10 The European corporate social responsibility strategy

A pole of excellence?

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Introduction

The European Union (EU) is strengthening its corporate social responsibility (CSR) strategy in the framework of Europe's contribution to the social dimension of globalization. This chapter analyses the origins and development of the EU's approach within the context of the international discourse on corporate responsibility in relation to human rights and the environment. It focuses on the international dimension of the Union's CSR strategy, considering some of the measures undertaken in recent years and options for the development of tools to make European companies accountable for their activities abroad. It considers, in particular, the impact that such development and the choices made by the EU when designing its strategy may have on its achievement of the wider goal of becoming a pole of excellence for CSR.

Legal accountability and corporate social responsibility

Interest in the regulation of the activities of corporations, in particular multinational enterprises, is not new (Ratner 2001). These attempts have been reviewed in the context of globalization, and attention to the impact of their activities and working methods as regards human rights and protection of the environment today constitutes part of the search for the definition and development of a 'social dimension of globalization'.

The issue of business and social responsibility has begun to be considered as part of the social discourse on the negative dynamics of globalization during the last two decades. International scrutiny of companies' activities and the way they exercised power led to the uncovering of certain practices that were inconsistent with human rights, in some cases, and in clear violation of such rights, in others. High-profile examples range from the use of child labour and forced labour conditions in the textile industry in South-East Asia to complicity with human rights violations, such as torture, forced disappearance and extrajudicial killings, in mining, in places such as Myanmar or Nigeria.[1] A strong civil society movement developed around the premise that the economic discourse cannot remain separate from the concepts of respect, protection and the promotion of

human rights (Sabapathy 2005: 242). The debate on how to make corporations accountable under this premise grew quickly, securing a place in international institutional agendas.

Social demand for accountability mechanisms has developed in parallel with a corporate reassessment of their social role and duties as corporate citizens. In this process, the development of legal structures and mechanisms has advanced at a much slower pace and has encountered much more opposition than social and corporate developments. In a way, the array of initiatives now under the umbrella of so-called corporate social responsibility has proliferated as a response to, or even a substitute for, unsatisfactory or non-existent legal liability in this area, at both national and international level (Dine 2005: 222–25).

At the international level, international law has not yet provided a functioning framework for the protection of human rights, as regards the direct action or involvement of corporations. International law norms are mainly addressed to states, which have the capacity to accept and comply with obligations. Corporations, like other non-state actors, cannot legally assume international human rights obligations as they lack international legal personality. Therefore, these norms cannot be enforced directly against them before any international jurisdictional body.

At the national level, the very designs of company laws and structures have contributed to the lack of legal accountability for certain corporate actions. The fact that, under company law, shareholders and companies are separate entities, and the lack of direct liability on the part of parent companies for the actions of their subsidiaries or suppliers (see generally Muchlinski 2007; Eroglu 2008), demonstrates the obstacles in the way of accountability of corporations involved in human rights abuses.

As a consequence of this difficulty in establishing the legal accountability of enterprises, because of these complexities in national and international law, a robust body of initiatives has developed to ensure responsibility that is, at the least, moral: this is 'corporate social responsibility'.[2] CSR expresses a commitment towards society that goes beyond a respect for human rights, from traditional corporate governance elements, such as information disclosure and fair market practices, to include contributions to sustainability. Therefore, strictly speaking, CSR is not the same as corporate accountability for human rights and environmental wrongdoing. CSR stands for the cluster of activities – from codes of conduct, social and environmental reporting, labelling and certification schemes and partnerships to social investment indexes – from different origins, but assumed voluntarily by corporate actors in order to respond to a moral social demand without compromising liability.

On account of corporations' lack of direct liability, the broader CSR scheme has been considered as a tool to prevent breaches of human rights (McBarnet and Kurkchiyan 2007: 59). However, so far, CSR has been considered, inherently, as a commitment to go beyond legal obligations. It also includes a wider variety of actors or 'stakeholders' engaged in the business relationship: the state, the enterprise, the consumer and worker, and the wider social community. In this sense,

CSR presents itself as being flexible enough to cover different sorts of enterprises, stakeholders, activities and relationships in the widest possible framework (McBarnet 2007: 11); and it contributes to better social performance, although doubts are raised about its benefits as a human rights accountability mechanism (Conley and Williams 2005; McLeay 2006: 233–36).

International approaches to CSR: the binding versus voluntary debate

During the 1990s and the beginning of the twenty-first century, CSR initiatives proliferated at an increasing rate, coming from very different organizations with different social and political agendas. This led to important disparities when defining the concept and fundamental elements of CSR, as well as a wide range of terminology. In many instances, terms that encapsulate different concepts are being used as synonyms, such as corporate responsibility, corporate accountability, corporate citizenship and corporate sustainability (Morgera 2004; Conley and Williams 2005: 1), each of which could 'mean anything to anyone' (Addo 1999: 13).

