

CORPORATE SOCIAL RESPONSIBILITY: (A EUROPEAN LEGAL PERSPECTIVE)

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ABSTRACT

In this article we analyse the extent to which the much talked about ideas on Corporate Social Responsibility (CSR) have been implemented within the framework of the existing legislation on corporate duties and liabilities, and the necessary steps required to overcome the continuing impasse.

We argue that the reason for the poor implementation of the CSR concept in companies' day-to-day and strategic business behaviour is the fact that CSR initiatives are not legally binding but are still more or less recommendations with a "wishful" orientation.

We propose that an EU Directive be enacted in order to harmonize national corporate legislation by redefining director's duties and responsibilities, including directors' duty "to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders". In this way, CSR would become legally binding and not just a declaration about the responsibility of enterprises which is not legally enforceable.

I. ON CORPORATE SOCIAL RESPONSIBILITY IN GENERAL

A. The Original Concept of CSR

In July 2001, the EU Commission presented a green paper, entitled *Promoting a European Framework for Corporate Social Responsibility*.¹ This document launched the debate around this issue at that time; it was followed in 2002 by a communication from the Commission concerning corporate social responsibility based upon the voluntary and beyond compliance concept.²

The promotion of CSR was based on the principle of the voluntary, transparent and credible nature of CSR activities, and a balance between the

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1 Commission of the European Communities "Green Paper - Promoting a European framework for Corporate Social Responsibility" (2001) <eur-lex.europa.eu>

2 Commission of the European Communities "Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development" (2002) <eur-lex.europa.eu>

actions taken in the economic, social and environmental spheres, and those in relation to consumers' interests. Compatibility with existing international agreements and instruments (particularly those developed by the International Labour Organization (ILO) and the Organization for Economic Cooperation and Development (OECD)) was a part of the approach.

EU initiatives³ related to corporate social responsibility are a part of the broader global context.⁴ The promotion of the OECD guidelines and ILO labour standards (freedom of association, abolition of forced labour, non-discrimination and elimination of child labour) is central to corporate social responsibility.⁵

CSR in this broader concept means the observance of human rights, ethical labour and employment practices (such as training, diversity, gender equality and employee health and well-being), the consideration of environmental issues and the combating of bribery and corruption.

B. New Definition of CSR, EU Communication 2011

In 2011, the EU redefined the concept of corporate social responsibility.⁶ According to this communication produced by the EU, CSR is increasingly important for the competitiveness of businesses and can bring benefits in terms

- 3 The Council, in its Resolution of 3 December 2001, stressed that a European approach to CSR could complement existing measures at the local and national level, imparting to them an added value, in order to contribute to the development of CSR. The Council mentioned that CSR can contribute not only to encouraging a high level of social cohesion, environmental protection and respect for fundamental rights, but also to improving competitiveness in all types of businesses, from SMEs to multinationals, and in all sectors of activity. The Economic and Social Committee highlighted that the principles of voluntary action and environmental, economic and social sustainability, together with guidance from international organizations' existing agreements are to be the frame of reference for further European initiatives in support of companies' efforts to act in a socially responsible way; The Committee of the Regions saw a role for the European level in providing a framework for raising awareness, promoting responsible principles, and assisting businesses and public authorities in incorporating CSR in their activities; The European Parliament proposed to mainstream CSR in all areas of EU competence, in particular regional and social funding, and to create a EU multi-stakeholder CSR platform. It called for triple bottom line reporting by companies on their social and environmental performance, including the human rights dimension. The Commission encourages developing knowledge on the impact of CSR on the economic performance of enterprises. It therefore proposes to launch studies into activities to raise awareness and disseminate information. The exchange of good practice between businesses and between Member States must also be encouraged through the networking and coordination of actors.
- 4 See ILO "ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy" (2001) <www.ilo.org> and OECD "OECD Guidelines for Multinational Enterprises" (2000) <www.oecd.org>.
- 5 The Communication urges companies to address employment and social issues such as training, youth employment, dialogues with employee representatives, employee health and well-being, gender awareness and diversity management within the context of the Europe 2020 strategy, and to see such initiatives as a key part of the solution to Europe's economic crisis.
- 6 European Commission, Communication "A renewed EU strategy 2011-14 for Corporate Social Responsibility" (25 October 2011) <eur-lex.europa.eu>.

