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A Lame Attempt or a Conscientious Commitment?

What is the Future for Corporate Social Responsibility and What
Role Should the EU Play in that Process?

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ABSTRACT

The effects of globalization in business, have been especially impactful in the recent years. This process contributed to a series of positive outcomes for the business sphere, such as the emergence of a solid global market, economic development or increased competition. However, this phenomenon also entailed some adverse effects. The legislative process has not kept the pace with the heightened scale of business activities, resulting in a legal void, where human rights abuses are being committed, while their perpetrators remain unpunished. Taking this in mind, it becomes clear that the European Union, as a superpower, can and must do much more.

A documentary analysis was conducted, starting with the historical evolution of corporate social responsibility, followed by a review of the main documents at the European level, as well as interviews with relevant actors in the field, and finalizing with the forecast for CSR and for business and human rights. Through this research, it was possible to conclude, that the EU should go back to its initial position, as one of the front-runners in the advancement of this field, particularly by engaging actively in the negotiation process of the binding treaty on business and human rights.

Finally, this dissertation has also highlighted that the pertinence of this debate, opens the opportunity for further investigation and also, how in this field, the establishment of partnerships and synergies should be prioritized.

LIST OF ABBREVIATIONS

BSR	Business Social Responsibility
CSR	Corporate Social Responsibility
EC	European Commission
EEEI	European Eco-efficiency Initiative
EMAS	Eco-Management and Audit Scheme
EMS	European Multi-Stakeholder
EP	European Parliament
ILO	International Labour Organization
ISO	International Organization for Standardization
MNE	Multinational Enterprises
NAPs	National Actions Plans
NCPs	National Contact Points
OBEs	Other Business Enterprises
OECD	Organization for Economic Co-operation
OEIGWG	Open-Ended Working Group
SMEs	Small and Medium Enterprises
SVN	Social Venture Network
TBL	Triple Bottom Line
TNCs	Transnational Corporations
UNGPs	United Nations Guiding Principles

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FIGURES

Figure I: Sethi's Three-Stage Schema.....	12
Figure II: Creating Value for Shareholders.....	13
Figure III: The Pyramid of Corporate Social Responsibility.....	15
Figure IV: The Escalation of CSR Concepts.....	18
Figure V: Corporate Social Responsibility a Three-Domain Approach.....	19
Figure VI: Agenda for Action.....	27

TABLE OF CONTENTS

<u>Chapter 1</u> - The Evolution of the Concept of CSR.....	7
1.1 The Charity Agenda.....	7
1.2 The Emergence of The Social Movements.....	7
1.3 Stakeholder Theory and Business Ethics.....	9
1.4 Pyramid of Social Responsibility.....	11
1.5 Corporate Social Responsibility in the International Standards.....	13
1.8 The Backbone of Corporate Social Responsibility.....	18
1.9 The Heart of Corporate Social Responsibility.....	19
1.10 The Materialization of Corporate Social Responsibility.....	20
<u>Chapter 2</u> - Historical overview of the main policies on Corporate Social Responsibility at the European Level.....	21
2.1 The European Union and Corporate Social Responsibility.....	21
2.3 A Business-centered Approach.....	24
2.4 The Impacts of the Green Paper.....	27
2.5 A More Conscious Approach.....	28
2.6 The Outcomes of the Contribution.....	30
2.7 First Multi Stakeholder Initiative.....	31
2.8 The Main Results of the European Multi-Stakeholder forum.....	33
2.9 A Renewed Awareness.....	35
2.11 A Constructive Critic.....	38
2.12 A New Definition.....	40
<u>Chapter 3</u> - Case Study: Portugal, Spain and the United Kingdom and their transposition of the 2014/95/EU Directive.....	43
3.1 Directive 2014/95/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.....	43
3.2 Case Study: Portugal, Spain and United Kingdom.....	48
3.4 A Significant Step Forward not a Game-changer.....	51
<u>Chapter 4</u> - CSR and Human Rights.....	59
4.1 The State of Play.....	59
4.2 A Wake-up Call.....	60
4.3 The Opening Stage.....	63
4.4 The Third Session of the Open-ended Working Group.....	66
4.5 The Position at the European level.....	68
4.6 The Future of CSR: A Momentum for Business and Human Rights.....	72
<u>Conclusion</u>	74
<u>Bibliography</u>	79
<u>Appendix I</u>	88

INTRODUCTION

This dissertation intends to analyze corporate social responsibility, as a multifaceted and living field, through a comprehensive examination of its evolution. Particularly focusing on how the European Union has been contributing to its development, while always framing its transformations *vis-à-vis* the international context of their occurrence, mainly, on other relevant international frameworks, whose emergence represented consistent influence for the work that has been developed at the European level.

