners (suppliers, distributors, subcontractors, etc.). LVMH will inform all its commercial partners of its ethical principles and expectations. LVMH asks its suppliers to comply with the principles set out in the Suppliers’ Code of Conduct. This code specifies the demands in the areas of social issues (forced labour, child labour, harassment, discrimination, pay, working time, freedom of unions, and health and safety), environmental and operational issues (legality, custom tariffs, safety, subcontracting and corruption)’ (204).

In addition, the Suppliers’ Code of Conduct drawn up by the same group of companies, after considering the social responsibility it believes to be fundamental and laying down its requirements, makes provisions for methods of control and auditing.

‘Inspection: We reserve the right to check adherence to these principles and to conduct compliance audits at any time without notice. Our suppliers shall supply the necessary information and grant access to “XXX’s” representatives who seek to verify compliance with the requirements of this code. They shall agree to improve and correct any deficiency discovered’.

‘Access to information: The supplier shall keep proper records to prove compliance with this code of conduct. Our suppliers shall provide access to complete, original, and accurate files to our representatives’ (205).

One can therefore understand why the information provided by contractual partners in these questionnaires must be factually correct. The obligation to remain informed is fulfilled by the party proposing the questionnaire. The respondent party’s obligation of good faith in theory provides an exemption from verifying the information provided. The obligation of good faith is a principle in commercial relationships. As a result, if the information provided is false, it should in theory be the sole responsibility of the party who provided it. Their bad faith is characterised simply by the gap between the information passed on and reality.

Other provisions allow for renegotiation if there is a change in technical, technological, environmental, social, political or human circumstances. These provisions resemble what practice refers to as ‘hardship provisions’.

Finally, in business practice and international trade, it is always preferable to secure the loyalty of one’s suppliers and subcontractors. However, if there is a violation of the conditions defining the parties’ agreement regarding the performance of the contract as part of a CSR approach, certain provisions may allow for the termination of the contract.

For example, the LVMH Suppliers’ Code of Conduct provides that only those suppliers who agreed to it may work with that company, and adds:

‘Any breach of conduct or any violation of this code of conduct by our suppliers or their subcontractors will result in a review and possible termination of the business relationship’ (206).

It would appear that, in business practice, a contract signed as an extension of a CSR programme is not, strictly speaking, necessarily sustainable (207). The contract must be terminated if the goal of complying with a shared CSR approach cannot be met. These provisions arise from party autonomy and must be adapted to suit the circumstances. Their existence and adaptation are, on the other hand, the responsibility of the legal representative or the individual to whom the company has given the power to negotiate and/or sign the contract. This may be seen as a resurgence of the ‘general duties’ given to the managers of limited stock companies in the UK.

1.2.2.2. The activity of non-financial rating agencies and Socially Responsible Investment (SRI)

Non-financial rating agencies, like financial rating agencies, have developed a new information market. Their activity consists in developing non-financial analysis, based on methodology and criteria that vary significantly from one agency to another and which are, moreover, adapted in particular to suit a sector or activity or the size of a company.


(206) Ibid.

Within these criteria, one finds sectoral exclusion criteria and positive approaches by field: customers, suppliers and subcontractors, shareholders and corporate governance, employees, employment and working conditions, environment, local community, human rights, etc. "The major agencies provide information on 300 to 500 items covering these areas. Most of the information processed by rating agencies (...) comes from the companies; it is voluntary. In each field, the evaluation may focus on the policies stated, the operational objectives set and their consistency with procedures, the means implemented and results obtained, and the risks taken. The absolute or sectoral evaluation criteria and the weighting given to items are choices that, depending on the agency, define a CSR standard: the priority given to risks or intangible capital in relation to the frames of reference implemented and to the certifications obtained determines two different performances" (208). Globally, EIRIS, Trucost, in the United States Innovest and KLD, Vigeo, Oekom Research, Ethibel, Scoris, EIRIS, Siris, GES Investment, KLD, Avanzi, CAER, Good Bankers, Centre Info, CoreRatings, Ethical Screening, SERM, etc., are some of the main non-financial rating agencies. Around the world, there are countless numbers of these agencies and it appears very difficult for companies to evolve in this emerging market in which competition has not yet carried out any selection.

The rating obtained is partly subjective, since the CSR assessment models may vary from one agency to the next. For example, company performance assessments may be carried out on the basis of criteria that are put together in a variety of ways, taken from the areas of financial reporting, CSR reporting, international standards of public or private origin (Global Company, GRI, ISO 26000, etc.), national standards defined by guidance issued by public agencies (AFNOR SD2 100 guide, AA1000 and SA8000 standards, etc.), dashboards proposed by research laboratories, professional federations or non-financial rating agencies. These various indicators measure the company’s or government’s capacity to consider and abide by its responsibility internally with regard to contractual partners and stakeholders, to meet its obligations and, if required, to agree to pay compensation for damages caused. There is a proven lack of homogeneity as regards interpretation references (209). The problem of commensurability then arises — that is, the process by which the various qualities become a common measure. Companies also frequently call for rating agencies to apply greater homogeneity to the criteria they use. In France, the CSR observatory (ORSE) has seen a proliferation of these multiple tools and has started to understand their limitations in the sense that they generate an abundance of follow-up indicators that do not always allow an understanding of key issues specific to the company’s sector of activity. A bank must deal with different sustainable development issues compared with a company in the field of advertising, retail, energy or tourism. Thus arises the question of developing sectoral frames of reference drawn up by companies and all of their stakeholders (210).

SRI is a form of investment that consists of taking account of environmental, social and governance criteria (also referred to as ESG criteria) in addition to financial criteria (211). SRI therefore requires non-financial criteria to be taken into consideration (such as social, environmental, ethical and moral questions, etc.) by institutional investors (212). As


(212) On this subject see: Manin, F., *Les investisseurs institutionnels*, thesis Paris I, 1996. Contrary to the image generally painted by economists, institutional investors do not constitute a homogenous group on the financial markets. Essentially, a distinction can be made between mutual funds, insurance companies, pension funds and
Professor Pérez has written (213), SRI has tenuous links with corporate governance (214) and one of its Anglo-Saxon corollaries, accountability. These two concepts are important and complement one another in the SRI problem: savers who are concerned about making a responsible investment can only check the legitimacy of their actions if the company directors involved are motivated to conduct themselves in a socially responsible manner (governance requirement) and if they are held accountable (accountability requirement). As regards the increasing intermediation and role of institutional investors, it is proving vital for savers to benefit from relevant information on the type of governance that is guaranteed by the administrators responsible for mutual funds (215). While managers must act in their clients’ interest, they must also respect environmental, social and governance criteria (ESG) — that is, the values that are promoted by the investment fund (216). However, over the past few years this issue of investment fund governance has been the subject of growing concern at both national and international level (217). The debate over investment fund governance is currently being boosted by a questioning of fund managers’ ability to select, control and evaluate companies in which they invest (218).

In order to foster the development of SRI, the UN has also taken the step of establishing the Principles for Responsible Investment (PRI). These PRI were designed for institutional investors, equity managers and liberal service providers. As part of their fiduciary role, these investors have the means to analyse the company’s environmental, social and governance policy (known as ESG criteria). These criteria are thought to have an influence on the performance of investment portfolios (to varying degrees depending on the companies, hedge funds. Martin, R., Casson, P. D., and Nisar, T. H., Investor Engagement: Investors and Management Practice under Shareholder Value, Oxford University Press, 2007, p.38.


(217) In June 2004, the US authorities significantly influenced the debate over investment fund governance following scandals which broke out in the asset management industry. Since then, they have required the presence of independent administrators within the boards of directors of mutual funds in order for the interests of unit-holders to be adequately represented. Evidence that this has become an issue of concern on an international level is that the International Organisation of Securities Commissions (IOSCO) Standing Committee 5 (SC5) on asset management has decided to establish common principles in the area of investment fund governance (OICV, ‘Examination of Governance for Collective Investment Schemes: Independence Criteria, Empowerment Conditions and Functions to be Performed by the Independent Oversight Entities’, Part II, Final Report, Report of the Technical Committee of the International Organization of Securities Commissions, 2007; OICV, ‘Examination of Governance for Collective Investment Schemes’, Part I, Final Report, Report of the Technical Committee of the International Organization of Securities Commissions, 2006). In addition, in July 2009 the Organisation for Economic Cooperation and Development (OECD) published new guidelines on pension fund governance (OECD http://www.oecd.org/document/45/0,3343,en_2649_34853_41088685_1_1_1_37411,00.htm, July 7 2009) and in March 2009, it published draft guidelines on insurer governance to amend the 2005 guidelines (IAIS AND oecd, ‘Issues Paper on Corporate Governance’, 13 March 2009).

sectors, regions, asset classes and time). They are designed "to be compatible with all types of investment made by large institutional investors, broadly diversified, and operate within a traditional fiduciary framework. Any application of the PRI therefore goes beyond a mere range of SRI products offered by investors. However, they incorporate certain approaches which many SRI fund managers and corporate governance managers also take, such as integrating ESG questions into investment analysis and into the practice of property appropriation" (219).

This rating, thanks to the PRI in particular (see below), allows an independent opinion to be formed on the quality of a company’s non-financial performances. This is sold to managers of socially responsible investment funds in order to guide their investments. In practice, ethical funds are still of basic concern. When selecting the securities that make up an investment fund, these funds incorporate criteria linked to companies’ social responsibility. Management firms that offer these products use different methods to set up such type of fund. Negative screening allows the securities of companies in a particular sector whose activities are considered unethical to be excluded from the fund. This eliminatory category of SRI is open and includes activities devoted to weapons and pornography in particular. Positive screening allows the existence and quality of companies’ CSR policies to be taken into consideration. The management firm can commit to using its voting rights in shareholders’ general meetings in order to encourage the adoption of social and environmental policies by companies whose securities it holds. This is known as shareholder activism.

Some agencies, alongside their SRI assessments services, offer a thorough diagnostic service for rated companies. The rating is requested by the company, which asks for a type of audit. As already highlighted, the difficulty then lies in the problem of agency independence. On the one hand, "the non-financial audit is paid for by the company, creating the problem of the agency’s independence; the boundary between diagnosis and advice, albeit stated by agencies, can be somewhat difficult to establish". On the other hand, this allows companies "to develop manipulative practices in order to appear as if they meet the expectations" (220). Finally, the risks of conflicts of interest are not negligible. How can an SRI assessment of a particular company be given legitimately by a rating agency that has audited that same company?

