

CORPORATE RESPONSIBILITY AND THE ROLE OF THE LEGAL PROFESSION

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Table of Contents

Preface	2
Executive Summary	3
I. What is Corporate Responsibility (CR)?.....	4
1) Definition.....	4
2) Triple Bottom Line (“People, Planet, Profit”)	4
3) CR Developments at the International, European and National Level	5
(a) International Developments:	5
(1) UN Global Compact.....	5
(2) Business and Human Rights	6
(3) OECD	6
(4) ISO 26000:2010 Guidance on Social Responsibility	7
(5) Global Reporting Initiative (GRI).....	7
(b) European Developments:.....	8
(c) National Developments:	10
II. Why do lawyers, law firms, bars and law societies have to be aware of CR?	10
1) Advice on Corporate Responsibility	10
2) Corporate Responsibility of the Legal Profession	11
(a) Lawyers as suppliers of services	11
(b) Law firms, bars and law societies as “enterprises”	11
(c) Essential elements of Corporate Responsibility of the Legal Profession.....	12
III. What are the challenges and foreseeable developments?	12
IV: Conclusion	13
Annex 1: Link to country reports	14
Annex 2: Link to the Charter of Core Principles of the European Legal Profession	14
Annex 3: Links to further Information	14

Preface

Since the foundation of the Corporate Social Responsibility Committee of the Council of Bars and Law Societies of Europe (CCBE) more than a decade ago Corporate Responsibility has become a core issue of business operations. In 2003 the CCBE issued Guidelines on Corporate Social Responsibility (CSR) and the Role of the Legal Profession. As early as 2003 the CCBE could identify the need for such Guidelines as it realized that CSR would have an increasing impact on the Legal Profession. This belief was reinforced in 2005, and again in 2008, when the CCBE could see that its Guidelines needed to be revised such was the growing importance of CSR, matched together with the growing awareness of the impact that CSR could have on the Legal Profession. Given the substantial developments at the international, European and national level with regard to Corporate Responsibility the CCBE has developed a "State of the Art" report that has become necessary in order to reflect the growing relevance of CSR for the Legal Profession. This report will be followed by a "Best Practice Guidance".

The CCBE now refers to CSR as Corporate Responsibility (CR) rather than Corporate Social Responsibility. The term CR is used by the CCBE throughout the Guidelines as covering social, environmental and economic responsibilities. However, other institutions, for example, the European Commission and the United Nations use CSR. Therefore, both CR and CSR are referred to in this paper.

Corresponding to the increase in importance of CR, the CCBE extended the remit of the Corporate Responsibility Committee with regard to both regional coverage and diversity to represent multijurisdictional, small and medium sized law firms.

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Executive Summary

- (1) CR has been defined by the EU Commission in its latest Communication of 25 October 2011, titled "A renewed Strategy 2011 - 2014 for CSR", as "*the responsibility of enterprises for their impacts on society*". With this new definition of CR, encompassing both compliance with applicable law and voluntary initiatives, the Commission abandons its former definition of CR as a purely voluntary scheme. In terms of substance, CR is usually characterised by the so-called Triple Bottom Line ("People, Planet, Profit"), encompassing in particular, social, environmental, ethical, human rights and anti-corruption concerns, including governance.
- (2) The CR discussion has been accelerated most recently by a myriad of developments at the international, European and national levels, affecting also European lawyers, both in their capacity as diligent advisors to their clients and suppliers of services, and with respect to the qualification of law firms, bars and law societies as "enterprises" or even "multinational enterprises" to which CR requirements apply. The attorney-client-privilege can be of crucial importance in assisting clients when they audit their compliance with legal and self-imposed standards.

Of particular importance for European lawyers is the EU Strategy 2011 - 2014 for CSR, requesting that all large enterprises (including law firms) take account of at least one of the following sets of principles: the UN Global Compact, the OECD Guidelines for Multinational Enterprises or the ISO 26000 Guidance on Social Responsibility. In addition, all European enterprises (including law firms, bars and law societies) are expected to meet the Corporate Social Responsibility to respect human rights as defined in the UN Guiding Principles on Business and Human Rights.

