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Corporate Human Rights Responsibility: A European Perspective

Jan Wouters* & Leen Chanet**

I. INTRODUCTION

¶1 Corporations, especially multinational enterprises (“MNEs”), have become ever larger and more powerful since the 1970s,¹ often surpassing the economic power and influence of states. Thanks to the development of modern communication technologies and the freer movement of goods and services through trade, corporations have also become more mobile and are now able to move capital and business to wherever conditions are most favorable. Because of high production and labor costs in industrialized countries, global competition, and the constant need to explore new markets, many corporations are now driven to developing countries.

¶2 Corporations often bring significant benefits to the states where they operate; by generating tax revenues, creating jobs, transferring skills and technologies and generally raising the standards of living, they often make a positive contribution to the development of a country.² However, they may also cause human rights problems. Developing countries are often clamoring for foreign direct investment (“FDI”) and will compete to attract corporations by offering them attractive investment terms. Thus, they may be tempted to lower working and environmental standards in hopes of attracting MNEs in search of ever-lower production costs.³ Developing countries may also lack the adequate means and resources to enforce existing standards.⁴ Some MNEs or their suppliers may take advantage of the resulting lack of enforceable regulations, leading to poor working conditions, restrictions on freedom of association and collective bargaining, and possibly child labor. Moreover, in some cases, local governments commit human rights abuses with the explicit or tacit support of corporations. This situation raises two questions: First, how can human rights violations by corporations be avoided and redressed? Second, how can corporations’ positive contributions to the countries where they operate be increased?

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¹ Philip Alston, *The ‘Not-A-cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in NON-STATE ACTORS AND HUMAN RIGHTS 1, 17 (Philip Alston ed., Oxford University Press 2005).

² See, e.g., Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, in 43 COLUM. J. TRANSNAT’L L. 389, 397 (2004-2005); Menno T. Kamminga, *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC*, in THE EU AND HUMAN RIGHTS 553, 554 (Philip Alston ed., Oxford University Press 1999).

³ Murphy, *supra* note 2, at 389-99.

⁴ *Id.*

¶3 The current state of international law regarding the position of MNEs is strikingly unbalanced. International law still focuses too much on protecting the rights of corporations (especially through international rules on trade and the protection of FDI) and lags far behind in regulating their responsibilities. It is telling, for instance, that the statutes of the relevant international criminal tribunals remain silent on the question of criminal responsibility of corporate entities for their involvement in international crimes like war crimes and crimes against humanity. International human rights instruments are also notoriously silent about such responsibilities. In Europe today, the European Convention on Human Rights is seen more as an instrument that provides *rights* for corporations rather than one that lays down obligations for them, unless they are vested with state powers and/or are controlled by the state.⁵

¶4 In the absence of hard law, there has been a marked tendency to use soft norms when addressing corporate human rights responsibility. Soft norms, like those embodied in the United Nations (“UN”) Global Compact to the Organization for Economic Cooperation and Development (“OECD”) Guidelines on Multinational Corporations, the International Labour Organization’s (“ILO’s”) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and corporate codes of conduct, are all deliberately kept legally non-binding. Follow-up mechanisms, if they exist, are aimed at dialogue rather than confrontation.

¶5 Against this backdrop, the European Union (“EU”) has an important role to play in ensuring that its corporations respect and protect human rights wherever they operate. Since human rights are core principles of the EU,⁶ it has a special responsibility to ensure that they are protected. The EU has addressed the issue of corporate human rights responsibilities as part of its corporate social responsibility (“CSR”) policy developed in the last decade. The purpose of this article is to assess the effectiveness of Europe’s CSR policy with regard to human rights.

¶6 This article is divided into four parts. In Part II of this article, we will search for the most appropriate framework capable of ensuring that corporations effectively take up the duty to uphold human rights and live up to that duty. We start from the assumption that corporations do indeed have the duty to behave responsibly towards a variety of stakeholders. In an attempt to move beyond the traditional divide between voluntary and regulatory approaches, we will argue that a mixed framework is needed. Indeed, the ‘business case’ for corporate responsibility -- that the profit-motive will encourage socially responsible business -- is not in itself able to guarantee responsible corporate behavior in all circumstances. Mere reliance on the law, however, will not suffice either. Therefore, public authorities should create a framework which maximizes the benefits of social responsibility for corporations. At the same time, however, regulatory measures must be provided to address the worst cases of human rights violations. In Part III we will use the framework set out in Part II to evaluate the EU’s CSR policy and practice. We will first discuss the EU’s CSR policy and discuss whether it follows the mixed approach we have advocated in Part II. Thereafter, we will assess to what extent the EU, and its Member States, have developed an appropriate regulatory framework for CSR.

⁵ See generally MARIUS EMBERLAND, *THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION* (Oxford University Press, 2006).

⁶ Treaty on European Union art. 6, para. 1, Dec. 29, 2006, 2006 O.J. (C 321 E) 5 [hereinafter EU Treaty]. (“The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”).

We will argue that the European Commission, which is the motor of the EU's CSR policy, despite having high ambitions at the outset, subsequently settled for an unsatisfactory voluntary approach to CSR. Finally, in Part IV, we will make recommendations on what steps should be taken to achieve the mixed CSR-framework that would best ensure corporate human rights compliance in the EU. In practice, the EU and its Member States have put in place some elements of a mixed CSR-framework, but they leave much to be desired.

II. IN SEARCH OF A CORPORATE HUMAN RIGHTS RESPONSIBILITY FRAMEWORK

17 Milton Friedman's vision that the one and only social responsibility of business is to use its resources to engage in activities designed to increase its profits⁷ is an archaic notion. Society now expects corporations to behave responsibly with regard to a wide range of stakeholders, including shareholders, consumers, workers, persons living in the vicinity of its operations, and even the wider community and the environment. Society's expectations are reflected in academic literature which argues that there is an evolution in international law towards the recognition of direct responsibility of corporations for human rights compliance.⁸ The aim of this article, however, is not to delineate the substantive human rights obligations of corporations under current or future international law. We will discuss neither their material content -- the kind of rights which corporations are obliged to protect and whether those are only negative or also positive rights -- nor the degree of involvement in the violations required for a company to be liable.⁹ Rather, we start from the assumptions that corporations have at least an ethical and moral duty to behave responsibly towards their stakeholders and that they may incur criminal or civil liability for grave human rights violations. Taking these concerns as a starting point, we search for the most efficient framework for ensuring such corporate human rights responsibility.

A. *The Choice Between a Regulatory or Voluntary Approach*

18 At the heart of the current debate about corporate responsibility lies the question of whether a *regulatory* or *voluntary* approach is more appropriate for ensuring corporate human rights, social and environmental responsibilities. NGOs and civil society, together with a significant number of academics are in favor of the former, while business typically prefers the latter. The proponents of a regulatory approach argue that corporate human rights responsibilities are too important an issue to be left completely in the hands

⁷ See Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sep. 13, 1970, at 122-26 (quoted in Aaron A. Dhir, *Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability*, 43 AM. BUS. L. J. 365, 365 n.4 (2006)).

⁸ See, e.g. NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY, (Intersentia 2002); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 195-270 (Oxford University Press 2006).

⁹ On the debate on corporate complicity and the margins of a company's responsibility, see, e.g., THE GLOBAL COMPACT, THE UNITED NATIONS GLOBAL COMPACT: ADVANCING CORPORATE CITIZENSHIP, (2005), http://www.unglobalcompact.org/docs/about_the_gc/2.0.2.pdf (last visited Apr. 21, 2008) (for use of the concept of "spheres of influence"); see also INTERNATIONAL COUNCIL ON HUMAN RIGHTS, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 121-141 (2002) (discussing different degrees of 'complicity' in human rights violations).

of corporations.¹⁰ They feel that the immense economic power that corporations have acquired should be accompanied by corresponding responsibilities.¹¹ Moreover, as corporations have been accorded important rights, including under investment law and even under human rights law,¹² proponents of the regulatory approach claim that there is no reason why they should not bear duties as well.¹³

¶9 Proponents of a voluntary approach, in contrast, argue that there is no need for regulatory intervention since the market itself steers corporations towards responsible behavior.¹⁴ According to the ‘business case’ on CSR, responsible business behavior is also good economic behavior, since it leads to an increase in profitability.¹⁵ Thus, responsible corporate behavior within a voluntary framework is argued to be a win-win situation for business and society, while regulatory interference would put unnecessary burdens on business without providing any additional benefit.

B. *A Hybrid Framework: The Need to Move Beyond a Choice Between a Voluntary or Regulatory Approach*

¶10 In line with other recent academic analysis, we would like to move the debate beyond the black-and-white argument of voluntary versus regulatory approaches.¹⁶ In

¹⁰ See, e.g., Pall A. Davidsson, *Legal Enforcement of Corporate Social Responsibility Within the EU*, 8 COLUM. J. EUR. L. 529, 552 (2002) (stating that “certain aspects of CSR are so critical to human welfare that they cannot be left to the discretion of the private sector”).

¹¹ See generally David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporation at International Law*, 44 VA. J. INT’L L. 931, 935 (2003-2004). The authors take the idea that the power of transnational corporations has to be accompanied by commensurate duties under international human rights law as the starting point of their examination of the possibility of directly regulating such corporations at the international level.

¹² See generally EMBERLAND, *supra* note 5.

¹³ See, e.g., Peter Muchlinski, *Corporate Social Responsibility and International Law: The Case of Human Rights and Multinational Enterprises*, in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 431, 433, (Doreen McBarnet, Aurora Voiculescu & Tom Campbell, eds., 2007).

¹⁴ For example, see the responses of business representatives to the *Commission Green Paper-Promoting a European Framework for Corporate Social Responsibility* COM (2001) 366 final (July 18, 2001); see also CSR EUROPE, CSR EUROPE’S RESPONSE TO THE EUROPEAN COMMISSION GREEN PAPER “FOR A EUROPEAN FRAMEWORK ON CSR”: PROPOSALS FOR ACTION, para. 7 (DEC. 21 2001), available at http://ec.europa.eu/employment_social/soc-dial/csr/csr_responses.htm (“These [voluntary] actions are motivated by a conviction that there is an inherent bottom line value in CSR as intelligent self interest for corporations that also brings benefits for society”); ICSCA, GREEN PAPER ON PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY -ICSCA STATEMENTS 1 (Dec. 27, 2001), available at http://ec.europa.eu/employment_social/soc-dial/csr/csr_responses.htm (“Companies with this [responsible] corporate philosophy are generally more successful and profitable than others; they benefit from sustainability as a competitive advantage.”); WORLD BUSINESS COUNCIL FOR SUSTAINABLE DEVELOPMENT, CORPORATE SOCIAL RESPONSIBILITY: MAKING GOOD BUSINESS SENSE, 7 (Jan. 2000), available at <http://www.wbcsd.org/DocRoot/IunSPdIKvmYH5HjbN4XC/csr2000.pdf>, (“For any company, giving a high priority to CSR is no longer seen to represent an unproductive cost or resource burden, but, increasingly, as a means of enhancing reputation and credibility among stakeholders – something on which success or even survival may depend. Understanding and taking account of society’s expectations is quite simply enlightened self-interest for business in today’s interdependent world.”).

¹⁵ See, e.g., DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 16 (Brookings Institution Press 2005) (“According to the business case for CSR, firms will increasingly behave more responsibly not because managers have become more public-spirited -- though some may have -- but because more managers now believe that being a corporate citizen is a source of competitive advantage.”).

¹⁶ See generally Sorcha MacLeod, *Reconciling Regulatory Approaches to Corporate Social Responsibility*:

our view, it would be misleading to see the two approaches as diametrically opposed and mutually exclusive for several reasons. In practice, legislation may take on different roles in a continuum, from soft to hard norms. It may create several incentives for corporations, including preferential public procurement; regulatory bodies with certain monitoring tasks; requirements for reporting on human rights issues; or civil or criminal remedies against non-complying corporations, among other options. Indeed, regulation may be used to make a voluntary approach more efficient.¹⁷ Seeing regulatory and voluntary initiatives as opposing extremes overlooks the fact that corporations already have several legal responsibilities, for example, corporate responsibility with respect to health and safety norms and working conditions.¹⁸

¶11 On the other hand, the creation of a regulatory framework does not mean that voluntary initiatives are not important. Indeed, the law is only one of a range of factors that influence corporate behavior.¹⁹ In some cases, corporations may be expected to do more than the law literally requires and, at the very least, not take advantage of its loopholes.²⁰ Voluntary and regulatory approaches should therefore not be seen as mutually exclusive, but rather as complementary.²¹ The question to be resolved is, then, what particular mixture of regulatory and voluntary elements best ensures corporate human rights responsibility.

C. *An Assessment of the 'Business Case' of CSR*

¶12 Proponents of the 'business case' explain that corporations are financially rewarded for behaving responsibly in various ways. They argue that not only consumers, but also investors and even workers, attach importance to corporations' human rights records and have a clear preference for responsible businesses.²² Thus, the market itself acts as an important and sufficient incentive for corporations to take human rights into account, since responsible behavior leads to higher profits. This assumption leads them to conclude that a voluntary approach to corporate responsibility is sufficient. In order to

The European Union, OECD and United Nations Compared, in 13 EUROPEAN PUBLIC LAW 671 (2007); Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability*, in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW, 9, (Doreen McBarnet, Aurora Voiculescu & Tom Campbell eds., 2007). See also JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW, 34-40 (Cambridge University Press 2006).

¹⁷ Cf. *infra* Part D.

¹⁸ See McBarnet, *supra* note 16, at 31.

¹⁹ ZERK, *supra* note 16, at 35.

²⁰ *Id.* at 34.

²¹ Davidsson, *supra* note 10, at 552.

²² VOGEL, *supra* note 15, at 16-17. Vogel describes the benefits corporate social responsibility is supposed to bring for business as: "A more responsibly managed firm will face fewer business risks than its less virtuous competitors: it will be more likely to avoid consumer boycotts, be better able to obtain capital at a lower cost, and be in a better position to attract and retain committed employees and loyal customers. Correspondingly, firms that are unable or unwilling to recognize this new competitive reality will find themselves disadvantaged in the marketplace: both "responsible" and "sophisticated" investors will regard their shares as too risky; the value of their brands and thus their sales will decline as a result of media exposure, public protests, and boycotts; and the morale of their employees will suffer." *Id.* He then assesses the existence of a business case for corporate social responsibility and the actual demand of stakeholders for responsible corporate behavior. *Id.* chs 2,3. The structure of our own discussion of the merits of the business case (no. 9 and following) draws upon this. See also McBarnet, *supra* note 16, at 17-19.

determine whether the ‘business case’ is a useful, sufficient and/or necessary approach to ensuring corporate human rights responsibility, we will critically examine the available evidence on these assumptions. Before doing so, however, we would like to put the ‘business case’ into the right perspective.

1. The ‘Business Case’ as a *Means* for Ensuring Responsible Corporate Behavior

¶13 When discussing the ‘business case’ for corporate responsibility, it is important to see things from the right angle. As explained above, we start from the assumption that corporations have human rights, social and environmental responsibilities with respect to a wide range of stakeholders. Thus our *goal* is to ensure that businesses live up to these responsibilities. The question then arises as to what would be the best *means* to reach that goal; in other words what kind of framework would be the most efficient in ensuring that corporations take up their human rights obligations. If proven correct, the ‘business case’ for corporate responsibility could lead to the conclusion that the best *means* for ensuring responsible behavior are regulatory instruments which make the ‘business case’ work, or alternatively, the ‘business case’ could be shown to work without any regulatory intervention whatsoever. Thus the ‘business case’ for corporate responsibility may inform us as to the *means* needed for ensuring responsibility. The idea that good responsible behavior leads to increased profits may be a good incentive for corporations to act responsibly, but it should never be seen as the ultimate reason for responsible behavior.²³ Corporations have to behave responsibly because it is their duty to do so, not because it helps them to make more profits.²⁴ Indeed, if respect for human rights is fundamental to our society, whether or not ensuring such respect would bring economic advantages is irrelevant; achieving it remains our final goal. Therefore, if corporate social responsibility were not economically profitable, as proponents of the ‘business case’ for corporate responsibility claim, we would have to look for other means to reach our goal, not simply drop the goal because of the inherent conflict. It is important to keep this perspective in mind when reflecting on the EU’s approach to corporate responsibilities, where it is sometimes hard to distinguish *goals* from *means*.