SRI is a vital vehicle for integrating a responsible approach within and by companies. However, generally speaking, there is a need to focus on the importance of whether or not to regulate the practice of non-financial rating. It has been shown that even if CSR continues to show ambiguity in its form and its application, it is nevertheless the reflection of real social movements against the excessive commodification of the economy. RSIs, unlike CSR, are today characterised by the prevalence of market and financial mechanisms over social mechanisms. This balance of power can be particularly explained by the conditions under which the SRI market has emerged, driven primarily by financial players such as management firms and institutional investors. In the financial sphere, however, the dictates of market liquidity always prevail, which is potentially the root of instability and disconnection between the company’s value and its listed value. This instability is more common within the SRI context because these investments are characterised by deep economic and financial uncertainty. Different means should be implemented to lessen this uncertainty and to stabilise and legitimise the way in which this market functions. While it would appear vital to regulate, standardise and produce shared references, it is also necessary to consider action that enables financial and non-financial ways of thinking to be

(219) Global Compact, UNEP Finance Initiative, Principles for responsible investment

(220) Ibid., p.63.
brought closer together. Under such conditions, the concept of SRI could become more similar to that of CSR and therefore synonymous with sustainable development (221).

To that end, at European level the European Sustainable Investment Forum (Eurosif) is dedicated to promoting responsible finance. It has called on the European Commission (222) to adopt measures with a view to increasing the transparency of companies and investment funds. More specifically, Eurosif believes it is necessary for institutional investors to disclose the way in which they take account of social and environmental factors in their investment policy.

Due to the novelty of techniques and businesses specialising in non-financial rating, before expanding the use of non-financial rating in the areas of insurance (some companies, such as Generali, have developed their own methods of non-financial rating), banking and finance in the EU, it would seem sensible to focus on the means of harmonising the criteria used for SRI and on the elements that can guarantee the independence of rating agencies.

As part of its action on sustainable finance, on 14 September 2011 and in collaboration with Numaï Partners, Paris EUROPLACE, which represents French financial markets, organised the first of its Sustainable Development-CSR-SRI workshops, with the theme ‘A Catalyst for Value Creation. Recommendations for the B-20/G20’. These workshops fuelled the recommendations on sustainable finance made to the B20/G20, the main of which are given below:

- Launch a debate on corporate social responsibility within the WTO or a similar organisation;
- Develop common core non-financial criteria with professionals to be imposed on businesses by the regulator;
- Improve the consideration of ESG indicators by investors and financiers (IMF, European Investment Bank);
- Integrate ESG criteria into executives’ remuneration policy;
- Encourage companies with publicly raised capital to compile ESG reports;
- Regulate and monitor the work of non-financial rating agencies;
- Provide the general public with information on SRI culture.

The assessment of the law that applies to CSR may cause some uneasiness. Federal initiatives seem difficult to conclude. Isolated initiatives are highly diversified. Hard law and soft law become confused. However, in view of all the measures that have been considered, the virtuous circle of CSR — as seen through the prism of law — envisages a series of measures and obligations to act, which in many respects, in terms of effectiveness, could seemingly be improved.


Figure 2: Virtuous circle of CSR

Source: JeantetAssociés (Jean-Philippe Dom).
2. RECOMMENDATIONS

The first series borrows from the various points that have already been mentioned briefly, but, in order to be understood correctly, should be presented in order. It is therefore analytical in nature and, starting with the distinction between CSR and CSR law, builds on the main reflections that have been highlighted as regards the way in which CSR law could be designed to be effective.

The second series of measures is forward-looking. It involves considering, beyond the CSR law that is currently under preparation, the way in which companies could, from a legal standpoint but with possible accounting and financial repercussions, find CSR appealing.

Indeed, in order to consider the level of legal effectiveness of a potential CSR law (chapter I), it is necessary to plan, again in the form of recommendations, the possible legal and economic impacts of this law on companies (chapter II).

2.1. DEVELOPING CSR LAW

Developing CSR law requires a distinction to be made between the normative field of CSR and CSR law. As has been briefly considered (see above, No 3), CSR is a normative field controlled by management, whereas CSR law consists of measures designed to advise or oblige enterprises to:

- firstly, anticipate their liability as regards their impact on society;
- secondly, to inform major stakeholders of that liability;
- and, finally, to protect themselves against it.

So as to avoid any confusion, it may be helpful to add that standards which apply to the field of CSR are not necessarily of a legal nature. In order to understand its impact on society, the company defines its values and establishes the means to ensure that they are respected. At the very least, those values should comply with applicable law. The overall result is therefore a combination of technical standards, from the area of management, and legal standards.

CSR law, meanwhile, is made up of exclusively legal obligations. These may come from soft law or hard law.

Within the EU Member States, CSR law mostly results in certain transparency obligations and, sometimes spontaneously (that is, without being brought about by the legislature or any regulation), in companies regulating their own conduct with the support of codes of conduct or charters of sustainable development by sector or in isolation.

However, even if the company has to define its own conduct, disclosing this creates opposability and allows shaping up obligations of minimum due diligence vis-à-vis of third parties. CSR obligations can therefore be imposed on companies through regulations or the latter can create their own; in any event, they are legal both in nature and/or impact.
Methodological recommendation:

In order to envisage a CSR law, this should be distinguished from the normative field of CSR. While the latter may include non-legal standards, CSR law consists of measures which are designed to advise or oblige enterprises to:

- firstly, consider their liability in view of regards their impact on society;
- secondly, inform major stakeholders of that liability;
- and, finally, protect themselves against it.

Based on existing measures, the recommendations — which concern the EU-level initiatives and instruments that are capable of improving legal efficiency in the area of CSR — can be addressed by the EU in the form of regulations, directives, recommendations or opinions, with three categories of final beneficiaries: firstly, the institutions, that is, the EU itself, the Member States, and the NGOs; secondly, socially responsible companies; and thirdly, the market. In other words, the EU may use the recommendations to regulate the institutions (that is, the EU itself, the Member States and the NGOs) (2.1.1), to regulate socially responsible companies (2.1.2) and, thirdly, to regulate the markets (2.1.3).

2.1.1. REGULATION OF INSTITUTIONS

While the EU’s external policies seek to create a context that fosters CSR, they nevertheless remain unclear to economic stakeholders and civil society. Indeed, the EU still seems to be a divided and passive stakeholder on global CSR issues (223).

In that sense, with regard to companies it would be useful to improve the way in which the EU, the Member States and NGOs communicate on this matter.

This need to improve communication suggests that certain initiatives are needed, which may have a legal impact (2.1.1.1). Furthermore, the culture of example suggests that public policies show private companies the way forward (2.1.1.2).

2.1.1.1. Communication in the area of CSR

Interviews with representatives from various companies show that the EU’s CSR policy is sometimes poorly understood.

Without using this type of process to promote a new way of evaluating the EU’s public policies, a search for examples other than those companies, among foundations, associations or diverse organisations (particularly charitable trusts), has led to the question of whether or not the EU itself considers its social, societal or environmental impact.

Documentation on the matter is partly available. Article 4 of the Governance Statement of the European Commission makes provision for an impact assessment. The statement requires the Commission to systematically examine the economic, social and environmental impacts of its proposals.

However, this impact assessment concerns:

- all major policy initiatives and legislative proposals which are on the Commission Legislative and Work Programme (CLWP);
- and some other proposals, which are not featured in the CLWP but which potentially have significant impacts.

It is regrettable that the EU, as a legal entity, does not, beyond examining political initiatives and legislative proposals, seem to have implemented criteria enabling its own CSR approach in the daily functioning of its institutions, bodies, offices and agencies to be monitored.

For the EU as a legal entity, any initiative could also consist of finding the means to supplement the instruments it has available.

**Recommendation 1:**

**Putting aside the assessment of public policies, encourage a CSR report to be drawn up for the EU as a legal entity, noting in particular its environmental and social impacts.**

This report could usefully contain all information, adapting it where appropriate, required from listed companies in France as set out in the Decree of 26 April 2012 implementing Law No 2010-788 of 12 July 2012 (see No 113 and following, above).

**Guarantee transparency in drawing up the relevant criteria.**

**Make the report publicly available.**

Similarly, CSR Europe is the main European business network for CSR with around 71 multinational companies and 33 national partner organisations as members. The organisation was founded in 1995 at Jacques Delors’ initiative. This network then developed to enable companies to exchange best practice on CSR. This brought about a website, [http://www.csreurope.org](http://www.csreurope.org). This website, in both form and substance, has drawn a number of comments particularly from representatives of SMEs that are keen to apply best foreign practice in their field of activity.

As regards the form, comments were made on the exclusive use of English, and on the quality of members, which gave the impression that only multinational corporations, listed companies, and enterprises whose activities were regulated could use the site as a means of communication and exchange.

As regards the substance, some people who were interviewed regretted the fact that, like CSR Germany (see above, No 98), the CSR Europe website does not combine solutions for SMEs with those of large companies.

**Recommendation 2:**

**Promote and where possible support the development of the website csreurope.org in order to make it more accessible to SMEs or, failing that, consider creating an equivalent site for SMEs.**
Corporate Social Responsibility

Of course, CSR Europe contains links between its website and that of its national partners in the Member States.

Those national partners are, by Member State, as follows:

* Austria: respACT – Austrian business council for sustainable development
* Belgium: Business & Society Belgium
* Bulgaria: Global Compact Network Bulgaria Association
* Croatia: Croatian Business Council for Sustainable Development
* Czech Republic: Business Leaders Forum (BLF)
* Czech Republic: Business for Society
* Denmark: VirksomhedsNetværket
* Finland: Finnish Business & Society
* France: IMS – Entreprendre pour la Cité
* France: ORSE (Observatoire sur la Responsabilité Sociétale des Entreprises)
* Germany: Econsense
* Greece: Hellenic Network for Corporate Social Responsibility
* Hungary: KÖVET, Association for Sustainable Economies
* Ireland: Business in the Community Ireland (BITCI)
* Italy: Improanta Etica
* Italy: Sodalitas
* Luxembourg: IMS Luxembourg
* Netherlands: MVO Nederland (CSR Netherlands)
* Norway: CSR Norway
* Poland: Responsible Business Forum
* Portugal: Grace
* Romania: CSR Romania
* Serbia: Business Leaders Forum Serbia
* Scotland: Scottish Business in the Community
* Slovakia: Slovak Business Leaders Forum/Pontis Foundation
* Slovenia: Network for Social Responsibility Slovenia
* Spain: Club de Excelencia en Sostenibilidad
* Spain: Forética
* Sweden: CSR Sweden
* Switzerland: Philias Foundation
* Turkey: CSR Turkey
* Ukraine: Center for CSR Development
* United Kingdom: Business in the Community

However, it seems that the presentation and content of these organisations’ websites are not at all harmonised. The relevant information that SMEs are able to gather is therefore somewhat diversified. National specificities in this area cannot be done away with. On the other hand, in order to avoid any competitive advantage linked to SME location in the area of CSR, a restriction on presentation criteria could potentially be introduced.