- (3) The CR Committee of the CCBE will have to deal with the following issues and challenges from a legal profession point of view and will have to consider how to address the requirements put forward by the Commission strategy paper:
 - (a) As the CR of the legal profession is already spelled out in a body of laws, Bar rules and ethical standards, the CR Committee has to identify the issues which are not covered yet but which are required to be addressed by the Commission Strategy Paper. This applies in particular to environmental, social and human rights, governance and supply chain responsibilities.
 - (b) Based on these findings the CR Committee will develop Guidance for the legal profession.
 - (c) The CR Committee will promote its Guidance at an international level.

I. What is Corporate Responsibility (CR)?

1) Definition

Corporate Responsibility is per se not a new concept. Business entities and their leaders have been held accountable and liable for their activities in the past. The root cause of the Corporate Responsibility discussion today lies in the governance gaps created by globalization and the increase of economic and political power of private enterprises which triggered the claim for enhanced and extended CR.

CR has been defined in a multitude of ways.¹ The most important development for European lawyers in that regard is the latest Communication of the European Commission, titled "*A renewed EU Strategy 2011 - 2014 for Corporate Social Responsibility*"². The Commission puts forward a new definition of CSR as "**the responsibility of enterprises for their impacts on society**". Respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility. To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of:

- maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large;
- identifying, preventing and mitigating their possible adverse impacts.

With this new definition of Corporate Responsibility encompassing both compliance with applicable legislation and voluntary initiatives the Commission abandoned its former definition of CR as a purely voluntary scheme. This expansion of the definition of CR encountered criticism by business and industry organizations. In substance, it acknowledges, however, only that the responsibility of businesses is defined by a multitude of instruments, situated on a sliding scale between mandatory and voluntary, making it difficult to draw a sharp line between the two categories.

2) Triple Bottom Line ("People, Planet, Profit")

In terms of substance, Corporate Responsibility is usually characterized by the so-called Triple Bottom Line ("People, Planet, Profit"). More recently **governance** was added as a fourth aspect of CR. The "**People**" aspect refers to the social responsibility of business towards its employees and external persons (potentially) affected by the business impacts. It encompasses i. a. the prohibition of slavery, forced or compulsory labor, child labor, right to a family life and to privacy, gender equality, diversity and the protection of minority rights. The "**Planet**" aspect covers the responsibility for the environment, in particular, the avoidance, prevention, minimization or remediation of negative business impacts on climate, water, soil and nature. The "**Profit**" element refers typically to the avoidance of corruption and bribery, conflicts of interest, money laundering, insider trading and other aspects of ethical and lawful business conduct.

Adequate "**Governance**" requires an internal system of checks, reporting and control which seeks to ensure that illegal or unethical behavior is discovered, remedied and sanctioned in order to avoid unethical and unlawful behavior and the risk of liability for the enterprise and its leadership. The so-called **ESG (Environment, Social, Governance)** criteria are increasingly applied by state funds like the Norwegian State Fund, pension funds and large scale private investors in order to assess the acceptability of an investment.

¹ Whereas the EU Commission and the EU Parliament defined CSR previously as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis", the EU Commission now promulgates a new definition of CR as "the responsibility of enterprises for their impact on society"; respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility.

² COM (2011) 681 final.

3) CR Developments at the International, European and National Level

Some multijurisdictional law firms have signed up to the UN Global Compact and issue annual CR reports, partly following the reporting requirements of the Global Reporting Initiative (GRI). The legal profession is being encouraged by the European Commission to implement the UN Guiding Principles on Business and Human Rights with far-reaching consequences for the day-to-day business of lawyers and law firms. European lawyers should take into consideration the latest significant developments regarding CR, both in their capacity as diligent advisors to their clients and with respect to the qualification of law firms, bars and law societies as "enterprises" or even "multinational enterprises" to which CR requirements apply.

(a) International Developments:

At the international level there have been a multitude of initiatives from both international organisations and from private organisations.

Initiatives from international organisations

(1) UN Global Compact

In 2000 the United Nations created the *Global Compact* with its "Ten Principles"³, derived from:

- The Universal Declaration of Human Rights
- The International Labor Organization's Declaration on Fundamental Principles and Rights at Work
- The Rio Declaration on Environment and Development
- The United Nations Convention against Corruption

The UN Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption. The companies are requested to submit annual progress reports. The core values are:

Human Rights

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

Labor

- Principle 3: businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- Principle 4: the elimination of all forms of forced and compulsory labor;
- Principle 5: the effective abolition of child labor; and
- Principle 6: the elimination of discrimination in respect of employment and occupation.