of risk management, cost savings, access to capital, customer relationships, human resource management and the capacity for innovation. Further, the EU's communication states that CSR can also benefit society as a whole by contributing to the efforts towards the achievement of the European Union's Treaty objectives of sustainable development and a competitive social market economy, and underpinning the objectives of the Europe 2020 strategy.⁷

An important step forward was made in the fact that the European Commission, by producing this communication, redefined CSR as a responsibility on the part of enterprises with respect to their impact on society. CSR behaviour is therefore no longer defined by the voluntary and beyond compliance concept, but is a duty on the part of the directors of companies to act in a responsible way as far as the impact of their decisions on society is concerned. However, are companies' directors liable for decisions they take that are contrary to the interests of society or, even, for *not* taking proactive steps in favour of society's interests? The answer is no! Would CSR operations even be deemed to be justified by the business judgment rule?

The new definition is a move forward for it expands the scope of CSR from a purely voluntary context to an active responsibility with respect to all the impacts on society (voluntary and mandatory activities, while increasing the positive and reducing the negative effects). However, the new definition still only exists on the level of a political declaration instead of being a firm and enforceable legal rule.

This is in line with current practice in many companies that employ sustainability performance measurements and reporting systems, where the effects resulting from actions "beyond compliance" have never been defined. However, the 2011 EU communication also accords responsibility to

7 The communication of 2011, which builds on the Commission's 2001 Green Paper (above n 2) on CSR and its 2006 communication on CSR, fulfils a commitment made in the Europe 2020 Strategy to promote CSR: -create multi-stakeholder CSR platforms in a number of relevant industrial sectors in 2013, so that enterprises, their workers and other stakeholders can make public commitments on the CSR issues relevant to each sector and jointly monitor progress; -launch, from 2012 onwards, a European award scheme for CSR partnerships between enterprises and other stakeholders; -address the issue of misleading marketing related to the environmental impact of products – so called 'green-washing'; -launch a process in 2012 with enterprises and other stakeholders to develop a code of good practice for self- and co-regulation; -as part of the 2011 review of the Public Procurement Directives, facilitate the better integration of social and environmental considerations into public procurement; -consider placing a requirement on all investment funds and financial institutions to inform all their clients about any ethical or responsible investment criteria they apply or any standards and codes to which they adhere; -in 2012, create with Member States a peer review mechanism for national CSR policies; -monitor the commitments made by European enterprises with more than 1,000 employees to take account of internationally recognized CSR principles and guidelines; and publish by the end of 2012 a report on EU priorities with respect to the implementation of the UN Guiding Principles, and thereafter to issue periodic progress reports.

European businesses in managing their impacts on society – both strategically and operationally - and in partnership and consultation with stakeholders.⁸

The above-mentioned communication produced by the EU defines CSR as enterprises taking responsibility for their impact on society. The communication also states that enterprises should integrate social, environmental, ethical, human rights and consumer concerns into their business operations, and draw up a core strategy in close collaboration with their stakeholders in order to fully meet their corporate social responsibilities. According to the communication, companies should lead the development of CSR, but they should be supported by public authorities, trade unions and civil society organizations.

For its part, the Commission committed itself to undertaking a number of measures, the majority of which are so called soft measures (awards, awareness activities, codes of ethics, and monitoring and reporting) and none of them are legal (with the exception of the review by the Public Procurement Directives, established in order to better integrate social and environmental considerations into public procurement).

II. THE MEANING OF SOCIAL RESPONSIBILITY

A. Integration of Social and Environmental Concerns in Business

According to Wood,⁹ corporate social responsibility (CSR, also called corporate conscience, corporate citizenship, social performance, or sustainable responsible business) is a form of corporate self-regulation integrated into a business model.

According to a green paper produced by the EU Commission,¹⁰ CSR is a concept whereby companies integrate social and environmental concerns into their business operations and into their interactions with their stakeholders on a voluntary basis.