**Recommendation 3:**

Promote and, if possible, support the development of the websites of CSR Europe’s national partners so that a minimum level of harmonisation can be achieved.

Communicating, to set an example or to put forward examples, would be the first step towards fulfilling the need for exemplarity that should come from the EU and NGOs. A
second step could involve public policies themselves taking a CSR approach, in order to subject private enterprises to the same approach, through a contagion effect.

2.1.1.2 Public CSR policies of local authorities and public enterprises

In the area of CSR, public policies with regard to public bodies should find expression, following the example of Spanish law, in public enterprises or, in keeping with the trend started by the European Commission itself, in public tenders.

A) Public enterprises and CSR

In its communication entitled ‘A renewed EU strategy 2011–2014 for Corporate Social Responsibility’, the European Commission stated that it was important that ‘public authorities and these other stakeholders should demonstrate social responsibility, including in their relations with enterprises’ and that ‘public authorities have a particular responsibility to promote CSR in enterprises which they own or in which they invest’ (224).

According to John Ruggie, speaking about human rights:

‘In principle, inducing a rights-respecting corporate culture should be easier to achieve in State-owned enterprises (SOEs). Senior management in SOEs is typically appointed by and reports to State entities. Indeed, the State itself may be held responsible under international law for the internationally wrongful acts of its SOEs if they can be considered State organs or are acting on behalf, or under the orders, of the State. Beyond any legal obligations, human rights harm caused by SOEs reflects directly on the State’s reputation, providing it with an incentive in the national interest to exercise greater oversight. Much the same is true of sovereign wealth funds and the human rights impacts of their investments’ (225).

This type of presentation gives strong legitimacy to an extrapolation based on the provisions of Spanish law (see No 103 and following, above).

Indeed, Spanish law makes provision for obliging public enterprises to produce annual reports on sustainable development. In the light of this provision, the report could just as easily be called a CSR report. The data contained in the report is of a descriptive nature. Only the preparation of the sustainable development plans seems to be of a prospective nature.

It is clear that in periods of crisis and when the public authorities of Member States are all seeking to lessen their responsibility, creating new obligations to define, analyse and consolidate information may seem inappropriate. Nevertheless, such measures may also seem useful because they may suggest some mid- to long-term savings, particularly on the basis of impact assessments and the fostering of innovation, in environmental areas among others.

Even so, it would be difficult to limit CSR action to the Spanish criteria alone. For that reason, for public enterprises the normative field of CSR should be specified by the EU, borrowing from the Spanish example in particular but also from current instruments including the Global Compact, the OECD Guidelines for Multinational Enterprises and the GRI criteria.

Although it shows innovation in this field, Spanish law can nevertheless be criticised on certain counts. The extent to which sustainable development reporting complies with


(225) See Protect, Respect and Remedy: a Framework for Business and Human Rights, HRC report, see point 32.
generally accepted standards appears difficult to establish, because the volume of standards is so big. Luxembourg voted against the ISO 26000 standard, and Austria and Germany abstained, which makes it difficult to use this standard as a management reference, particularly for public enterprises. On the other hand, it would seem that the Global Compact, the OECD Guidelines for Multinational Enterprises and the GRI standard could at least be used.

**Recommendation 4:**

4.1 **Promote the adoption of CSR policy by public enterprises in the Member States.**

4.2 **Define the principles of CSR policy for public enterprises in the Member States.**

4.3 **Include a reference to generally accepted standards in these principles, to the Global Compact and the OECD Guidelines for Multinational Enterprises as a minimum requirement.**

4.4 **Encourage public enterprises in the Member States to publish a CSR report on the basis of the Global Reporting Initiative (GRI) each year.**

Furthermore, the way in which Spanish law conceives production processes for goods and services of public enterprises by applying management criteria and an environmental audit also seems judicious. It may appear strange to impose these priorities, particularly in France, where the precautionary principle has constitutional value. However, by guaranteeing that these instruments are enhanced through regulations, the priorities are clearly defined and must be respected.

**Recommendation 5:**

**Encourage public enterprises in the Member States to carry out an environmental audit before designing their production processes for goods and services.**

This type of audit continues in the contractual relations that public enterprises may have with their suppliers, sub-contractors and clients. This is why, as is the case with Spanish law, monitoring the level of greenhouse gas emissions may seem useful, as well as controlling the consumption of raw materials and energies.

**Recommendation 6:**

**Encourage, in contracts between public enterprises in the Member States, the inclusion of clauses relating to:**

– conditions concerning the level of greenhouse gas emissions;
– the description of the means available to maintain or improve environmental protection during the performance of the contract;
– compliance, particularly by suppliers, with CSR principles and practices.

Similarly, optimising and reducing energy consumption by public enterprises in the Member States may come under consideration.
Recommendation 7:
Encourage optimising and reducing energy consumption by public enterprises in the Member States.

Finally, in order for public enterprises and all workers in the public sector to follow this example, it may also be recommended to implement a training system that enables workers to become qualified in and adapt to the culture of sustainable development.

Recommendation 8:
Advise implementing a training system that enables workers of the Member States' public sector to become qualified in and adapt to the culture of sustainable development.

Should this approach be extended to export credit agencies? In human rights terms, John Ruggie’s proposal suggests that it would be useful. ‘Now consider an example from the home State side. It concerns export credit agencies (ECAs), which finance or guarantee exports and investments in regions and sectors that may be too risky for the private sector alone. ECAs may be State agencies or privatized, but all are mandated by the State and perform a public function. Despite this State nexus, however, relatively few ECAs explicitly consider human rights at any stage of their involvement; indeed, in informal discussions, a number indicate they might require specific authority from their government overseers to do so.

‘On policy grounds alone, a strong case can be made that ECAs, representing not only commercial interests but also the broader public interest, should require clients to perform adequate due diligence on their potential human rights impacts. This would enable ECAs to flag up where serious human rights concerns would require greater oversight — and possibly indicate where State support should not proceed or continue.

‘Closer alignment between a State’s ECA and its official development agency is also desirable. A development agency may view the arrival of an ECA-supported private investment in a particular region of a country as reason to focus its own efforts elsewhere. But if the investment has a large physical and social footprint, the chances are that it will generate pressures that local authorities may need help in managing — and which the home country development agency might be able to provide’ (226).

In France, although Coface has refocused its activity on credit insurance, it has established a transparency charter in which it promises to freely inform companies of their scores and any potential changes, and give them any new information it might have.

As part of public procedures management for the French Government, Coface systematically assesses the impact on the environment and local populations of projects in environmentally sensitive areas or those with a budget greater than EUR 10 million. The guarantees are only effective on the condition that both host country standards and international standards are met (227).


(227) http://www.coface.fr/.
This kind of example could be promoted.

**Recommendation 9:**

Encourage export credit or equivalent agencies in Member States to assess the impact on the environment and local populations of projects in environmentally sensitive areas or projects with a budget greater than EUR 10 million.

Encourage the implementation of financing and/or guarantees under the conditionality that both host country standards and adapted international standards are complied with.

**B) Public markets and CSR**

The principles relating to public procurement law should enable a selection on the basis of CSR. The EU seems to drift somewhat on this issue. Although EU law, Directives 2004/17/EC and 2004/18/EC (see No 44 and following, above), leaves very little room for taking CSR criteria into account in the awarding of public contracts, changes have been proposed by the Commission.

In a Green Paper on the modernisation of EU public procurement policy (‘Towards a more efficient European Procurement Market’), a communication was issued on 27 January 2011 stating that ‘in the current EU public procurement legal framework the link with the subject-matter of the contract is a fundamental condition that has to be taken into account when introducing into the public procurement any considerations that relate to other policies. This is true throughout the successive stages of the procurement process and for different aspects (technical specifications, selection criteria, award criteria). In the case of contract execution clauses, what is required is that there should be a link with the performance of the tasks necessary for the production/provision of the goods/services being tendered. Relaxation of this requirement might enable public authorities to go further in pursuing Europe 2020 policy objectives through public procurement. Among others, it would allow contracting authorities to influence the behaviour of undertakings regardless of the product or service purchased, e.g. in order to encourage more environmental responsibility or greater attention to corporate social responsibility. This could be a powerful instrument in support of Europe 2020 policy objectives.’ (228)

The same communication continues by stating: ‘However, when considering such a possibility, the trade-offs with other policy considerations must be carefully assessed. The link with the subject-matter of the contract ensures that the purchase itself remains central to the process in which taxpayers’ money is used. This is an important guarantee to ensure that contracting authorities obtain the best possible offer with efficient use of public monies. As explained above, this objective is also highlighted in the Europe 2020 strategy, which stresses that public procurement policy must ensure the most efficient use of public funds. At the same time, this guarantee of purchases at the best price ensures a measure of consistency between EU public procurement policy and the rules in the field of State aid, as it makes sure that no undue economic advantage is conferred on economic operators through the award of public contracts. Loosening the link with the subject-matter of the contract might therefore entail a risk of distancing the application of EU public procurement rules from that of the State aid rules, and may eventually run counter to the objective of more convergence between State aid rules and public procurement rules’ (229).

(228) COM(2011)15, see p. 84.

(229) Ibid. p. 84.
3 Shortly afterwards, in the Communication ‘A renewed EU strategy 2011–14 for Corporate Social Responsibility’, of 27 October 2011, ‘the Commission set an indicative target that by 2010 50 % of all public procurement in the EU should comply with agreed environmental criteria. In 2011 the Commission published a guide on Socially Responsible Public Procurement (SRPP), explaining how to integrate social considerations into public procurement while respecting the existing EU legal framework. SRPP can include positive action by public authorities to help under-represented businesses, such as SMEs, to gain access to the public procurement market.

‘Member States and public authorities at all levels are invited to make full use of all possibilities offered by the current legal framework for public procurement. The integration of environmental and social criteria into public procurement must be done in particular in a way that does not discriminate against SMEs, and abides by Treaty provisions on non-discrimination, equality of treatment and transparency’ (230).

The Commission guide entitled ‘Buying Social: a guide to taking account of social considerations in public procurement’ mentioned in this communication only focuses on the social dimension in the strictest sense, in other words the dimension that is inherent to workers’ rights, and the examples given remain in line with the case law of the European Court of Justice (see No 44 above).

However, the Commission expressed its intention to ‘facilitate the better integration of social and environmental considerations into public procurement as part of the 2011 review of the Public Procurement Directives, without introducing additional administrative burdens for contracting authorities or enterprises, and without undermining the principle of awarding contracts to the most economically advantageous tender’ (231).

This solution, however, was not accepted. On 20 December 2011, the Commission put forward a proposal for a Directive on public procurement and another on procurement for entities operating in the water, energy, transport and postal services sectors.