³ www.unglobalcompact.org

Environment

- Principle 7: businesses should support a precautionary approach to environmental challenges;
- Principle 8: undertake initiatives to promote greater environmental responsibility; and
- Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

- Principle 10: businesses should work against corruption in all its forms, including extortion and bribery.

(2) Business and Human Rights

In June 2008, Professor John Ruggie submitted a report to the UN Human Rights Council: entitled *Protect, Respect and Remedy: a Framework for Business and Human Rights*⁴. The *Framework* rests on three pillars described as “differentiated but complementary responsibilities”:

- (1) The State’s duty to protect human rights of its people.
- (2) The Corporate Responsibility to respect human rights.
- (3) The need for more effective access to remedies.

Based on the Framework the SRSG developed “*Guiding Principles on Business and Human Rights: implementing the United Nations “Protect, Respect, and Remedy Framework”*⁵. On 16 June 2011, the Human Rights Council endorsed these Guiding Principles. The American Bar Association and the International Bar Association endorsed them later as well. The Human Rights Council established a working group to work on the implementation of the UN Guiding Principles on the issue of Human Rights.

The UN Guiding Principles require business enterprises to have in place **policies** and **processes** appropriate to their size and circumstances. They should carry out **human rights due diligence**, assess actual and potential human rights impacts, integrate and act upon the findings, and track as well as communicate their performance. It should be **on-going** and extend **beyond a business enterprise’s own activities** to include relationships with business partners, suppliers, and other non-State and State entities that are associated with the enterprise’s activities.

(3) OECD

In May 2011, the OECD launched an updated set of Guidelines for Multinational Enterprises.⁶ The *OECD Guidelines* are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards. The *Guidelines* are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting. They are considered to be *soft law*.

The 2011 Guidelines call on companies to “contribute to economic, environmental and social progress with a view to achieving sustainable development”⁷. Changes to the *Guidelines* include:

⁴ In 2005 UN Secretary General Kofi Annan appointed Professor John Ruggie as Special Representative on the issue of human rights and transnational corporations and other business enterprises (SRSG) who developed in the course of his six year mandate a systematic approach to Business and Human Rights. The Report is *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, 7 Apr. 2008.

⁵ A/HRC/17/31, 21 March 2011.

⁶ The Organization for Economic Cooperation and Development (OECD) engages with a wide range of issues related to international investment, business regulation, and corporate governance⁶. In the 1970’s, it adopted a set of *Guidelines for Multinational Enterprises*⁶. In 2000, it issued revised Guidelines for Multinational Enterprises, intended to supplement applicable law and to “complement and reinforce” codes of conduct and other private efforts to promote business responsibility⁶. Implementation was supported through National Contact Points.

⁷ Ibid, Part I Chap II – General Policies, par A.1.

- A new human rights chapter, which is consistent with the *Guiding Principles*.
- A new and comprehensive approach to due diligence and responsible supply chain management.
- Important changes in many specialized chapters, such as on Employment and Industrial Relations; Combating Bribery, Bribe Solicitation and Extortion, Environment, Consumer Interests, Disclosure and Taxation.
- Clearer and reinforced procedural guidance to strengthen the role of National Contact Points, and to improve their performance and foster functional equivalence.
- A pro-active implementation agenda to assist enterprises in meeting their responsibilities as new challenges arise.

Initiatives from private organisations

(4) ISO 26000:2010 Guidance on Social Responsibility

Besides these initiatives the International Standardization Organization (ISO) issued its *ISO 26000:2010 Guidance on Social Responsibility* as an internationally applicable guideline for all business sectors. The *ISO 26000:2010 Guidance* was developed by 91 countries and 42 organizations. ISO 26000:2010 provides guidance to all types of organizations, regardless of their size or location, on:

- Concepts, terms and definitions related to Social Responsibility;
- the background, trends and characteristics of Social Responsibility;
- principles and practices relating to Social Responsibility;
- the core subjects and issues of Social Responsibility;
- integrating, implementing and promoting socially responsible behavior throughout the organization and, through its policies and practices, within its sphere of influence;
- identifying and engaging the stakeholders; and
- communication commitments, performance and other information related to Social Responsibility.

ISO 26000:2010 is not a management system standard. It is not intended or appropriate for certification purposes or regulatory or contractual use. It is intended to promote common understanding in the field of Social Responsibility, and to complement other instruments and initiatives for Social Responsibility, not to replace them.