- 8(i) At the company level, there is no evidence of a common understanding or definition of an enterprise's pathways of impacts and final impacts for society.
- (ii) Impact measurement of this kind is complex, and non-linear; causality is hard to establish. It requires lots of time and offers uncertain outcomes.
- (iii) There is no evidence of standardized methods, tools or approaches available to companies to support management systems and processes which would enable them to conduct the kind of impact assessment and management which is implied in the Commission's definition.
- (iv) It is equally unclear where the boundaries of responsibility and accountability lie between the firm and society, and who has the legitimacy and capability to assess companies' claims about their impacts on society.

9 D Wood "Corporate Social Performance Revisited" (1991) *The Academy of Management Review* 16.

10 Commission of the European Communities, above n 2.

CSR involves a perception on the part of enterprises that sustainable business success and shareholder value cannot be achieved solely through maximizing short-term profits, but instead through market-oriented yet responsible behaviour. Companies are aware that they can contribute to sustainable development by managing their operations in such a way as to enhance economic growth and increase competitiveness whilst ensuring environmental protection and promoting social responsibility, including consumer interests.

B. CSR as a Business Culture

CSR should be considered as a specific business culture, whereby business behaviours over and above legal requirements are voluntarily adopted because the business deems it to be in their long-term interest. CSR is linked to the concept of sustainable development: businesses need to integrate awareness of their economic, social and environmental impact into their operations.

CSR is not supposed to be an alternative to business activities but the way in which the businesses are normally managed. This way of doing business should have a positive impact on the competitiveness of enterprises, in particular, given consumers and financial investors' awareness of the image and reputation of enterprises.

In addition, a CSR approach could be required for enterprises that have activities abroad, for example in developing countries where financial institutions and investors could take into account the CSR activities of enterprises when evaluating the positive aspects and risk factors inherent in a company.

III. TOOLS AND POLICIES TO ENHANCE CSR

A. The Role of the Government

The responsibility of governments is to undertake measures to foster (enhance) the integration of economic, social and environmental considerations in the business policy of enterprises.¹¹

Environmental legislation and policy, setting out environmental standards and restrictions, stimulating eco technology, and the environmental effectiveness of products (subsidies, tax deductions) can effectively contribute to CSR principles.

Consumer protection legislation and policy are important instruments of CSR for raising consumers' awareness of social and environmental standards.

11 Government of Canada "Corporate Social Responsibility Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector" (2013).

Surveys have shown that consumers not only want to buy good and safe products, but they also want to know if they are produced in a socially responsible manner.

Public procurement legislation and policy might include social and environmental criteria in public procurement procedures.

In employment and social policy, as in the fields of education, training, equal opportunities and the integration of people with disabilities, the anticipation of industrial changes and the restructuring of enterprises is also essential.

Although companies perceive CSR as essential for society, the majority of them do not consider such measures as relevant to the economic outcomes for the firm (CSR awards/best practices, cooperative instruments, private-public partnerships, awareness raising).

There are of course exceptions, in terms of CSR being perceived as a possible driver of company performance, for example: green public procurement (GPP), subsidies, tax incentives, reporting standards/obligations, socially responsible investments.

Obviously, the 'harder' public policy instruments – such as GPP, reporting obligations, tax incentives and so on – are seen as more effective in fostering CSR than 'softer' instruments that support CSR as an approach (through for example awards, campaigns, and so on).¹²

B. The Enterprise Level

At the enterprise level, there are several ways to promote CSR. For example, CSR could be encouraged by including the principles of CSR in corporate codes of conduct (concerning workers' rights, human rights, protection of the environment, and so on) and in management training programmes. Under increasing pressure from non-governmental organizations (NGOs) and consumer groups, companies are increasingly adopting codes of conduct covering working conditions, human rights and environmental issues.

Shareholders could redefine management standards in order to integrate social and environmental aspects into the day-to-day activities of enterprises, rather than requiring the pure maximization of the shareholders' value. In line with this, instruments for measuring performance (such as internal evaluation reports) should include CSR achievements.