2. The Impact of Socially Conscious Consumerism on Corporate Behavior

¶14 With this perspective in mind, we will now assess the merits of the ‘business case’.²⁵ First, proponents of the ‘business case’ base their argument on the premise that consumers take corporations’ human rights records into consideration. A company with a positive human rights image would therefore be rewarded by consumers, and conversely, a company known to violate human rights would suffer from consumer avoidance and possibly even boycotts.²⁶ Indeed, research has shown that consumers claim to take a corporation’s human rights record into account and that consumers are willing to pay more for ethically produced goods.²⁷ A 1997 survey found that seventy-

²³ See Doreen McBarnet, *supra* note 16, at 24-25.

²⁴ See Davidsson, *supra* note 10, at 532.

²⁵ See VOGEL, *supra* note 15, at 46-74. The structure of our assessment of stakeholders’ demand for responsible behavior is based on Vogel’s model. It also provided the basis for our substantive analysis.

²⁶ See *id.* at 47-56 (assessing the influence of consumers on corporate behavior).

²⁷ See, e.g., *id.* at 47.

one percent of French consumers would choose a ‘child-labor-free’ product even if it were more expensive than the alternatives.²⁸ Other surveys show that more than 30% of UK customers claimed to have boycotted stores because of ethical concerns and that 60% said to be prepared to participate in a boycott in the future.²⁹

¶15 There is a discrepancy, however, between what consumers say and what they actually do.³⁰ In practice, only a small minority of consumers take social considerations into account when shopping.³¹ It is true that the segment of consumers who base decisions on corporate responsibility is growing, evidenced by the fact that consumer awareness in the UK of the Fair Trade Brand doubled to 50% between 2003 and 2005, and sales of all Fair Trade Products increased by 51% between 2003 and 2004.³² Nonetheless, the impact of socially conscious consumerism on business profits still appears to be limited.

¶16 The question then arises how the impact of socially conscious consumerism can be increased. One reason consumers might not take human rights considerations into account when shopping may be that they lack adequate information about the responsible or irresponsible behavior of corporations.³³ Most products do not contain any information about the conditions of their production, and if products do have a certain label, consumers may not know its exact meaning and may not trust its credibility. They might be aware of the human rights behavior of large corporations -- and then mostly in cases of recent scandal -- but they will hardly ever be aware of the human rights record of lesser known brands.³⁴ This general lack of information makes it hard for consumers to compare different products and leaves them unable to make informed choices. To do so, they would need easily accessible, comprehensible, and credible information about the human rights records of corporations. There is thus a role for public authorities to create a general regulatory framework to make the ‘business case’ for corporate human responsibility work. Governments could require credible human rights reporting with effective monitoring. They could also support or even create a credible social label and

²⁸ S. GARONE, THE LINK BETWEEN CORPORATE CITIZENSHIP AND FINANCIAL PERFORMANCE, CONFERENCE BOARD, RESEARCH REPORT 1234-99-RR, 9 (quoted in VOGEL, *supra* note 15, at 47).

²⁹ See VOGEL, *supra* note 15, at 48.

³⁰ *Id.*

³¹ *Id.* (“[S]tudies suggest that the true number of socially conscious consumers may even be lower [than 10 percent].”) Vogel refers to a 2004 European survey (MICHEL CAPRON AND FRANÇOISE QUAIREL-LANOIZELEE, MYTHES ET RÉALITÉS DE L’ENTREPRISE RESPONSIBLE 57 (La Découverte 2004)), which found that while seventy-five percent of consumers indicated that they were ready to modify their purchasing decisions because of social or environmental criteria, only three percent had actually done so. Other studies in Britain have reported that approximately five percent of the public strictly follows ethical concerns in their purchasing, while “ethical boycotts” affect less than two percent of market transactions. Dara O’Rourke, *Opportunities and Obstacles for Corporate Social Responsibility in Developing Countries*, WORLD BANK/INTERNATIONAL FINANCE CORPORATION 22 (March 2004). See also VOGEL, *supra* note 15, at 51-52 (discussing the limited effects of consumer boycotts).

³² Between 2002 and 2005 there has been a 265% rise in Fairtrade products. A 2006 Survey by the Co-operative Bank in November 2006 put the UK ethical consumption market at £29 billion, an 11.4 per cent rise on the previous year compared to a 1.4 per cent rise in household expenditure more generally. See McBarnet, *supra* note 16, at vii.

³³ See VOGEL, *supra* note 15, at 52. Vogel also suggests their lack of knowledge arises from lack of interest rather than lack of available information. *Id.* We do not agree and believe that consumers still have no easy access to the necessary information, so that a conclusion on their interest in the matter cannot be so easily reached.

³⁴ See McBarnet, *supra* note 16, at 26.

adopt advertising laws to combat false or misleading social statements in advertising. Only then would consumers be able to make informed choices, taking human rights into account.³⁵

3. The Impact of Socially Responsible Investment on Corporate Behavior

¶17

Investors are seen as a second category of stakeholders who influence the behavior of corporations.³⁶ The idea is that socially responsible investors take corporations' human rights policies into account when deciding in which company to invest.³⁷ Socially responsible investment ("SRI") is thus arguably an effective market incentive for respecting human rights, since it may be assumed that non-responsible corporations will find it harder to attract investors and might even see their share prices drop. Investors may have two reasons for investing their money in a responsible way, both of which point towards a confirmation of the 'business case' for responsibility. First, some investors may decide only to invest in 'responsible' corporations because they feel it is their moral duty to do so. They do not want to lend their support to corporate human rights violations through their investment decisions. For others, SRI may simply be a means of ensuring greater share returns. Indeed, under the 'business case' reasoning, socially responsible corporations would be more profitable and SRI would make perfect economic sense.³⁸ However, empirical research has not been able to prove unequivocally that SRI leads to higher profits. At best,³⁹ the risk-adjusted returns of a carefully constructed, socially-screened portfolio are neither better nor worse than if no social criteria are included in stock selection.⁴⁰ This means that there is a place in the market for both responsible businesses and SRI, but an increase in responsible business behavior or SRI is not self-evident. In practice, a socially responsible stock index was introduced in the UK in 2001 -- the FTSE4Good Index -- which uses criteria based on CSR. Although SRI is growing,⁴¹ it still only accounts for a very small part of the European

³⁵ See Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, in NON-STATE ACTORS AND HUMAN RIGHTS, 226, 227 (P. Alston ed., 2005). See also BEUC, EUROPEAN CONSUMERS' ORGANISATION, CORPORATE SOCIAL RESPONSIBILITY: BEUC COMMENTS ON THE GREEN PAPER, 2-3 (Feb. 6, 2002), http://ec.europa.eu/employment_social/soc-dial/csr/pdf/092-NGOEU_BEUC_EU_020207_en.pdf (stating its view that it is a governmental duty to create a situation where consumers have an informed choice to buy sustainable and ethical products for a competitive price).

³⁶ Vogel, *supra* note 15, at 60-72.

³⁷ *Id.* at 16-17.

³⁸ *Id.* at 21-23. Vogel also suggests that the second group of investors, compared to the first group, is becoming increasingly important, compared to the first group. *Id.*

³⁹ Since their inception, two major ethical stock indexes, the FTSE4Good Index and the Dow Jones Sustainability Index have underperformed the market by 3% and 8% respectively. *Id.* at 35-36.

⁴⁰ *Id.* at 37. See also Kevin Campbell & Douglas Vick, *Disclosure Law and the Market for Corporate Social Responsibility*, in THE NEW CORPORATE ACCOUNTABILITY *supra* note 13 at 277 ("Previous empirical studies of the comparative performance of 'ethical' and 'non-ethical' corporations did not provide clear evidence that CSR improved a company's value in the stock market, but they did not clearly indicate that CSR activities hurt performance, either"). Their own empirical study leads to similar equivocal results, which are, however, not encouraging in the sense that socially responsible corporations performed worse than other corporations during bad market times.

⁴¹ See McBarnet, *supra* note 16, at 18 ("SRI investment in France rose 76 per cent in 2004, with 60 per cent of that accounted for by institutional investors." (quoting Ethical Corporation, *Business Briefs*, ETHICAL CORPORATION, Sept. 2005, at 4).

stock market,⁴² meaning that it is unable to affect share values.⁴³ Nevertheless, in some cases SRI may have some influence on corporate policies through shareholder activism.⁴⁴

¶18 All in all, the ‘business case’ for corporate responsibility based on investor preferences seems to be weak as the market share of SRI is still very low. It could be improved by putting an enabling framework into place that provides investors with easily accessible and credible information on corporations’ human rights policies. The actual influence of SRI on corporate policies, however, could remain weak; to have a significant effect on shareholder value, the uptake of SRI must dramatically increase.⁴⁵ Admittedly, shareholder activism may have some influence, but it seems insufficient to have a real influence in most cases.

4. The Impact of Workers on Corporate Behavior

¶19 A third category of stakeholders who could make corporations act in a more responsible way are workers.⁴⁶ The idea is that the brightest and best people will not want to work for a company with a bad human rights record. However, this idea falls short. On one hand, research has shown that ninety-two percent of UK employees considered it important that their employers be socially responsible and sixty percent said they felt strongly about it.⁴⁷ Some firms are indeed more attractive to some employees because of their social reputation.⁴⁸ On the other hand, it has not been proven that the labor market provides incentives for all corporations to behave responsibly and there is no evidence that firms without strong reputations for social responsibility find it difficult to attract first-rate, highly committed employees. In the end, having a strong reputation for responsible corporate behavior is only one of the many ways of making a firm a desirable place to work.⁴⁹ Nevertheless, employees may sometimes pressure a company to behave more responsibly.⁵⁰

5. The ‘Business Case’ Does Not Suffice

¶20 Having reviewed the empirical evidence, it does not seem self-evident that responsible behavior is indeed good for business or conversely that irresponsible behavior is bad for profits. Behaving responsibly may be beneficial for some corporations in some situations whose marketing strategy is built entirely on their social reputation.⁵¹ Similarly, irresponsible behavior may be costly for well-known brands, since they may be easily targeted by media campaigns.⁵² However, it has not been

⁴² Approximately 0.36%. See VOGEL, *supra* note 15, at 61.

⁴³ *Id.* at 62-63.

⁴⁴ *Id.* at 64-65. See also McBarnet, *supra* note 16, at 37-38 (stating that NGOs, for instance, have bought shares in order to be able to exercise shareholder rights at annual general meetings.)

⁴⁵ See VOGEL, *supra* note 15, at 62-64 (according to one model SRI should occupy at least 25% of the market to be able to have an influence on share prices).

⁴⁶, See *id.* at 56-60 (providing an assessment of the influence of employees on corporate behavior).

⁴⁷ McBarnet, *supra* note 16, at 19.

⁴⁸ VOGEL, *supra* note 15, at 58.

⁴⁹ *Id.* at 58-59.

⁵⁰ See *id.* at 59-60.

⁵¹ *Id.* at 50-51.

⁵² *Id.* at 29-33.

proven that corporate responsibility will generally make a company more profitable. Thus, “the market for virtue is not sufficiently important to make it in the interest of all firms to behave more responsibly”⁵³ and an appropriate regulatory framework is needed.

D. A Hybrid Framework is Necessary to Make the ‘Business Case’ Work and Address Its Failures

¶21 An important factor in the failure of the ‘business case’ for corporate human rights responsibility is the absence of an appropriate framework to make it work. In order to improve the ‘business case’ for corporate responsibility, public authorities should put such an enabling framework in place. In quite the same way that market efficiencies can only be assured if public authorities ensure fair competition, it may very well be that responsible corporate behavior will only be rewarded if the right framework is in place. As already mentioned, a first role for public authorities is to ensure that consumers, investors and workers alike have access to clear and credible information on the behavior of corporations so that they are able to make informed decisions. Thus, reporting on non-financial issues according to certain guidelines could be made mandatory, verification of social claims should be ensured, and monitoring of code of conducts must be put in place.⁵⁴ In addition, misleading advertising laws should be adopted to combat false social claims. Apart from that, public authorities can also influence the behavior of corporations through their role as economic actors, especially through public procurement decisions. Ironically, business representatives who favor the ‘business case’ are opposed to the implementation of such a framework designed to make the ‘business case’ work, which raises doubts about their true belief in such a ‘business case’. Indeed, “[i]f voluntary adherence to CSR standards is ‘good for business,’ what do business entities have to fear from legally-binding obligations to respect human rights and environmental standards?”⁵⁵

¶22 Even with an appropriate enabling framework in place, however, not all corporations would gain from behaving responsibly. If the choice is left to business, with shareholder value as the only justification for responsible -- or irresponsible -- behavior, it cannot be assumed that responsible behavior will always win out in a conflict of demands. In some cases the immediate gains from violating human rights or exploiting weak laws in developing countries may be larger than their potential costs. Admittedly, the more responsible option may be beneficial for the long-term reputational interests of a company, but even then corporations may prefer short-term profits and/or taking advantage of limited business opportunities.⁵⁶

⁵³ *Id.* at 17, 29-34.

⁵⁴ *See, e.g.,* Davidsson, *supra* note 10, at 552-553. Note that a variety of regulatory techniques may be used to achieve these objectives. While it is crucial that public authorities make sure all necessary mechanisms are put in place, they do not necessarily need to provide all of them themselves and may delegate some to the private sector.

⁵⁵ Sorcha MacLeod, *Corporate Social Responsibility Within the European Union Framework*, 23 WIS. INT’L L.J. 541, 551 (2005).

⁵⁶ *See, e.g.,* De Schutter, *supra* note 35, at 227 (“With respect to many socially responsible practices, companies will frequently find themselves in the familiar situation where what would be profitable in the long run if other competitors act similarly will be costly in the short run, where certain competitors seeking an immediate return on the investment of the shareholders, will act otherwise.”). *See also* McBarnet, *supra* note 16, at 25; THE PLATFORM OF EUROPEAN SOCIAL NGOS: SOCIAL PLATFORM RESPONSE TO THE COMMISSION’S GREEN PAPER, II.1 (Nov. 26 2001) [hereinafter EUROPEAN SOCIAL NGOS], *available at*

¶23 This leads us to the conclusion that the ‘business case’ for corporate human rights responsibility is a useful, but not sufficient, *means* for attaining our *goal* of ensuring responsible corporate activity. Accordingly, corporate human rights responsibility cannot be left to the market alone.⁵⁷ Effective state action is necessary to ensure that grave human rights violations by business are not tolerated, whether they happen in the corporation’s home or host state. Such violations must be redressed and victims must receive reparations. There is thus a need for civil and criminal procedures to address serious violations of human rights.

¶24 The fact that legally enforceable remedies are needed does not mean that voluntary initiatives lack value. If we want corporations to truly behave responsibly, it is important that they not only comply with the letter, but also with the spirit, of the law.⁵⁸ As Mary Robinson, former UN High Commissioner for Human Rights, has aptly pointed out: “Regulation is crucial to minimize abuses and to enforce compliance with minimum norms but it alone will not establish the ‘business case’ for making the necessary changes. To do so we must provide incentives, so that doing the right thing also makes good business sense.”⁵⁹

III. THE EUROPEAN UNION’S CSR POLICY: AN APPROPRIATE APPROACH TO CORPORATE HUMAN RIGHTS OBLIGATIONS?

¶25 In the previous part, we argued that a hybrid framework is needed to ensure responsible corporate behavior. Such a framework will have to consist of enabling elements which help to make the ‘business case’ work as well as an effective sanctions mechanism to address failures of the ‘business case’ that may still occur in spite of the preventive framework.