In the explanatory memorandum of each of these two Directives, it specifies that ‘Contracting authorities may refer to all factors directly linked to the production process in the technical specifications and in the award criteria, as long as they refer to aspects of the production process which are closely related to the specific production or provision of the good or service purchased. This excludes requirements not related to the process of producing the products, works or services covered by the procurement, such as general corporate social responsibility requirements covering the whole operation of the contractor.’ (232)

This position is a step back from the introduction of CSR policy criteria as a means of selecting public procurement contractors. This is probably the reason why the Spanish legislature limited itself to a measure that required public enterprises to foster respect among their suppliers of CSR principles and practices, particularly with regard to promoting women’s integration, gender equality and the full integration of people with disabilities. No 104 and following, above).

Keeping in mind all the terms of the debate and the importance of economic issues, a recommendation could be put forward which, in the same terms as Communication


(231) Ibid.

(2011)681, considers the selection criteria for contractors on an ancillary basis and based on
genral CSR requirements.

**Recommendation 10:**

As part of the 2012 review of Public Procurement Directives, facilitate the better integration of social and environmental considerations into public procurement, without introducing additional administrative burdens for contracting authorities or enterprises, and without undermining the principle of awarding contracts to the most economically advantageous tender. Adapting the constraints to the size of the contracts and thus the enterprises concerned is clearly necessary.

### 2.1.2. REGULATION OF SOCIALLY RESPONSIBLE ENTERPRISES

The initiatives aimed at responsible enterprises relate to three areas. They do not target the same people. Indeed, the company's values can only be embodied by company managers and senior executives who represent its entities or components. These leaders’ conduct (2.1.2.1) is therefore vital for initiating a CSR policy. Next, it is necessary to reach a consensus as regards the best way of monitoring, to focus on the transparency of the results (2.1.2.2), and, finally, to discuss the possible legal consequences in terms of liability (2.1.2.3).

#### 2.1.2.1. Conduct

Managers’ conduct seems to have been most narrowly defined by UK law. The obligation to implement various means of guaranteeing a company’s success is part of its obligations under Article 72 of the Companies Act (see No 117, above).

This Article emphasises the need for conduct based on good faith on the part of directors. However, that is not the only thing specified in the text. In countries with a Romano-Germanic legal tradition, one finds, particularly in case law, a definition of directors’ obligation to conduct themselves in good faith. However, the legal content of this obligation does not appear to be as detailed as the provisions made by the ‘general duties’ of English law.

It is remarkable that in the Companies Act the list of obligations establishing the director’s conduct in good faith should be so extensive and precise, while remaining open. Certainly, Anglo-American law links these directors’ general obligations to other obligations known as ‘due diligence’. This notion started in North-American case law, under which managers and boards of directors have an obligation to carry out fiduciary duties to their shareholders, the company and society, in other words, all of the stakeholders. This obligation of trust (managing for others) is supplemented by the notion of ‘business judgment’, which represents the moderate margin of appreciation given to leaders so as to allow them to represent the interests of conducting business efficiently, provided that they act in good faith (*bona fide*). These company leaders could therefore be held responsible for violating the trust obligation that holds them accountable for the capital and rights of shareholders and other stakeholders.

Although the Anglo-Saxon term has certainly appeared recently, the principle it covers dates back to the very origins of cross-border trade: ‘The concept of due diligence has been with us from the very beginning of transactions between strangers (...). This practical advice forms part of the general process by which reasonable business people inform themselves about the transaction they are contemplating so they may satisfy themselves, their
superiors, their shareholders, or their principals that the transaction is what it appears to be. The Americans may have come up with a catchy name in ‘due diligence’, but (…) they did not invent the concept(233). The process linked to due diligence is part of the business decision-making process (234).

General duties therefore lead to an obligation to act. Based on an analysis of EU law, these obligations of diligence and vigilance include the obligation to remain informed, to inform others, to be held accountable, and to select the company’s partners on the basis of the information received. These obligations have a bearing on all of the impacts a company might have on society.

English law specifies (Companies Act 2006, Article 172), inter alia, that the director must, when carrying out his duties, take into consideration:

- the likely consequences of any decision in the long term;
- the interests of the company’s employees;
- the need to foster the company’s business relationships with suppliers, customers and others;
- the impact of the company’s operations on the community and the environment;
- the desirability of the company maintaining a reputation for high standards of business conduct; and
- the need to act fairly as between members of the company.

It does seem possible to bring together the various elements of directors’ obligation of diligence.

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Recommendation 11:

11.1 As part of the obligation of due diligence for company directors, call for reference to be made in the law of limited stock companies in Member States to 'best effort' obligations that are more specific than a reference to the obligation to act in good faith.

11.2 Consider that, with regard to the impacts the enterprise may have on society, company directors have an obligation to remain informed, to inform others, to be held accountable, and to select the company’s partners on the basis of the information received.

11.3 Consider that, in order to perform their duties, all company directors should, as a minimum, take account of:

- the likely consequences of any decision in the long term;
- the interests of the company’s employees;
- the need to foster the company’s business relationships with suppliers, customers and others;
- the impact of the company’s operations on the community and the environment;
- the desirability of the company maintaining a reputation for high standards of business conduct; and
- the need to act fairly as between members of the company.

2.1.2.2. Transparency

Transparency brings virtue. To provide an anecdote, the new city of Richelieu in France, built in 1631 by Jacques Lemercier, had a street named rue de la vertu obligée (street of obliged virtue). This street was named by the inhabitants, because it had 24 private hotels facing each other, and they were in such close proximity that each could see what was happening in the house opposite (235).

Furthermore, without returning to the root of the matter (236), a distinction should be made between information and transparency. The information leaders that have about the company’s operations is vital for managing its social affairs. If there is no information available, no decision can be made. The director is left in the dark. Information must therefore be allowed to circulate within the company. Transparency is not about control but rather about spreading information. However, the virtues of systemic transparency have been put into perspective. Indeed, an eminent doctrine based on comparative analyses considered that "the transparency obligation, whatever moral virtues of sincerity and contractual justice it may have, cannot be somehow detrimental to the economy" (237).

This is probably the reason why, in the EU, legal solutions to the transparency of environmental, social and societal information on the company’s activity are nuanced and swing between being nonexistent, presuming a company will simply volunteer, to overblown

(235) See, under the direction of Morisset, L. K. and de Breton, M.-E., La ville phénomène de représentation, Presses de l'Université du Québec, 2011, p. 238.


regulations, as is the case particularly in Denmark, Spain, France and, to a certain extent, the UK.

When it comes to transparency, two issues arise. Which entities should be bound by transparency? To what should minimum transparency in CSR terms apply?

A) Ratione personae

Ratione personae: it is important to consider which person has a transparency obligation and to whom it is intended.

a) Who owes the transparency obligation?

To provide a reminder, the Sustainable Development Code establishes a transparency standard for the sustainable management of companies. It can be freely implemented by companies of different sizes.

In Denmark, the obligation to provide information lies with large enterprises. These are companies in accounting category C, listed companies and those that are publicly owned. Accounting category C includes those companies that exceed at least two of the following three thresholds: (i) total assets and liabilities of DKK 143 million; (ii) net revenue of DKK 286 million; (iii) an average of 250 full-time employees.

In Spain, the obligation to provide information on CSR concerns companies of more than 1000 employees.

In France, social and environmental reporting is mandatory for listed companies and limited stock companies and unlisted partnerships limited by shares, with total minimum assets or turnover of EUR 100 million and an average of at least 500 permanent employees during the financial year.

In the UK, only the boards of directors of listed companies are required to supplement their annual report with environmental, social and societal information.

Under such conditions, except by convincing Member States whose companies carry out CSR reporting on a voluntary basis, it would be difficult to retain the principle of an obligation to report annually on CSR conditions in a general meeting.

Nevertheless, it should be pointed out that, according to the practices of Member State companies, they may comply with the Global Compact, EMAS, the OECD Guidelines for Multinational Enterprises, and even adopt the ISO 26000 standard and the GRI criteria. However, in Germany in particular there seems to be an understanding that listed companies and all the larger SMEs are certain to comply with these standards. Under these conditions, there would be a chance to impose CSR transparency by applying it to listed companies as a minimum and, potentially (this theory will be put aside for the purposes of this study, given the impossibility of establishing criteria that are sufficiently relevant and unifying from an economic standpoint) to large companies unless they already refer to or comply with the instruments listed above.

In addition, audited companies could also be exempt from reporting requirements, which would bring the Danish, French and British systems closer together.

On that basis, it could be considered, in line with authors such as Professor Michel Capron, that it would be possible to recommend transposing an obligation to carry out CSR reporting.
To that end, it is considered that item 1(b) of Article 46 of Directive 78/660/EEC would need to be rewritten as follows.

‘To the extent necessary for an understanding of the company’s development, performance or position, the analysis shall include both financial and, where appropriate, non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters.’

The same principle would be applied to Directive 83/349/EEC on consolidated accounts (amending Article 36, §1, para. 2).

This would shift the situation from a proposal to produce a non-financial report to an obligation to carry out reporting.

The introductory statement of this Directive explains, however, why such a solution was not adopted.

The Directive ‘is consistent also with Commission Recommendation 2001/453/EC of 30 May 2001 on the recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies. However, taking into account the evolving nature of this area of financial reporting and having regard to the potential burden placed on undertakings below certain sizes, Member States should be able to waive the obligation to provide non-financial information in the case of the annual report of such undertakings’ (introductory recital, point 9).

In that sense, limiting the obligation to listed companies would enable all of the projected targets to be met.
Recommendation 12:

Propose redrafting Article 46 of Directive 78/660/EEC in the following way:

‘1. a) The annual report shall include at least a fair review of the development of the company’s business, performance and position, together with a description of the principal risks and uncertainties that it faces.

The review shall be a balanced and comprehensive analysis of the development of the company’s business, performance and position, consistent with the size and complexity of the business;

b) To the extent necessary for an understanding of the development of the company’s business, performance and position, the analysis shall include both financial and, where appropriate, non-financial key performance indicators relevant to the company’s particular activity, including information on environmental and employee matters;

c) In companies where securities are admitted on a financial market, analysis shall include both financial and non-financial key performance indicators relevant to the company’s particular activity, including information on environmental, social and societal matters.

Subsidiaries or companies which are controlled by a company whose securities are admitted on a financial market are not required to publish information on environmental, social and societal matters:

• if the parent company meets the requirements for presenting the CSR report for all the companies it controls;
• or when the parent company prepares a report describing its progress in this area as part of its endorsement of the UN Global Compact or as part of its adherence to the UN Principles for Responsible Investment. In its management report, the company must then specify that it is making use of this exemption.

d) In providing its analysis, the management report shall, where appropriate, include references to and additional explanations of amounts reported in the annual accounts’.

b) The beneficiaries of transparency

Information on the social responsibility of listed companies and, therefore, leaders’ obligations and management method, should be disclosed.