In addition, standards for socially responsible investment (SRI) could be defined on a corporate and broader level, in order to attract investors towards enterprises based on their CSR results. Socially responsible investment primarily involves investment in human capital, health and safety, painless

12 European Commission - IMPACT (2014) "Corporate Social Responsibility (CSR) IMPACT Project- Impact Measurement and Performance Analysis of CSR, Executive Summary, Headline findings, insights & recommendations for policy makers, business & stakeholders February 2014".

restructuring, environmentally responsible practices relating to the management of the natural resources and so on.

CSR is also about managing change (restructuring) at the company level in a socially responsible manner. This happens when a company seeks to maintain a balance with respect to the trade-offs between the requirements and the needs of the various stakeholders, which is acceptable to all parties. If companies succeed in managing change in a socially responsible manner, this will have a positive impact at the macro-economic level.¹³

Corporate social responsibility has so far been mainly promoted by large or multinational companies. However, it is relevant for all types of companies and in all sectors of activity, from small and medium-sized enterprises (SMEs) to multinationals. Certain SMEs already recognize their social responsibilities, particularly through community involvement.

Worker cooperatives and participation schemes, as well as other forms of cooperative, mutual and associative enterprises structurally integrate other stakeholder interests and spontaneously take on social and civil responsibilities.

In a world of multinational investment and global supply chains, corporate social responsibility must also extend beyond the borders of Europe. One of the external dimensions of corporate social responsibility is that of human rights, particularly in relation to global production activities. Despite the existence of relevant international instruments,¹⁴ human rights remains a very complex issue presenting political, legal and moral dilemmas.

Companies also contribute to their local communities by providing jobs, wages, services and tax revenues. On the other hand, companies depend on the health, stability and prosperity of the communities in which they operate. In this sense, corporate social responsibility involves a wide range of stakeholders: business partners and suppliers, customers, public authorities and NGOs representing local communities, as well as the environment.

13 Commission of the European Communities, above n 2.

14 ILO "ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy" (2001) <www.ilo.org>.

IV. PROBLEM ANALYSIS OF THE CSR

A. Dissenting Opinions with Respect to CSR

Siegel and Williams wrote that researchers have reported a positive, negative, and neutral impact of corporate social responsibility (CSR) on financial performance.¹⁵

There are significant dissenting opinions on CSR, mainly stemming from the common understanding that the mission (function) of an enterprise is to produce goods and services for consumers at the lowest possible price, thereby generating profit and increasing the value for its shareholders. This is consequently stipulated as the director's main duty in most corporate legislation.

In line with the CSR concept, the function of an enterprise would also be to create welfare for society, particularly through the process of job creation, employment, environmental care and so on. However, this could come into conflict with the above-described mission of the company; besides, this is not declared as the director's duty in corporate legislation (with some exceptions).

From the perspective of businesses, a globalized market requires that sustainable development, as an indispensable element of CSR, should be developed at the global level (not just the national or EU level). Attempts to regulate CSR at the EU level only would be counterproductive, because this would stifle creativity and innovation among enterprises which drive the successful development of CSR, and could lead to conflicting priorities for enterprises operating in different geographical areas.¹⁶

Trade unions and civil society organizations emphasize that voluntary initiatives are not sufficient to protect workers and citizens' rights. They mainly advocate for a regulatory framework establishing minimum standards and ensuring a level playing field. They also insist that, in order to be credible, CSR practices should not be developed, implemented and evaluated unilaterally by businesses, but rather with the involvement of relevant stakeholders. They also ask for effective mechanisms to ensure companies' accountability for their social and environmental impact.

Investors stressed the need to improve the disclosure and transparency of companies' practices, rating agencies' methodology and the investment

15 A McWilliams and D Siegel "Corporate social responsibility and financial performance: correlation or misspecification?" (2000) *Strategic Management Journal* 21 at 603–609 <onlinelibrary.wiley.com>. See also M Baker "Arguments against Corporate Social Responsibility, Business Respect" (2008) <www.mallenbaker.net>; E Blackmore and E Wilson *Dispute or Dialogue? Community perspectives on company-led grievance mechanisms* (IIED, London, 2013); M Porter and N Kramer "Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility" (2006) *Harvard Business Review* 84.