(5) Global Reporting Initiative (GRI)

The Global Reporting Initiative (GRI) was founded in 1997 by two US not-for-profits, the Coalition for Environmentally Responsible Economies (CERES) and the Tellus Institute, with the support from the United Nations Environment Programme (UNEP).

The GRI Reporting Framework is intended to serve as a generally accepted framework for reporting an organisation's economic, environmental, and social performance. It is designed for use by organisations of any size, sector, or location. It takes into account the practical considerations faced by a diverse range of organisations – from small enterprises to those with extensive and geographically dispersed operations.

The GRI Reporting Framework contains general and sector-specific content that has been agreed by a wide range of stakeholders around the world to be generally applicable for reporting an organisation's sustainability performance⁸.

To our knowledge, to date only three law firms have aligned their sustainability reports to the GRI.

⁸ Application Levels - A, B and C - define the amount of GRI standard disclosures that have been covered in a sustainability report. A '+' Level indicates that external assurance has been sought against an internationally recognised standard e.g. the AA1000 AccountAbility Principles Standard. GRI also offers a service for organisations to have their self-declared Application Level confirmed. Some reporters also choose to have their Application Level checked by a third party.

The GRI Framework has its critics, especially when it comes to organisations self-declaring their own Application Level.

The GRI does not intend to actively promote the Framework but does aim to make sustainability reporting by all organisations as routine as, and comparable to, financial reporting.

In addition to these international initiatives encompassing all business areas, sector specific initiatives were developed, e. g. the Extractive Industry Transparency Initiative (EITI), the Equator Principles for the project finance sector, and the UN Principles for Responsible Investment, to name but a few (for more details, see Annex 3).

(b) European Developments:

At the European level CR has been an issue since the mid 1990's. The Council of Ministers and the European Parliament have both called on the EU Commission to further develop its CSR Policy⁹. On 25 October 2011 the EU Commission issued a Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, titled "A renewed EU Strategy 2011 – 2014 for Corporate Social Responsibility"¹⁰ ("EU Strategy"). The EU Strategy contains significant changes in a number of respects. Besides the new definition of CR, the EU Commission lays out a complex and multi-layered approach.

To fully meet their CR, enterprises should have in place processes to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders.

The EU Commission states that the EU Strategy should be fully consistent with the OECD Guidelines for Multinational Enterprises, the UN Global Compact, the ISO 26000 Guidance Standard on Social Responsibility, the ILO Tri-Partite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the UN Guiding Principles on Business and Human Rights.

The EU Commission highlights the multidimensional nature of CSR covering as a minimum human rights, labour and employment practices, environmental issues, and combating bribery and corruption. Community involvement and development, the promotion of social and environmental responsibility through the supply-chain, and the disclosure of non-financial information are also part of the CR agenda. The EU Commission has adopted a *Communication on EU policies on volunteering* in which it acknowledges employee volunteering as an expression of CSR¹¹. Volunteering in this context includes "**pro-bono-engagement**" of the sort familiar to law firms.

The Commission confirms that the development of CR should be **led by enterprises themselves**. Public authorities should play a supporting role through a **smart mix of voluntary policy measures** and, where necessary, **complementary regulation**, for example, to promote transparency, create market incentives for responsible business conduct, and ensure corporate accountability.

According to the Commission, enterprises must be given the flexibility to innovate and to develop an **approach** to CR that is **appropriate to their circumstances**, in particular, the size of the enterprise and the nature of its operations. Large enterprises, and enterprises at particular risk of having negative impacts, for example enterprises involved in the chemical industry, are encouraged to carry out **risk-based due diligence, including through their supply-chains**. For most small and medium-sized enterprises the CR process is likely to remain informal. Many enterprises will however value the existence of principles and guidelines that are supported by public authorities, to **benchmark** their own policies and performance, and to promote a more level playing field. The Commission also believes that other stakeholders like trade unions, civil society organizations, consumers and investors are stakeholders who should work constructively with enterprises to co-build solutions.

The EU Commission sets out an *Agenda for Action 2011 – 2014* which contains in particular the following items (the items of most relevance with regard to the CR of the legal profession are highlighted in bold):

⁹ Environment Council 5 December 2008, Environment Council 20 December 2010, Foreign Affairs Council 14 June 2010, European Parliament Resolution 13 March 2007, European Parliament Resolution 8 June 2011.

¹⁰ COM (2011) 681 final.