The last decades witnessed a rampant and unprecedented shift inside the business world. The emergence of a massive and powerful social media, was responsible for bringing the business world closer to its consumers. More than ever before, globalization became a palpable reality, specially when we acknowledge that, “(...) the world’s largest corporations raise more money than most countries in the world combined (...)” and, consequently, that they possess the power to affect millions of people around the world.¹ Currently, technologies are more than part of our life, they are ubiquitous in our life. If something happens, independent of the scale of that event, it only *actually* happens when it is published on social media. This new era of free, accessible and instant stream of information, left business enterprises exposed. That convenient invisibility that was used by companies as an advantage to avoid transparency and accountability, has now come to an end. Social media holds the power to play with companies reputations, by having the ability to blow the whistle on their alleged violations and, to rapidly spread the word worldwide.

The emergence of corporate social responsibility, appeared as a nuisance for the strict capitalistic view of business, continuously trapped in its conservative old-fashioned ways. One of CSR's most important features is that it aims to achieve a perfect balance between several variables while privileging a long-term strategy.

¹Z. Rodionova, 'World's largest corporations make more money than most countries on Earth combined' *Independent* (London 13 September 2016), <https://www.independent.co.uk/news/business/news/worlds-largest-corporations-more-money-countries-world-combined-apple-walmart-shell-global-justice-a7245991.html>, (accessed 2 April 2018).

Conversely, the traditional logic of doing business entails a mere mathematical reasoning, where reduced costs are equal to higher profits, which basically sums up their whole *modus operandi*. This apparent clash between quantity versus quality or the methods versus the outcomes brought fertile soil to some incandescent ideas. May we recall, for example, the argument of Milton Friedman, in 1970, in an article about the social responsibility of business, where he argued that “The discussions of the “social responsibilities of business are notable for their analytical looseness and lack of rigor.”² Belittling the idea of corporate social responsibility has probably been one of the foremost used strategies to prevent the realization of its full potential, and one of the main reasons why we still find a gap between the urgency to mainstream it and what in practical terms, has actually been done.

Nonetheless, as a certain misunderstanding may persist around the meaning of CSR, also a great number of new factors, that in fact reinforce its significance, keep emerging. As the role of the governments, in coping with corporate social responsibility, is visibly shrinking, some corporations are starting to feel the pressure to fill that position, while others, take advantage of this situation, by behaving with total disregard for the environment that surrounds them, holding to a feeling of complete impunity. Even though the States have the primary responsibility to address these concerns, a lot of different factors have led to their reduced capacity in managing it properly. The impact of the financial constraints as a direct result of the economic crisis contributed to the weakening of the government's power and to an increased lack of resources. What we witnessed in the last decades was the typical role of governments and the replacement of them with mammoth corporations with endless resources and power.

Presently, societies are trapped in an atmosphere, built upon an unquenchable demand, as a result of the unbridled consumerism that is constantly propagandized by the world of advertising. As an immediate consequence of this phenomenon, companies main concern has been to find ways of producing faster and cheaper and reaching a

² F. Friedman, 'A Friednzan Doctrine' *The New York Times Magazine*, New York, 13 September 1970, <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>, (accessed 10 April 2018).

larger scale. Hence, the social and ethical performance of some enterprises has been called into question. Persistent accusations on human rights harm, failure to respect core labor standards and disrespect for the environment, are three of the main results of this race to massive production and profit. This scenario generated a major decrease in consumers' confidence and, on the levels of trust in business. These consumption societies we are living in created the false premise that only by possessing things, we can demonstrate to others, that we are in fact being successful. However, things are changing for business. The traditional view of business has always been what we could call, a realistic one. Like the realists, who deeply believe that States should only pursue their power and their self-interest, also the general rule within the business sphere, has consistently been, that the business enterprises should only have one concern, and that is - to make money. In the world we are living in today, these obsolete views are just no longer possible. Our world is now an unprecedented big brother and there is not much anyone can hide anymore, especially when the human value is being undermined for the sake of cheaper goods and bigger profits.

Overall, there is one specific determinant, that has been probably one of the most powerful barriers to the dissemination of CSR, which is, the chosen discourse. The discourse that has been persistently used when addressing the utmost relevance of CSR, has been predominantly, the wrong one. Tedious, exhaustive and sometimes, even with a desperate tone to it, that transforms the intended debate in something closer to a preaching act. Privileging this sort of approach is self-defeating since the great majority of people will not be convinced by a solely moral and vague advocacy, but rather, by consistent arguments and a very clear notion of the possible added value of its integration. This inappropriate strategy has led to the spreading of misleading perceptions about CSR and in some occasions, to a certain stereotyping on the subject itself. The rhetoric of CSR needs to be reversed and, the focus should be on its benefits and on its added value, to transform the concept in something more appealing, palpable and less vague.