16 Commission of the European Communities, above n 2.

management of SRI (socially responsible investment) funds and pension funds.

Consumer organizations underline 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 purchasing choices.

B. Implementation of the CSR Concept

Banerjee (2008) argues that, despite their emancipatory rhetoric, the discourses of corporate citizenship, social responsibility and sustainability are defined by narrow business interests, and serve to curtail the interests of external stakeholders.¹⁷ The United States Supreme Court, in the case of *Dartmouth College vs. Woodward*, defined a corporation as a fictitious being which not only allowed corporations to be protected under the constitution, but also limited states from enforcing restrictions on firms that did not act in the public good¹⁸.

In the above-mentioned EU Commission Communication 2011, the Commission states that many EU companies have not yet fully integrated social and environmental concerns into their operations and core strategy. There are also accusations that some European enterprises do not observe principles of human rights and fail to respect core labour standards, and that only 15 out of the 27 member states have national policy frameworks to promote CSR.¹⁹

The implementation of the CSR concept, measured by its contribution to achieving the economic, social and environmental goals of the European Union, as framed in the Lisbon and Gothenburg Agendas, is poor. Few of the recommendations were implemented in the following 10 years. According to a recent analysis, there are not even any widely applied tools and methods which provide valid and representative assessments of the impacts of CSR for society.²⁰

17 SB Banerjee "Corporate Social Responsibility: The Good, the Bad and the Ugly, Critical Sociology" (2008) Critical Sociology 34 at 51–75.

18 *Dartmouth College vs. Woodward* 17 U.S. 518 (1819)

19 The European Commission, above n 7, states that progress on CSR has been made over the past five years. Examples include: the number of EU enterprises that have signed up to the 10 CSR principles of the United Nations Global Compact has risen from 600 in 2006 to over 1,900 in 2011; the number of organizations with sites registered under the Environmental Management and Audit Scheme (EMAS) has risen from 3,300 in 2006 to over 4,600 in 2011; the number of EU companies signing transnational company agreements with global or European workers' organizations, covering issues that include labour standards, rose from 79 in 2006 to over 140 in 2011; the number of European enterprises publishing sustainability reports according to the guidelines of the Global Reporting Initiative rose from 270 in 2006 to over 850 in 2011.

20 European Commission - IMPACT, above n 13.

Companies' approaches in dealing with their responsibilities and relationships with their different stakeholders vary according to sectorial and cultural differences. In general, companies tend to adopt a mission statement; a code of conduct where they state their purpose, core values, and responsibilities towards their stakeholders. These values are then translated into action across the organization, adding a social or environmental dimension to their plans and budgets in order to carry out social or environmental audits and set up ongoing education programmes.

Many multinational companies now issue social responsibility reports. While environmental, health and safety reports are common, reports tackling issues such as human rights or child labour are not. In order for these reports to be useful, a global consensus needs to evolve on the type of information to be disclosed, the reporting format to be used, and the reliability of the evaluation and audit procedures.

C. Reasons for the Poor Implementation of CSR

The crucial reason for the poor implementation of the CSR concept in companies' day-to-day and strategic business behaviour is the fact that EU and global CSR initiatives are not legally binding but are still more or less recommendations and a "wishful" orientation.

However, for the implementation of CSR it is essential that corporate social responsibility be supported by legislation in specific fields, and by corporate legislation on directors' duties and corporate damage liability.

Analysis of the level of the implementation of the CSR concept in corporate legislation (corporate duties and liabilities) shows that the concept of CSR as the responsibility of enterprises (directors as their representatives) is not elaborated upon in corporate legislation at all.

With the exception of the rare pieces of legislation which have some general provisions on a responsibility at the societal level, companies' directors are only responsible in the sense of a duty of care and a duty of loyalty to the company, and its shareholders. Huge steps forward in developing this aspect of corporate legislation are therefore needed to overcome the continuing impasse as far as the implementation of CSR on the company level is concerned.