In this context, the relationship between international and national legal developments and CSR is both complicated and dynamic. Until recently, the main focus here has been on the tension between voluntary versus binding approaches towards companies' responsibilities. Such tension confronts those in favour of the self-limitation of corporate behaviour in order to comply with socially demanded responsibility and those who believe that, as 'organs of society' (Henkin 1999; Weissbrodt and Krugger 2003, 2005), corporations have a legal responsibility towards human rights and call for legally binding standards with enforceable consequences for non-compliance.

Advocates of voluntary self-regulation of business activities in relation to human rights and the environment claim that, as a voluntary-based approach, CSR has an important role to play in creating a culture of values and compliance with already existing standards (McBarnet 2007: 47–50). The very existence of voluntary initiatives has been used to oppose efforts to develop legally binding instruments in this area and, on occasion, to attack normative initiatives on the basis that they discourage the responsible conduct of business that would avoid assuming any commitment that may lead to legal accountability (International Chamber of Commerce and International Organisation of Employers 2003). Discourses opposing legal developments have been based on rhetorical arguments that they would lead to a cutback in the responsibilities that companies currently take voluntarily (ibid.), and that the concept of corporate responsibility remains vague and has not proved sufficiently coherent to be legislated for (Sabapathy 2005: 252).

Emphasis on the separation between legal regulation and CSR, and its preference over a voluntary approach, has mainly come from business entities and organizations (Zerk 2006: 30), which have lobbied strongly for them at both national and international level, as well as within the EU, and influenced the definition of corporate responsibility in such terms.

The opposing argument is based on concern over the development of a concept of corporate responsibility based on self-regulation, in which companies themselves decide the content and scope of their obligations by defining their standards, implementation, monitoring and sanctioning systems (McBarnet 2007: 28), resulting in important impediments to accountability (Shamir 2004). In the main, these self-designed initiatives, which are generally ambiguous in their content and definition of the scope of obligations, settle for the minimum standards, ignoring those internationally agreed standards that define human rights (De Schutter 2005: 308; Martin-Ortega and Wallace 2005; Martin-Ortega 2006).

Non-governmental organizations (NGOs) have generally aligned themselves with this side of the debate, being wary of the growth of voluntary-based instruments and advocating legally binding standards (International Council for Human Rights Policy 2002; Amnesty International 2004), and even preparing the ground for their development (Bennett and Burley 2005: 372; Sullivan 2005: 286).

This binding versus voluntary dichotomy has also impacted on the development or review of international initiatives at the intergovernmental level. Generally, governments of capital-exporting states have being reluctant to take steps that could harm international competitiveness (Zerk 2006: 7), avoiding normative burdens over nationally based businesses. Equally, capital-importing countries have avoided creating obstacles to foreign direct investment by removing corporate obligations in their territory (Sabapathy 2005: 239).

At an intergovernmental level, the main instruments establishing those standards directly addressed to companies are the Organization for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises (1976, reviewed 2000) and the International Labour Organization Tripartite Declaration on Multinational Enterprises and Social Policy (1977, reviewed 2000). They are voluntary by nature and represent a soft law approach to business responsibilities, having become the most authoritative instruments in terms of the definition of labour standards for companies in international law (Clapham and Martignoni 2006: 296).

At the United Nations (UN) level, the paramount tool is the UN Global Compact, launched by the Secretary General in 1999 as an invitation for business to endorse UN goals. It comprises ten principles on human rights, labour rights, the environment and anti-corruption, which businesses commit to incorporating into their practices. It is conceived of as a *learning network* (Ruggie 2001) rather than as a legally binding instrument (ibid., 371); it does not try to impose obligations on corporations or to evaluate the particular actions of companies (Global Compact Office 2003).

Initiatives have also been taken to provide a binding legal framework on human rights for corporations. The most ambitious attempt – the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights of the Sub-commission on the Promotion and Protection of Human Rights (2003) – proposed an innovative approach in international law applying standards directly addressed to companies in an attempt to impose internationally binding human rights norms on business (Weissbrodt and Krugger 2003, 2005; Wallace and Martin-Ortega 2004). This initiative is now considered to have failed

(Gelfand 2006; Kinley *et al.* 2007), even by the UN Secretary-General Special Representative on the Issue of Transnational Corporations and Other Business Enterprises (2006: paras 59–60).

Finally, it is worth mentioning how some hybrid initiatives promoted by certain states are proving particularly successful and opening up interesting avenues for co-operation in the prevention of human rights abuses in specific areas. Examples include the Kimberley Process for certification of rough diamonds and the Voluntary Principles on Security and Human Rights.