The European Union has also mirrored some of these societal changes from the last

decades and has been constantly evolving, to become better equipped to respond to these mutations. The EU is currently much more than a mere regional institution or a solely complex organism, the EU is what we can call a superpower. Its system works as an enormous octopus, spreading in a variety of different areas, reinforcing not merely the relationship between member-states but also between Europe and the rest of the world. Being one of the world's biggest economies comes also with a great number of responsibilities. More than ever, the EU has to work in accordance with the values it is constantly proclaiming and trying to widespread since the rest of the world will be ready to point the finger at the slightest slip. One undeniable setback, was the decision of the UK to leave the EU, leaving an atmosphere of suspicion and mistrust around the European Union and on what are the exact benefits of being part of this intricate orchestra.

The EU was one of the pioneers in putting CSR as one of the core principles in its business strategies. Very early on, the European Union understood that to built a superpower economy it was imperative to choose the right foundations and to think long term. Some policies have been working better on paper than on practice, nevertheless, it is also true that solid changes take time to come to fruition. The debate on sustainable development and corporate social responsibility was initiated by the EU in 2001 and since then, a considerable number of different strategies, policies and important documents were produced. In 2011, a giant step was also made by the United Nations, with the establishment of the UN Guiding Principles on Business and Human Rights³, and the EU immediately started to tackle CSR, in line with the coordinates set in this document. The proposed cocktail had a mixture of voluntary policies and some complementary regulation when necessary. The voluntary aspect of CSR has been a constant since its first appearance and persists as one of its more evident features. When we measure the impacts of an absence of a CSR commitment, it becomes obvious that this voluntary characteristic is probably not the most effective approach and one of the

³ United Nations Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights: Implementing the "Protect, Respect and Remedy" Framework' (16 June 2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, (accessed 12 April 2018).

reasons why CSR has been developing at a slow pace, however it is also clear that the recent years reveal a change from this traditional tendency.

The methodology selected for this dissertation will encompass that of analytical research, making use of the crucial documents within the area of Corporate Social Responsibility, and more specifically, the documentation at the European level, not disregarding other essential instruments at the international level, whose influence and pertinence are indisputable. The primary method for the purpose of this research will be documentary analysis, using as the main sources, all the different documents concerning CSR, that have been produced at the European level, such as, strategies, regulations, directives, guidelines, resolutions, communications and reports. Additionally, some of the most relevant works, from the most prominent authors, and leading figures within the area of Corporate Social Responsibility, will also be analyzed, such as Archie Carroll, Edward Freeman, Frank Abrams and John Elkington. On the last chapter, the documentary analysis will be at the United Nations level, acknowledging the more recent documents produced concerning the field of CSR and business and human rights, however, maintaining the focus on the EU position on the matter. Finally, the interview method will also be used, with representatives from the European Commission, NGOs working with CSR, and lawyers working specifically with these questions being questioned in some of the most crucial problematics here deconstructed. This method will be mostly applied, concerning the last two chapters, where additional information and insight can be of extreme added-value for this research, and where a more practical and empirical knowledge will provide a more holistic comprehension.

Acknowledging all the aforementioned societal transformations, and on how they have been shaping the field of CSR, and - asserting that the European Union can make a much better use of its position to enhance CSR - is the central hypothesis of this dissertation that will be examined by asking the following questions. Firstly, how was the development of the field of CSR and which factors have shaped that process, through the analysis of the evolution of the concept, since its emergence, until the present time. Secondly, how at the European level, has the field of CSR has been

addressed, and what have been the outcomes of those policies and main documents, while examining the language used and the impacts of that usage. Thirdly, by reviewing the “Directive 2014/94, as regards disclosure of non-financial and diversity information by certain large undertakings and groups”⁴, and by going through, its transposition into the national legislations of Portugal, Spain and the United Kingdom, trying to comprehend what were the results, that the creation of this legislation, managed to achieve. The decision to analyze, these three specific countries was to take advantage of my knowledge of their three official languages, and consequently, having the opportunity to easily access information from their national databases. In the fourth chapter, this dissertation will be dedicated to CSR and Human Rights, addressing the question on, what can be the future of this relationship, the current challenges and opportunities and, the landscape in terms of new policies and legislation. This section will also focus on the current negotiation process of a future binding instrument on business and human rights, through the analysis of the most relevant documents on this issue, and on how this can affect the field of CSR.

This research acknowledges the limitations of framing the business practice, whose development happens faster than the contributions for its process, however, the significance of tackling this matter with dedication and passion is certainly greater than its evident constraints.

⁴ Council (EC) Directive 2014/95 as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2013] OJ L330/1, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN>, (accessed 12 April 2018).