¹¹ Communication on EU policies and volunteering: recognizing and promoting cross-border voluntary activities in the EU" COM (2011) 568

1. Create in 2013 multi-stakeholder CSR platforms in a number of relevant industrial sectors;
2. launch a European Award Scheme for CSR partnerships;
3. address the issue of misleading marketing ("greenwashing") in the context of the Unfair Commercial Practices Directive;
- 4. initiate an open debate with citizens, enterprises and other stakeholders on the role and potential of businesses in the 21st century;**
5. launch a process with enterprises and other stakeholders to **develop a code of good practice for self- and co-regulation exercises;**
6. facilitate the **better integration of social and environmental considerations into public procurement** as part of the 2011 review of the Public Procurement Directives;
7. consider a requirement on all investment funds and financial institutions to inform all their clients about any ethical or responsible investment criteria they apply;
8. provide further financial support for education and training projects on CSR under the EU Lifelong Learning and Youth in Action Programs;
9. create with Member States a peer review mechanism for national CSR policies;
- 10. monitor the commitments made by European enterprises with more than 1000 employees to take account of internationally recognized CSR Principles and Guidelines, and take account of the ISO 26000 Guidance Standard on Social Responsibility in its own operations;**
11. work with enterprises and stakeholders in 2012 to develop human rights guidance for a limited number of relevant industrial sectors as well as guidance for small and medium-sized enterprises, based on the UN Guiding Principles;
12. publish by the end of 2012 a report on EU priorities in the implementation of the UN Guiding Principles, and thereafter to issue periodic progress reports;
13. identify ways to promote responsible business conduct in its future policy initiatives towards more inclusive and sustainable recovery and growth in third world countries.

Besides the above "intentions" the EU Commission "invites":

- A. Member States to develop or update by mid-2012 their own plans or national lists of priority actions to promote CSR in support of the Europe 2020 Strategy, with reference to internationally recognized CSR Principles and Guidelines;
- B. All large European enterprises to make a commitment by 2014 to take account of at least one of the following sets of principles and guidelines when developing their approach to CSR: the UN Global Compact, the OECD Guidelines for Multinational Enterprises, or the ISO 26000 Guidance Standard on Social Responsibility;**
- C. All European-based multinational enterprises to make a commitment by 2014 to respect the ILO Tri-Partite Declaration of Principles concerning Multinational Enterprises and Social Policy;**
- D. The EU Commission expects all European enterprises to meet the Corporate Social Responsibility to respect human rights, as defined in the UN Guiding Principles;**
- E. The Commission invites EU Member States to develop by the end of 2012 national plans for the implementation of the UN Guiding Principles.

In accordance with Intention no. 11, the Commission has mandated in the meantime two human rights organisations to develop Human Rights Guidance for the Oil and Gas Sector, the Information Communications Technology (ICT) Sector and the Employment and Recruitment Agencies Sector¹².

¹² See www.ihrb.org; www.shiftproject.org

(c) National Developments:

At the national level a tremendous variety of strategies, initiatives and guidelines has been developed displaying the fact that the various jurisdictions approach CR at a different speed. A survey conducted by the CCBE showed substantial interest in CR throughout the CCBE member states; it displayed, however, also the significant differences in terms of knowledge, understanding and implementation of CR and CR related strategies (for further detailed information see link in Annex 1 to the country reports).

II. Why do lawyers, law firms, bars and law societies have to be aware of CR?

Given the definition of the EU Commission of Corporate Responsibility as covering compliance with applicable laws, soft law and voluntary codes of conduct it is apparent that lawyers' core competencies are at stake. Lawyers will increasingly be called to advise their clients on CR matters. In that respect, the attorney-client privilege can provide critical benefit to their clients, for instance, when they are requested to audit their clients' compliance with legal and self-imposed CR standards.

It is, however, not only a new area of legal advice; law firms, bars and law societies can also be subject to CR-requirements as "enterprises", and, as suppliers of services, bound by CR-requirements in their client's supply chain.

1) Advice on Corporate Responsibility

Compliance with applicable laws is a traditional and established element of advice provided both by attorneys in private practices as well as by in-house lawyers. The traditional scope of *advice has to be extended*, however, as soft law instruments and voluntary codes of conduct and strategies have a tendency, as shown above, to be developed into more binding instruments, or, at least into instruments which may have a legal impact. This applies for example to the public procurement sector where CR factors can play a decisive role for admission to a public procurement procedure and the award of a contract. In addition, a solid anti-corruption strategy may be decisive to ensure that a client is not excluded from a public procurement procedure or even blacklisted for future procedures. An example might be a situation where an employee is guilty of making bribes, despite clear and adequate anti-corruption-policies.