This is sensitive information on the company’s method of protecting itself against risks related to its activity. It would provide a useful addition to the information disclosed in accordance with provisions in the corporate governance codes, by applying the ‘implement or explain’ principle. It would also enable investors to specify their investment criteria.

Furthermore, in the light of the CSR virtuous circle, there is another reason why it would be useful to disclose this information. Indeed, stakeholders could then refer to it and ensure that it is consistent with statements issued and, if appropriate, resume a dialogue with the company regarding any points that could be improved.

However, Article 47.1 of Directive 78/660/EEC establishes:
‘1. The annual accounts, duly approved, and the annual report, together with the opinion submitted by the person responsible for auditing the accounts, shall be published as laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC.

The laws of a Member State may, however, permit the annual report not to be published as stipulated above. In that case, it shall be made available to the public at the company’s registered office in the Member State concerned. It must be possible to obtain a copy of all or part of any such report upon request. The price of such a copy must not exceed its administrative cost.’

According to this text, the information shall be supplied to the public by the company, unless the Member State has stipulated that the report is only available to the public upon request. On environmental matters, Article 4.1 of the Commission Recommendation of 30 May 2001 on the recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies nevertheless paves the way for different practices. Following points 1 and 2 of its explanatory memorandum, this ‘recommendation recognises that there has been a gradual development of separate environmental reports, particularly by companies that operate in sectors with significant environmental impacts. (…) However, this recommendation recognises that different groups of stakeholders have different information needs or rank them differently. Separate environmental reports satisfy the information needs of stakeholder groups that are only partially met by the information provided in the annual accounts and annual reports of enterprises. Therefore, the aim should be to make separate environmental reports and the annual accounts and annual reports more consistent, cohesive and closely associated’. Its purpose is therefore ‘to promote this aim by ensuring that environmental disclosures are incorporated in the annual accounts and annual reports in a way that complements the more detailed and wide-ranging separate environmental reports. Appropriate disclosures are considered a key factor that facilitates transparency of information. Disclosures are appropriate where they affect the user’s understanding of the financial statements.’ That is why the recommendation ‘aims at providing comprehensive guidance in the area of disclosure, and identifies relevant disclosures that allow for comparability and consistency of the environmental information presented. (…)’

Transparency and CSR principles stand out in this text. However, it is merely a recommendation, with no direct regulatory force.

Even if France has established a system aimed at certifying non-financial information, Member States’ practices are too disparate within the EU to propose textual amendments involving mandatory and systematic publishing of CSR reporting. However, this possibility should be analysed, particularly by specialists in non-financial auditing.

On this matter, apart from completely reviewing the EU’s approach to the publishing of management reports, no particular recommendation has been made.

B) Ratione materiae

Ratione materiae, the question of the content of CSR reports, is complex to say the least. It requires establishing the normative field for CSR. However, as has already been pointed out, that normative field relates to management rather than law.

Companies are calling for the harmonisation and division of the frames of reference. Several solutions have been put forward.

By way of reminder, without reviewing the detailed content of the regulation adopted by the Member States (see above), the proposed legal content ranges from the Sustainable Development Code to be applied on a voluntary basis (Germany) to the detailed
requirements of French and Danish regulations, by way of the due diligence obligations of the directors of English limited stock companies.

The views expressed by companies whose representatives were questioned were equally mixed.

- Some are somehow cynical, believing it would be easier to have a legal framework because ‘then the boxes would be even easier to tick’.
- Others see the reference to the Global Compact (or to ISO 26000, the OECD Guidelines for Multinational Enterprises, etc.) coupled with the GRI and even the PRI framework as the ideal solution. Some would use combined frames of reference.
- Others believe the analysis grid needs to be defined and, where applicable, supplemented by the company itself, with stakeholders contributing on any points that may require it.

For its part, ‘the Commission is also developing a policy to encourage companies to measure and benchmark their environmental performance using a common life-cycle based methodology that could also be used for disclosure purposes’ (238).

Until this common methodology is developed, generally speaking, it would seem desirable not to disconnect enterprises in EU Member States from the internationally recognised benchmarks. For this reason, these enterprises should at least be able to make use of these benchmarks.

The bare minimum appears to be the Global Compact and its corollaries, namely the standards based on the PRI and the GRI since the CSR data and the manner of organising and presenting that data are closely related.

For social concerns, the OECD Guidelines for Multinational Enterprises and, for environmental concerns, the EMAS principles can be usefully added to this basic set of standards. Finally, ISO 26000 appears to allow the collection of all the management data required for CSR.

A convergence of these management tools is certainly necessary from a practical point of view. But does the law have to address these issues? This seems hard to imagine without compromising businesses’ freedom of management. However, a balance must be found between absolute freedom of management and protection of the general interest. It has been noted that UK law addresses this legal framework for management by specifying the general duties expected of directors and the information on the execution of those duties that should be published (see above).

Consequently, bearing in mind that German enterprises have an approach to CSR that is presented as exemplary (see above) and that the other Member States studied (Denmark, Spain and France) all provide for CSR reporting in varying degrees of detail, shouldn't it be the case, that the Global Compact and the GRI framework be recommended for defining the minimum reporting basis?

Enterprises would then adapt to and complete this basic reporting obligations according to their activities, possibly using a sectoral approach.

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(238) COM(2011)681, point 4.5.
Recommendation 13:

Advise companies in EU Member States whose shares are issued on the financial markets to use the GRI framework for organising the collection and presentation of information on CSR.

Advise companies in EU Member States whose shares are issued on the financial markets to comply with the Global Compact, and with the OECD and EMAS guidelines.

Advise companies in EU Member States whose shares are issued on the financial markets to consider a sectoral adaptation of the current benchmarks (particularly ISO 26000, GRI).

Advise companies in EU Member States whose shares are issued on the financial markets to define their own analysis grid based on existing international benchmarks and, where applicable, benchmarks established using a sectoral approach, consulting with stakeholders where appropriate.

By extension, it could be considered that adopting or following these recommendations falls under the general obligation of due diligence for directors. Thus, there would be a link to be made between the company’s performance in terms of CSR and an evaluation — for example by the committees of the Board of Directors — of the conditions of growth and director’s remuneration.

2.1.2.3. Responsibility

Due to the flexible nature of the notion of responsibility, the case law of various Member States shows that a business that declares itself to be ‘responsible’ and organises itself accordingly must take account of its responsibility and that of its directors in the CSR policies that it adopts and the acts that result from those policies.

However, it has been pointed out that the term ‘responsibility’, which essentially concerns moral responsibility, needs to be distinguished from the corresponding term ‘liability’, which relates more to legal responsibility (239).

By defining, in terms of management, appropriate behaviours for enriching legal concepts such as that of the ‘reasonable person’ or of ‘due diligence’ by adapting them to managers’ duties or to the governance system of a company or group, it is inevitable that civil liability will be drawn into the debate. Obligations of due diligence, vigilance and ‘best effort’, the obligation to do something, even the obligation not to do something, must be dealt with in any event.

It is probably on this topic that the distinction between CSR normative framework and CSR law becomes most interesting. In the CSR normative framework, there are various texts that provide for the extra-territorial responsibility of the legal representative, company or group concerned. The example of Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims has been given (See No 51 above). In terms of combating corruption, the recent Bribery Act can be used as an example for the United Kingdom. In terms of environmental

responsibility, Article 224 of the Grenelle II Law can also be highlighted. In terms of human
rights, with regard to the extraterritoriality of the parent company's responsibility
concerning the activity of its subsidiaries and holdings abroad, ‘experts disagree on whether
international law requires home States to help prevent human rights abuses abroad by
corporations based within their territory. There is greater consensus that those States are
not prohibited from doing so where a recognized basis of jurisdiction exists, and the actions
of the home State meet an overall reasonableness test, which includes non-intervention in
the internal affairs of other States. Indeed, there is increasing encouragement at the
international level, including from the treaty bodies, for home States to take regulatory
action to prevent abuse by their companies in other countries’ (240).

Consideration should thus be given to reinforcing texts included within CSR normative
framework so as to bring groups of companies within reach and to provide, on a case-by-
case basis, their specific responsibilities. In the same way, extra-territorial requirements
could also be provided by national legislation, by the EU (241) or by treaty law (242) to
achieve the same goal. These measures that modify elements of the scope of CSR normative
framework are one thing. However, it is quite another to consider by a strange shortcut, that
CSR law should be an instrument of responsibility.

On the one hand, CSR law includes obligations of action for the directors of the company, or
for the companies of the group (particularly with regard to the consolidation of CSR
information for compiling a CSR report) and, on the other hand, it includes obligations of
means for the companies, which must have adequate governance instruments that allow
them to predict and define as clearly as possible what effects their activity might have on
society.

When transparency relating to CSR reporting has not been complied with in the most
comprehensive legal systems that provide for certification and compliance tests, this will
lead to consequences apparently removed from the notion of responsibility. A deficiency
report could be drawn up and additional information could be demanded from companies
and their directors. In countries with less detailed regulations on these issues, shareholders
or stakeholders will raise legitimate concerns. The former may submit written questions at
shareholders’ meetings, while the latter may request meetings with the directors in order to
renew the dialogue.

As things stand, CSR law does not provide for any direct sanctions against directors,
companies or the group. Indeed, it would be strange if it did so. By extending the scope of
their responsibilities in terms of management, how could these directors be more liable than
those who have not done the same? (243).

However, it should be considered that companies without an adequate governance system
are at risk, along with their directors. ‘Best effort’ obligations have not been complied with.
Due diligence has not been shown. The risk that was not properly predicted will generate
negative effects and, in this event, questions relating to liability will be raised. Is the

(240) See Protect, Respect and Remedy: a Framework for Business and Human Rights, HRC report, point 19 and
quoted references. See also Ascensio, H., ‘Le pacte mondial et l'apparition d'une responsabilité internationale des

(241) Reich, R., ‘La leçon finale de BP: tous les coups sont permis – Il faut contraindre les pétroliers à agir

(242) V., de Schutter, O., ‘La responsabilité des Etats dans le contrôle des sociétés transnationales: vers une
convention internationale sur la lutte contre les atteintes aux droits de l’homme commises par les sociétés
transnationales’, in Responsabilité sociale de l’entreprise et globalisation de l'économie, loc. cit. p. 706 et seq.