CHAPTER 1 - THE EVOLUTION OF THE CONCEPT OF CSR

1.1 THE CHARITY AGENDA

The 50's were the decade, where eventually the concept of corporate social responsibility, emerged in official terms. Howard Bower's book, entitled "Social Responsibilities of Businessman", is considered, by a great number of scholars, as the first to have used the concept of CSR inside the academic community. Bower was, therefore, one of the pioneers in the CSR sphere, and certainly one of the first individuals to understand it as an opportunity to go the extra mile. He recognized that in a world mainly constructed by numbers, as the business world is and always has been, adding the human value, was essential, "(...) it is a businessman obligation to nurture and develop human values."⁵ Abrams, also raised his concerns about the impact of enterprises towards their employees and the community from which the enterprise draws its resources, in a time where the concept of the shareholder was most probably still unknown.⁶ In a nutshell, this decade marks the appearance of a certain questioning, on the exact role of corporations and, if it should remain, as the sole pursuit of the shareholders' interest - which would often mean, to the detriment of the community it was impacting - or something more than that. The questioning is in itself a positive shift, but in truth, this decade was still marked by a mere philanthropic approach of CSR and this questioning was still far from leading to a genuine commitment.

1.2 THE EMERGENCE OF THE SOCIAL MOVEMENTS

The 60's and the 70's were times of great effervescence, struggle and protest and, as a consequence, times of major transformations. Society in general felt the need to rupture with an obsolete societal conservativeness and most importantly, with the constant passive role of the individuals in the decision-making processes, in other words, these two decades were marked by a *breaking the rules* atmosphere. These

⁵ M. Storchevoy, *Business Ethics as a Science: Methodology and Implications*, Palgrave Macmillan, Switzerland 2018, p. 98.

⁶ F. Abrams, 'Management Responsibilities in Complex World,' *Harvard Business Review*, vol. 29, 1951.

observations may give the impression that we are talking of a certain rebel or even childish period, but it was in fact, quite the opposite scenario. People were not merely galvanizing for no reason or aimlessly criticizing as a form of forged participation. People were more *awake* than ever, and society in general was finally becoming aware and conscious of a great number of injustices, inequalities and imbalances, that needed to be put on the table. People were not afraid to go on the streets and to demand their rights, by pointing the finger to the ruling powers and calling for change. In these two decades, we witnessed the emergence of various social movements, such as the women's movement, the civil rights movement, the consumer's movement, and also, the environmental movement.

In the year of 1962, Rachel Carson published the famous book “Silent Spring” where she fiercely exposed the industrial's mammoth negligence and, how their reckless practices were brutally impacting the environment.⁷ People were starting to question the link between some environmental catastrophes and the work of a few major industries and, to a certain extent, Carson's work, ultimately created the momentum for the emergence of an environmental conscience. Coincident with this conjuncture, also occurred, the birth of the concept of sustainable development, that would become interdependent with the notion that was building on CSR.

As it happened with the environmental movement, also the consumer's movement was fueled by certain books published during this decade. In 1960, the book “The Waste Makers”⁸ by Vance Packard, became one of the most representative works of this movement, since it instigated the discussion on the uncontrolled consumerism that was being fostered by the business community, through brutal marketing and advertisement strategies. Packard, also touched upon some of the hot topics of the time, such as the idea that quantity should prevail over quality and most importantly, on the artificial belief that owning things would be a synonym of being happier or more successful.

Even though these social movements were extremely important in the dissemination of a certain CSR conscience or philosophy, the topic remained controversial, and a lot

⁷ R. Carson, *The Silent Spring*, Houghton Mifflin, Boston, 1962.

⁸ V. Packard, *The Waste Makers*, David McKay Company, Inc., New York 1960, pp.183-195.

of dissident voices persisted to neglect its relevance. Friedman, an extremely well-reputed economist, was one of those voices. In 1972, he affirmed “(...) there is one and only one social responsibility of business – to use its resources and engage in activities designed to improve its profits (...)”.⁹ His opinion was shared by a great number of other individuals and it reflected the one-sided capitalistic view of business that, at that time, was still ingrained in most of the conservative businessman mindset. Overall, what marked the concept of CSR in the 70s, was the considerable growth in the research and, on how this increased interest generated the appearance of several new concepts, such as, corporate social responsiveness or corporate social performance. The first one, meaning that corporations should pursue a long-term approach that would allow them to act in a preventive manner, instead of a reactive one, and the second one, concerning the outcomes of the first.