Lawyers are requested to form part of auditing teams whose task is not only to examine compliance with locally applicable laws and regulations but also with a globally applicable firm policy. As it will be increasingly more difficult to draw a sharp line between compliance with hard law and "voluntary" standards, taking into consideration the developments described above on the international, European and national levels, lawyers risk falling short of giving their clients a comprehensive advice on the potential risks and liabilities in a given situation unless they include CR aspects. With the increasing "hardening" of soft law and voluntary initiatives lawyers have to inform themselves on CR as part of their *ongoing education responsibility*. The continuing professional development requirement is spelled out in the national Bar Rules and in section 5.8 of the CCBE Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers of 2010.

In advising on CR, and in the formulation and implementation of CR policies, their supervision, auditing, and reporting, lawyers have a special and unique role to play due to legal professional privilege. The content and the structure of the *attorney-client privilege* may vary from country to country, but there is, however, a common thread applicable throughout all Member States, i. e. that correspondence, documentation and information entrusted by the client to the attorney or otherwise gathered in the course of the client relationship by the attorney shall be treated as confidential and shall in general be protected against discovery.

A CR policy is only credible when the company supervises and audits its implementation in its day-to-day business. So far at least in Europe no "*safe-harbor-rules*" apply, i. e. there is no legal regime in place which would guarantee a company voluntarily undertaking a CR audit not to be held liable by the competent authorities or a public prosecutor on the basis of information or documentation generated in the course of such audit. Thus, a company voluntarily undertaking a CR audit might suffer a disadvantage compared to its competitors which do not undertake such an effort. The attorney-client privilege of lawyers could therefore encourage enterprises to undertake assessments and audits, and to generate the relevant information without fear that it might have to be disclosed. Such information may lead to remediation measures, and the attorney-client

privilege may, as a result, contribute to enhancing CR compliance and good corporate and social governance.

It is not unlikely that we will see more CR related *litigation* in the foreseeable future. Nike was sued on the grounds of unfair commercial practices for untrue allegations on its website that it did not employ child labor in the Asian production facilities.¹³ The EU Commission set out in item 3 of its Agenda for Action its determination to address the issue of misleading marketing, in particular greenwashing, in the context of the Unfair Commercial Practices Directive. European parent companies have been sued in European courts for human rights violations by their African subsidiaries, based on a direct parent liability concept, or, on piercing the corporate veil.¹⁴ Royal Dutch Shell has been sued by Nigerian citizens for human rights violations by its Nigerian joint venture in Nigeria in US and other courts based on the Alien Tort Statute.¹⁵ The impressive list of amicus curiae briefs in this case, together with the statements of European governments and industry associations, reflects the growing importance and relevance of this type of litigation.

Finally, clients expect their lawyers to advise them on prospective legal developments as part of their risk management. This has to include CR.

2) *Corporate Responsibility of the Legal Profession*

(a) Lawyers as suppliers of services

Companies involved in CR increasingly impose CR requirements on their suppliers, and as law firms are also considered suppliers of services they may be asked to comply with clients' codes of conduct. This raises a number of questions. Such a request from a client may lead to its code of conduct becoming part of the contractual relationship between the law firm and the client. In order to avoid becoming subject to a multiplicity of potentially conflicting policies and requirements, law firms have increasingly started to develop their own policies on CR issues.

Clients also increasingly request law firms to fill out due diligence questionnaires regarding the anti-corruption or CR policies they have in place. The score on these requirements can be a factor in the selection of the appropriate advisor. Often law firms do not have an adequate answer to this type of request. The reference to Bar Rules and ethical standards is usually not an adequate answer to CR requests of clients as they cover different issues, or, to the extent there is an overlap, they address them in a different way. The CCBE CR Committee will develop Guidance in this regard.