Beyond the dichotomy

There is now a consensus that corporations bear certain social responsibility so, as Zerk (2006: 299) stated, the question now is *how* corporations should be made responsible rather than *why*. However, the discourse and creation of instruments of social responsibility for companies in the opposing terms of binding versus voluntary have simply contributed to a fragmented set of norms and mechanisms that does not provide an adequate framework for the prevention and sanction of corporate abuses of human rights.

In order to overcome this stagnating dichotomy, it becomes necessary to look beyond binding norms and voluntary options as closed categories, and to consider the potential for interaction. In this sense, a 'third way' for CSR regulation has been suggested (MacLeod 2007: 676–77). This third way, or simply an effective framework, should be based on a combination of legal obligations and voluntary contributions from business.

Therefore, both approaches – the promotion of corporate awareness and the development of normative frameworks – should be complementary as they fulfil different functions. First, the legally based instruments establish the framework for company behaviour and define the practices to be considered as abuses of human rights and the environment. Next, voluntary commitments enable companies to assume obligations that would enhance their position as corporate citizens and benefit the wider community. Both sets of standards fulfil a business function of social responsibility as part of the social dimension of globalization: on the one hand, the prevention and sanction of business participation in human rights abuses and, on the other hand, the development of the positive role that businesses can play in the promotion and protection of human rights.

In this sense, the regulation of those business activities that might impact on the enjoyment of human rights requires this combination of hard law, soft law and voluntary contribution by all the stakeholders involved. Hard law is necessary to provide the minimum standards, compliance with which is not an option. Soft law creates a framework that provides platforms on which to advance the issues and mechanisms that make voluntary adhesion to them more attractive. And finally, voluntary initiatives allow their participants to distinguish themselves in terms of market performance. They impact on the development of soft law instruments by demanding further frameworks for action and on hard law by contributing to the creation of a common consensus over the applicable law.

There are minimal common hard law standards that should serve as a starting point: states have an internationally legally binding obligation to respect, promote and protect human rights, including protecting individuals from third-party intrusions into their rights, which also covers corporate actors (Clapham 2006; UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises 2007). The fulfilment of state obligations to offer protection from the violation of human rights in which corporate actors participate implies a duty to create the necessary mechanisms of guarantee and sanction. In this respect, within the EU framework, it is not only EU member states that are bound by such international legal obligations, but the Union itself is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law (Article 6.1, EU Treaty), and has assumed an obligation to respect fundamental rights as general principles of Community law (Article 6.2). Therefore, the EU not only represents the right forum in which to develop an adequate framework for corporate responsibility, but should also show a commitment to fully uphold human rights in this sphere.

De Schutter (2006: 2) argued that the question today is how to ensure consistency between the different initiatives to improve corporations' human rights accountability, and whether the time is ripe for a more ambitious development. A question that can be asked of the EU is whether it has the capacity do provide such a framework that can ensure consistency in the development of business responsibilities, and whether it is time for it to lead more ambitious steps in this respect.

The European framework of corporate social responsibility

The legal order of the European Community offers a number of possibilities that are hard to envisage within the circumstance of other multilateral organizations in order to define the private sector's responsibilities for social issues, including human rights and the protection of the environment. Unique legal instruments can bind both natural and legal persons, including states and corporations, creating rights directly enforceable before the national courts of EU member states (Clapham and Martignoni 2006: 296). However, these advantages have not proved to be of major benefit as the binding versus voluntary tension has informed, and so far eclipsed, the debate and the development of the EU strategy, making it difficult to advance into the definition of specific standards and implementation mechanisms within the European framework.

The EU has developed its approach by defining its own strategy on CSR, independent of other institutions that had already developed tools in this field. It has, however, constantly demonstrated its support for initiatives such as those already mentioned from the OECD, ILO, the UN Secretary General's Global Compact and, most recently, the Kimberley Process certification scheme for international trade in rough diamonds, by assuming its chairmanship in 2007. It has also developed other areas that provide interesting instruments to be considered in the matter in hand, at both the internal and the external level.

The EU corporate social responsibility strategy: origins and defining elements

The EU CSR strategy originated in the context of a global trend to give a particular role to the private sector in global governance and the responses to the challenges posed by economic globalization. For example, at the global level, the United Nations, in its Millennium Declaration (2000), was calling for the inclusion of civil society and the private sector in activities related to the organization's objectives, such as development and the eradication of poverty, as well as suggesting a wider contribution to the strengthening of the organization itself (paras 20 and 30).

The EU's interest in the matter has evolved since 1999, when the European Parliament (EP) made the first call for the adoption of a 'European Code of Conduct for European enterprises operating in developing countries' (European Parliament 1999). In its resolution, following the so-called Howitt Report (European Parliament 1998), the EP urged the European Commission and the Council to develop the right legal basis for establishing a European multilateral framework governing companies' operations worldwide, as well as improving the monitoring of European companies' activities in third countries. The EP's initial approach involved combining both voluntary and binding models for the enhancement and control of corporate activities abroad. This was referred to as an 'evolutionary approach' to the question of standard setting for European enterprises (European Parliament 1999: 10).