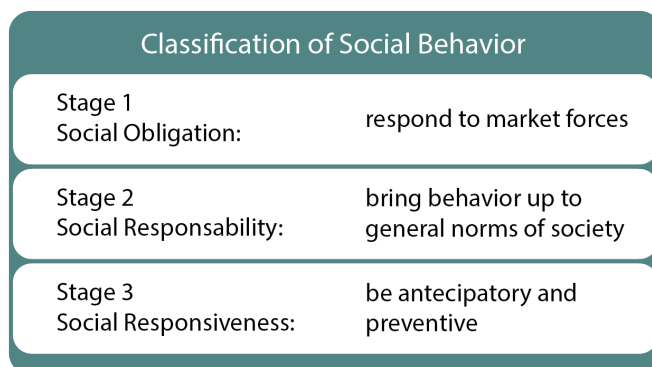


Figure 1: Sethi's Three-Stage Schema¹⁰

1.3 STAKEHOLDER THEORY AND BUSINESS ETHICS

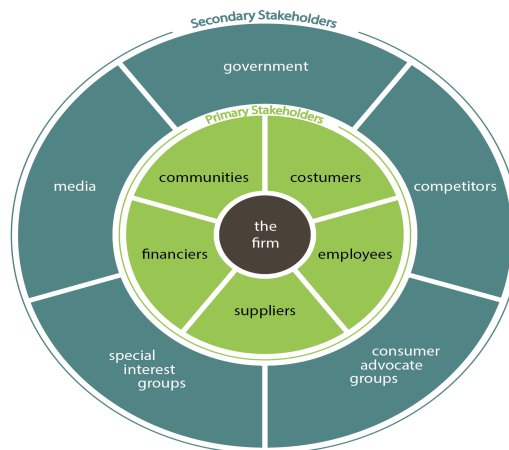
The 80's was a decade not only remembered by its excess and a rampant technological innovation, but also by the appearance of the Stakeholder Theory and the

⁹ F. Friedman, 'A Friedman Doctrine' *The New York Times Magazine*, New York, 13 September 1970, <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>, (accessed 16 April 2018).

¹⁰ W. Taiwo, 'Using Corporate Social Responsibility to Enhance Value', BBA thesis, University of Helsinki, 2012, p.9.

new concept of Business Ethics. The term “stakeholder” was used for the first time in literature, in 1963, in an internal document of the Stanford Research Institute and since then, its scope has continuously been broadened.¹¹ Freeman was one of the founding fathers of the Stakeholder Theory and developed it, in his book entitled the “Strategic Management: A Stakeholder Approach”. The Stakeholder Theory challenges the ethics of capitalism by its understanding that, in a constantly evolving society it is impossible to keep using always the same lenses. This theory argues that it is peremptory for companies to learn, that they should correspond to their stakeholders' interests, as much as they do for their shareholders. Highlighting that they should not continue to undervalue their shareholders and their needs. In other words, it affirms that one of the most important tenets for a business to be successful is to create value for its shareholders as well as its stakeholders, reinforcing the interdependence of these connections and generating a balanced circle instead of a variety of parallel organisms, working separately.

Figure II: Creating Value for Shareholders¹²



In essence, the stakeholder theory sheds light on the paramount importance of not considering - in any circumstance - the shareholders or the stakeholders as islands.

¹¹ R. Edward Freeman et al., *Stakeholder Theory: The State of the Art*, Cambridge University Press, New York, 2010, pp. 30-38.

¹² *Ibid.*, p. 24.

Being knowledgeable about their unique characteristics is important, but what this theory staunchly demonstrates is the importance of a certain level of togetherness and cooperation between all the constructive elements, by exploring where their interests merge and giving due regard to these groups.

The concept of business ethics, arose at the academic arena, officially in the 70's, when conferences on the topic started to be held and also, several articles and books, such as the one written by Thomas Donaldson and Patricia Werhane, “Ethical Issues in Business: A Philosophical Approach”, were published, helping to instigate the discussion on this field. Taking into account, the above-mentioned importance of having a wider perspective that embraces the different elements, instead of observing them separately, that same thought, is reinforced, not only by the emergence of the stakeholder theory but also, of the business ethics, at the exact timeframe. However, it can also be said that in the case of business ethics, more than its emergence in the 70's, it would probably be more accurate to talk about its resurgence, if we decide to consider it as a sub-field of moral philosophy.¹³ Business ethics as a living concept has gone under numerous transformations and somewhere along the road, its strict connection with the stakeholder theory was predominantly lost.

In conclusion, it is impossible to mention the evolution of CSR in the 80's without mentioning the Social Venture Network.¹⁴ The SVN was created in 1987, by Wayne Silby and Josh Mailman. These two creative minds were responsible for the widespread of a more thoughtful, fair and sustainable way of doing business, and Social Venture Network, remains, until today, as one of the most active and innovative organizations in this area.

1.4 PYRAMID OF SOCIAL RESPONSIBILITY

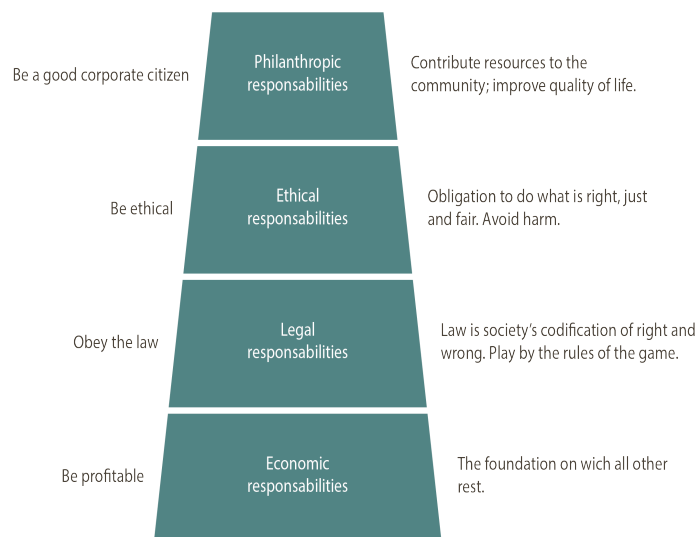
In 1991, Archie Carroll exposed CSR in a way that no author has been capable of doing before. Carroll knew that coming up with a different approach to CSR was urgent if we wanted to convince the most reluctant businessman to embrace it. Taking this in

¹³ Freeman et al., p. 197.