V. SOME PROPOSALS TO OVERCOME THE CONTINUING IMPASSE

A. *Why Not Have CSR as a Legal Concept?*

Although, according to the cited EU documents, CSR is not (exclusively) a legal concept, legal regulations can be an important driving force of the CSR behaviour of companies at least for some of the issues.²¹

What we want to prove is that corporate legislation (like the respective regulation concerning the duties and liabilities of directors, and the distribution of profit for purposes other than shareholders' dividends) could contribute substantially to the development of CSR in a real and concrete manner.

The prevailing theory argues that CSR activities driven by regulation do not fall under CSR. However, experience in the implementation of CSR in companies' business decisions shows the contrary: regulation does not make CSR weaker, but by fostering and sanctioning CSR behaviour, it even makes it stronger.

Of course, legal motivations are not the exclusive, or sometimes even the main, driver of CSR. Voluntary CSR activities still play an important role in different areas. It seems that support for CSR, combined with targeted legislation on specific issues, would provide a solid ground for an optimal mix rather than having each approach by itself.

As a consequence, strong/dense (potential) legislation for CSR can coexist with (additional) voluntary action. It would even seem that regulations help in raising companies' awareness of actions that can be carried out to the benefit of society and the environment, and so on.

To conclude, we agree that legal regulation may not be the only driver for companies to act in a socially responsible manner. However, the real reason for firms to act in a socially responsible manner might not be purely ethical, but also stem from the firm legal duty and liability of those who are responsible for companies' decision making processes and their behaviour (directors and shareholders).

21 European Commission - IMPACT, above n 13:

- In the textile & ICT sector, EU legislation (RoHS, WEEE, REACH) was named as the major driver for companies to engage in activities to protect natural resources from pollution,
- Existing EU & national legislations are drivers for companies to engage in activities on climate change,
- In the retail sector, anticipated future legislation is a driver for companies to engage in activities on the conservation of natural resources (mainly with respect to food waste & packaging),
- Laws & regulation are drivers for companies to engage in activities on intrinsic job quality (especially in ICT & textile sector),
- ILO standards, regulation & legal compliance are drivers for companies to engage in activities on inclusion & wages (especially in Auto, construction & ICT).

B. Shareholders' Responsibility for CSR

Particularly crucial is the responsibility of shareholders to redefine the mission of the company from that of purely maximizing shareholders' value to also satisfying the interests of employees, customers, partners, local and broader society, and the environment.

Shareholders could voluntarily encourage CSR by including principles of CSR in corporate codes of conduct (concerning workers' rights, human rights, protection of the environment and so on).

Shareholders could voluntarily redefine management and performance appraisal standards by integrating social and environmental objectives and results, rather than requiring a pure maximization of the shareholders' value.

Shareholders could voluntarily introduce standards for socially responsible investment (SRI) as investment in human capital, health and safety, painless restructuring, environmentally responsible management of natural resources and so on.

However, are holders of capital willing to do this voluntarily for ethical reasons or other "higher" interests? Would not such a change in owners' behaviours shake the foundations of modern capitalism?

C. Proper Regulatory or Legislative Framework

The green paper mentioned above defined CSR as a concept whereby companies integrate social and environmental concerns into their business operations and into their interactions with their stakeholders on a voluntary basis.

However, is acting in a manner that has a socially responsible impact at the macro-economic level in any way stimulated or sanctioned? So far, generally not, which is one of the main reasons why the CSR concept is, so far, more or less purely academic.

Why would companies (managers) not only fulfil their applicable legal obligations, but also go beyond compliance and voluntarily invest "more" in human capital, the environment and relations with their local community and broader society, which is what CSR is all about, if there is only a moral incentive to do so?

The question, more and more widely asked, is whether the voluntary concept of CSR implementation is sufficient? Is it enough to increase public (not so much shareholders' and managerial) awareness that responsible behaviour leads to sustainable business success for the implementation of the CSR concept to move forward in real life? Are legal tools and remedies necessary or not to support the directions of CSR?

Investment in projects going beyond legal compliance will increase competitiveness and have a direct impact on productivity, only if there are governmental or municipal subsidies and tax incentives for environmentally responsible technologies and other SCR business practices. The experience

of the social behaviour and business culture of the stakeholders in modern capitalism shows that we cannot expect managers and shareholders today to act in a socially responsible manner that is to their detriment, for the benefit of society and mankind alone.