¶26 In this part we will assess to what extent the EU’s CSR policy intends to establish such a hybrid framework for CSR. We will discuss the European Commission’s Green Paper on CSR of 2001 which is the real starting point of the EU’s CSR policy (section A), its follow-up Communication of 2002 which launched the EU Multi-Stakeholder Forum (section B) and the activities and outcome of the Forum (section C). The Forum’s conclusions, together with the review of the Lisbon Strategy in 2005, which emphasized the importance of growth and jobs (section D) have shaped the Commission’s current -- purely voluntary -- approach to CSR (section E). Its approach can be contrasted with the one of the European Parliament, which is in favor of a mixed approach to CSR, which in our view would be more desirable (section F). In spite of the European Commission’s

http://ec.europa.eu/employment_social/soc-dial/csr/pdf/092-NGOEU_Platform-of-European-Social-NGOs_EU_011126_en.htm, (“all actors need to acknowledge that short-term profit and social responsibility are not always reconcilable”); Davidsson, *supra* note 10, at 532 (“Additional costs are involved in adopting new policies and schemes to align existing company practices with social responsibilities, and these additional costs will not always result in increased profits. Even where consumers or investors reward ethical conduct, practices that are socially harmful could be even more profitable.”).

⁵⁷ See, e.g. Davidsson, *supra* note 10, 552 (“Certain aspects of CSR are so critical to human welfare that they cannot be left to the discretion of the private sector.”).

⁵⁸ See McBarnet, *supra* note 16, at 47-54 (on the need to comply with the spirit of the law and the problem of ‘creative compliance’).

⁵⁹ MacLeod, *supra* note 55, at 551 (quoting Mary Robinson, United Nations High Commissioner for Human Rights, RSA World Leaders Lecture: Beyond Good Intentions: Corporate Citizenship For a New Century (May 2002)).

early ambitions to put a basic enabling regulatory framework into place, and consistent calls from the European Parliament and NGOs for regulatory measures, the voice of business has prevailed, resulting in a purely voluntary approach to CSR (section G).

A. The Starting Point for the EU's Corporate Social Responsibility Policy: the European Commission's Green Paper on CSR of 2001

¶27 Although there had been some earlier initiatives,⁶⁰ the real starting point for the EU's CSR policy was the issuing of the European Commission's ("Commission") Green Paper on the promotion of a European framework for corporate social responsibility ("Green Paper") in 2001.⁶¹ Following the tradition of EU Green Papers, it aims to "launch a wide debate and seek views on corporate social responsibility at a national, European and international level."⁶² The Green Paper defines CSR as "a concept whereby corporations integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis,"⁶³ but makes it clear that CSR should not be seen as a substitute for regulation or legislation concerning social rights or environmental standards, including the development of new appropriate legislation. On the specific issue of human rights, the Commission notes that "binding rules ensure minimum standards applicable to all, while codes of conduct and other voluntary initiatives can only complement these and promote higher standards for those who subscribe to them."⁶⁴ Although CSR itself is seen as something voluntary, the Commission clearly envisages an active role for public authorities.⁶⁵

[The] main contribution of a European approach [would] be to complement and add value to existing activities by providing an overall European framework, aiming at promoting quality and coherence of corporate social responsibility practices, through developing broad principles, approaches and tools, and promoting best practice and innovative ideas, [and by] supporting best practice approaches to cost-effective evaluation and independent verification of corporate social responsibility practices, ensuring thereby their effectiveness and credibility.⁶⁶

Nevertheless, it is clear that the 'business case' for CSR lies at the base of the Commission's approach. The Commission believes that socially and environmentally

⁶⁰ See, e.g., *Commission Communication on Multinational Undertakings and Community Regulations*, COM (73) 1930 final (Nov. 7, 1973); see also MacLeod, *supra* note 55, at 543; Parliament Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct of April 14, 1999, 1999 O.J. (C 104/180).

⁶¹ *Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility*, COM (2001) 366 final (July 18, 2001) [hereinafter *Commission Green Paper on CSR*].

⁶² *Id.* at 7.

⁶³ *Id.* at 8. See also *Commission Communication on Promoting Core Labour Standards and Improving Social Governance in the Context of Globalization*, COM (2001) 416 final (July 18, 2001) (confirming the Commission's view that CSR initiatives are of a voluntary nature).

⁶⁴ *Commission Green Paper on CSR*, *supra* note 61, at 15.

⁶⁵ Olivier De Schutter, *Corporate Social Responsibility European Style*, 2 EUROPEAN LAW JOURNAL 203, 207 (2008).

⁶⁶ *Commission Green Paper on CSR*, *supra* note 61, at 7.

positive behavior “can result in better performance and can generate more profits and growth,”⁶⁷ acknowledging, however, the “need for better knowledge and further studies on the impact of corporate social responsibility on business performance.”⁶⁸ All in all, the underlying rationale of the Commission seems to be that there is a ‘business case’ for CSR, but that public authorities should create the necessary framework conditions to make this ‘business case’ work.

¶28

In the Commission’s vision, responsible corporate behavior should be promoted by enabling consumers and investors alike to take a corporation’s human rights, social and environmental record into account. It sees an important role for the EU in establishing the necessary means for providing consumers and investors with reliable information to allow them to make informed decisions. More concretely, the Commission addresses the importance of social responsibility reporting, the monitoring and verification of CSR practices,⁶⁹ and suggests the creation of a public social label.⁷⁰ As regards SRI, it points out the need for further standardization, harmonization and transparency in screening tools and metrics used by screening agencies.⁷¹ In addition, public authorities would have a direct role to play by “support[ing] education and awareness-raising around labor conditions issues, promot[ing] best practice through sponsorship of company awards, facilitat[ing] . . . the development of multi-stakeholder partnerships, develop[ing] . . . standards in social labeling, and us[ing] . . . public procurement and fiscal incentives in promoting labeled products”.⁷²

¶29

The Green Paper succeeded in its aim to launch a wide debate and received a large number of reactions from different stakeholders and public authorities.⁷³ On some issues, especially the role of public authorities in providing a regulatory framework for CSR, different stakeholders have taken diametrically opposed views. NGOs emphasize that a purely voluntary approach to CSR would be insufficient and that voluntary commitments should not be seen as a substitute to regulation or legislation.⁷⁴ Instead, they propose a

⁶⁷ *Id.* at 8 (“The economic impact of corporate social responsibility can be broken down into direct and indirect effects. Positive direct results may, for example, derive from a better working environment, which leads to a more committed and productive workforce or from efficient use of natural resources. In addition, indirect effects result from the growing attention of consumers and investors, which will increase their opportunities on the markets. Inversely, there can sometimes be a negative impact on a company’s reputation due to criticism of business practices. This can affect the core assets of a company, such as its brands and image”). *See also id.* at 9 (“Financial institutions are making increasing use of social and environmental checklists to evaluate the risks of loans to, and investments in companies. Similarly, being recognized as a socially responsible enterprise, for example, through listing in an ethical stock market index, can support the rating of a company and therefore entails concrete financial advantages”).

⁶⁸ *Id.* at 9.

⁶⁹ *Id.* at 18-19.

⁷⁰ *Id.* at 21.

⁷¹ *Id.* at 22.

⁷² *Id.* at 21.

⁷³ All responses to the consultation on the *Commission Green Paper on CSR* are available at http://ec.europa.eu/employment_social/soc-dial/csr/csr_responses.htm.

⁷⁴ *See, e.g.,* E-mail from Dr. Allen White, Director, Global Reporting Initiative, in response to the call by the European Commission for input to the discussion opened by the recent *Green Paper on Promoting a European Framework for Corporate Social Responsibility*, *supra* note 61; CLEAN CLOTHES CAMPAIGN, REACTION FROM THE CLEAN CLOTHES CAMPAIGN TO THE EUROPEAN COMMISSION GREEN PAPER “PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY” (Dec. 21, 2001) [hereinafter CLEAN CLOTHES CAMPAIGN] <http://www.cleanclothes.org/news/01-12-21.htm>; EUROPEAN SOCIAL NGOS, *supra* note 56, paras. I.15, I.16; OXFAM INTERNATIONAL, THE EUROPEAN COMMISSION’S GREEN PAPER: PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY: A

mixture of voluntary and regulatory instruments.⁷⁵ Business and employers' organizations agree with the Commission's definition that CSR involves actions that go beyond regulatory compliance.⁷⁶ They clearly favor a voluntary approach to CSR, which they see as a more efficient way to promote good corporate practices than prescriptive governmental codes and regulations.⁷⁷ Emphasizing the inappropriateness of "a one-size-fits-all" approach,⁷⁸ they stress the need for flexibility⁷⁹ which could best be addressed by voluntary initiatives.⁸⁰ Moreover, they claim, regulatory initiatives would also be unnecessary because of the high standards of existing regulations.⁸¹ According to some organizations, the only role for public authorities is to encourage voluntary corporate initiatives and to promote best corporate practices.⁸² CSR Europe,⁸³ however, sees scope for regulation on specific matters of widespread social concern such as health and safety or exploitative employment.⁸⁴ It also supports CSR-enabling legislation, citing the examples of disclosure regulations in the UK, France and Germany.⁸⁵

SUBMISSION BY OXFAM INTERNATIONAL, para 16 (Jan. 2002), *available at* http://ec.europa.eu/employment_social/soc-dial/csr/pdf/091-NGOINT_OXFAM_INT_020121_en.pdf, [hereinafter OXFAM INTERNATIONAL]; TRADCRAFT EXCHANGE, EU CORPORATE SOCIAL RESPONSIBILITY GREEN PAPER: SUBMISSION BY TRADCRAFT EXCHANGE, 2 (Dec. 2001), *available at* http://ec.europa.eu/employment_social/soc-dial/csr/pdf/091-NGOINT_Traidcraft_INT_011221_en.pdf, [hereinafter TRADCRAFT EXCHANGE]; *but see* Letter from Chris Wille, Director, Rainforest Alliance, to the European Commission (Dec. 28, 2001) (stating that "CSR and certification are voluntary systems and should be market driven, otherwise they will not succeed in the long term").

⁷⁵ *See, e.g.*, OXFAM INTERNATIONAL, *supra* note 74, para. 19; TRADCRAFT EXCHANGE, *supra* note 74; CLEAN CLOTHES CAMPAIGN, *supra* note 74.

⁷⁶ CSR EUROPE, CSR EUROPE'S RESPONSE TO THE EUROPEAN COMMISSION GREEN PAPER "FOR A EUROPEAN FRAMEWORK ON CSR": PROPOSALS FOR ACTION, para. 7 (Dec. 21 2001), *available at* http://ec.europa.eu/employment_social/soc-dial/csr/pdf/043-COMPNETEU_CSREUROPE_EU_011221_en.pdf, [hereinafter CSR EUROPE]; *see also id.* at para. 15 ("It is illogical to speak of regulating CSR activities, if they are simultaneously to be encouraged as activities that lie beyond regulation").

⁷⁷ INTERNATIONAL CHAMBER OF COMMERCE GROUP ON BUSINESS IN SOCIETY, ICC COMMENTS ON THE EUROPEAN COMMISSION GREEN PAPER "PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY" (Dec. 20, 2001), *available at* http://ec.europa.eu/employment_social/soc-dial/csr/pdf/043-COMPNETEU_CSREUROPE_EU_011221_en.pdf; *see also* ASSOCIATION DES INDUSTRIES DE MARQUE, AIM® POSITION PAPER: AIM REPLY TO THE GREEN PAPER ON CORPORATE SOCIAL RESPONSIBILITY, (Jan. 2002), *available at* http://ec.europa.eu/employment_social/soc-dial/csr/pdf/043-COMPNETEU_AIM_EU_020118_en.pdf; CSR Europe, *supra* note 76, para. 22.

⁷⁸ ICSCA, GREEN PAPER ON PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY: ICSCA STATEMENTS (Dec. 27, 2001), *available at* http://ec.europa.eu/employment_social/soc-dial/csr/pdf/031-ORGINT_ICSCA_INT_011227_en.pdf.

⁷⁹ CSR EUROPE, *supra* note 76, paras. 3, 4.

⁸⁰ INTERNATIONAL CHAMBER OF COMMERCE, ICC COMMENTS ON THE EUROPEAN COMMISSION GREEN PAPER "PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY" (Dec 20, 2001), *available at* http://ec.europa.eu/employment_social/soc-dial/csr/pdf/042-COMPNETINT_International-Chamber-of-Commerce-ICC_INT_011220_en.pdf.

⁸¹ *Id.*

⁸² *Id.*

⁸³ CSR Europe is a business driven network made up of over fifty member companies and linking fifteen national and international partner orgs around Europe, who together represent over 1200 businesses.

⁸⁴ CSR EUROPE, CSR EUROPE'S RESPONSE TO THE EUROPEAN COMMISSION GREEN PAPER "FOR A EUROPEAN FRAMEWORK ON CSR": PROPOSALS FOR ACTION, para. 16, (Dec. 21 2001), *available at* http://ec.europa.eu/employment_social/soc-dial/csr/pdf/043-COMPNETEU_CSREUROPE_EU_011221_en.pdf.

⁸⁵ *Id.* at para. 17.

B. The Commission's Communication on CSR as a Business Contribution to Sustainable Development and Launch of the EU Multi-Stakeholder Forum on CSR in 2002

¶30 After the consultation process, the Commission adopted a new Communication on CSR as a business contribution to sustainable development in July 2002.⁸⁶ The basic policy views of the Commission do not seem to have changed since its Green Paper. It confirms its definition of CSR and, while it expresses its belief in the 'business case' for CSR, it continues to see a role for a European CSR framework to make the 'business case' work.⁸⁷ More concretely, it sees room for EU action aimed at improving transparency and thus credibility of CSR practices.⁸⁸

¶31 Indeed, there has been an increase in guidelines, principles and codes relating to CSR, which cannot be easily compared,⁸⁹ which causes confusion for business, consumers, investors, other stakeholders and the public.⁹⁰ Therefore, "there is a need for a certain convergence of concepts, instruments, practices, which would increase transparency without stifling innovation, and would offer benefits to all parties."⁹¹ Further, greater consensus is necessary "on the type of information to be disclosed, the reporting format, the indicators used and the reliability of the evaluation and audit procedure [as that] would allow for a more meaningful benchmarking and communication of corporations' performance within particular sectors and for businesses of similar size." The guidelines developed by the Global Reporting Initiative ("GRI") are a good example which could serve as the foundation of such consensus.⁹² Apart from convergence, it is also important that codes be effectively implemented, monitored and verified,⁹³ that social and environmental claims be made and assessed in accordance with commonly agreed-upon criteria, and that such claims be monitored by Member States and stakeholders.⁹⁴ There is also room for an EU approach to SRI.⁹⁵

¶32 In order to make progress on all these issues, the Commission launches in this Communication an EU Multi-Stakeholder Forum ("Forum") on CSR whose purpose is to facilitate dialogue between business and their stakeholders. The aim of this Forum is:

to promote transparency and convergence of CSR practices and instruments, through (1) exchange of experience and good practice between actors at EU level, (2) bringing together existing initiatives within the EU, and seeking to establish common EU approach and guiding principles, including as a basis for dialogue in international fora and with

⁸⁶ *Commission Communication concerning Corporate Social Responsibility: a Business Contribution to Sustainable Development*, COM (2002), 347 final, (July 2, 2002).

⁸⁷ *Id.* at 5.

⁸⁸ *Id.* at 8.

⁸⁹ *Id.* at 12-13

⁹⁰ *Id.* at 8.

⁹¹ *Id.* at 12-13 (references omitted).

⁹² *Id.* at 14.

⁹³ *Id.* at 13.

⁹⁴ *Id.* at 15.

⁹⁵ *Id.* at 16.

third countries and (3) identifying and exploring areas where additional action is needed at European level.⁹⁶

The Commission invites the Forum to address and develop guiding principles on the issues discussed above: the effectiveness and credibility of codes of conduct, the problem of CSR measurement, reporting and assurance, labeling schemes based on the core ILO conventions and environmental standards, and the disclosure of SRI policies on pension and retail funds.⁹⁷ In theory, it would have been possible for the Commission to develop these guidelines itself. The reason for entrusting this task to the Forum was that the Commission absolutely wanted “ownership” of the CSR principles by all stakeholders.