¹⁴ See e.g. Website of the Social Network Venture, <http://svn.org/>, (accessed 27 April 2018).

mind, he designed a diagram, entitled the “Pyramid of Social Responsibility”, where he examined four different types of social responsibilities: philanthropic, ethical, legal and economic.¹⁵ His work did not bring exactly new findings, but the method used to tackle the topic - recurring to clear and precise language - was one of the most remarkable steps in transforming CSR in a more comprehensible concept, by transforming its usual vagueness in something more concrete and consequently, easier to be disseminated.

Figure III: The Pyramid of Corporate Social Responsibility¹⁶



In 1992, the Maastricht Treaty was signed and the European Economic Community became the European Union and, in the exact same year, the “Business Social Responsibility” was launched.¹⁷ BSR shared the vision and the willingness of the Social Venture Network and used it as an inspiration to establish an organization, to help companies, introducing a more sustainable and socially committed strategy, into their

¹⁵ A. Carroll., 'The Pyramid of Social Corporate Responsibility: Toward the Moral Management of Organizational Stakeholders' *Business Horizons*, vol. 34, no. 4, 1991, pp. 39-48, <http://faculty.wvu.edu/dunnc3/rprnts.pyramidofcsr.pdf>, (accessed 14 April 2018).

¹⁶ Ibid., p. 42.

¹⁷ B. Saumitra and E. Selarka, *Corporate Governance and Corporate Social Responsibility of Indian Companies*, Springer, Singapore 2016, pp. 11-29.

business practices. Business Social Responsibility, became a valuable vehicle for the dissemination of CSR, continuously investing in new and creative approaches to spread the word. Also in 1992, the United Nations held for the first time, a Conference on Environment and Development at Rio de Janeiro.

This decade was also marked by the emergence of the so-called, “Triple Bottom Line Approach”, formulated by John Elkington, in 1994. The TBL, used the Stakeholder Theory as its basis, and developed an accounting framework with three different dimensions of organizational performance: environmental or ecological, financial and social, sometimes also referred as “People, Planet, and Profit”. The Triple Bottom Line, demonstrated that the merely profit-driven mindset was a deprecated scheme and that for the sake of a sustainable future, these three variables had to be considered together at all times.¹⁸ Finally, it was also in this decade, that the new concept of “Corporate Citizenship” gained more supporters.¹⁹ This term appeared as basically a synonym of CSR, emphasizing the importance for business, to create stakeholder partnerships, to engage in proactive strategies and to transform the social responsibility from a simple approach to a firm commitment.

1.5 CORPORATE SOCIAL RESPONSIBILITY IN THE INTERNATIONAL STANDARDS

The twenty-first century witnessed a vital and most desired change in the field of corporate social responsibility. After decades of intense research, a proliferation of different theories, a great amount of debate - even though, not exactly constructive - and a constant fabrication of new concepts - that instead of helping CSR only ended up with its fragmentation - things finally took an alternative direction. CSR moved from a traditional theoretical approach to an empirical one, where experience and practice were lastly privileged. For the first time, CSR started to be understood as an allied to corporate goals and not as a waste of money and resources, or even as a simple public

¹⁸ J. Elkington, *Cannibals with Forks: The Triple Bottom Line of the 21st Century Business*, Oxford, Capstone, 1999.

¹⁹ D. Stangis and K. Smith, *21st Century Corporate Citizenship: A Practical Guide to Delivering Value to Society and Your Business*, Bingley, Emerald Publishing, 2017.

relations strategy. The business world proved to be a slow learner, and in the vast majority of cases, corporations would only initiate their CSR path, after facing some undesired failures. This new window of opportunity for CSR came with the long-awaited awareness that not only, “doing good is the right thing to do, but it also leads to doing better.”²⁰

In 2003, Carroll and Schwartz, redefined the pyramid of corporate social responsibility, from the beginning of the 90's, and excluded one of its fourth spheres: philanthropic. At that moment in the CSR history, the plain charity or donor-based policies were completely outdated and there was finally a common understanding that CSR embedded much more than that. Following these new trends in the CSR field, a great number of international organizations started to produce important documents on the topic. One of the most significant ones was the creation of the United Nations Global Compact, launched in 2000, with the mission to engage businesses in socially responsible strategies and policies, that should ultimately be reported.²¹