However, by taking the lead in defining the EU strategy on CSR, the Commission separated itself from the enthusiasm for binding standards shown by the EP and relied heavily on a voluntary approach. The bases of this strategy were set out in two documents: the Green Paper 'Promoting a European Framework for Corporate Social Responsibility' (European Commission 2001a), and the Communication 'Corporate Social Responsibility: A business contribution to sustainable development' (European Commission 2002).

The fundamentals of the CSR concept adopted by the Commission in these documents, which have remained constant ever since, were: a voluntary, business-based, strategy consisting of the integration by companies of 'social and environmental concerns in their business operations and their interactions with their stakeholders'. The Green Paper (European Commission 2001a) also addressed the external dimension of CSR and brought to the agenda consideration of the EU's role as a global actor in relation to this matter, which is analysed further below.

The Green Paper launched a consultation process in which all relevant actors were asked to express their 'views on how to build a partnership for the development of a new framework for the promotion of corporate social responsibility' (European Commission 2001a: para. 20). This marked the starting point of developing the EU CSR strategy which relied heavily on voluntarism. The Green Paper focused intensely on the business case for CSR, elaborating extensively on the advantages that contributing to social and environmental goals has for businesses themselves as well as for the wider community. Therefore, this could be

considered to be a successful outcome for business organizations in their effort to turn the EU CSR strategy towards favouring voluntary schemes. The Green Paper hardly considered issues that had become increasingly important to the public, related to corporate misbehaviour and the negative impact of the activities of corporations and certain working methods used by some of them in the context of the global economy.

This initiative was a success in terms of opening the debate and including all sorts of relevant actors, and in creating a healthy environment for future developments (McBarnet 2007: 47). The invitation to participate in defining the strategy attracted a great number of companies, employers' organizations, coalitions of NGOs, trade unions and academics. As expected, the responses of the NGOs and the trade union community indicated that they were not keen on the voluntary approach, while the business sector devoted its efforts and enthusiasm to enhancing this approach as a core element of the developing strategy (Voiculescu 2007: 378).

The European Commission (2002) then went on to confirm the principles for Community action in relation to CSR: recognition of its voluntary nature; need for credibility and transparency of CSR practices; focus on those activities where Community involvement adds value; a balanced and all-encompassing approach to CSR, including economic, social and environmental issues as well as consumer interests; attention to the needs and characteristics of small and medium-sized enterprises (SMEs); and support and compatibility with existing international agreements and instruments, such as the ILO core labour standards and the OECD Guidelines on Multinational Enterprises.

During the initial phase of the CSR strategy, the importance of maintaining a comprehensive approach and developing a strategy intimately connected with other EU policies and priorities was stressed, along with an understanding of the impact that the Union's position on this matter would have in response to the challenges of globalization both internally and as a global actor. In this respect, the European Commission (2002) committed to further promoting the integration of CSR principles into EU policies. The policies linked with the establishment of a CSR strategy were considered to be: employment and social affairs policy, enterprise policy, environmental policy, consumer policy, public procurement policy and public administration, at the internal level, and external relations policy, including development policy and trade, at the external one (European Commission 2002: 18).

In order to develop the strategy, the European Commission organized what was called the European MultiStakeholder Forum (EMSF) on CSR in October 2002. The forum was composed of EU-level representatives of what were seen as all interested stakeholders, including representatives of the European Commission and other EU institutions. The forum's work was published in a final report on 29 June 2004, which contains mainly case studies and recommendations on how to raise awareness and improve knowledge of CSR, and develop the capacities and competences to help mainstream CSR and ensure an enabling environment for it. It assumed the Commission's definition of CSR and insisted on it being

commitments undertaken over and above legal requirements and contractual obligations. Thus, at this stage, the binding versus voluntary question remained constant. As MacLeod (2007: 684) has pointed out, the result of the forum 'failed to move the EU away from the binary approach to CSR, the idea that voluntary and other regulatory approaches are opposed and cannot be reconciled'.

During this evolution, the tension between the Commission and the Parliament was evident. The EP consistently advocated for a better suited regulatory system for CSR (Voiculescu 2007: 378, 383) and repeatedly demanded the right legal basis be developed for a multilateral framework for European companies' operations worldwide (European Parliament 2002: para. 25), under the conviction of the existence of 'a clear basis in international law for extending obligations on companies to respect human rights' (para. 46). Notwithstanding the benefits of a voluntary approach, the EP has been firm in its assertions that 'companies should be required to contribute to a cleaner environment by law rather than solely on a voluntary basis' (European Parliament 2003: para. 5).