C. *Activities and Outcome of the EU Multi-Stakeholder Forum on CSR*

¶33

The outcome of the EU Multi-Stakeholder Forum on CSR was unfortunately far less ambitious than it could have been. From the very start, business representatives dominated the debate in the Forum, succeeding immediately in downgrading its mandate when it was formally established at its first High-Level Meeting on October 16, 2002.⁹⁸ According to its self-adopted mandate, the Forum was

to promote innovation, transparency and convergence of CSR practices and instruments through improving knowledge about the relationship between CSR and sustainable development . . . by facilitating the exchange of experience and good practices and bringing together existing CSR instruments and initiatives, with a special emphasis on SME specific aspects [and by] exploring the appropriateness of establishing common guiding principles for CSR practices and instruments, taking into account existing EU initiatives and legislation and internationally agreed instruments such as OECD Guidelines for multinational enterprises, Council of Europe Social Charter, ILO core labor conventions and the International Bill of Human Rights.⁹⁹

The mandate of the platform had one crucial difference from that envisaged by the Commission in its Communication: it lacked the objective of “identifying and exploring areas where additional action is needed at the European level.”¹⁰⁰ This determined the outcome of the Forum as no proposals for legislative actions could have been proposed by a platform that did not have a mandate to do so.¹⁰¹

⁹⁶ *Id.* at 17.

⁹⁷ *Id.* at 18.

⁹⁸ For an interesting and revealing discussion of the establishment and early life of the Forum, see Olivier De Schutter, *Corporate Social Responsibility European Style*, 14 EUROPEAN LAW JOURNAL NO. 2, 203, 210-214 (2008).

⁹⁹ EU MULTI-STAKEHOLDER FORUM ON CSR, OBJECTIVES, COMPOSITION AND OPERATIONAL ASPECTS (Oct. 16, 2002), para. 1, available at http://circa.europa.eu/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/CSR%20Forum%20Rules.htm.

¹⁰⁰ De Schutter, *supra* note 98, at 213.

¹⁰¹ *Id.* at 213-214.

¶34 The Multi-Stakeholder Forum presented its Final Report with results and recommendations at its last High-Level Meeting in June 2004.¹⁰² According to its foreword, the Final Report is a “fair record of points of consensus identified during the twenty month process and work of the Forum, [which] was presented, discussed and agreed [subject to internal consultation led by some NGOs with their constituencies]”. It recognizes, though, that “some differences and debates . . . remain.”¹⁰³ In reality, no consensus was reached.¹⁰⁴ Indeed, the Final Report of the Forum represents the business approach to CSR, presenting it as “the voluntary integration of environmental and social considerations into business operations, over and above legal requirements and contractual obligations. CSR is about going beyond these, not replacing or avoiding them.”¹⁰⁵

¶35 Not surprisingly, the recommendations made by the Final Report are very weak. The Final Report recommends that “public authorities ensure that there is both a legal framework and the right economic and social conditions in place to allow corporations which wish to go further through CSR to benefit from this in the market place, both in the EU and globally,”¹⁰⁶ but does not explain what such a framework should look like. On the issue of reporting and monitoring, for instance, it merely “notes that for trade unions and NGOs, transparent CSR reporting is a particularly important process in providing meaningful information, a clear record of CSR development and assessing credibility.”¹⁰⁷ Since business representatives have always opposed the adoption of mandatory reporting rules, no consensus was reached. The recommendation on the establishment of an enabling framework for CSR thus rings hollow. Only on the issue of public procurement is the outcome somewhat more positive, with the request for “EU and/or Member States [to] consider and evaluate how to use public funds in the most responsible and effective manner, taking into account environmental and social, as well as economic considerations.”¹⁰⁸ In sum, few of the European Commission’s and Parliament’s early ambitions remain, and no progress has been achieved in the establishment of a regulatory framework, which would have enabled the ‘business case’ for CSR.

D. The Lisbon Strategy and its 2005 Review

¶36 In order to understand the further evolution of the EU’s policy on CSR, it is important to keep in mind that its CSR policy has been made a part of the “Lisbon

¹⁰² EU MULTI-STAKEHOLDER FORUM ON CSR, FINAL REPORT, (June 29, 2004), available at http://circa.europa.eu/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/CSR%20Forum%20final%20report.pdf, Foreword.

¹⁰³ *Id.*

¹⁰⁴ De Schutter, *supra* note 98, at 214.

¹⁰⁵ EU MULTI-STAKEHOLDER FORUM ON CSR, *supra* note 102, at 2-3. Richard Howitt, member of the European Parliament and Rapporteur on CSR has confirmed that no definition has been reached on the definition of CSR. At the Review Meeting of the Forum in 2006, he said that “despite the fact that it has been said many times today that there is a consensus on the definition of CSR and that this is a consensus of the forum, really there isn’t. We mustn’t deceive ourselves about that. There is a European Commission definition of CSR that is in its communication, which we respect, but we should also respect that there are other views out here about the appropriateness of that definition. To say that there is a consensus where there isn’t, I think it unhelpful.” *Id.*

¹⁰⁶ *Id.* at 15.

¹⁰⁷ *Id.* at 15.

¹⁰⁸ *Id.* at 16.

Strategy”. The European Council’s Lisbon Declaration of March 2000¹⁰⁹ sets the goal for the EU to become, by 2010, “the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion”.¹¹⁰ To help the EU achieve this rather bold objective, the European Council suggests a fully decentralized approach in which both corporations and civil partners would be actively involved.¹¹¹ This suggestion has been interpreted by the European Commission as “a special appeal [from the European Council] to corporations’ sense of social responsibility regarding best practices on lifelong learning, work organization, equal opportunities and sustainable development.” The Commission sees its CSR-policy as a means of contributing to the Lisbon goals.¹¹²

¶37 Given the integration of the EU’s CSR policy into the Lisbon Strategy, a review of the latter clearly would have an impact on the former. Such refocusing took place in 2005 when, following recommendations from a High-Level report prepared by Wim Kok¹¹³ and a concurring Communication from Commission President Barroso and Vice-President Verheugen,¹¹⁴ the Council re-launched the Lisbon Strategy with a focus on growth and employment.¹¹⁵ Delivering stronger, lasting growth and creating more and better jobs is now seen as the key to meet Europe’s wider economic, social and environmental ambitions.¹¹⁶ Indeed, the revised Lisbon Strategy aims to “[embed] the European commitment to social cohesion and the environment in the heart of the growth process—to be a means of growth rather than a claim on it.”¹¹⁷

¶38 In reality, the result of the refocusing of the Lisbon Strategy is that its goal of social cohesion -- and thus also the CSR debate -- has been made subordinate to the achievement of economic growth and more and better jobs.¹¹⁸ This not only seems to make a special CSR-aimed policy less relevant, but may also imply that CSR is only a policy objective insofar as it does not contradict the superior aims of growth and jobs.

¹⁰⁹ Lisbon European Council, of Mar. 23 and 24, 2000, *Presidency Conclusions*, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm.

¹¹⁰ *Id.* para. 5.

¹¹¹ *Id.* para. 8.

¹¹² *Commission Green Paper on CSR*, *supra* note 61, para. 6 (stating that the European Union is concerned with corporate social responsibility as it can be a positive contribution to the strategic goal decided in Lisbon).

¹¹³ High Level Group, *Facing the Challenge, The Lisbon Strategy for Growth and Employment* (Nov. 2004) available at http://ec.europa.eu/growthandjobs/pdf/kok_report_en.pdf, [hereinafter *The Lisbon Strategy*].

¹¹⁴ *Communication from President Barroso and Vice-President Verheugen to the Spring European Council – Working Together for Growth and Jobs: a New Start for the Lisbon Strategy*, at 24, COM (2005) (Feb. 2, 2005).

¹¹⁵ Lisbon European Council, Mar. 23 and 24, 2000, *Presidency Conclusions*, para. 6, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm.

¹¹⁶ *Communication from President Barroso and Vice-President Verheugen to the Spring European Council – Working Together for Growth and Jobs: a New Start for the Lisbon Strategy*, at 7, COM (2005) (Feb. 2, 2005).

¹¹⁷ *The Lisbon Strategy*, *supra* note 113, at 39. In that sense aiming for growth and jobs is believed to go hand in hand with promoting environmental and social objectives. *See id.* at 4, 12.

¹¹⁸ Interestingly, the European Parliament does not seem to accept the new focus for the Lisbon Strategy. In its Resolution on a European Social Model for the future of September 2006, it indicates its disagreement with the European Council and the Commission, “call[ing] on the Commission and the Council to respect the initial equilateral triangle of the Lisbon strategy and to develop an approach that is better balanced between economic coordination on the one hand and employment and social policy on the other.” European Parliament Resolution on a European Social Model for the Future, 2006/340 final (Sept. 6, 2006), para. 11.

This is problematic, since corporate responsibility should be a *goal* in itself; the fact that it may bring economic benefits may act as an incentive for policymakers, but should not be their motivation for ensuring compliance by corporations. Just as corporations should not act responsibly merely because it will increase their profits, public authorities should not promote responsible corporate behavior on the grounds of its economic benefits. Respect for human rights has to be considered a priority and should not risk being sacrificed for economic growth. Sadly, however, CSR no longer seems to be a priority for the EU.¹¹⁹

E. The Commission's Current Approach to CSR

¶39 Following the final report of the Multi-Stakeholder Forum on CSR and the review of the Lisbon Strategy, the Commission issued its latest Communication on CSR, entitled “Implementing the partnership for growth and jobs: making Europe a pole of excellence on CSR.”¹²⁰ The name of the document is telling: in accordance with the refocusing of the Lisbon Strategy, the Commission sees CSR as merely a means to create growth and jobs rather than an end in itself. Abandoning the view that CSR needs an enabling public framework in order to be profitable for corporations, the Commission now opts for a completely voluntary approach, believing that “an approach involving additional obligations and administrative requirements for business risks being counter-productive and would be contrary to the principles of better regulation.”¹²¹ It “acknowledg[es] that enterprises are the primary actors in CSR, [and] has decided that it can best achieve its objectives by working more closely with European business.”¹²² With this, the Commission leaves behind both its mixed approach to CSR and the idea that multi-stakeholder involvement is essential to the promotion and development of CSR. Instead, it chooses to favor the most powerful of stakeholders, namely business.

¶40 On the important issue of ensuring transparency and credibility of CSR practices, for instance, the Commission admits that consumers still lack clear information on the social and environmental performance of goods and services, including information on the supply-chain, but sees only room for voluntary actions as a remedy.¹²³ The Commission thus does not conclude that the voluntary approach taken by the Forum did not succeed in making progress on the matter and that time has come for some regulatory intervention. Indeed, the only role the Commission sees for itself with respect to CSR is to raise awareness in order to promote best practices¹²⁴ and to support multi-stakeholder initiatives.¹²⁵ The Forum itself is to be regularly reconvened, but merely with a view to continually reviewing progress on CSR in Europe.¹²⁶

¶41 Moreover, the only follow-up to the Forum is a European Alliance on CSR, a purely voluntary alliance of European enterprises, set up by the Communication. The

¹¹⁹ See De Schutter, *supra* note 98, at 206.

¹²⁰ *Commission Communication Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on CSR*, COM (2006) 136 final (Mar. 22, 2006).

¹²¹ *Id.* at 2.

¹²² *Id.*

¹²³ *Id.* at 7.

¹²⁴ *Id.* at 6.

¹²⁵ *Id.* at 7.

¹²⁶ *Id.* at 3.

Alliance will function as an umbrella for new or existing CSR policies. It is not a legal instrument, but a purely political process to increase European corporations' compliance with CSR.¹²⁷ The fact that there are no formal requirements for declaring support for the Alliance, and that the European Commission will not keep a list of corporations that support it, stresses its purely voluntary character.¹²⁸ Contrary to the Multi-Stakeholder Forum, which started with a rather broad mandate and included a variety of stakeholders,¹²⁹ the only ambition of the Alliance is to bring business together. It has been launched as a joint initiative of the Commission and part of the business world without even consulting other stakeholders.¹³⁰ Business representatives are thereby favored above other stakeholders and the furtherance of CSR has been entirely entrusted to business itself.¹³¹

F. The Contrasting View of the European Parliament

¶42 It is interesting to contrast the evolution of the Commission's CSR policy with the view of the European Parliament. The Parliament has always been in favor of a mixed approach to corporate human rights responsibility, combining voluntary and regulatory mechanisms.¹³² It accepts that the starting point to CSR is a voluntary approach,¹³³ and that voluntary initiatives promoting the 'business case' for CSR should be preferred to legislation as a more effective and efficient way of achieving measurable outcomes.¹³⁴ Nevertheless, it considers that regulation, where appropriate, is an option.¹³⁵ To start with, the Parliament would like public authorities to create an enabling framework for CSR. It emphasizes the importance of providing consumers and investors with credible information on CSR practices and has asked for mandatory reporting on social and environmental issues,¹³⁶ independent verification of reports,¹³⁷ the creation of a European Monitoring Platform¹³⁸ and a proposal on social labeling.¹³⁹ It has also called for the use

¹²⁷ *Id.*

¹²⁸ *Id.* at 6.

¹²⁹ See *supra* Part III.B.

¹³⁰ According to the European Economic and Social Committee, the European Alliance on CSR is "of the nature of a joint initiative on the part of the Commission and part of the business world, and . . . the other interested parties were not consulted." *Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility*, para. 1.10, COM (2006) 136 final (Dec. 30, 2006).

¹³¹ See De Schutter, *supra* note 98, at 216 (noting that this perceived preference for business was a particularly damaging political message).

¹³² Parliament Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct of 14 April 1999, 1999 O.J. (C 104) 180, Preamble, Recital F [hereinafter Parliament Resolution on EU Standards for European Enterprises].

¹³³ Parliament Resolution 2002/278 on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility (COM(2001) 366 – C5-0161/2002 – 2002/2069(COS)) of 30 May 2002, 2003 O.J. (C 187 E), Preamble, Recital J [hereinafter Parliament Resolution on the Commission Green Paper].

¹³⁴ *Id.* para. 2.

¹³⁵ *Id.* Preamble, Recital J.

¹³⁶ *Id.* para. 6.

¹³⁷ *Id.* para. 8.

¹³⁸ Parliament Resolution on EU Standards for European Enterprises, *supra* note 132, para. 14.

¹³⁹ Parliament Resolution on the Commission Green Paper, *supra* note 133, para. 11.

of advertising laws to combat false and misleading social and human rights claims.¹⁴⁰ In order to create incentives for corporations to behave more responsibly, it has suggested taking corporations' social and human rights behavior into account in public procurement decisions.¹⁴¹ Finally, should this preventive, enabling framework fail, the Parliament recognizes the need for remedial measures, and has suggested the possibility of initiating civil liability proceedings against corporations domiciled in the EU under European conflict of laws rules.¹⁴² The framework envisaged by the European Parliament thus reflects our idea of an optimal corporate human rights responsibility framework, set out above.

¶43 Unsurprisingly, the European Parliament does not approve of the current CSR policy of the Commission and the way business has succeeded in dominating the Multi-Stakeholder Forum. This is shown by the Parliament's March 13, 2007 Resolution on corporate social responsibility: a new partnership¹⁴³ adopted in response to the Commission's Communication. The resolution starts by stating that CSR must be linked to the principle of corporate accountability¹⁴⁴ and "notes the concerns expressed by some key stakeholders about the lack of transparency and balance of the consultation procedure undertaken before adoption."¹⁴⁵ While it recognizes the Commission's definition of CSR, it makes it clear that stakeholders have not reached a consensus on an appropriate definition for CSR.¹⁴⁶ Importantly, it expresses its disappointment stemming from the lack of progress that has been made since the Green Paper, believing that the time has come to shift emphasis from "processes" to "outcomes."¹⁴⁷ Indeed, while the Commission has been busy creating "political processes" -- first the Forum and then the Alliance -- not much has been achieved on the various elements of the Parliament's proposed framework on CSR. Apparently seeing no better option to further the debate, it suggests to expand the role of the Alliance as envisaged by the Commission, adding to its aims the identification and promotion of specific EU action and regulation to support CSR.¹⁴⁸

G. An Evaluation of the EU's CSR Policy

¶44 The evolution of the EU's CSR policy has thus, to this point, been rather disappointing. The European Parliament has consistently supported a mixed approach to CSR and has proposed an interesting framework which closely resembles the theoretical framework we set out in the first part of this article. However, it has done so from the sidelines. Although the European Commission also seemed to have rather great ambitions in the early development of its CSR policy, it has completely dropped these

¹⁴⁰ *Id.* para. 33. See also *id.* Preamble, Recital 12.