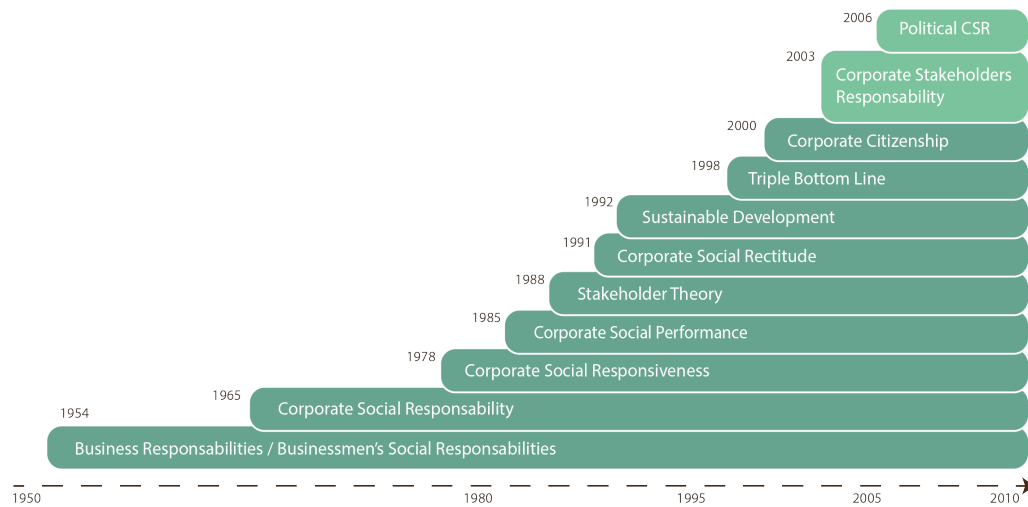
Additionally, one year later, the Organization for Economic Co-operation, published “The OECD Guidelines for Multinational Enterprises and Global Instruments for Corporate Responsibility”.²² These are just two examples of a great number of other documents that spearheaded this new and most significant change in the CSR development.

²⁰ S. Sankar, 'The Role of Corporate Social Responsibility in Strengthening Multiple Stakeholder Relationships: A Field Experiment', *Journal of the Academy of Marketing Science*, vol. 34, no.2, 2006, pp. 158-166, <https://link.springer.com/article/10.1177/0092070305284978>, (accessed 17 April 2018).

²¹ United Nations General Assembly Res 70/224 (22 December 2015) UN Doc A/RES/70/224, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/224, (accessed 19 April 2018).

²² Organization for Economic Co-operation (OECD) 'The OECD Guidelines for Multinational Enterprises and Global Instruments for Corporate Responsibility' (16 May 2001), <https://www.oecd.org/corporate/mne/1898155.pdf>, (accessed 19 April 2018).

Figure IV: *The Escalation of CSR Concepts*²³



1.6 DIMENSIONS OF CSR

As it was referred before, one of the main obstacles to the CSR development has always been the absence of a consensus on a clear definition of the concept. Even though, there is currently a common understanding on what it should entail, when we analyze the topic in depth, it becomes obvious that there are a great number of rough edges that need to be smoothed. One of the most evident problematics is the definition of the dimensions of CSR. As Dennis Masaka greatly put, “The term is a brilliant one; it means something, but not always the same thing, to everybody.”²⁴ The emergence of the Triple Bottom Line approach may have brought an agreement on those three dimensions: environmental, social and financial, but there are certainly more aspects that need to be considered and, for those, a common view is still lacking. This problematic emphasizes the general and continuous controversies on the topic and also, the importance of looking at CSR as an umbrella, under where a lot of different other

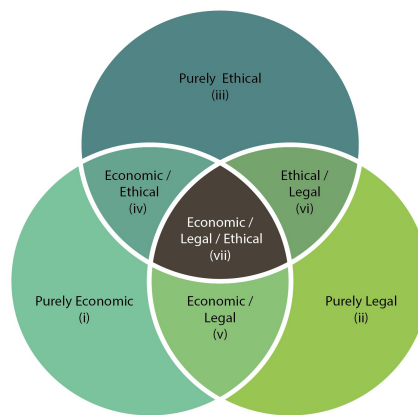
²³ J. Moon and J. Pascal, 'Corporate Social Responsibility in Retrospect and Prospect: Exploring the Life-Cycle of an Essentially Contested Concept', *International Centre for Corporate Social Responsibility*, no. 59, 2011, p.11, <https://www.nottingham.ac.uk/business/businesscentres/iccsr/documents/59-2011.pdf>, (accessed 24 April 2018).

²⁴ D. Masaka, 'Why Enforcing Corporate Social Responsibility (CSR) is Morally Questionable', *Electronic Journal of Business Ethics and Organization Studies*, vol. 13, no. 1, 2008, http://ejbo.jyu.fi/pdf/ejbo_vol13_no1_pages_13-21.pdf, (accessed 2 May 2018).

terms and perspectives should fall under, instead of as a secluded concept.