Following the issuing of the EMSF report (2004), the process ground to a standstill until recently, when it has received an impetus as part of the revision of the Lisbon objectives and the definition of the EU's contribution to the social dimension of globalization. This placed CSR as a shared interest between different areas of competence, now being developed mainly by the Directorate General of Enterprise and Industry, the Directorate General of Trade, the Directorate General of Employment, Social Affairs and Equal Opportunities and, increasingly, the Directorate General of Development and Relations with Africa, Caribbean and Pacific States.

The next steps: the European Alliance for CSR

In 2006, the European Commission (2006a) assumed the objective of making Europe 'a pole of excellence' on CRS as part of its objectives for growth and jobs. Once again, the main elements of this strategy are stressed as voluntary and multiparticipatory in its implementation. Companies, employees and their representatives and trade unions, external stakeholders, including NGOs, consumers and investors, and public authorities are requested to 'further improve the consistency of their polices in support of sustainable development, economic growth and job creation' (European Commission 2006a: 5).

In order to stimulate this excellence in CSR, in March 2006, the Commission launched the 'European Alliance for CSR'. This new initiative has been conceived as a partnership open to all those enterprises that share the goal of making Europe a pole of excellence on CSR in support of a competitive and sustainable enterprise and market economy. According to the Commission, the Alliance is built upon an understanding that CSR can contribute to sustainable development while enhancing Europe's innovative potential and competitiveness. Therefore, in theory, it foresees it contributing to both employability and job creation within the EU and to the goal of enhancing Europe's contribution to the social dimension of globalization.

The Alliance has been designed and launched in a business language. The main areas of activity are identified as: raising awareness and improving knowledge on CSR and reporting; helping to mainstream and develop open coalitions and co-operation; and ensuring an enabling environment for CSR. The rationale behind its launch is the same as that of other ongoing initiatives, such as that of the UN Secretary General's Global Compact: the creation of exchange, dialogue and learning networks, and promotion of CSR as a business opportunity to contribute to society. It is described by the Commission as a 'political umbrella for new or existing CRS initiatives by large companies, SMEs and their stakeholders' (European Commission 2006a: 6). It is explicitly 'a non-legal instrument', and there are no formal requirements for declaring support for the Alliance, to the extent that it is not to be signed by enterprises, the Commission or any public authority. The Commission has reinforced the business community by stating that it will not keep a list of companies that support it.

The NGO community has expressed its discontent with the way the Alliance has been designed and the lack of inclusiveness the Commission has shown in taking the next step in the development of the CSR strategy. The European Coalition for Corporate Justice (ECCJ), which brings together several relevant NGOs at the European level in the field, has complained that the Alliance has been developed without any involvement of stakeholders other than business, and has claimed that it is being used as a public relations tool, failing to comply with the main elements required for the credibility of CSR initiatives, such as the level of standards and commitment, the involvement of stakeholders, transparency and quality of monitoring and independent verification (ECCJ 2006).

The Alliance is in its very initial stage, but the focus on business methods and language, the limited management through the Directorate General for Enterprise and Industry and the excessive care taken over not being identified as a normative instrument pose certain doubts over its capacity to project at the global level and to make a difference as regards existing voluntary schemes. Additionally, it certainly raises doubts with regard to the EU's capacity to offer alternatives beyond the binding versus voluntary dialectic.

One positive impact of developing the EU CSR discourse has been that it has contributed to opening the debate at both European and national levels. Most national governments have embraced CSR and made developments in this area (European Commission 2007), mainly in the form of raising and promoting CSR issues and creating codes of conduct initiatives with private partners and social reporting and, among some of them, by actively promoting international instruments (Voiculescu 2007: 369). Member states have also tended to prefer a voluntary approach as a basic tool to make corporations socially responsible (Albareda *et al.* 2007).

The international dimension of the EU strategy on CSR

Consideration of the impact that European companies' activities have outside the EU is particularly important as the Union is home to the majority of the biggest

companies operating in global trade (UNCTAD 2007), accounting for one-fifth of world trade (European Commission 2006b: 2).

From the beginning, the EU's CSR strategy has developed as being linked to international institutions' response to economic globalization. However, more recently, the EU has clearly adopted it as one of the instruments aiming to make a contribution to the social dimension of globalization at the international level. The inclusion of CSR considerations in external policies is part of developing the EU's aim to use its position in international relations and global trade to promote human rights and democratization (European Commission 2001b; 2001d). As described in Chapter 1, the inclusion of CSR objectives within the social dimension of globalization is part of the trend initiated by the EU since 2001 to widen the definition of the social objectives pursued and the recurrence of soft and development-related instruments to achieve this.