¹⁴¹ Parliament Resolution on EU Standards for European Enterprises, *supra* note 132, para. 28.

¹⁴² Parliament Resolution on the Commission Green Paper, *supra* note 133, para. 54. For a discussion of the possibility to initiate civil liability proceedings against companies based in the EU for damage abroad, see *infra* Pt. IV.B.1.

¹⁴³ European Parliament resolution on corporate social responsibility: a new partnership of 13 March 2007 (2006/2133(INI)).

¹⁴⁴ *Id.* para. 1.

¹⁴⁵ *Id.* para. 2.

¹⁴⁶ *Id.* paras. 3-4.

¹⁴⁷ *Id.* para. 7.

¹⁴⁸ *Id.* para. 13.

under the influence of business and the review of the Lisbon Strategy. Unfortunately, it now favors a completely voluntary approach to CSR that does not suffice to ensure corporate compliance with human rights responsibilities.

IV. DEVELOPING A EUROPEAN HYBRID FRAMEWORK FOR CORPORATE HUMAN RIGHTS RESPONSIBILITY

¶45 We have now evaluated the EU's CSR policy, as it has been developed by the European Commission. This part of the article will take a step back and focus on the actual development of a European hybrid framework for corporate human rights responsibility, rather than on the EU's policy. Indeed, although the Commission has completely abandoned the idea of a mixed approach to CSR, there have been some initiatives, by the EU and a number of Member States, to develop certain regulatory elements of a CSR framework. We will evaluate these initiatives against the ideal framework as it has been set out in Part II and assess to what extent an appropriate framework has already been developed, by the EU and/or Member States, and which elements are still lacking or need improvement.

¶46 First, we will address the elements of an enabling framework for CSR, aimed at making the 'business case' for CSR work. Afterwards we will assess whether an appropriate sanctions mechanism has been set in place, in case the preventive framework fails.

A. Creating an Enabling Framework for CSR

¶47 In order to make the 'business case' for CSR work, public authorities have to establish an appropriate framework. First, they have to ensure that stakeholders have easy access to credible information on corporate human rights behavior, so that they are able to make informed choices. The measures taken by the EU to ensure such access to credible information will be evaluated in the first subsection of this part. Second, they should use their own economic power to influence corporate human rights behavior, particularly through considering human rights in public procurement decisions. The possibilities EU law offers for doing so will be discussed in the second subsection of this part.

1. Improve Transparency and Ensure Credibility of Corporations' Social and Human Rights Claims

¶48 Improving the access through credible information on corporate human rights behavior has been recognized by the European Parliament as an important task for public authorities in creating an enabling framework designed to make the 'business case' work. This is demonstrated by the fact that the Parliament has consistently argued in favor of more mandatory reporting, independent verification of reports and monitoring compliance with codes of conduct.¹⁴⁹ It has also suggested the use of misleading advertising regulations to combat unfaithful claims.¹⁵⁰

¹⁴⁹ See, e.g., Parliament Resolution on EU Standards for European Enterprises, *supra* note 132, at para. 14; Parliament Resolution on the Commission Green Paper, *supra* note 133, paras. 6, 8, 11.

¹⁵⁰ Parliament Resolution on the Commission Green Paper, *supra* note 133, para. 33. See also *id.*

¶49 Early on in the development of its CSR policy, the Commission also saw a role for public authorities in improving the transparency and credibility of corporations' human rights claims. It stressed the need for more convergence of CSR instruments and pushed for more monitoring of CSR commitments, even suggesting that a social label be created.¹⁵¹ However, as discussed above, the EU Multi-stakeholder Forum failed to achieve consensus on the issue,¹⁵² and the Commission later dropped the idea of regulatory intervention, considering it counterproductive and bad for innovation.¹⁵³

¶50 Nevertheless, the EU has taken some measures to ensure that stakeholders have access to credible information on corporate human rights behavior through reporting and through the use of laws on misleading advertising laws.

i) Measures to ensure transparency and credibility through reporting

¶51 The 2003 Accounts Modernization Directive, which amends earlier directives on the annual and consolidated accounts of certain types of corporations, banks and other financial institutions and insurance undertakings,¹⁵⁴ imposes an obligation on corporations to take non-financial matters into account in the preparation of their annual reports. It requires all annual reports to “include at least a fair review of the development and performance of the company’s business and of its position, together with a description of the principal risks and uncertainties it faces.”¹⁵⁵ The Directive points out explicitly that “to the extent necessary for an understanding of [these elements], the analysis shall include both financial and, where appropriate, non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters.”¹⁵⁶ When transposing the Directive into national law, Member States may waive the obligation to provide this non-financial information for small corporations.¹⁵⁷

¶52 Thus, while the Directive does not impose an absolute obligation to provide non-financial information in all annual accounts, it does require corporations to include information on environmental and employee matters insofar as it is necessary for a good understanding of the company’s business development, performance or position.

Preamble, Recital 12.

¹⁵¹ *Commission Green Paper on CSR, supra* note 61, para. 66.

¹⁵² *Cf. supra* Part III.C.

¹⁵³ *Commission Communication Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility*, at 2, COM (2006) 136 final (March 22, 2006).

¹⁵⁴ Council Directive 2003/51 of June 18, 2003, Amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the Annual and Consolidated Accounts of Certain Types of Companies, Banks and Other Financial Institutions and Insurance Undertakings, 2003 O.J. (L 178) 16-22 (EC) [hereinafter *Accounts Modernization Directive*].

¹⁵⁵ *Id.* art. 1, para. 14 (amending Council Directive 78/660, art. 46(1)(a), based on Article 54(3)(g) of the Treaty on the Annual Accounts of Certain Types of Companies, 1978 O.J. (L 222)). For consolidated accounts see *Accounts Modernization Directive, supra* note 154, art. 2, para. 10(a) (replacing Directive 83/349, art. 36(1), based on Article 54(3)(g) of the Treaty on Consolidated Accounts, 1983 O.J. (L 193)).

¹⁵⁶ *Accounts Modernization Directive, supra* note 154, art. 1, para. 14 (amending Council Directive 78/660, art. 46(1)(b), based on Article 54(3)(g) of the Treaty on the Annual Accounts of Certain Types of Companies 1978 O.J. (L 222)). For consolidated accounts see *Accounts Modernization Directive, supra* note 154, art. 2, para. 10(a) (replacing Directive 83/349, art. 36(1), based on the Article 54 (3) (g) of the Treaty on Consolidated Accounts 1983 O.J. (L 193)).

¹⁵⁷ *Accounts Modernization Directive, supra* note 154, art. 1, para. 14 (adding a fourth paragraph to Council Directive 87/660, art. 46, 1978 O.J. (L 222)).

However, this is only a very small step toward the mandatory disclosure of credible information on matters of corporate social responsibility. Such a mandate would require clearer guidance on the exact information to be disclosed, explicitly including human rights matters. It could build on the experience of private initiatives such as the Global Reporting Initiative, as has been suggested earlier by both the Commission and the Parliament. Under current EU law, however, corporations only have very limited obligations to report on their corporate human rights compliance.¹⁵⁸

¶53 It is regrettable that the EU has not provided for mandatory reporting on social and human rights matters.¹⁵⁹ Although an increasing number of corporations report on a voluntary basis, it is unrealistic to believe that soon all corporations will do so; the ‘business case’ for voluntary reporting thus does not apply consistently to all corporations.¹⁶⁰ The argument that mandatory reporting would stifle innovation and that it is still too soon to adopt a specific reporting standard is exaggerated. Indeed, it seems perfectly possible to require corporations to respect certain guidelines for their social and human rights reporting, while avoiding overly detailed rules that may not be appropriate for all cases. The fact that it would be more difficult and costly for small and medium enterprises to provide comprehensive human rights reports may influence the specific requirements imposed on them, but is not a reason *per se* to abandon the idea of mandatory reporting.

ii) The use of misleading advertising laws

¶54 The use of legislation on misleading advertising and unfair commercial practices is an interesting means of ensuring the credibility of corporations’ social claims. While not obliging corporations to subscribe to any substantive rules, it offers the possibility of holding them responsible for making false claims. Specifically, corporations could be held accountable for false claims about their adherence to certain codes of conduct or their respect for human rights.

¶55 *Kasky v. Nike* is a well-known example of the use of misleading advertising regulations. In 1998, a California resident sued Nike for unfair and deceptive practices

¹⁵⁸ However, some member states have gone further than EU law requires. The UK, Belgium and Germany, for instance, require pension fund managers to state whether and how they take social, environmental and ethical decisions into account in their investment decisions. See Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy, etc.) Amendment Regulations, 1999 S.I. 1999/1849, reg. 11A(a) (U.K.) (amending Occupational Pension Schemes (Investment) Regulations, 1996, SI 1996/3127 (U.K.)); Local Government Pension Scheme (Management and Investment of Funds) (Amendment) Regulations, 1999, S.I. 1999/3259 (U.K.) (amending Local Government Pension Scheme (Management and Investment of Funds) Regulations, 1998, S.I. 1198/1831 (U.K.)); Law concerning Supplementary Pensions and the Fiscal Regime of Such Pensions and of certain Supplementary Benefits Concerning Social Security, April, 28, 2003, art 42, §1 (F.R.G.); McBarnet, *supra* note 16, at 32. France requires disclosure of social issues in annual reports and accounts of listed corporations. Nouvelles Régulations Economiques, Law No. 2001-240 of May 15, 2001, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 16, 2001, art. 116, p. 7776. Publication of a ‘bilan social’ providing employee-related information about *inter alia* health, salaries and working conditions has been required since 1977. Decree No. 77- 1354 of December 8, 1977, Journal Officiel de la République Française [J.O.] [Official Gazette of France], December 10, 1977, p. 5751.

¹⁵⁹ Some EU Member States, however, require reporting. See, e.g., HALINA WARD, LEGAL ISSUES IN CORPORATE CITIZENSHIP, PREPARED FOR THE SWEDISH PARTNERSHIP FOR GLOBAL RESPONSIBILITY 3-4 (International Institute for Environment and Development) (Feb. 2003).

¹⁶⁰ *Id.*

under California's Unfair Competition Law¹⁶¹ and False Advertising Law,¹⁶² claiming Nike had made misrepresentations of its working conditions in factories overseas in letters to newspaper editors and university presidents.¹⁶³ According to Nike, its claims were political speech and the lawsuit was therefore barred by the First Amendment. In reversing the decisions of the California Superior Court¹⁶⁴ and the California Court of Appeals,¹⁶⁵ the California Supreme Court¹⁶⁶ qualified Nike's statements as commercial speech and allowed the case to proceed. Nike then appealed to the U.S. Supreme Court, which first granted certiorari, but then dismissed it as improvidently granted because of jurisdictional problems and sent the case back to the Californian courts for further proceedings.¹⁶⁷ Nike and Kasky subsequently reached a settlement in September 2003¹⁶⁸ and the merits of the case were never decided. As a result, the California Supreme Court's decision that Nike's statements were commercial speech still stands and it remains undetermined whether Nike's public relations campaign actually infringed California's Unfair Competition and False Advertising Laws. Critics have attacked both the California Supreme Court's judgment and the Supreme Court's refusal to decide the issue. Perhaps surprisingly, part of the criticism was based on the potentially negative effects of the rulings on CSR. Some critics argued that the judgments would have a chilling effect on CSR reporting because corporations would become less transparent about their CSR policies, fearing possible liability.¹⁶⁹ Indeed, following California's Supreme Court judgment, Nike announced that "it would limit its work in corporate accountability, not release its 2002 corporate responsibility report and restrict public platform activities."¹⁷⁰ In 2005, however, Nike published its 2004 corporate social responsibility report and made a return to transparency, finding that "the risks of any future lawsuit were far outweighed by benefits of transparency."¹⁷¹ Indeed, corporations have good business reasons for continuing to tell their side of the story, they just need to be more careful that what they say is accurate. A potential chilling effect would in any event be avoided if reporting on social and human rights issues were mandatory.¹⁷²

¹⁶¹ Cal. Bus. & Prof. Code § 17200 et seq. (2003).

¹⁶² *Id.*

¹⁶³ Petition for Writ of Certiorari, at 3-4, Nike Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575), 2002 WL 32101098.

¹⁶⁴ Kasky v. Nike, Inc., 93 Cal. Rptr. 2d 854 (Cal. Ct. App. 2000).

¹⁶⁵ Kasky v. Nike, Inc., 2 P.3d 1065, 97 Cal. Rptr. 2d 511 (Cal. 2000).

¹⁶⁶ Kasky v. Nike, Inc., 45 P.3d 243, 119 Cal. Rptr. 2d 296 (Cal. 2002), *rehearing denied* (Jul 31, 2002).

¹⁶⁷ Nike, Inc. v. Kasky, 539 U.S. 654, 657-658 (2003).

¹⁶⁸ Nike agreed to contribute \$1.5 million to the Fair Labor Association (FLA), which will use these funds to focus on three primary areas: (1) improving independent monitoring in manufacturing countries, (2) developing worker education and economic opportunity, and (3) advancing a common global standard to measure and report on corporate responsibility performance. William Baue, *The Implications of the Nike and Kasky Settlement on CSR Reporting*, Ethical Corporation (September 23, 2003), available at <http://www.ethicalcorp.com/content.asp?ContentID=1130>.

¹⁶⁹ For a discussion of the potential effects of the ruling on CSR reporting see Michele Sutton, *Between a Rock and a Hard Place: Corporate Social Responsibility and Potentially Legal Liability Under Kasky v. Nike*, 72 UMKC L. REV. 1159, 1178-1182 (2004). See also Vicky McIntyre, Note, *Nike v. Kasky: Leaving Corporate America Speechless*, 30 WM. MITCHELL L. REV. 1531, 1562-1565 (2004).

¹⁷⁰ Sutton, *supra* note 169, at 1175 (quoting Baue, *supra* note 168).

¹⁷¹ Sarah Murray, *Nike makes the step to transparency*, Financial Times, Apr. 13, 2005, at 12 (quoting Hannah Jones, Nike's Vice-President of Corporate Responsibility).

¹⁷² Baue, *supra* note 168.

¶156 The use of misleading advertisement laws against false social or environmental commercial claims is also possible under EU law. It had been suggested by the European Parliament¹⁷³ even before the recent revision of the European advertisement rules made their relevance to false social or human rights claims more explicit. Inaccurate or incomplete representations by corporations about CSR or their adherence to and compliance with voluntary codes of conduct can be attacked on the basis of the 2005 Unfair Commercial Practices Directive¹⁷⁴ or the 2006 Directive Concerning Misleading and Comparative Advertising.¹⁷⁵ The former applies to unfair business-to-consumer commercial practices and the latter aims to protect traders.¹⁷⁶ As business-to-consumer practices are the most relevant for us, we will focus on the Unfair Commercial Practices Directive.¹⁷⁷

¶157 The Unfair Commercial Practices Directive (“Directive”) generally prohibits misleading practices as unfair commercial practices, insofar as they (1) are contrary to the requirements of professional diligence and (2) materially distort or are likely to materially distort the average consumer’s economic behavior with regard to the product.¹⁷⁸ The latter means that they have to “appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.”¹⁷⁹ The term ‘transactional decision’ is understood quite broadly by the Directive to mean “any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment . . . for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting.”¹⁸⁰ Given the fact that a large proportion of consumers claim to take the human rights record of corporations into account,¹⁸¹ it can be argued that false commercial statements on human rights issues will indeed materially distort -- or at least be likely to materially distort -- the consumer’s ability to make an informed decision, and thus will fall under the general prohibition of the Directive.

¶158 According to the Directive, a commercial practice shall be regarded as misleading “if it contains false information and is therefore untruthful or in any way . . . deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of [a certain list of] elements, and in either case causes or is likely

¹⁷³ Parliament Resolution on the Commission Green Paper, *supra* note 133, para. 33 (“Calls on the Commission to enforce strong consumer protection measures to uphold the credibility of corporate information in relation to environmentally and socially responsible business practice, in particular applying provisions regarding misleading advertising;”). See also *id.* Preamble, Recital 12.