(243) During the interviews, this image was painted, ‘A swimmer does not become responsible by realising that he
has swum from the swimming pool to the ocean’.
damage not the result of non-compliance with the 'best effort' obligations that would have allowed this risk to be foreseen? In French law, if the link of causality can be established, liability or shared liability is therefore conceivable. By going further, some States have started to use the notion of 'corporate culture' in order to establish the criminal liability of corporations (244). They examine the company’s policies, rules and business practices to determine criminal liability and penalties rather than basing liability on the individual acts of employees or directors. These principles may be used during the liability investigation stage or at the time of sentencing, or their application may be left to the discretion of the public prosecutor (245)(246).

It is therefore important to understand the close links between the governance system and CSR policy. In this area, more than any other, prevention is better than cure and this can only be achieved by implementing a governance system that is proportionate to the risks taken. Paying attention to CSR does not mean giving up an illusionary immunity by revealing one’s weaknesses. It should instead lead to the development of a governance system that is appropriate to the ecosystem in which the enterprise operates, in order to adapt its obligations of means to the risks taken and to avoid any instances of preventable non-compliance (247).

Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) goes even further with regard to the importance of this adequacy of the governance system in relation to the risk involved. It provides for a financial assessment of the governance systems of insurance undertakings. If these systems are not adapted (application of the proportionality principle) to different risk criteria, the company’s capital must be increased. This means that there is a close correlation between the mapping of the risks taken by the business —insurance undertakings appear to provide the best example in this matter — and the governance system best suited to managing these risks (Directive 2009/138/EC, Article 36 end of paragraph 1, and Article 37). With the financialisation of the link between exposure to risk and the assessment of governance systems, this Directive probably heralds a move from an extra-financial assessment to a financial assessment of the responsible undertaking (see below).

**Recommendation 14:**

**Advise companies and groups of companies in EU Member States to adopt a governance system adapted to the risks involved in the foreseeable effects, in terms of CSR, of their activity.**

### 2.1.3. REGULATION OF CSR MARKETS

The extra-financial information market is an unregulated market. It allows the supply of products to a regulated market, the SRI market. The security of this market is highly dependent on the security of the information market. For this reason, measures affecting


(245) For examples of the former, see section 12.3 of Australia’s Criminal Code Act 1995 (Cth) and Article 102 of the Swiss Penal Code. For an example of the latter, see chapter 8 of the United States Federal Sentencing Guidelines Manual: (2006) §8C2.5(b)(1).


the pre-investment period might be envisaged. To avoid creating a financial bubble in the SRI market, measures affecting the period after investment must also be provided.

2.1.3.1. The information market

The information market is essentially led by extra-financial rating agencies. These agencies have multiplied over the last few years. There were around 200 of them in 2005. Caution is needed when faced with such a boom in a non-regulated area that is capable of affecting the commercial reputation of enterprises and influencing the SRI market. In this respect, their existence raises the question of their legitimacy (A) while their activity raises the question of their independence (B).

A) Legitimacy of extra-financial rating agencies

In terms of safety, the question has been posed directly concerning the certifiers and auditors. Who certifies the certifiers? Who audits the auditors? If we consider the expansion of assessment and rating in the area of business management (particularly for management systems), it is quite clear that the requirements and the assessment processes have been effectively communicated and are therefore well-known. However, upstream of these processes, there are lesser-known systems that constitute the very basis of the assessment process leading to certification according to a normative framework (248).

The ISO/CEI 17021:2006 standard sets out the requirements for bodies carrying out the auditing and certification of management systems. This certification is based on six principles.

The principle of impartiality requires the certification bodies to be impartial and to be perceived as such (249). This means that payments other than for certification or assessment costs are open to suspicion.

The principle of competence applies both to the competence of the auditors and to the processes defined by the certification body that allow it to select, train and officially approve the auditors and to choose the technical experts consulted during the certification process. This principle also involves the implementation of the ISO 19011:2002 standard which sets out guidelines for auditing quality and/or environmental management systems.

The principle of responsibility imposes an 'best efforts' obligation on the certification body, with the client remaining responsible for ensuring compliance with the certification requirements.

The principle of transparency ensures that relevant and up-to-date information relating to the audit and certification process is made available to the public by the certification body. Transparency is provided mainly via the internet - on this point it would seem that certain shortcomings have been observed (250).

The principle of confidentiality applies to the client’s activities and not those of the certification body.


The principle of complaint handling is set out in Article 4.7 of ISO 17021. According to this standard ‘parties that rely on certification expect to have complaints investigated and, if these are found to be valid, should have confidence that the complaints will be appropriately addressed and that a reasonable effort will be made to resolve the complaints’.

Based on these systems, tools are implemented to maintain impartiality within the organisation and its management in order to justify the suitability of the resources and procedures for the needs of the company and to have adequate corporate governance.

This standard also requires that the certification bodies for management systems carry out this certification competently and in a coherent and impartial manner. If this standard could be applied in a generalised way to extra-financial rating agencies with independent certification, the ratings and certificates issued all over the world should have very similar values and thus provide comparable assurance for all parties (251). The issue of evaluating the assessors cannot be avoided, as it is closely linked to the crucial issue of confidence in the assessment system itself (252).

**Recommendation 15:**

**15.1 Provide information within the EU and beyond on the existence of ISO/CEI 17021:2006 and its importance.**

**15.2 Encourage extra-financial rating agencies to obtain this certification from a specialist and independent certification body.**

**15.3 Encourage EU enterprises to verify the ISO/CEI 17021:2006 certification of the agency before any extra-financial rating or certification takes place.**

**B) Independence of extra-financial rating agencies**

A fair extra-financial rating by specialist agencies presupposes their complete independence. This independence appears to be guaranteed by ISO 17021. Nevertheless, given current practices, it would appear to be useful to ensure that advisory services are not provided as part of the rating work. In fact, by analogy with audit firms, rating agencies should prohibit any services which could put them in the position of having to give their opinion on any documents, assessments or opinions to whose formulation they may have contributed to (253).

Similarly, conflicts of personal interest and of institutional independence should be provided for and limited. For example, the same person should not be able to take part, without legal safeguards, in the management, administration or supervision of a rating agency or of a rated undertaking or an undertaking directly or indirectly using the proposed rating. The same applies to market integrity.

(251) Ibid, p.185.


Recommendation 16:

Advise extra-financial rating agencies operating within the EU (i) to have documentation and procedures allowing them to avoid conflicts of interest, either direct or through a third party, and to prove at any time that they are not in such a situation; and, where appropriate (ii) to avoid issuing a rating where, despite these efforts, the situation of conflict could not be avoided.

It is likely that the activity of rating agencies and certification bodies will one day have to be regulated in the same way as it was done for auditors by Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts.

2.1.2.3. The SRI market

The SRI market is one of the ways of providing the connection between non-financial and financial considerations.

It is thus one of the best ways to promote a responsible business. To this end, various improvements have been suggested by Paris-Europlace, which represents French financial markets, to make this market more fluid, more liquid and more reliable.

With reference to the previous developments that explain the existence of this market (see above) these proposals should also be examined by the EU which could promote it.

Recommendation 17:

Support and promote the main Paris-Europlace proposals in relation to SRI and particularly the following:

- Launch a debate on corporate social responsibility within the WTO or a similar organisation;
- Develop common core extra-financial criteria with professionals to be imposed on enterprises by the regulator;
- Strengthen the consideration of ESG indicators by investors and financiers (IMF, European Investment Bank);
- Integrate ESG criteria into director remuneration policy;
- Encourage companies with publicly raised capital to compile ESG reports;
- Regulate and monitor the work of extra-financial rating agencies;
- Provide the general public with information on SRI culture.

Following the example of French legislation, the EU could adopt measures with a view to increasing the transparency of companies and investment funds in SRI. In this respect, a
first step could be taken by obliging institutional investors to make public the way they take account of social and environmental factors in their investment policy.

**Recommendation 18:**

**Invite, encourage or oblige institutional investors to:**

- state, in their annual report and in documents intended to provide information to their subscribers, the methods used to take account of criteria relating to compliance with social, environmental and quality of governance objectives in their investment policies;
- specify the nature of these criteria and the way in which they are applied in accordance with a standard presentation to be defined;
- indicate how they exercise voting rights attached to the financial instruments resulting from these choices.

These initiatives envisaged in turn for institutions, enterprises and the markets would require a great deal of further discussion. Nevertheless, with regard to identifying initiatives and instruments at EU level, which might improve legal efficiency in the area of corporate social responsibility, these initiatives can help in sketching the first outlines of a CSR law which, if applied, would make it possible to consolidate the foundations of what could become a responsible enterprise law — a notion that it seems preferable to replace with that of a sustainable enterprise law.

### 2.2. TOWARDS A ‘SUSTAINABLE ENTERPRISE’ LAW

The move from a CSR law to a sustainable enterprise law may seem particularly audacious. How might such a law make an enterprise sustainable?

From an economic point of view, the limits of this reasoning are clear. Even if an accounting analysis and evaluation were to support this approach (254), it is not the law that makes a business successful, it is the economic ability of that business to attract, keep and expand its clientele.

From a legal point of view however, it is perfectly possible to create certain links between CSR law and a prospective analysis of what would characterise a sustainable enterprise. From this point to considering that jurists and the law could contribute to the performance of the enterprise is clearly quite a step. Nevertheless, this step can be taken and is worth taking (255). Ultimately, if it is a question of restructuring the business, instead of management power being based on the company’s articles of association it could be considered that a director’s authority is legitimised by his ability to lead effective collective action (256). It would thus be possible to identify who steers the business and stimulates the

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markets towards a more sustainable perspective (257). This kind of call for the business means that the business, led by responsible governance, takes on the challenge of sustainable development (258).

To understand what makes a sustainable business attractive, we must first define what, in legal terms, gives it a certain substance. By analogy with the classical definition of sustainable development, a sustainable business might be considered to be one that meets current needs without compromising the ability of future generations to meet their own needs. In other words, a responsible business is one that is managed in a responsible manner, in the light of a CSR policy and values supported by an adequate governance system.

Such a business might be understood legally as having an additional intangible value. To the extent that the business can secure its customer base over a longer term, all the elements that contribute to its sustainability could be incorporated into its goodwill. By supporting long-term ethical values, CSR policy and the governance system could also characterise an economic value of the business. Fundamentally, is it not this additional value that gives large family businesses, mutual societies and cooperatives their special qualities? These companies, which have proven more resistant to the crisis due to their values being in a flexible governance system, are sustainable enterprises.

By laying the foundations for a discussion that will need to be expanded in many respects, drafting a sustainable enterprise law should at least enable these businesses to be differentiated from other businesses.

Through its governance, the business has a value vector which CSR law can protect and maintain over the long term (Section I).

Through its ability to prevent risk, it also has an economic value which is framed over the same long term (Section II).