The external dimension of CSR was first considered by the EP (1999), which focused on the activities of European companies in developing countries. It has been developed mainly by the Commission, which first insisted on the business case for a better performance abroad (2001a), and then considered it among policies already initiated and developed that were relevant to its commitment to promote both economic progress and social cohesion (European Commission 2004). And it specifically placed it in the context of the need to balance economic, social and environmental imperatives within its external relations policies. In this context, the CSR strategy is considered by the Commission as one of the tools in the achievement of a more equal and sustainable globalization at the international level, together with the Generalized System of Preferences (see Chapter 9), the Neighbourhood Policy (see Chapter 4) or the support of other regional integration procedures (European Commission 2004, paras 18–19).

Since then, the EU has remained consistent in its approach to inserting CSR considerations into external relation policies, in particular in trade and development. Even if many measures have been timid and recurrently framed in a language reflecting voluntarism, the EU has committed to developing a coherent strategy that could have a significant impact. This is why it is particularly noticeable that the Communication 'Europe in the world – some practical proposals for greater coherence, effectiveness and visibility' (European Commission 2006b) does not include any reference to social considerations with regard to carrying out business, when it addresses either trade and competitiveness or development.

Some of the initiatives in inserting CSR concerns into trade and development are considered below, as well as the options for corporations' accountability for human rights violations abroad. However, before that, the EU's support for the Kimberley initiative of setting up a system of certification and import and export controls for the international trade in rough diamonds, which it joined in 2002,[3] is worthy of a brief mention. In 2007, the EU strengthened this commitment by chairing the scheme and establishing a plan of action entitled 'From conflict diamonds to prosperity diamonds' (EC Chairmanship of the Kimberley Process 2007). This is important encouragement for this initiative, in particular, while the fact that the EU is ready to back this hybrid mechanism contributes to its legitimacy.

This exemplifies the relevance that any action taken by the EU has in this field as well as the importance of a coherent actuation in advancing the matter.

Inserting CSR considerations into trade and development co-operation policies

Both trade and development policies have provided attractive fora for the inclusion of CSR issues in the external action of the EU (European Commission 2002, 2004, 2006a), and both the DG Trade and the DG Development are now putting effort into developing CSR actions.

Activities in this area have focused on the goal of 'raising awareness' and covering this perspective in the international agenda. In this respect, the EU has included CSR as a topic for dialogue with developed and developing countries, and business and civil society in the framework of trade negotiations. Engagements in bilateral talks include those with the government of Bangladesh in 2006, which led to the establishment of a forum on social compliance as well as the enhancement of labour rights considerations in EU co-operation programmes (European MultiStakeholder Forum 2006), and with China, mainly through the Industrial Policy Dialogue between China's National Development Reform Commission and the Directorate General Trade, which has set up a programme of co-operation on CSR in the textile sector (ibid.).

But perhaps the most interesting advancements have taken place within development co-operation policy (Voiculescu 2007: 395). It would appear that development co-operation policy is the preferred means of promoting human rights and contributing to the social dimension of globalization (see Chapter 1), and presents itself as one of the most suitable areas for the inclusion of CSR. This has been the line followed by the Commission (2005a) when defining the policy coherence for development and placing of CSR as one of the elements of its co-operation policy, in particular as a contribution to sustainable development and poverty reduction.

In this context, the main advance has been in the context of development co-operation with ACP countries in the framework of the Cotonou Agreement. The Agreement, signed in 2000, included a reference to trade and labour standards (Article 50) and consideration of a greater involvement of the private sector as an element contributing to the maintenance and consolidation of a stable and democratic political environment (Article 10). It made no direct mention of the matter of businesses' responsibilities, but did include them as partners (Article 2), thereby shifting development co-operation from exclusively state-to-state to state-to-stakeholder interactions (Voiculescu 2007: 393). The inclusion of the human rights clause in the Agreement and, in particular, the possibility of suspending development co-operation aid, programmes and subsidies in the case of a recipient state failing to make human rights progress may prove to be a key development in this area. As has been highlighted (Voiculescu 2007: 386–92), the Cotonou Agreement has the potential for co-interesting governments and businesses in the promotion of human rights and socially responsible practices, opening the door to much greater business involvement in promoting human rights standards.

Voiculescu (2007: 392) has inferred that the Agreement opens the door to a two-way CSR–Cotonou reinforcement action: on the one hand, EU companies interested in becoming CSR champions will acquire an official outlet for action under the Cotonou human rights umbrella and, on the other hand, promoters of CSR can use the Agreement to compel compatible behaviour from companies and the development of an intergovernmental structure to maintain consistency with the Agreement's human rights and CSR agenda.

In the context of the EU's strategy for Africa, agreed with the African Union in December 2005, however, a direct reference to CSR was avoided when setting parameters for the promotion of foreign investment in Africa. Even if there are constant references to the need to develop investment in a sustainable way and to promote decent work, no consideration is given to the role of European companies in participating in such goals, or the role of the EU in avoiding corporate behaviour that would jeopardize them. It is interesting to note that, within the framework of the Union's strategy for Africa, an EU–Africa Business Forum has been established and has become an annual event following meetings in 2006 and 2007.[4] This forum has established a governance and CSR working group. During its first meeting, the group called for the creation of 'an African business network to promote, disseminate and exchange best practices on governance and CSR and to promote a better understanding of corporate responsibility initiatives in Africa among the wider public' (EU–Africa Business Forum 2006), and a dialogue seems to have started in this respect.