¹⁷⁴ Parliament Directive (EC) 2005/29, Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450 (EEC), Directives 97/7 (EC), 98/27 (EC) and 2002/65 (EC) of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, of 6 November 2005, sec. 1, 2006 O.J. (L 149) 22 [hereinafter Unfair Commercial Practices Directive].

¹⁷⁵ See generally Parliament and Council Directive 2006/114 (EC) Concerning Misleading and Comparative Advertising (codified version), of 12 December 2006, 2006 O.J. (L 376) 21 [hereinafter Misleading Advertising Directive].

¹⁷⁶ *Id.* art. 1.

¹⁷⁷ The provisions of the Directive had to be transposed into national law and should have entered into force by December 12th 2007. Unfair Commercial Practices Directive, *supra* note 174, art. 19.

¹⁷⁸ *Id.* arts. 5, 6.

¹⁷⁹ *Id.* art. 2(e). This requirement reflects the fact that the scope of the Directive is limited to practices related to a commercial transaction in relation to a product. See *id.* at art. 3(1).

¹⁸⁰ *Id.* art. 2(k).

¹⁸¹ See *supra* Pt. II.

to cause him to take a transactional decision that he would not have taken otherwise,”¹⁸² including the “geographical or commercial origin of the product.”¹⁸³ Thus, deceptive information about “the working conditions in which the advertised goods were produced, or . . . the countries in which the production took place” would be prohibited.¹⁸⁴

¶59 Another prohibited practice, insofar as it misleads or is likely to mislead the average consumer, is the “non-compliance by a trader with commitments contained in codes of conduct”¹⁸⁵ by which he has undertaken to be bound, where (i) the commitment is not aspirational but firm and capable of being verified, and (ii) the trader indicates in a commercial practice that he is bound by the code.”¹⁸⁶ The Unfair Commercial Practices Directive thus explicitly provides a means of ensuring that corporations comply with the voluntary codes they have subscribed to. Finally, it is in all circumstances prohibited for a trader (1) to claim to be a signatory to a code of conduct when he is not; (2) to claim that a code of conduct is endorsed by a public or other body when it is not; or (3) to display a trust mark, quality mark or equivalent without having obtained the necessary authorization.¹⁸⁷ The Directive thereby ensures a minimum control of the use of code of conducts and labels in commercial statements.

¶60 On the whole, the substantive provisions of the Directive are satisfying. Subject to reasonable interpretation by enforcement bodies, the Directive lays down effective rules that clarify its use as a means to ensure the credibility of corporate social and human rights statements.

¶61 As regards enforcement of the rules, the Directive gives Member States several options. The bottom line is that persons or organizations which have, according to national law, a legitimate interest in combating unfair commercial practices, should be able to take action against such practices. It is up to Member States, however, to decide on the form of such action. They can allow them to go to court and/or to bring unfair commercial practices before an administrative authority, which must be competent either to itself decide on complaints or to initiate appropriate legal proceedings.¹⁸⁸ It is “for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with such complaints, including [proceedings before bodies of code owners].”¹⁸⁹

¹⁸² Unfair Commercial Practices Directive, *supra* note 174, at art. 6(1).

¹⁸³ *Id.* at art. 6, para. 1(b). Under the Misleading Advertising Directive, information provided about the geographical or commercial origin of a product also has to be taken into account to determine whether advertising is misleading. Misleading Advertising Directive, *supra* note 175, art. 3(a).

¹⁸⁴ *See* De Schutter, *supra* note 35, at 301.

¹⁸⁵ According to Article 2(f) of the Unfair Commercial Practices Directive, “code of conduct” means “an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behavior of traders how undertake to be bound by the code in relation to one or more particular commercial practices or business sectors.” Unfair Commercial Practices Directive, *supra* note 174, art. 2(f).

¹⁸⁶ *Id.* art. 6, para. 2. The Misleading Advertising Directive in turn defines “misleading advertising” as “any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor.” Misleading Advertising Directive *supra* note 175, art. 3(a).

¹⁸⁷ Unfair Commercial Practices Directive, *supra* note 174, art. 5.

¹⁸⁸ *Id.* art. 11, para. 1.

¹⁸⁹ *Id.* art. 10 *juncto* art. 11, para. 1.

¶62 However, the Directive's sanctions for misleading practices are rather disappointing. Member States are only obliged to allow the courts or administrative authorities dealing with complaints to order cessation of the unfair practice, or to institute appropriate legal proceedings for an order of cessation. If the unfair commercial practice is imminent, courts must be able to order prohibition of the practice or institute legal proceedings for an order of such prohibition. Besides that, Member States *may* give the courts or administrative authorities the power to require publication of its decision and the publication of a corrective statement.¹⁹⁰ Such publication would inform consumers that certain advertising was misleading and may have a negative impact on the image of a corporation. It therefore encourages corporations to avoid misleading advertising.

¶63 A lot of flexibility, therefore, is left to Member States in deciding how to deal with complaints. Indeed, enforcement mechanisms vary widely between Member States, ranging from a state-controlled regime to self-regulation. The Nordic countries have an efficient state-controlled enforcement system. They have instituted a consumer ombudsman who polices advertisements and responds to complaints. This ombudsman can issue fines or prohibit further publication of the advertisements in question. More controversial cases are sent to the market court.¹⁹¹ In other countries, such as the UK, Ireland and Belgium, enforcement is in the hands of a self-regulatory body. The efficiency of such bodies differs greatly: whereas some operate quite well with a rather high degree of independence from the advertising industry, others are not so independent, do not include a wide range of stakeholders and do not even publish their decisions.¹⁹² In any event, in practice, proceedings often take a long time, which means that decisions are frequently reached after the advertising is already over. In such cases, publication of the decision would be the only possible remedy. Since several countries do not allow judges to order publication, however, corporations may get away with misleading advertising without being effectively sanctioned.¹⁹³

2. Obligate Human Rights Consideration in Public Procurement Decisions

¶64 Taking human rights into account in public procurement is another manner of enabling the 'business case' for CSR to work. Such measures would enable public authorities to use the awarding of public contracts as a means of encouraging businesses to comply with human rights responsibilities. Attaching a certain weight to human rights considerations seems perfectly legitimate as it would represent the collective preferences of citizens who increasingly want to buy products from responsible corporations.¹⁹⁴ Since public procurement is an important sector of the European Community, with spending by public authorities accounting for 16.3% of the Community GDP,¹⁹⁵ it may prove to be a very efficient incentive for corporations to improve their social behavior.

¹⁹⁰ *Id.* art. 11, para. 1.

¹⁹¹ See BRADFORD ROHMER, GREENWASH CONFRONTED: MISLEADING ADVERTISING REGULATION IN THE EU AND ITS MEMBER STATES, 6, 22-23 (Friends of the Earth Europe) http://www.foeeurope.org/corporates/pdf/greenwash_confronted.pdf (last visited Apr. 15, 2008).

¹⁹² *Id.* at 6-7, 35-40.

¹⁹³ *Id.* at 6, 22-23.

¹⁹⁴ Surveyed consumers apparently hold this collective preference, but, for a more nuanced discussion, see c.f. *supra* Pt. II.

¹⁹⁵ See EU Policy on Public Procurement, http://europa.eu/publicprocurement/index_en.htm, (last visited Apr. 15, 2008).

¶165 Indeed, the potential of public procurement to increase corporate human rights compliance was recognized early on by the European Commission and Parliament, and has also been encouraged by civil society. Already in its Green Paper, the Commission recognized the potential of public procurement as a means of encouraging the use of social labels.¹⁹⁶ In their reactions to the Green Paper, several NGOs also stressed the role of public procurement as a means to encourage responsible corporate behavior. They asked the Commission and other EU institutions to take social and environmental considerations into account for their own procurement and to ask Member States to do the same.¹⁹⁷ The European Parliament has called on the Commission to raise awareness among public purchasers about the possibilities offered by existing Community law with regard to the integration of social and environmental considerations into public procurement.¹⁹⁸ In 2001, the Commission had issued an interpretative Communication on Community law applicable to public procurement, explaining the admittedly rather restrictive possibilities for integrating social considerations into public procurement.¹⁹⁹ Moreover, in its follow-up Communication to the Green Paper it suggested that EU Member States “[make] access to public procurement conditional on adherence to and compliance with the OECD Guidelines for Multinational Enterprises, while respecting EC international commitments.”²⁰⁰

¶166 The potential to consider human rights in public procurement decisions is based on the European Directives in this area -- that seek to harmonize national laws -- and especially the binding interpretation of these Directives by the European Court of Justice (ECJ). Since the latest Directive on public procurement of 2004²⁰¹ only partly codifies earlier judicial interpretations of the previous Directives,²⁰² the case-law of the ECJ

¹⁹⁶ See *Commission Green Paper on CSR*, *supra* note 61, para. 83; see also Parliament Resolution on the Commission Green Paper, *supra* note 133, para. 17.

¹⁹⁷ BEUC, EUROPEAN CONSUMERS’ ORGANISATION, *supra* note 35, at 1-2; CLEAN CLOTHES CAMPAIGN, *supra* note 74; TRADCRAFT EXCHANGE, *supra* note 74, at 4; OXFAM INTERNATIONAL, *supra* note 74, paras. 35, 40; *Opinion of the Committee of the Regions on the Green Paper on Promoting a European Framework for Corporate Social Responsibility*, at 3, 7, COM (2001) 366 final (March, 14, 2002), available at http://ec.europa.eu/employment_social/soc-dial/csr/pdf/012-GOVEU_Committee-of-the-Regions_EU_020327_en.pdf; SOCIAL ACCOUNTABILITY INTERNATIONAL, SOCIAL ACCOUNTABILITY INTERNATIONAL’S COMMENTS TO THE EUROPEAN COMMISSION’S GREEN PAPER: “PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY” 1 (Dec. 29, 2001) http://ec.europa.eu/employment_social/soc-dial/csr/pdf/031-ORGINT_SAI_INT_011229_en.pdf.

¹⁹⁸ Parliament Resolution on the Commission Green Paper, *supra* note 133, para. 17. The European Parliament had already recognized the importance of public procurement as an incentive for corporations complying with international standards. Parliament Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct of 14 April 1999, 1999 O.J. (C 104), 180, para. 28.

¹⁹⁹ *Commission Interpretative Communication on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Social Considerations into Public Procurement*, COM (2001) 566 final, 2001 O.J. 27-41 (Nov. 28, 2001).

²⁰⁰ *Commission Communication concerning Corporate Social Responsibility: a Business Contribution to Sustainable Development*, at 23, COM (2002), 347 final, 23 (July 2, 2002).

²⁰¹ Council Directive 2004/18 (EC), On the Coordination of Procedures for the Award of Public Work Contracts, Public Supply Contracts and Public Service Contracts, 2004 O.J. (L 134) 114-240, Corrigendum O.J. (L 351) 44. [hereinafter Public Procurement Directive]. For the water, energy, transport and postal services, a separate Directive has been adopted: Council Directive 2004/17 (EC), Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors, 2004 O.J. (L 134), 1-113, Corrigendum O.J. (L 358) 35.

²⁰² The Public Procurement Directive aimed to codify the previous case-law of the ECJ, as can be seen in the first Recital, according to which the Directive “is based on Court of Justice case-law, in particular case-

remains important. For reasons of clarity, we will take the current Directive as a starting point in explaining the role of social considerations in the award of public contracts, and refer to relevant case-law where needed.

¶167 There are three stages in the awarding of a public contract to the most suitable bidder. First, certain candidates may be or must be excluded from participation according to Articles 45 and 46 of the Directive. Already at this stage, the social behavior of a candidate -- or the lack thereof -- may be taken into account. Thus, a candidate who has been convicted for participation in a criminal organization, corruption, fraud or money laundering is excluded.²⁰³ More importantly, an economic operator may, *inter alia*, be excluded from participation if he “has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct”²⁰⁴ or if he “has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate.”²⁰⁵ According to the Preamble to the Directive, national law can determine that non-compliance with environmental legislation or legislation on unlawful agreements in public contracts are offences concerning the professional conduct of the economic operator concerned or grave misconduct.²⁰⁶ It is thus for the Member States to define these concepts in their national legislation and to determine whether non-compliance with certain social obligations constitutes grave professional misconduct.

¶168 Second, the suitability of the remaining candidates has to be checked in accordance with the criteria of economic and financial standing and of professional and technical knowledge or ability.²⁰⁷ According to the ECJ, no other criteria may be taken into account, which means that there is no room in this particular determination for social considerations.²⁰⁸

¶169 Third, all eligible offers are ranked and the most suitable candidate is awarded the contract. At this stage, social considerations have a role to play, as ECJ case-law demonstrates. In *Beentjes*,²⁰⁹ the ECJ was confronted with the question of whether social considerations, specifically measures aimed at combating long-term unemployment, could be taken into account in the award of public contracts. The Court made it clear that there is indeed room for social considerations to be taken into account in the actual awarding of the contract. According to the Directive, a public contract has to be awarded either to the one offering the lowest price or to the most economically advantageous tender.²¹⁰ In order to determine the most economically advantageous tender, public authorities may take various criteria into account, such as price, period for completion, running costs, profitability and technical merit. As the Directive does not contain an exhaustive list of criteria, authorities may also use other criteria as long as they are aimed

law on award criteria.” Public Procurement Directive, *supra* note 201, Preamble, First Recital.

²⁰³ *Id.* art. 45, para. 1.

²⁰⁴ *Id.* art. 45, para. 2(c).

²⁰⁵ *Id.* art. 45, para. 2(d).

²⁰⁶ *Id.* Preamble, para. 43.

²⁰⁷ *Id.* art. 44.

²⁰⁸ Case 31/87, *Gebroeders Beentjes BV v. State of the Netherlands*, 1988 E.C.R. 4635, para. 17 *juncto* para. 28. Note that the use of environmental management standards may be taken into account at this stage. *See* Public Procurement Directive, *supra* note 201, art. 48, para. 2(f).

²⁰⁹ Case 31/87, *Gebroeders Beentjes BV*, 1988 E.C.R. 4635.

²¹⁰ *Id.* para. 18 (referring to Article 29 of the Directive applicable at the time, which corresponds to Article 53 of the Public Procurement Directive, *supra* note 201).

at identifying the most economically advantageous offer,²¹¹ are given sufficient publicity,²¹² and comply with all relevant provisions of Community law, such as the principle of non-discrimination.²¹³

¶70 The ECJ further elaborated its view on the potential for additional award criteria in *Concordia Bus*.²¹⁴ The case concerned the awarding of a contract for the urban bus network of Helsinki according to the most economically advantageous offer standard, which was to be assessed by reference to three categories of criteria: the overall price of operation, the quality of the bus fleet, and the operator's quality and environment management. The Court reiterated that the award criteria listed in the Directive are not exhaustive, which means that additional criteria may be used.²¹⁵ Importantly, it pointed out that not all of the award criteria used by the contracting authority to identify the most economically advantageous tender must necessarily be of a purely economic nature, since factors which are not purely economic may influence the value of an offer from the point of view of the contracting authority.²¹⁶

¶71 As Article 6 of the Treaty Establishing the European Community demands that environmental protection requirements be integrated into the definition and implementation of Community policies and activities,²¹⁷ there is clearly room for environmental criteria when assessing the most economically advantageous offer, as long as certain conditions are fulfilled. The additional award criteria -- in this case related to the preservation of the environment -- must be linked to the subject-matter of the contract, should not give the contracting authority an unrestricted freedom of choice as regards the award of the contract, must be expressly mentioned in the contract documents or the tender notice, and must comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.²¹⁸

¶72 The possibility of taking into account environmental considerations when awarding contracts according to the economically most advantageous tender was confirmed in *EVN AG, Wienstrom GmbH*.²¹⁹ This case concerned a contract for the supply of electricity, where the criterion that the electricity would be produced from renewable energy sources was given a weight of forty-five percent.²²⁰ The ECJ reiterated the conditions for award criteria laid down in *Concordia Bus* and pointed out that the contracting authorities are free not only to choose the criteria for awarding the contract, but also to determine their weight, provided that the weight enables an overall evaluation to be made of the criteria applied in order to identify the most economically advantageous tender.²²¹ Given that the

²¹¹ *Id.* para. 19.