### 2.2.1. DEFENDING THE VALUES OF THE SUSTAINABLE ENTERPRISE THROUGH ITS GOVERNANCE

A fashion led need to communicate, means of identification, competitive reality or an effective foundation for governance? Values are declared on the websites of listed companies in EU Member States, in the documents of regulated entities and even within mutual societies and cooperatives.

Do the values of the business help it to prevent risks? Where the company is owned by one person, its values are those of the trader, the craftsman, the self-employed professional or the farmer. These values, which are necessarily individualised, are psychological or moral in nature. So, can a company or indeed a group of companies promote and defend such values? CSR law suggests that it can.

Developing corporate values is often seen as a project which brings together all shareholders, directors and employees. These people who sometimes include stakeholders have to share the same vision of the business. Now, predicting the future of the company means anticipating the risks inherent in its existence and its activities. But what are these


risks and how can values protect against them? This question, which appears to be neglected by the law, seems nevertheless to be one of the keys to corporate governance. In answering it, it is no longer a matter of who runs the business, but in what direction and how the business will be managed to anticipate risks. The values of the business thus constitute the very reason for its existence. The primary function of the business is certainly its economic activity. However, this activity cannot be conducted just anyhow, carelessly without taking account of the risks involved. The values of the business govern the actions of its directors, its employees and even its sub-contractors. Economic activity itself depends on these values, since without them a business constantly runs a reputational risk.

Taking account of the risks, the values of the business provide legitimacy and a purpose for its corporate governance (259). They are its very backbone (2.2.1.1). However, these values should not be ossified or set in stone since they may prove inappropriate in the event of any change in the risks (2.2.1.2).

2.2.1.1. Corporate governance and institutionalisation

The risks considered fall broadly into four categories.

The first category involves industrial and environmental risks (260). To deal with these types of risks, companies develop an assessment grid, sometimes on a long-term basis, in the interests of sustainable development, seeking to prevent and warn against the risks involved (261). The business thus seeks to be responsible, which constitutes a primary value. To this end, occasionally through dedicated industrial management, it defines and complies with its own obligations of means to show that everything has been done to prevent the occurrence of the projected risk. This is a way of limiting risk and, where appropriate, mitigating the liability of the actors (see No 176 et seq. above).

The second category of risks is social risk. Social risk may involve issues relating to the fight against slavery, child labour, or discrimination and to the promotion of equal pay for men and women. These risks mainly arise, generally at international level, from sub-contractors and suppliers. However, the business must also protect itself internally. The business must thus show integrity towards its employees as well as its main contracting parties. There are several legal instruments that can be used to declare this value (262) and ensure that it is complied with internally, such as the ethical alert system or, with regard to contracting parties, by requesting that they make a declaration of compliance with this value of integrity and by including clauses in contracts to ensure the effectiveness of this declaration (263).

The value of integrity, strongly characterised by loyalty and honesty, can also be found in relation to ethical risk. For many companies, this risk includes compliance with standards on anti-corruption, anti-money laundering, anti-terrorist financing and those that guarantee free competition. Some businesses define what they understand to fall within the scope of ethical behaviour (264). These definitions may also be defined in more detail in a group's

(259) See in this respect, Bergery, L., (dir.) Le management par les valeurs, Lavoisier, 2011.

(260) The most notable cases in France were, the AZF factory explosion in Toulouse and, internationally, apart from the nuclear accidents in Tchernobyl, Russia and Fukushima in Japan, the sinking of the British Petroleum’s Deepwater Horizon platform.

(261) For the origins of the distinction of these concepts, see Kourilsky P. and Viney G., Le principe de précaution, Rapport au Premier ministre, Editions Odile Jacob 2000, p. 18.

(262) For example, see the UN Global Compact.

(263) Anticipatory breach clause, cancellation clauses, standstill clause pending compliance, etc...

(264) For example, see the GDF-Suez website: Under the heading 'Ethics and Compliance’ it is stated that ‘ethics can be defined as a practical application of morally acceptable — or value-based — practices in a given situation’.
Code of Ethics, the implementation of which — generally entrusted to a compliance officer — may be set out in a guide to ‘ethical practices,’ for example. \(^{(265)}\). Behavioural obligations will thus result from the business’s concepts of ethics and may be imposed on employees as well as directors or intermediaries acting on behalf of the company.

The fourth and final risk category is economic risk. This can lead to the loss of customer confidence, the loss of customers and ultimately the loss of the business. This risk, which is an overall risk, may arise from the occurrence of the preceding risks. It may also be circumstantial. The value that protects against this risk is compliance. This may involve compliance of products with the market or compliance of activities with standards. In both cases, the internal audit services ensure compliance.

A business must therefore be compliant, loyal, honest and responsible. These values are necessarily integrated in the interest of the group and, associated with a management agreement, they provide due diligence and good faith for the whole group by going beyond the legal personality of the companies of the group: an ideal form of entrepreneurial justice and a foundation for corporate governance. Thus, the business becomes institutionalised. According to Hauriou, an institution is ‘an idea of a work or enterprise that is realised and endures juridically in a social milieu; for the realisation of this idea, a power is organised that equips it with organs; moreover, among the members of the social group interested in the realisation of the idea, manifestations of communion occur, which are directed by the organs of the power and regulated by procedures’ \(^{(266)}\). In other words, the enterprise has a mission of its own and, supported by its governance, seeks to be sustainable.

However, in order to be capable of taking their place in space and time, the company’s values must be adaptable to changes in risks.

### 2.2.1.2 Governance and the longevity of the company

In the same way that conflicts of values may exist on an international level \(^{(267)}\), risks may change from one State to another. This is true to the extent that some enterprises, particularly public enterprises or listed companies, consider that, from an ethical point of view, there is such a thing as country risk. Consequently, these companies refuse to do business in certain Member States. Then there are other companies such as Total, which declares having adopted ‘core values’ \(^{(268)}\) with a transnational role.

Compliance refers to the set of systems put into practice in order to conform to the required standard of ethical behaviour. In other words, ethics and compliance are two sides of the same reality, a reality that applies to all GDF-Suez employees. This therefore needs to be communicated to them through a specific structure and existing frames of reference. The group’s principles on ethics and compliance are thus relevant to employees and group entities which are third-party and stakeholder guarantors. There are four principles: 1. ‘To act in accordance with laws and regulations (...) international, federal, national and local laws and the professional codes of practice applicable to their activities’. 2. ‘To establish a culture of integrity (...) avoiding any conflict between personal interests and the Group’s interests’ and combating corruption. 3. ‘To behave fairly and honestly’ for employees to ‘fulfil their undertakings and engagements scrupulously’ and communicate ‘in good faith and in a constructive spirit, with a concern for providing genuine, accurate and complete information’. 4. ‘To respect others’, which involves respect for the rights of individuals, different cultures and tangible and intangible goods.


\(^{(265)}\) Ibid.


\(^{(268)}\) Ibid.
Closer to the ground, corporate governance can help in adapting these rigid concepts of risk assessment in different legal environments by promoting the principle of subsidiarity. Thus, to take account of specific cultural factors (269), the values established at the head of the group can be reflected in the drawing-up of guidelines, with best practices then being established for each country and for each of the company’s activities.

2.2.2. ENHANCING THE VALUE OF THE SUSTAINABLE ENTERPRISE THROUGH ITS GOVERNANCE

ESG criteria provide for an extra-financial assessment of an enterprise. Indirectly, SRI allows a financial value to be protected. Can this be taken any further? On the face of it, accounting law appears impervious to any enhancement of the value of the sustainable enterprise. However, some possibilities for such enhancement could open up. The intangible capital of a business has been presented as a challenge for accountants and managers (270); but this challenge does not appear to be insurmountable.

Firstly, IFRS 3, as an extension of IAS 22, recommends that intangible assets should be recognised separately from goodwill (271). However, the question of identifying which elements of human capital, share capital and green capital are to be considered as intangible assets will still need to be tackled (IAS 38.9 and IAS 38.12). Intangible assets can still be recognised if it is probable that the future economic benefits attributable to the asset will flow to the entity and the price of the asset can be measured reliably (IAS 38.21). As things stand, apart from some very specific cases (e.g. the carbon market), intangible assets are difficult to identify, perhaps due to their subjective nature. For the reliability and fairness of the accounts, elements that could not be recognised in the accounts must be included in the annexes.

Furthermore, until such time as the intangible capital of a sustainable enterprise can be recognised in accounting terms, it remains possible to consider this capital from the point of view of assessment.

In this respect, assessment professionals have shown that institutional governance (namely the monitoring of intangibles for the Administrative Board) combined with functional governance (the role of indicating intangible value for management) will enable companies to convince the markets of the potential sustainable value of intangible assets, whatever temporary fluctuations there may be (272). This is further evidence, if further evidence is needed, to support the fact that by extending and fully substantiating CSR policy, corporate governance can characterise a sustainable enterprise.

**Recommendation 19:**

Advise companies and groups of companies in EU Member States to adopt a corporate governance system which allows them to link defending company values through CSR policy and sustained economic value.

(269) For example, child labour in India and the ILO’s tolerance.


CONCLUSION

In conclusion, by enabling enterprises to generate economic value through the ethical values they promote, legal efficiency can be fully improved in the field of CSR. Quality and competitiveness may come together if economic value is created.

The transition of a CSR concept to a CSR law could help to identify what distinguishes, in legal terms, an enterprise without ethical values from a sustainable enterprise. A sustainable enterprise has intangible property, a sustainable business fund with its own economic value.

Despite all this, EU law has not yet addressed the issue of an advent of a CSR law. Directives have raised the issue of the due diligence obligations of directors on an ad hoc basis, mainly in relation to environmental and social matters. In its most recent Communications, the Commission has suggested that the transition to a CSR law will take place soon. However, actual measures have not yet been taken.

This delay could be an advantage, as the international experiences, particularly that of the UN, and the national experiences of the Member States could provide solutions. The EU could draw on these experiences to obligen the Member States, through Regulations or Directives, to regulate the actions of institutions, responsible enterprises and the markets in relation to CSR.

This delay could also be a disadvantage as it may lead to very different legal policies on CSR law being implemented in the Member States. It could prove difficult for the EU, in the near future, to reconcile German and British opinions based on self-regulation and voluntary reporting and Danish and French ideas, which are a lot more rigid and coercive.

Moreover, by considering the recognition of the special features of a sustainable enterprise’s economic value, hard law and soft law could be brought together to make the legal system for CSR more effective.