(b) Law firms, bars and law societies as "enterprises"

Law firms qualify as business enterprises in the sense of the above cited international, European and national instruments. As already noted, some law firms have signed up to the UN Global Compact, a number of firms publish CR reports annually, a few follow the Global Reporting Initiative (GRI) guidelines, which contain key performance indicators regarding the Triple Bottom Line, or, have adopted CR policies. Bars and law societies are, like other professional organizations and associations, also regarded as enterprises, and in a wider sense subject to CR requirements. Law firms may see the dilemma resulting from the fact that they are requested by their clients to sign their CR policies as suppliers of services on one hand and to answer certain requirements specified in the clients code of conduct, and, on the other may be subject as business enterprises to the "invitations" and "expectations" of the EU Commission set out in the Agenda for Action 2011-2014, and to the Bar Rules and ethical code of conduct. Finally, the adoption of sound CR policies may increase the attractiveness of law firms and enhance their ability to recruit talented young lawyers.

¹³ See *Kasky v. Nike Inc.*, www.businesshumanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/NikelawsuitKasky/Nikeredenialoflabourabuses

¹⁴ See *Chandler v. Cape plc*, (2012) EWCA Civ 525, www.business-humanrights.org; the parent company was directly liable towards the employees of its subsidiary on the basis of a "duty of care".

¹⁵ See *Kiobel v. Royal Dutch Petroleum Co.*, Legal documents at <http://harvardhumanrights.wordpress.com/criminal-justice-in-latin-america/>

(c) Essential elements of Corporate Responsibility of the Legal Profession

- National laws and Bar Rules regulating attorneys' responsibilities and ethical standards.
- CCBE Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, edition 2010, covering the economic and governance side of lawyers' responsibilities.
- Environmental responsibilities (compliance and voluntary measures such as the reduction of carbon footprint; electronic file keeping, waste management, etc.)
- Social responsibilities (diversity, programmes for female professionals, social inclusion etc.)
- Governance (conflict of interest resolution mechanisms; confidentiality issues; firm policies against bribery and money laundering; insider trading guidelines; organizational structures for the implementation and compliance with these rules).
- Supply chain management of law firms and bars and law societies
- Pro bono and community services.
- Philanthropy / charity.

III. What are the challenges and foreseeable developments?

Given the developments at the international, European and national level it can be foreseen that lawyers, law firms, bars and law societies will increasingly be required to deal with CR in the near future. Although the EU Commission confirms that the development of CR standards should be led by the enterprises themselves, and, they should have the flexibility to develop an approach that is appropriate to their circumstances, in particular, the size of the law firm or organization and the specific risks and challenges of their operations, it is clear that no sector is exempt. The legal profession, in particular large multijurisdictional law firms, will have to face the expectations spelled out by the EU Commission and the Member States.

Private initiatives¹⁶ are trying to engage law firms in the implementation of the UN Guiding Principles. The EU Commission has already procured for certain sectors the development of human rights guidance, which however, was not developed by the respective sectors but by two human rights organizations with the participation of stakeholders. To date the Commission has maintained its general standpoint that the development of CR Guidance should be led by enterprises themselves, or, at least by the respective business sectors which usually know best the specific risks and challenges of their business and can determine practical and proportionate responses to them.

Consistent with the Commission's Strategy Paper it is possible to develop different approaches depending on the size of the law firms and their risk profile. Huge bureaucratic exercises to implement CR policies should be avoided, however.

It should also be taken into consideration that in highly regulated areas like the EU and the USA human rights and social and environmental requirements are defined in detail by legislation, administration, courts and arbitration tribunals. Therefore the question arises to what extent there is space at all for a separate regime parallel to the legal regime enterprises have to comply with. National constitutions like the German Constitution do not provide for the direct applicability of human rights between private parties but only an indirect application of the national constitutional rights in the context of the interpretation and adjudication of civil law. The reasons why a direct applicability of human rights between private parties is considered inadequate is that most human rights guarantees in the national constitutions, the European Charter of Fundamental Rights and the UN and European Human Rights Conventions are spelled out in general terms which require further specification by the democratically legitimized legislator, administration and the courts in order to be operational. Direct applicability might be acceptable in cases where the prohibition is spelled out clearly and in an absolute way, e. g. the prohibition of slavery and forced labor (see Art. 5 European Charter of Fundamental Rights); it is not clear, however, for an enterprise what it has to do when an employee's right to healthy, safe and decent working conditions is guaranteed (see Art. 31 European Charter). It also has to be taken into consideration, that in certain national

¹⁶ e.g. Avocats for international development "Law firms' implementation of the Guiding Principles on Business & Human Rights" discussion paper, November 2011, see www.a4id.org.

constitutions, the UN and European Conventions on Human Rights rank below the corresponding national constitutional guarantees.¹⁷

The discussion to what extent stakeholder participation can replace democratic rule-making procedures is also in its infancy. The stakeholder approach requires further discussion: What are the criteria to qualify as "stakeholder"? Who decides which stakeholders are invited to participate in a stakeholder-driven rule-setting process (the CCBE was not admitted as a participant in the multi-stakeholder roundtables on CSR initiated by the EU Commission in the early 2000s)? Does a stakeholder itself have to fulfill CR requirements, and which one? In particular, does it have to be transparent with regard to the sources of its income? What should be the role of stakeholders – advisory or with the right to vote or even veto?