²¹² *Id.* paras. 2, 31.

²¹³ *Id.* paras. 20, 29-30. This has been confirmed by later case law. See generally *C-225/98, Commission v. France*, 2000 E.C.R. I-7445 (concerning combating unemployment as an additional award criterion).

²¹⁴ Case C-513/99, *Concordia Bus Finland*, 2002 E.C.R. I-07213.

²¹⁵ *Id.* para. 54.

²¹⁶ *Id.* para. 55.

²¹⁷ Treaty Establishing the European Community, Art. 6, of 29 December 2006, 2006 O.J. (C 321 E) 37 [hereinafter EU Treaty] ("Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.").

²¹⁸ Case C-513/99, *Concordia Bus Finland*, at paras. 56-64.

²¹⁹ Case C-448/01, *EVN AG, Wienstrom GmbH v. Wienstrom GmbH*, 2003 E.C.R. I-14527.

²²⁰ *Id.* paras. 15-18.

²²¹ *Id.* paras. 34, 37-39.

use of renewable energy contributes to the reduction in emissions of greenhouse gases (one of the main causes of climate change), and considering that the EU and its Member States have pledged to combat climate change, the Court accepted that the use of renewable energy be used as a criterion with a forty-five percent weight.²²² Insofar as all relevant conditions are complied with, nothing seems to exclude the extension of this case-law to the use of the human rights behavior of a company as an additional award criterion. The fact that the Treaty on the European Union ranks fundamental rights among the principles on which the Union is founded -- and which are considered to be common to all Member States²²³ -- may provide support for that argument.²²⁴

¶73 Although the 2004 Directive was intended to include previous case-law,²²⁵ it fails to include a reference to social or human rights considerations as additional award criteria. In its non-exhaustive list of award criteria linked to the subject-matter of the public contract which may be taken into account when awarding the contract to the most economically advantageous tender, it only mentions quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, and the lowest price.²²⁶ Regrettably, no criteria regarding the social performance of the bidder are mentioned, contrary to the draft Directive, which at the European Parliament's insistence contained specific provisions relevant to work-force matters as part of the award criteria.²²⁷

¶74 The Directive does, however, mention social and environmental considerations as "special conditions relating to the performance of a contract" which may be set out by the authorities, provided that they are compatible with Community law and are indicated in the contract notice or in the specifications.²²⁸ The Preamble mentions "compl[iance] in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law" as an example of such a contractual condition.²²⁹ In principle, it would have been possible to refer to other instruments of international human rights law as well, thus encouraging Member States to take compliance with human rights standards into account in awarding public contracts.²³⁰

²²² *Id.* paras. 40-42. Austria lost the case however, because (1) the criterion was not accompanied by requirements which permit to verify the information submitted by tenders and (2) tenders were required to state how much electricity they could supply from renewable energy sources to a non-defined group of consumers, and allocated the maximum number of points to whichever tender stated the highest amount, where the supply volume was taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement, i.e. the criterion was not directly related to the subject-matter of the public procurement contract. *Id.*

²²³ The first paragraph of Article 6 of the EU Treaty provides: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." EU Treaty, *supra* note 217, art. 6.

²²⁴ De Schutter, *supra* note 35, at 311.

²²⁵ Public Procurement Directive, *supra* note 201, Preamble, Recital 1.

²²⁶ *Id.* art. 53, para. 1.

²²⁷ CHRISTOPHER BOVIS, EU PUBLIC PROCUREMENT: CASE LAW AND REGULATION 178 (Oxford University Press, 2006).

²²⁸ Public Procurement Directive, *supra* note 201, art. 26.

²²⁹ *Id.*

²³⁰ De Schutter, *supra* note 35, at 312.

¶75 When evaluating the role of social considerations in the current European public procurement regime, one cannot but have mixed feelings. On the one hand, it is very positive that social considerations clearly have a role to play. Case-law from the ECJ has made it clear that public authorities may use social considerations as additional award criteria as long as certain conditions are fulfilled. The new Public Procurement Directive states explicitly that, subject to certain conditions, social considerations may be posited as contractual performance conditions. Moreover, national legislation may determine that non-compliance with certain social obligations constitutes grave professional misconduct, thereby making it possible to exclude non-complying candidates from participation in public contracts.

¶76 On the other hand, it is unfortunate that the new Public Procurement Directive has not explicitly listed social considerations as an award criterion and has generally failed to clarify their scope in public procurement. Such clarification would have encouraged Member States to pay attention to the social and human rights record of corporations when awarding public contracts. In practice, the public procurement policies of Member States increasingly take social factors in account.²³¹ However, more could be done and the European Parliament has found it necessary to point out “that major efforts should be undertaken by the Commission and Member State governments at national, regional and local level to use the opportunities provided by the revision of the public procurement Directives in 2004 to support CSR by promoting social and environmental criteria amongst potential suppliers.”²³²

B. Providing for Redress and Deterrence

¶77 Even if a perfect preventive framework were in place, the occurrence of human rights abuses can not entirely be ruled out. Therefore, it is important to have an effective sanctions mechanism in place to redress potential human rights violations. Such a mechanism needs to ensure that victims receive adequate reparation and that corporate wrongdoers are held to account. It also serves to deter corporations from committing future violations.

¶78 There are two principal ways of providing for redress and deterrence, namely civil liability proceedings and criminal proceedings. Since each has its own advantages, an ideal framework should provide for both. Currently, however, the European framework fails to do so.

1. The Use of Civil Liability Proceedings

¶79 Foreign direct liability proceedings are one means for holding corporations accountable and providing reparations for victims. The European Parliament has referred to corporate accountability as one means of ensuring that corporations respect human rights²³³ and has addressed the issue of foreign civil liability for European corporations in

²³¹ For a very short overview see EUROPA, Employment & Social Affairs, Corporate Social Responsibility, http://ec.europa.eu/employment_social/emplweb/csr-matrix/csr_topic_allcountries_en.cfm?field=14. Examples of countries that take social criteria into account in their public procurement policies are Belgium, France, the Netherlands and Slovenia.

²³² Resolution on Corporate Social Responsibility: a New Partnership, EUR. PARL. DOC. (COM 62) para. 39 (2007).

²³³ *Id.* para. 41.

a number of resolutions. In 1999, it made reference to the rules regarding conflict of laws,²³⁴ and in its next resolution on CSR it pointed out “that the 1968 Brussels Convention (now Brussels I Regulation) [...] enables jurisdiction within the courts of EU Member States for cases against corporations registered or domiciled in the EU in respect of damage sustained in third countries.”²³⁵ It also asked “the Commission to compile a study of the application of this extraterritoriality principle by courts in the Member States . . . [and] call[ed] on the Member States to incorporate this extraterritoriality principle in legislation”.²³⁶ In its latest resolution on CSR in 2007, it again explicitly pointed out the possibilities offered by the Brussels I Regulation for bringing EU-domiciled corporations before European courts expressing its belief “that CSR policies can be enhanced by better awareness and implementation of existing legal instruments [and] call[ing] on the Commission to organize and promote awareness campaigns and monitor the implementation of the application of foreign direct liability according to the Brussels Convention.”²³⁷

¶80 Indeed, according to European conflict of laws regulations, foreign direct liability cases are possible in the EU. Thanks to Council Regulation 44/2001,²³⁸ better known as the “Brussels I Regulation,” concerning the allocation of jurisdiction in civil and commercial matters²³⁹ in the EU,²⁴⁰ the courts of EU Member States are competent to adjudicate civil proceedings against corporations based in the EU for acts which have taken place outside the EU even if the damage occurred outside the EU and the victim is not domiciled in the EU.

¶81 The Regulation’s primary rule for allocating jurisdiction is the domicile of the defendant, with Article 2 (1) stipulating that “persons domiciled in a Member State shall,

²³⁴ Parliament Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, of 14 April 1999, Preamble, Recital 18, 1999 O.J. (C 104), 180 (“having regard to Article 220 of the EC Treaty regarding reciprocal recognition of court judgments (31 Treaty EU), the 1968 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, usually known as the Brussels Convention, (now Brussels I Regulation).”) Rapporteur Richard Howitt’s proposal for the resolution included a more explicit paragraph, in the operative part of the resolution, at para. 24: “requests the European Council to confirm the interpretation in the 1968 Brussels Convention that, for cases of basic duty of care, legal action may be taken against a company in the EU country where its registered office is, in respect of any third country throughout the world and calls on the Commission to study the possibility of enacting done by MNEs, thus creating a precedent for developing customary international law in the field of corporate abuse.” Committee on Development and Cooperation, Report on EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct, A4-0508/98, (Dec. 17, 1998), available at <http://www.cleanclothes.org/codes/howit.htm>.

²³⁵ Parliament Resolution on the Commission Green Paper, *supra* note 133, para 50.

²³⁶ *Id.*

²³⁷ Resolution on Corporate Social Responsibility, *supra* note 232, para. 37. *See also id.* para. 32 (“Calls on the Commission to implement a mechanism by which victims, including third-country nationals, can seek redress against European companies in the national courts of the Member States[.]”).

²³⁸ Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, of 22 December 2000, 2001 O.J. (L 12) 1-23 (EC) [hereinafter Brussels I Regulation]. The Brussels I Regulation is the successor to the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

²³⁹ Brussels I Regulation art. 1, para. 1.

²⁴⁰ Council Decision 2006/325, 2006 (L 120), 22 (EC). Although the Regulation is not directly applicable to Denmark, the country is bound by it through the Agreement between the European Community and the Kingdom of Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 19 October 2005, 2005 O.J. 62-70.

whatever their nationality, be sued in the courts of that Member State.”²⁴¹ The ECJ has made clear that “although the court seized must be that of a Contracting State, that provision does not further require that the plaintiff be domiciled in [a Member] State.”²⁴² This means that persons domiciled in a non-Member State, i.e. the most likely victims of abuses by multinationals overseas, may sue a company before the courts in the Member State where the company is domiciled.²⁴³

¶82 Apart from this general rule of jurisdiction, there is also another provision which may be of interest to plaintiffs: if a dispute arises out of the operations of a branch, agency or establishment of a company domiciled in the EU, the parent company may also be sued in the courts of the State where that branch, agency, or establishment is located.²⁴⁴ This is so even if those acts -- e.g., the lack of supervision -- have effects outside the state where the branch is situated.²⁴⁵ The added value for plaintiffs is that if a parent company and its branch responsible for the actual damage are domiciled in different EU countries, plaintiffs can choose whether to institute proceedings in the State of the parent company -- on the basis of the general rule of Article 2 (1) of the Brussels I Regulation -- or in the State of its branch. As civil procedures are different in all Member States, with class-actions for human rights violations, for instance, being exclusive to the UK, this extra choice of forum may in practice be very useful.

¶83 Such use of the competence of the European courts to deal with civil cases against corporations on the basis of their being domiciled in the EU has been referred to as a “European ‘Foreign Tort’ Claims Act,”²⁴⁶ making reference to the *Alien Tort Claims Act* (“ATCA”) of the United States.²⁴⁷ Nonetheless, the mechanism provided by the Brussels I Regulation differs from the ATCA in several ways.²⁴⁸ First, as opposed to ATCA, the Brussels I Regulation does not require the plaintiff to be an alien. The domicile of the defendant in the EU is sufficient in order to establish jurisdiction and neither the domicile nor the nationality of the plaintiff is relevant in this respect.²⁴⁹ Second, the Brussels I Regulation may be relied upon in all civil proceedings against corporations domiciled in

²⁴¹ Brussels I Regulation art. 2, para. 1 (“Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”). According to Article 60 para. 1 of the Brussels I Regulation, the domicile of a company or other legal person or association of natural or legal persons, is the place where it has its (a) statutory seat, (b) central administration, or (c) principal place of business. *Id.* art. 60, para. 1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State. Brussels I Regulation art. 4, para. 1.

²⁴² Case C-412/98, Group Josi Reinsurance Company SA v. Universal General Insurance Company (UGIC), 2000 E.C.R. I-5925, para. 45.

²⁴³ *See id.* paras. 57-61.

²⁴⁴ Brussels I Regulation art. 5, para. 5.

²⁴⁵ *See De Schutter, supra* note 35, at 265; Geret Betlem, *Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 283, at 286-288 (Menno T. Kamminga and Saman Zia-Zarifi eds, Kluwer Law International, 2000) (referring to the findings of the ECJ in Case C-439/93, *Lloyd’s Register of Shipping v. Société Campenon Bernard*, 1995 E.C.R. I-961).

²⁴⁶ De Schutter, *supra* note 35, at 265.

²⁴⁷ Alien Tort Claims Act, 28 U.S.C. § 1350.

²⁴⁸ *See Jan Wouters, Leen De Smet & Cedric Ryngaert, Tort Claims Against Multinational Companies for Foreign Human Rights Violations Committed Abroad: Lessons from the Alien Tort Claims Act?*, in *GLOBALISATION AND JURISDICTION*, 183-200 (P.J. Slot and M. Bulterman eds., 2004).

²⁴⁹ De Schutter, *supra* note 35, at 266. This is why he refers to the mechanism as a “Foreign” and not an “Alien” Tort Claims Act.

the EU. ATCA, on the other hand, can only be invoked in case of an alleged violation of the ‘law of nations.’ The instituting of proceedings against a company domiciled in the EU on the basis of the Brussels I Regulation does not *per se* determine the law applicable to the conflict.²⁵⁰

¶84 Finally, the doctrine of *forum non conveniens*, often an important procedural hurdle to ATCA foreign direct liability cases, will not bar adjudication under the Brussels I Regulation. According to the doctrine of *forum non conveniens*, a court may stay an action brought before it if an alternative forum exists to which plaintiffs may turn that would be more appropriate, unless substantial justice could not be done there.²⁵¹ As the general principle that defendants may be sued in the courts of the State of their domicile is a mandatory rule wherefrom no derogation is permitted, courts in which a case is brought on the basis of the Brussels I Regulation cannot rely on the doctrine of *forum non conveniens* to decline jurisdiction. This is so even if the competing forum would be in a non-Member State.

¶85 Such a conclusion could already be implied from the ECJ judgment in the *Group Josi Reinsurance Company SA* case, which stated that the rules on jurisdiction that are now reflected in the Brussels I Regulation are “applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country.”²⁵² This was also the conclusion reached by commentators.²⁵³

¶86 The ECJ has now explicitly confirmed the non-applicability of the *forum non conveniens* doctrine in the case of *Andrew Owusu v. N.B. Jackson*.²⁵⁴ In that case, the Court began by confirming the applicability of Article 2 of the Brussels Convention in cases where the conflict involves “relationships between the courts of a single Contracting State and those of a non-Contracting State rather than relationships between the courts of a number of Contracting States”.²⁵⁵ Once the Court came to this conclusion, it addressed the question of the applicability of the doctrine of *forum non conveniens* in such cases. First, it stressed the mandatory nature of Article 2 of the Brussels Convention, and the fact that it can only be derogated from in the cases expressly

²⁵⁰ On the question of the law applicable to tort actions for human rights violations see De Schutter, *supra* note 35, at 274-75.

²⁵¹ See, e.g. *Lubbe & Ors v. Cape plc.*, UKHL 41, [2000], 1 WLR 1545 (applying the classic *Spiliada* test).

²⁵² Case C-412/98, *Group Josi Reinsurance Company SA v. Universal General Insurance Company (UGIC)*, 2000 E.C.R. I-5925, at para. 61. The Court continues: “It would be otherwise only in exceptional cases where an express provision of the Convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff’s domicile being in a Contracting State,” but the jurisdictional rules relevant for our purposes (as referred to above) do not provide for this. *Id.*

²⁵³ De Schutter, *supra* note 35, at 271-272 (“The position thus expressed by the European Court of Justice seems to suggest that, if it had answered either the *Harrods* or the *Lubbe* courts on the interpretation of the 1968 Brussels Convention in those cases, it would probably have found the application of the *forum non conveniens* doctrine, in situations where the United Kingdom has jurisdiction based on the domicile in that State of the defendant, to be incompatible with the requirements of the Brussels Convention, or, today, with those of Regulation No. 44/2001.”). The Court of Appeals in *Re Harrods* disagreed and the House of Lords did not need to ask for a preliminary ruling from the ECJ, since it had already decided that the English courts had jurisdiction. See *id.* at 268-272 for more information on the cases. See also Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT’L & COMP. L. REV. 451, 461-462 (2000-2001) (stating that *Group Josi Reinsurance Company SA* “spells the death of the *forum non conveniens* principle in foreign direct liability cases involving dependant companies domiciled in England and Wales”).