This system, based on our proposed recommendations, involves, first of all, defining obligations of due diligence for company directors to convey company values on environmental, social and societal matters. These obligations of due diligence are then supported by corporate governance and the enterprise’s governance system in the branches and subsidiaries located anywhere in the world. Sectoral codes, pre-contract questionnaires and contract documents will also help to guarantee the integrity of contracting parties, suppliers or sub-contractors. Extra-financial information obtained from the business's activity, its CSR policy and governance can be rated by agencies which must be perfectly legitimate and independent. Rating criteria must be harmonised in the best possible way. Thus, socially responsible investment may thrive from an economic and legal safety perspective without running the risk of creating a financial bubble.

Under these conditions, Socially Responsible Investment could be used to enhance the value of a sustainable enterprise. This value would be further enhanced if accounting and assessment techniques were adapted accordingly.

In terms of competitiveness, a sustainable enterprise would have a legitimate advantage in many respects. Firstly, it could be favoured in public tendering procedures with CSR criteria usefully adding to financial criteria. Secondly, when an enterprise meets all “best effort” obligations enabling it to predict the negative effects of the business on society, its liability should be mitigated compared to enterprises which do not have the same means. Finally, on an international level, the sustainable enterprise which respects the opinion of stakeholders should be favoured, particularly in the awarding of public contracts and international funding.
Doesn't the advent of CSR law provide also the instruments for defending a specific EU economic model, where social protection and economic growth could find a balance?

Supported by the EU, the advent of CSR law and the recognition of an enterprise aiming to be sustainable should also make links with other, technical, areas apart from law. This could provide accounting and economic and financial analysis with a fertile ground for the reported (273) and expected (274) change in paradigm.


SUMMARY OF RECOMMENDATIONS

Methodological recommendation:

In order to envisage a CSR law, this should be distinguished from the scope of CSR. While the latter may include non-legal standards, CSR law consists of measures which are designed to advise or oblige enterprises to:

- consider their liability in view of their impacts on society;
- inform major stakeholders of this liability
- and, finally, to protect themselves against this liability.

Recommendation 1:

Putting aside the assessment of public policies, encourage a CSR report to be drawn up for the EU as a legal entity, noting in particular its environmental and social impacts. This report could usefully contain all information, adapting it where appropriate, required from listed companies in France as set out in the Decree of 26 April 2012 implementing Law No 2010-788 of 12 July 2012 (see No 113 and following above).

Guarantee transparency in drawing up the relevant criteria.
Make the report publicly available.

Recommendation 2:

Promote and, where possible, support the development of the website csreurope.org in order to make it more accessible to SMEs or, failing that, consider creating an equivalent site for SMEs.

Recommendation 3:

Promote and, if possible, support the development of the websites of CSR Europe's national partners, so that a minimum level of harmonisation can be achieved.

Recommendation 4:

4.1 Promote the adoption of CSR policy by public enterprises in the Member States.
4.2 Define the principles of CSR policy for public enterprises in the Member States.
4.3 Include a reference to generally accepted standards in these principles, to the Global Compact and the OECD Guidelines for Multinational Enterprises as a minimum requirement.
4.4 Encourage public enterprises in the Member States to publish a CSR report on the basis of the Global Reporting Initiative (GRI) each year.
**Recommendation 5:**

Encourage public enterprises in the Member States to carry out an environmental audit before designing their production processes for goods and services.

**Recommendation 6:**

Encourage, in contracts between public enterprises in the Member States, the inclusion of clauses relating to:

*conditions concerning the level of greenhouse gas emissions;*

*the description of the means available to maintain or improve environmental protection during the performance of the contract;*

*compliance, particularly by suppliers, with CSR principles and practices.*

**Recommendation 7:**

Encourage optimising and reducing energy consumption by public enterprises in the Member States.

**Recommendation 8:**

Advise implementing a training system that enables workers of the Member States' public sector in to become qualified in and adapt to the culture of sustainable development.

**Recommendation 9:**

Encourage export credit or equivalent agencies in Member States to assess the impact on the environment and local populations of projects in environmentally sensitive areas or projects with a budget greater than EUR 10 million.

Encourage the implementation of financing and/or guarantees under the conditionality that both host country standards and adapted international standards are complied with.

**Recommendation 10:**

As part of the 2012 review of Public Procurement Directives, facilitate the better integration of social and environmental considerations into public procurement, without introducing additional administrative burdens for contracting authorities or enterprises, and without undermining the principle of awarding contracts to the most economically advantageous tender. Adapting the constraints to the size of the contracts and thus the enterprises concerned is clearly necessary.
Recommendation 11:

11.1 As part of the obligation of due diligence for company directors, call for reference to be made in the law of limited stock companies in Member States to ‘best effort’ obligations that are more specific than a reference to the obligation to act in good faith.

11.2 Consider that with regard to the impacts the enterprise may have on society, company directors have an obligation to remain informed, to inform others, to be held accountable, and to select the company’s partners on the basis of the information received.

11.3 Consider that in order to perform their duties, all company directors should, as a minimum, take account of:

*the likely consequences of any decision in the long term;
*the interests of the company’s employees;
*the need to foster the company’s business relationships with suppliers, customers and others;
*the impact of the company’s operations on the community and the environment;
*the desirability of the company maintaining a reputation for high standards of business conduct; and
*the need to act fairly as between members of the company

Recommendation 12:

Propose redrafting Article 46 of Directive 78/660/EEC in the following way:

‘1. a) The annual report shall include at least a fair review of the development of the company’s business, performance and position, together with a description of the principal risks and uncertainties that it faces.

The review shall be a balanced and comprehensive analysis of the development of the company’s business, performance and position, consistent with the size and complexity of the business;

b) To the extent necessary for an understanding of the development of the company’s business, performance and position, the analysis shall include both financial and, where appropriate, non-financial key performance indicators relevant to the company’s particular activity, including information on environmental and employee matters;

c) In companies where securities are admitted on a financial market, analysis shall include both financial and non-financial key performance indicators relevant to the company’s particular activity, including information on environmental, social and societal matters. Subsidiaries or companies which are controlled by a company whose securities are admitted on a financial market are not required to publish information on environmental, social and societal matters:

*if the parent company meets the requirements for presenting the CSR report for all the companies it controls

*or when the parent company prepares a report describing its progress in this area as part of its endorsement of the UN Global Compact or as part of its adherence to the UN Principles for Responsible Investment. In its management report, the company must then specify that it is making use of this exemption.

d) In providing its analysis, the management report shall, where appropriate, include references to and additional explanations of amounts reported in the annual accounts’.
**Recommendation 13:**

Advise companies in EU Member States whose shares are issued on the financial markets to use the GRI framework for organising the collection and presentation of information on CSR.

Advise companies in EU Member States whose shares are issued on the financial markets to comply with the Global Compact, and with the OECD and EMAS guidelines.

Advise companies in EU Member States whose shares are issued on the financial markets to consider a sectoral adaptation of the current benchmarks (particularly ISO 26000, GRI).

Advise companies in EU Member States whose shares are issued on the financial markets to define their own analysis grid based on existing international benchmarks and, where applicable, benchmarks established using a sectoral approach by consulting with stakeholders where appropriate.

**Recommendation 14:**

Advise companies and groups of companies in EU Member States to adopt a governance system adapted to the risks involved in the foreseeable effects, in terms of CSR, of their activity.

**Recommendation 15:**

15.1 Provide information within the EU and beyond on the existence of ISO/CEI 17021:2006 and its importance

15.2 Encourage extra-financial rating agencies to obtain this certification from a specialist and independent certification body.

15.3 Encourage EU enterprises to verify the ISO/CEI 17021:2006 certification of the agency before any extra-financial rating or certification takes place.

**Recommendation 16:**

Advise extra-financial rating agencies operating within the EU (i) to have documentation and procedures allowing them to avoid conflicts of interest, either direct or through a third party, and to prove at any time that they are not in such a situation; and, where appropriate (ii) to avoid issuing a rating where, despite these efforts, the situation of conflict could not be avoided.
**Recommendation 17:**

Support and promote the main proposals of Paris-Europlace in relation to SRI and particularly the following:

- Launch a debate on corporate social responsibility within the WTO or a similar organisation;
- Develop common core extra-financial criteria with professionals to be imposed on enterprises by the regulator;
- Strengthen the consideration of ESG indicators by investors and financiers (IMF, European Investment Bank);
- Integrate ESG criteria into director remuneration policy;
- Encourage companies with publicly raised capital to compile ESG reports;
- Regulate and monitor the work of extra-financial rating agencies;
- Provide the general public with information on SRI culture.

**Recommendation 18:**

Invite, encourage or oblige institutional investors to:

- State, in their annual report and in documents intended to provide information to their subscribers, the methods used to take account of criteria relating to compliance with social, environmental and quality of governance objectives in their investment policies;
- Specify the nature of these criteria and the way in which they are applied in accordance with a standard presentation to be defined;
- Indicate how they exercise voting rights attached to the financial instruments resulting from these choices.

**Recommendation 19:**

Advise companies and groups of companies in EU Member States to adopt a corporate governance system which allows them to link defending company values through CSR policy and sustained economic value.
REFERENCES

Publications, theses, contribution papers


Gomez, P.-Y., du gouvernement des entreprises, éd. de Boeck 2009


Habermas, J., L’espace public, Paris, Payot, 1978


Le Goff, J.-P., Le mythe de l’entreprise, La Découverte/Essais 1995


Mazuyer, E., Regards croisés sur le phénomène de la responsabilité sociale de l’entreprise, under the direction of CERIC / La documentation française 2010.


Vreillis, S., Conflit ou coordination de valeurs en droit international privé, Académie de droit international, Recueil des cours, T. 328, 2007


Articles, reports and contributions to anthologies or omnibus editions


Muka Tshibende, L.-D., Queinnec, Y., Tchotchourian, Y., ‘Articles 224 and s. de la loi Grenelle II: Vers un droit de la gouvernance d’entreprise (enfin?) responsable’, Revue internationale et de dr. comparé 2012, p. 97


Vrellis, S., ‘Conflit ou coordination de valeurs en droit international privé, Académie de droit international’, Collected Courses, T. 328, 2007, p. 175 et seq..


Most frequently cited EU Communications

COM(2001)366

COM(2001)566

COM(2002)347
COM(2008)419
COM(2010)477
COM(2010)608
COM(2010)614
COM(2010)682
COM(2010)758
COM(2011)206
COM(2011)681
COM(2011)895
COM(2011)896
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275 Only companies who agree to disclose their name are included in this list. The interviews covered a wide range of companies (listed companies, non-listed companies, companies whose activities are regulated (banking, insurance), etc.
ANNEX

Annex: 1 : Questionnaires to foreign correspondents\textsuperscript{276}

\textsuperscript{276} This annex can be obtained upon request from the Department C: Citizens' Rights and Constitutional Affairs of the European Parliament (poldep-citizens@europarl.europa.eu).
Role

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