The development of better methodologies and tools to measure the impact of CSR activities at different levels is an indispensable approach to overcoming the gap between the ideas and implementation of the CSR concept. However, at the same time, the standards of socially responsible behaviour in different fields (environment, social capital ...) defined in legislation and tools that perform incentives and sanctions for improper behaviour (violation of standards and legislative rules) are also needed.

The above-mentioned green paper indeed states that corporate social responsibility should nevertheless not be seen as a substitute for regulation or legislation concerning social rights or environmental standards, including the development of appropriate new legislation. However, it is true that in countries where such regulations do not exist, efforts should focus on putting the proper regulatory or legislative framework in place on the basis of which socially responsible practices can be developed.²²

VI. CORPORATE DIRECTORS DUTIES AND RESPONSIBILITIES

A. CSR is Not the Directors' Duty

There are substantial differences between corporate legislation in EU countries as far as the definition of the legal duties and responsibilities of directors is concerned. However, none of the national legislation explicitly stipulates that corporate social responsibility is the directors' legal responsibility. Despite this, there are a few national corporate legislations that set the consideration of the interests of the employees, and the interests of the society, as the directors' responsibility.

B. The Example of Austria

Austria, for example, is one country to have the attitude of the director codified as a responsibility in the company's legislation.

According to Austrian company law, it is the responsibility of the management board to manage the company, not only in its own best interests, but also considering the interests of the shareholders and the employees, as well as the interests of the public.

This is an example of how legislation can sharpen the responsibility of enterprises to engage in CSR, as laid out by EU recommendations.

22 Commission of the European Communities, above n 2.

C. German Business Judgment Rule

On the contrary, Article 93 (Duty of Care and Responsibility of Members of the Management Board) of the German Stock Corporation Act (Aktiengesetz, hereafter AG) only imposes on the members of the management board (directors) the duty to employ the care of a diligent and conscientious manager²³. Further on, it is explained that directors shall not be deemed to have violated the aforementioned duty if, at the time of taking the entrepreneurial decision, they had good reason to assume that they were acting on the basis of adequate information for the benefit of the company (business judgment rule). It is therefore up to directors to judge, if they have good reason, for example, not to follow socially responsible corporate objectives or not to have them at all. However, there is no doubt that directors have to follow the interests of the company and its shareholders as a matter of priority.

Directors who violate their duties shall be, according to AG, jointly and severally liable to the company for any resulting damage. Acting contrary to the principles of corporate social responsibility is not seen as a violation of director's duties and therefore directors bear no damage liability for such actions. The directors, as AG stipulates, shall, in particular, be liable for damages for several actions enumerated in the law, but none of the actions refers to corporate social responsibility.²⁴

D. UK Directors Owe Their Loyalty to the Company Alone

The scope and the nature of directors' general duties are regulated in Section 170 of the UK's 2006 Companies Act, where it is stipulated that the

23 German Stock Corporation Act (Aktiengesetz) 2010 (Norton Rose Fulbright "German Stock Corporation Act - English translation as of 18 September 2013" <www.nortonrosefulbright.com>).

24 These particular actions, listed in the AG, Para. 93/3 are:

1. contributions are repaid to shareholders;
2. shareholders are paid interest or dividends;
3. own shares or shares of another company are subscribed, acquired, taken as a pledge or redeemed;
4. share certificates are issued before the issue price has been paid in full;
5. assets of the company are distributed;
6. payments are made contrary to Para. 92 (2),
7. remuneration is paid to members of the supervisory board;
8. credit is granted;
9. in connection with a conditional capital increase, new shares are issued other than for the specified purpose or prior to full payment of the consideration.

director's general duties specified in sections 171 to 177 only apply to the company and not at all to society.²⁵

In the discussion on corporate social responsibility, the most relevant issue is the director's duty to promote the success of the company, which requires that the director act in the way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members.²⁶ Section 172 lists a number of matters that a director of a company must consider when promoting the success of the company. First of all, the director of a company must consider the likely consequences of any decision in the long term. Moreover, a director of a company must take into consideration the interests of the company's employees and the need to foster the company's business relationships with suppliers, customers and others. It is the duty of the director then to consider the impact of the company's operations on the community and the environment, to maintain high standards of business conduct, and finally, to act fairly towards different members of the company.