In the context of development co-operation and humanitarian aid, another interesting step taken by the EU in the inclusion of human rights considerations within company activity has been the insertion of specific requirements for tenderers who have being awarded contracts to perform Community external assistance activities funded by the EU budget. The Union has assumed the trend to use public procurement as a tool to consider when shaping the social responsibility of business (McRudden 2007: 93), even in contradiction to its prior position in the World Trade Organization (WTO) opposing the Massachusetts public procurement initiative against companies operating in Burma in 1998. The Regulation on Access to Community External Assistance[5] provides that all those performing such assistance, including legal persons, shall respect internationally agreed core labour standards (Article 10).[6] The Regulation does not detail the consequences of not complying with such a requirement. Nevertheless, this means a step forward as regards the stand taken in relation to regulating member states' public procurement,[7] which allows the use of non-economic criteria for the selection of the most advantageous tender, opening the door to inserting human rights considerations into public procurement contracts (Zeisel 2006: 369), although it does not refer to them explicitly.

It is rather early to assess the impact of these advances. Nevertheless, it is possible at this stage to acknowledge that CSR can play an important part in shaping a development strategy coherent with human rights, as it places such rights at the centre of the interests of companies when they are involved in economic activities backed by EU aid or EU-sponsored programmes. Equally, it promotes the interest

of recipient states towards more socially responsible companies, knowing that their business operations might be scrutinized by the Union.

Making companies accountable in the EU for human rights violations committed abroad

As the examples above show, development of the international dimension of the EU's strategy has focused mainly on the insertion of CSR considerations in pre-existing international relations tools that address states. Activities directly linked to the control of the behaviour of business itself have been restricted to awareness-raising activities and dialogue so far. However, the EU does have the instruments and the capacity to develop adequate norms to make those companies that are domiciled in a member state and participate in human rights abuses abroad accountable.

The European Commission (2001a) has insisted that, by adopting socially and environmentally responsible practice, all companies must respect the relevant rules of EU and national competition laws. However, the lack of clarity over which rules and how they apply leads to ambiguities that cannot resolve the contradiction of having a strong regulatory framework within the EU in relation to corporate social, labour and environmental practices that does not apply when the same companies carry out their activities in third countries. The human rights norms that apply within the EU framework do not apply extraterritorially, i.e., they do not impose obligations on companies to comply with internally established standards abroad. Accordingly, the international dimension of EU rules on human rights in this matter fall short because of jurisdictional barriers (De Schutter 2005). This is why, in order to apply these norms, tools such as those referred to below, which provide liability for activities abroad, are of such relevance.

The EU has the instruments and the capacity to challenge this extraterritoriality in relation to legal persons by developing adequate norms to make companies that are domiciled in a member state and participate in human rights abuses abroad accountable. On the one hand, the norms on civil jurisdiction within the Union have opened the door for companies' civil liability for human rights violations committed abroad. On the other hand, the EU has demanded the criminalization of legal persons involved in certain abuses. Both avenues are addressed in brief below.

Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters,[8] consolidating the 1968 European Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters – the Brussels Convention – establishes that 'persons domiciled in a Member State, shall, whatever their nationality, be sued in the courts of that Member State' (Article 2.1). According to De Schutter (2005: 265), who qualifies this Regulation as a 'European Alien Tort Claims Act', the instrument recognizes jurisdiction for member states' courts to hear tort actions based on the damage caused by companies to human rights victims, wherever they are domiciled and whatever their nationality. This option was initially considered by the EP (1999: Preamble) and the Commission (2001a: para. 50),

but has since been abandoned, and there have been no more references to this possibility by the Commission or the Council. De Schutter (2005: 282) considers that this should not constitute an obstacle to the future development of corporate accountability.

Developments in relation to the criminalization of certain corporate activities have taken place mainly within the ambit of the prevention and punishment of human trafficking. The Council Framework Decision on 'Combating Trafficking in Human Beings'[9] establishes the obligation for states to take the necessary measures to ensure that legal persons can be liable for participating in transferring, harbouring, receiving and exchange or transfer control of human beings, and establishes that member states shall punish such acts effectively and proportionately, including through the imposition of criminal sanctions (Articles 4 and 5). Therefore, technically speaking, the EU has not encountered any difficulties in establishing legal consequences for companies' involvement in human rights abuses abroad.