²⁵⁴ Case C-281/02, *Andrew Owusu v. N.B. Jackson*, 2005 E.C. R. OJ C 106, available at <http://curia.europa.eu/>.

²⁵⁵ *Id.* para. 35.

provided for by the Convention. There is no such exception on the basis of the *forum non conveniens* doctrine, although the question was discussed by the drafters of the Brussels Convention.²⁵⁶

¶87 The ECJ next explained that application of the doctrine of *forum non conveniens* would prevent the principle of legal certainty, which is one of the objectives of the Brussels Convention, from being fully guaranteed.²⁵⁷ This principle requires that “a normally well-informed defendant [be] reasonably able to foresee before which courts, other than those of the State in which he is domiciled, he may be sued.”²⁵⁸ Since the *forum non conveniens* doctrine allows courts a wide discretion as regards the question whether a foreign court would be a more appropriate forum, it would undermine the predictability of the rules of jurisdiction laid down by the Convention and thus undermine the principle of legal certainty.²⁵⁹

¶88 The Court also reasoned that the application of the doctrine of *forum non conveniens* would undermine the legal protection of persons established in the Community, since defendants are generally better placed to conduct their defense before the courts of their domicile and the *forum non conveniens* doctrine would not allow them to reasonably foresee before which other court he may be sued.²⁶⁰ Moreover, the *forum non conveniens* doctrine would also cause problems for claimants. Indeed, when defendants consider an alternative foreign court more appropriate, it would be up to claimants to prove that they would not be able to obtain justice there. Alternatively, claimants would have to prove that the foreign court in fact does not have jurisdiction to try the action, or that, in practice, they are unable to obtain effective justice before that court.²⁶¹

¶89 Finally, the *forum non conveniens* doctrine is only recognized by a limited number of States, so its application would undermine the uniform application of the jurisdictional rules of the Brussels Convention and therefore run counter to its objective of harmonization.²⁶²

¶90 The Court then logically concluded that the Brussels Convention does not allow courts to invoke the doctrine of *forum non conveniens* in order to decline their jurisdiction based on the domicile of the defendant, even in cases where the competing forum is that of a Non-Member State.²⁶³

¶91 The clarification by the ECJ that the issue of *forum non conveniens* is irrelevant if a defendant company has its domicile in an EU Member State is important. Indeed, as a number of UK cases have shown, corporations have systematically relied on the doctrine of *forum non conveniens* as a means to stay tort proceedings by foreign claimants. At minimum, the invocation of *forum non conveniens* results in lengthy proceedings. One example is the *Edward Connelly vs. RTZ Corporation* case. It dealt with a UK national who had contracted cancer of the throat, allegedly as a result of negligent exposure to uranium dust during his work in a uranium mine in Namibia. Relying on legal aid, he

²⁵⁶ *Id.* para. 36.

²⁵⁷ *Id.* para. 38.

²⁵⁸ *Id.* para. 40.

²⁵⁹ *Id.* para. 41.

²⁶⁰ *Id.* para. 42.

²⁶¹ *Id.* para. 42.

²⁶² *Id.* para. 43.

²⁶³ *Id.* para. 46.

brought proceedings in England against the parent company of the mining company and another associated company, both of which were registered in England. After endless court battles about *forum non conveniens*, the House of Lords agreed that “the Namibian forum is not one in which the case can be tried more suitably for the interests of all the parties and for the ends of justice.”²⁶⁴ However, the Queen’s Bench Division subsequently held that the case was time-barred.²⁶⁵

¶92 Another well-known case in which the issue of *forum non conveniens* has been debated at length is *Lubbe & Ors v. Cape*. In this case, more than 3000 South African claimants sued Cape for damage they sustained due to their alleged exposure to asbestos resulting from the activities of a Cape subsidiary mining company in South Africa. In 2000, after lengthy proceedings, the House of Lords allowed the case to proceed because in South Africa:

the plaintiffs would have no means of obtaining the professional representation and the expert evidence which would be essential if these claims were to be justly decided. This would amount to a denial of justice. In the special and unusual circumstances of these proceedings, lack of the means, in South Africa, to prosecute these claims to a conclusion provides a compelling ground, at the second stage of the *Spiliada* test, for refusing to stay the proceedings here.²⁶⁶

¶93 A puzzling question is why, if the Brussels Regulation can be a useful tool for European civil damages claims against European corporations for human rights abuses abroad, have there not been more cases? One of the reasons may be that procedural laws in Europe are less favorable than in the US. The general principle that the loser of a case pays its own as well as the winner’s costs may raise the threshold for launching a case.²⁶⁷ Other reasons may be the general lack of contingency fee arrangements and the impossibility for class actions (the UK, traditionally home to European civil liability cases, being a notable exception to both). Of course, the lengthy duration of civil trials, problems of evidence and lack of funding also may have an influence.

¶94 However, it may also be that it is still too soon to assess the real impact of the ECJ ruling in the *Owusu* case. The UK has traditionally been the European country where most of the civil cases against (parent) corporations have been launched by foreign victims for damages sustained abroad. One can only assume that now that the important procedural hurdle of *forum non conveniens* has been lifted by the ECJ, more suits against corporations will be launched. A recent article in the Financial Times suggests that this is exactly what is happening.²⁶⁸ One of the claims launched in the aftermath of the *Owusu* judgment is a collective action brought by 12,500 Ivorians who say they were poisoned

²⁶⁴ *Connelly v. RTZ Corporation plc & Ors*, UKHL 30 [1997] C.L.C. 1357.

²⁶⁵ *Connelly v. RTZ Corp plc & Anor* [1999] C.L.C. 533.

²⁶⁶ *Lubbe & Ors v. Cape plc.*, UKHL 41, [2000], 1 WLR 1545. For a description on the evolution of the proceedings in this case see HALINA WARD, CORPORATE ACCOUNTABILITY IN SEARCH OF A TREATY? SOME INSIGHTS FROM FOREIGN DIRECT LIABILITY (Royal Institute of International Affairs, May 2002), http://www.chathamhouse.org.uk/files/3033_corporate_accountability_insights.pdf.

²⁶⁷ WARD, *supra* note 159, at 16.

²⁶⁸ Michael Peel, *European Lawyers in Hunt for Big Game*, FINANCIAL TIMES, Jan. 30, 2008, available at <http://www.ft.com/cms/s/0/927bab82-cf57-11dc-854a-0000779fd2ac.html>.

by toxic chemicals dumped by a ship chartered by Trafigura, an oil trading company, in 2006.²⁶⁹

2. The Use of Criminal Accountability

¶95 To this point, there have not been any EU initiatives in the field of criminal corporate responsibility for grave human rights violations.²⁷⁰ Professor Olivier De Schutter has suggested that the EU could adopt an instrument requiring its Member States to criminalize serious corporate violations of human rights, regardless of whether those violations are committed at home or abroad by one of their nationals or habitual residents. EU instruments dealing with trafficking in human beings and sexual exploitation of children, which provide for extraterritorial incrimination, could serve as a model for such an instrument. It would also be preferable to action by individual Member States. De Schutter argues convincingly that, if the right legal basis were found, there would be no conceptual difficulties in adopting such an instrument.²⁷¹

¶96 As for now, the only examples of criminal cases brought against corporations for grave human rights violations are national ones. Human rights NGOs and victims associations have tried to use the more user-friendly criminal jurisdictions of Member States to hold multinationals accountable. These systems are, in particular, States whose systems of criminal procedure are based on the civil law “*partie civile*” model. In this model, private individuals can bring a complaint and the investigating criminal magistrate is required to take it up. The “*partie civile*” model, in combination with national criminal statutes that provide for extraterritorial jurisdiction for international crimes such as war crimes, crimes against humanity and genocide, has opened the door to some interesting proceedings.

¶97 A well-known and disappointing example is when proceedings were launched against Total, a French corporation, in France and Belgium by Burmese claimants.²⁷² The claimants in the French case alleged that Total made them engage in forced labor in the construction of a pipeline. However, since Burmese law does not provide for jurisdiction over forced labor, and there is not enough available information to know whether the acts could have been seen as ‘sequestration,’ the proceedings were discontinued in 2006. Indeed, the necessary information could only have been supplied by the claimants, which

²⁶⁹ *Id.* The case has been allowed to go forward as a class action and is expected to go to trial shortly. Leigh Day & Co, Press Release: Ivory Coast – Alleged Toxic Waste Claims, Feb. 2, 2007, <http://www.leighday.co.uk/doc.asp?doc=1032&cat=850>.

²⁷⁰ Resolution on Corporate Social Responsibility, *supra* note 232, para. 31, 41. Although it might be possible to read an implied reference to criminal mechanisms in the call from the European Parliament on the Commission “to implement a mechanism by which victims, including third-country nationals, can seek redress against European corporations in the national courts of the Member States” and its belief “that the CSR debate must not be separated from questions of corporate accountability.”

²⁷¹ See De Schutter, *supra* note 35, 282-295, for a discussion of the possibility and the form of a European initiative inviting the Member States to adopt certain measures to ensure that certain forms of corporate conduct, leading to severe violations of human rights, are made punishable by criminal legislation applicable not only in the territory of each Member State, but also to the conduct of corporations established in a Member State, even when the conduct takes place outside the territory.

²⁷² For background information about the case and a description of the proceedings, see generally Olivier De Schutter, *Les Affaires Total et Unocal: Complicité et Extraterritorialité dans l’Imposition aux Entreprises d’Obligations en Matière de Droits de l’Homme*, 52 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL, 55 (2006).

in the meantime had reached a settlement with Total.²⁷³ Availing themselves of the then-existing Belgian ‘universal jurisdiction law’ for international crimes, the claimants in the Belgian case alleged that Total was guilty of crimes against humanity and complicity with the Burmese regime in crimes against humanity. Subsequently, however, the ‘universal jurisdiction law’ was changed, and it now provides a much more limited scope for jurisdiction. After a long jurisdictional battle between the Constitutional Court and the Court de Cassation, the latter stopped the proceedings.²⁷⁴ Following injunctions by the Minister of Defense, supplanting the Minister of Justice, the Prosecutor has twice taken up the case again, but judicial authorities recently decided that the judgment of the Court de Cassation was final and that the case could not go further.²⁷⁵

3. Civil and Criminal Accountability as Complementary Parts of an Effective Sanctions Mechanism

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Both criminal and civil accountability are valuable tools in the effort to promote corporate social responsibility. Civil liability proceedings present some advantages over criminal proceedings, as victims can institute proceedings without having to await action on their behalf and the burden of proof is generally lighter than in criminal cases. Moreover, the negative publicity generated by a civil liability case may be very worrisome for corporations and may have a positive influence on their human rights behavior.²⁷⁶ Nevertheless, sometimes criminal proceedings may be more appropriate. In criminal cases, the state apparatus may help to fight against impunity of corporations and ease the burden of proof imposed on victims to prove corporate misconduct.²⁷⁷ Moreover, victims may be better compensated when the corporation itself, rather than one or more of its directors, is held directly accountable.²⁷⁸ Criminal cases may also help to ensure that the same violation will not be repeated in the future, since sanctions may be imposed on the corporation.²⁷⁹ Finally, a criminal case directed against a corporation

²⁷³ See *id.* at 70-71.

²⁷⁴ *Id.* at 68. The Court de Cassation asked the Constitutional Court for a preliminary ruling in 2004 on the question of whether it was discriminatory, and therefore unconstitutional, that the law allowed cases brought by Belgian nationals to proceed, but did not do the same for plaintiffs who had obtained refugee status at the time of launching the case. The question was of particular relevance for the case, since one of the plaintiffs had indeed obtained such refugee status as the Court de Cassation recognized on May 5, 2004. *Id.* The Constitutional Court ruled that the distinction between Belgian nationals and persons having obtained refugee status was indeed discriminatory on April 13, 2005. *Id.*

²⁷⁵ *Id.* After the judgment of the Court de Cassation the law was adapted to the ruling of the Constitutional Court and the Minister of Defense, supplanting the Minister of Justice, ordered the Prosecutor to start proceedings to have the 2005 judgment of the Court de Cassation retracted, on the grounds that it was based on a no-longer existing provision. *Id.* On March 28, 2007, the Court de Cassation did not accept the demand for retraction, arguing that retraction was only possible for the benefit of those who have been negatively affected by proceedings undertaken against them and not for the benefit of the *partie civile*. *Id.* Upon a second injunction of the Government, the case was taken up again by the Prosecutor, but recently stopped by judicial authorities. See Joan Condijs, *Les Birmans déboutés: Total l'emporte*, LE SOIR, Mar. 5, 2008, <http://www.lesoir.be/actualite/monde/la-justice-met-fin-aux-2008-03-05-582191.shtml>.

²⁷⁶ See JÄGERS, *supra* note 8, at 213-214 (discussing the advantages of civil cases).

²⁷⁷ De Schutter, *supra* note 35, at 282.

²⁷⁸ *Id.*

²⁷⁹ Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW*, 139, 147 (M.T. Kamminga and S. Zia-Zarifi eds., Kluwer Law International 2000); De Schutter, *supra* note 35, at 282-283.

may generate a lot of attention from the media, thus publicly shaming the corporation in question.

¶99 Ultimately, both civil and criminal liability could prove to be effective measures in promoting corporate human rights compliance. Since they are complementary, an effective sanctions mechanism should allow for both.

¶100 Unfortunately, the current EU framework regarding corporate human rights responsibility fails to do so. It allows for civil liability proceedings against corporations domiciled in Europe, for human rights abuses committed anywhere, but does not provide for corporations' criminal responsibility. An instrument concerning corporations' criminal responsibility would be necessary to ensure an effective European sanctions mechanism.

V. CONCLUDING OBSERVATIONS

¶101 In an attempt to move the debate beyond the black-and-white divide between voluntary and regulatory approaches to corporate responsibility, we have searched for an appropriate framework for ensuring that corporations respect human rights. Our conclusion is that such a framework must include enabling measures to make the 'business case' for corporate responsibility work and thereby encourage responsible corporate behavior. In addition to such enabling measures, redress, in the form of civil and criminal procedures, must be available for the worst cases of human rights abuses.

¶102 Unfortunately, the EU has not yet chosen to take this path, instead preferring a purely voluntary approach in cooperation with business. The European Commission started its CSR policy with higher ambitions and envisioned an enabling framework for CSR. These ambitions were later abandoned, however, likely because of the dominance of business in the Multi-Stakeholder Forum and the Lisbon Strategy review in 2005. Calls from the European Parliament for a more comprehensive framework have not yet succeeded

¶103 Nevertheless, some elements of a regulatory framework have been put in place. Some progress has been made in providing consumers, investors and workers with access to credible information about corporations' social and human rights responsibility, although the result is far from satisfactory. Corporations are now expected to report on social and environmental matters, but no guidelines have been adopted. Also, the Unfair Commercial Practices Directive may be relied on to combat false or misleading social statements, but national enforcement systems vary widely and are not always efficient. Unfortunately, no progress at all has been made on the issues of verification and monitoring. Some leeway has also been given to public authorities to take human rights into account in public procurement, which may provide an incentive for corporations to act more responsibly.

¶104 As far as an effective sanctions mechanism is concerned, the Brussels I Regulation is crucial in that it provides the authority to bring foreign direct liability cases against corporations domiciled in the EU without permitting the application of the *forum non conveniens* doctrine. For the time being, however, it has not often been relied on. Moreover, all tort liability cases initiated so far have either been dismissed or have been the object of a settlement between the parties. As regards criminal proceedings, there is not yet an EU instrument providing for the possibility of criminal proceedings against

corporations for grave human rights violations. There have been some cases in Member States, but none of them has resulted in a conviction.

¶105 We cannot but therefore unfortunately conclude that the European Union's approach to corporate human rights responsibility has thus far largely failed. Although some progress has been made, the approach falls far short of ensuring human rights compliance by all corporations.