The duty of a director to consider the impact of the company's operations on the community and the environment is a step forward towards CSR compliance but still far from being a serious responsibility for which directors would be liable.

The general duties of directors under UK law are derived from common law rules and equitable principles, defining how directors are expected to behave. The general rules governing the duties of directors are concerned with the possibility that a director may put his or her own or other interests ahead of those of the company (conflicts of interest). The statutory statement of a director's main fiduciary duties and his or her duty of care and skill aims in particular to address the key question: "in whose interests should companies

25 Section 172. The 2006 (UK) Companies Act is very precise in defining the general duties of directors. Director's duties are explicitly stipulated by the law, as follows:

- Duty to act within powers; s 171 stipulates that a director of a company must act in accordance with the company's constitution. A director on the other hand may only exercise powers for the purposes for which they are conferred.

Other duties defined by the Act:

- duty to promote the success of the company,
- duty to exercise independent judgment,
- duty not to accept benefits from third parties,
- duty to declare interests in existing and proposed transactions or arrangements.

26 Section 172: Duty to promote the success of the company (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—(a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly between members of the company.

be run?" which reflects modern business needs and the wider expectations of responsible business behaviour.²⁷

Section 178 of the UK Companies Act provides that the civil consequences of a breach (or threatened breach) of the statutory duties are the same as would apply if the corresponding common law rule or equitable principle applied. It also makes it clear that the statutory duties are to be regarded as fiduciary duties (with the exception of the duty to exercise reasonable care skill and diligence), of course to the company and not to society.

The statutory duties do not cover all the duties that a director may have to the company. Many duties are imposed elsewhere in the legislation, such as the duty to file accounts and reports with the registrar of companies,²⁸ or the duty to consider the interests of creditors in times of threatened insolvency. Duties related to socially responsible behaviour remain more or less uncodified. Nevertheless, within the concept of the director's duties to the company, there is no reasonable ground for this whatsoever.

A director is in a fiduciary relationship with the company and not at all with broader society. The director may, however, be in a relationship with the shareholders, in which case he or she has fiduciary duties to the shareholders as well as to the company. The director's duty is to act in the best interests of the company (the duty to act *bona fide*). The company is an entity distinct from its members, so the director's duties are primarily to the company and not to individual shareholders.

As regards director's care, section 309 of the Companies Act provides that the matters to which the directors of a company are to pay attention to in the performance of their functions shall include the interests of the company's employees in general, as well as the interests of its members. However, the duty imposed on the director is to the company and not to the employees.

VII. CONCLUSION

It would be best to avoid disputes between having a mandatory or voluntary concept of CSR, but, considering the poor implementation of CSR achievements so far, we are raising this issue once again.

As different players (states, local communities, companies, civil society and so on) have different understandings of how CSR should be exercised, it cannot be assumed that all of these actors will voluntarily fulfil the expectation that they recognize CSR as a responsibility that they have with respect to their impact on society.

27 Explanatory notes, referring to the Companies Act 2006 (c 46), which received Royal Assent on 8 November 2006.

28 Section 441.

For this reason, binding corporate legislation rules are necessary. We suggest the following corporate legislative changes in national corporate laws:

- The definition of CSR given in the 2012 communication produced by the EU Commission as the responsibility of enterprises to consider their impact on society should be transformed into an EU Directive to be implemented in national corporate legislation through the redefinition of directors' duties and responsibilities, including the director's duty "to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders."
- All types of companies should introduce CSR impact management and CSR impact assessment (identification and measurement of companies' impacts on issues in the areas of society, environment, human rights, economy and so on) as a binding element of annual reporting and therefore publicly disclosed annually;
- All types of companies should involve (integrate) social and environmental objectives (CSR) in(to) their corporate governance codes, and as a consequence into their business strategies and operations.