These issues are not part of the present discussion although clarification would be highly desirable in order that acceptable and practical standards for business behaviour can be consistently developed.

IV. Conclusion

The CR Committee of the CCBE will have to deal with the following issues and challenges:

- (a) As the CR of the legal profession is already spelled out in a body of laws, Bar rules and ethical standards, the CR Committee has to identify the issues not covered yet but are required to be addressed by the Commission Strategy Paper. This applies in particular to environmental, social and human rights, governance and supply chain responsibilities. [See page 3]
- (b) Based on these findings the CR Committee will develop Guidance for the legal profession
- (c) Once approved by the CCBE delegations, the CCBE will promote its Guidance at an international level

¹⁷ As is the case in Germany - any German citizen including business entities enjoy the constitutional guarantee that their constitutional rights to a free development of their enterprise, the enjoyment of their property and the free selection and enjoyment of a profession may be restricted only by or on the basis of a constitutional law.

Annex 1: Link to Country reports

http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/30_01_13pdf1_1361954850.pdf

This country report "overview table" provides an overview of CSR developments at a national level. The overview table will be updated on a periodic level.

Annex 2: Charter of Core Principles of the European Legal Profession

http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1306748215.pdf

Annex 3: Further Information

There is an abundance of information available on CSR. The CCBE would suggest that as a starting point lawyers could consult the following documents and websites:

<http://www.csreurope.org> – CSR Europe is a business-driven membership network. Its mission is to help companies achieve profitability sustainable growth and human progress by placing corporate social responsibility in the mainstream of business practice.

<http://www.csrwire.com> – CSRwire seeks to promote the growth of corporate responsibility and sustainability through solutions-based information and positive examples of corporate practices.

<http://www.bsr.org> – Business for Social Responsibility (BSR) is a global organisation that helps member companies achieve success in ways that respect ethical values, people, communities and the environment.

<http://www.business-humanrights.org> – Business & Human Rights Resource Centre is a charity promoting greater awareness and informed discussion of important policy issues.

<http://www.unglobalcompact.org> – the Global Compact seeks to advance responsible corporate citizenship so that business can be part of the solution to the challenges of globalisation.

<http://www.ilo.org> – This is the website of the International Labour Organisation.

<http://www.hrw.org> – Human Rights Watch is dedicated to protecting the human rights of people around the world.

<http://www.goodmoney.com> – This website provides information on Social, Ethical and Environmental Investing and Consuming & Corporate Accountability.

<http://www.inform.umd.edu/crge/resources/interest.htm> – This is an association of academic units and individual faculty on the University of Maryland Campus whose mission is to promote, advance, and conduct, research, scholarship, and faculty development that examines the intersections of race, gender, and ethnicity with other dimensions of difference.

<http://eumc.eu.int> – The primary task of the European Monitoring Centre on Racism and Xenophobia (EUMC) is to provide the Community and its Member States with objective, reliable and comparable information and data on racism, xenophobia, islamophobia and anti-Semitism at the European level in order to help the EU and its Member States to establish measures or formulate courses actions against racism and xenophobia.

<http://www.socialinvest.org> – The Social Investment Forum site offers information, contacts and resources on socially responsible investing.

<http://www.idealswork.com> – This website is committed to make socially and environmentally responsible behaviour essential to the success of any business.

<http://www.ethicalcorp.com> – Ethical Corporation's mission is to provide balanced, informed, unbiased, useful original content on the issues in and around corporate social, environmental and financial responsibility through publishing and learning events.

<http://www.bitc.org.uk> – Business in the Community is a unique movement of 700 member companies committed to continually improving their positive impact on society.

<http://www.csrcampaign.org> – The European Business Campaign on Corporate Social Responsibility has set itself the goal of mobilising 500,000 business people and partners to integrate CSR into their core business by 2005.

<http://www.international-alert.org> - International Alert is an NGO committed to the peaceful transformation of violent conflict.