Conclusions

The debate over the responsibilities of companies within the social dimension of globalization has moved forward from the mere recognition of the potential positive role of the private sector in achieving development and respect for human rights to acknowledging the need to provide a certain threshold below which it is not acceptable to do business. This threshold is the respect for human rights.

In order to draw up such a framework, two aspects should be considered. The first is the indispensable need for institutional support. In this regard, the call by the ILO World Commission on the Social Dimension of Globalization (WCSDG) to develop a coherent approach towards the involvement and commitment of the private sector in the social dimension of globalization (WCSDG 2004) requires a firmer institutional back-up. The EU is not only qualified to assume such a role, but its capacity to contribute to fulfilling its external goals depends, to a certain extent, on its determination to do so. Second, a clear distinction between CSR as a synonym of voluntary social commitment and the international protection of human rights is necessary to unblock both the debate and the immobility at international and European level. Further, an understanding that hard law, soft law and voluntary contributions are indispensable elements of an effective normative framework able to guarantee compliance with human rights is equally important. International protection of human rights, towards which all European member states have legal obligations, and which the EU made one of its main objectives, requires guaranteeing a system in which no actor has the capacity to participate in human rights abuses and remain unpunished. The duty of both member states and the EU itself to protect human rights goes beyond the promotion of good corporate behaviour to guarantee accountability.

Even if the international legal norms do not currently provide a clear framework for the control of the conduct of companies, they do identify the existing human rights standards relevant to such control. The EU has developed an ambiguous approach in this matter. On the one hand, the Alliance on CSR seems to have

followed a path that, while acknowledging the relevance of international legal standards, does not rely on them to draw its strategy and focuses on businesses' own contribution. On the other hand, the inclusion of CSR concerns within EU external relations, in particular its development policy, firmly rooted in these international standards and in the Union's commitment towards them, seems to be providing an interesting framework for human rights promotion in developing countries. Added to this is the possibility of going beyond this to impose civil liability on companies for torts committed abroad or even to criminalize and sanction certain activities in which they become involved. Both these options require further development.

Therefore, on the one hand, through the institutional backing of a business-focused definition of social responsibilities and its insistence on a solution involving voluntary contributions, the EU risks marginalizing the important issue of accountability for human rights and environmental violations. On the other hand, adherence to regimes such as the Kimberley Process or the design of systems promoting human rights within development policy that involve some sort of business participation triggers the potential for developing an effective framework where hard law, soft law and voluntary measures interact.

An overall evaluation of EU CSR initiatives indicates that voluntary and soft law approaches have been dominant and more determinant within the political agenda. From a legal perspective, failure to introduce binding legislation within the EU legal order that tackles violations of core human rights could mean that the Union will have a reduced range of options at the international level (Clapham and Martignoni 2006: 296). However, this analysis also reveals that there is potential for more dynamic relationships between these approaches and, as Voiculescu (2007: 286) has pointed out, even if voluntarism is consistently referred to as the basic approach to CSR, within the European context and as a consequence of recent developments, it lies 'in the vicinity of a subtle, potentially expanding normative regime'. It is dependent on the efforts invested in the development of this normative regime in which the EU has the potential not only to provide a 'pole of excellence' for CSR, but to lead an economic model that is effective while, at the same time, complying with human rights and environmental standards, i.e. adequate to provide a social response to globalization.

The launching of the Alliance for CSR (EU 2006) insisted that 'the delivery of this strategy is crucial for securing Europe's sustainable growth as much as the European way of life'. The next developments in the EU CSR strategy should aim to reinforce the idea that the European way of life does not stop at its borders by preventing European companies from doing abroad what is considered a violation of our rights and values at home.

Notes

1 These three cases prompted law suits in the United States under various pieces of legislation: for false or misleading public statements in the *Kasky v Nike* case (2002) and under the Alien Torts Claims Act in the *Doe v Unocal Corp*. (2002) and *Wiwa v Royal Dutch Petroleum Co.* (2002) cases.

2 The origins of CSR are often traced back to post-Second World War business initiatives in the US, as a combination of the principles of charity and stewardship. But it has been the development of the theory of stakeholders that has led to the modern conception of a corporate responsibility towards society (Kolk *et al.* 1999: 141).
3 Council Regulation No. 2368/2002 of 20 December 2002, OJ 2002 L 358/28.
4 The first EU–Africa Business Forum met in Brussels on 16–17 November 2006, and the second one in Accra (Ghana) on 21–22 June 2007.
5 Council Regulation No. 2110/2005 of 14 December 2005, OJ L 344.
6 The European Commission is currently negotiating with ACP partners to extend this obligation to contracts financed under the European Development Fund.
7 Directive 2004/18/EC of 31 March 2004, OJ L 134.
8 Council Regulation No. 44/2001 of 22 December 2000, OJ 2001 L 12/1.
9 Council Framework Decision 2002/629/JHA of 19 July 2002, OJ L 203/1.

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