When analyzing the dimensions of CSR, a starting point would certainly be through the work developed by Archie Carroll. Despite the fact that, it is still possible to find companies, whose only CSR approach is a philanthropic one, there is now a shared understanding that this dimension is totally outdated, which is also proved by its exclusion from the initial pyramid, in 2003, replacing it for a three dimension approach:

Figure V: Corporate Social Responsibility a Three-Domain Approach²⁵



Beneath the discussion on the CSR dimensions, and considering the economic, legal and ethical as the three generally accepted, a lot of other distinct designations are also used, such as voluntary, stakeholder, community, workplace, marketplace, among others. This proliferation of formulations is a result of the huge range of different perceptions of what CSR means, and how they led to different approaches on the subject. Before trying to understand these new terminologies - what would certainly be an endless task - its crucial to properly define the three *official* dimensions and to emphasize, that a genuine CSR approach, should arise from the fulfillment and interdependence of these three domains.

²⁵ A. Carrol and M. Schwartz, 'Corporate Social Responsibility: A Three-Domain Approach', *Business Ethics Quarterly*, vol. 13, no. 4, 2003, https://www.researchgate.net/profile/Archie_Carroll/publication/261827186_Corporate_Social_Responsibility_A_Three-Domain_Approach/links/54a17ab80cf267bdb902c00f/Corporate-Social-Responsibility-A-Three-Domain-Approach.pdf, (accessed 8 May 2018).

1.7 THE BASIS OF CORPORATE SOCIAL RESPONSIBILITY

The economic responsibility of business, is definitely, the only one that is usually not controversial, however, that does not make it less intricate. Considering CSR as the pyramid designed by Carroll, the economic responsibility is the first layer, the basis that allows all the others to exist, working as the *mother*.²⁶ What was problematic about this dimension, was the one-sided capitalistic view of business, that considerably hampered the CSR development. By creating an unsubstantiated idea, that anything that would go beyond profit maximization should not be part of the business language, CSR became a suspicious topic, whose possible engagement would only result in significant drawbacks for the companies involved. This false principle was accepted by a great number of businessmen and oddly enough, some remnants of this mindset made it to the present time. This being said, it is important to establish a difference between acknowledging that companies should not be merely profit-driven and to assume that making a profit should not be one of their main goals. Businesses have to preserve their profitability in order to survive, especially in a world built on fierce and unregulated competition. Undermining the importance of turning profit can be the formula for a companies' collapse and for people to start losing their jobs.

Healthy businesses should result in economic development, and economic development should mean, creating jobs, fostering the economic activity and pursuing the interests of both shareholders and stakeholders. The economic dimension of CSR should mean that businesses always take into consideration the importance of distributing fair wages to their employees, to generate a return to their shareholders, to produce goods and services at a fair price, to create value to the society and to positively impact the surrounding communities. All companies should operate their businesses while trying to be as profitable as possible and that should not be seen as a policy that goes against the tenets of CSR. Although, companies economic responsibility should always consider that while fetching for profit, trying to assure a competitive position in the market and achieving high levels of productivity, their social responsibilities have to

²⁶ Carrol and Schwartz, pp. 508,509.

be a priority at all times. The economic dimension of CSR should never be translated into abandoning the profit maximization, on the contrary, it should mean taking a holistic approach, where all the different branches are weighted and the potential impacts, diligently assessed.²⁷

1.8 THE BACKBONE OF CORPORATE SOCIAL RESPONSIBILITY

The legal dimension of corporate social responsibility is the necessary response to the severe challenges that we now face in this globalized and interconnected world. If we consider the economic sphere as the basis, the legal dimension can be seen as the *backbone* of CSR.²⁸ This second layer of the pyramid, encompasses various sub-areas, such as International Law, European Law, Corporate Law and Criminal Law. If we consider the business world as a game, companies have to master the rules and play accordingly, if they want to be successful, and this explains the major relevance of mastering the legal arena. In other words, companies need to be equipped with knowledgeable professionals, able to ensure their operations and initiatives are performed within the law. The legal domain is a prerequisite for the companies to be considered as being operating in a socially responsible manner and, when businesses decide to overlook it, the consequences can be dramatic and even more, they can carry irreversible consequences.

Past scandals prove that acting in conflict with the law can result in colossal damages for businesses' reputation, great profit drop and the loss of customers preference and trust. One of the most flagrant examples - and certainly one with the more severe outcomes - was the case of the American energy company, Enron Corporation, in 2001.²⁹ Enron was formed in 1985 and was one of the largest and most prestigious corporations in the United States, and also internationally. Its enormous

²⁷I. Kolstad, 'Why Firms should not always Maximize Profits' *Chr Michelsen Institute*, no.11, 2006, <https://www.cmi.no/publications/file/2349-why-firms-should-not-always-maximize-profits.pdf>, (accessed 10 May 2018).

²⁸ T. Lambooy, 'Legal Aspects of Corporate Social Responsibility', vol. 30, no. 78, *Utrecht Journal of International and European Law*, 2014, <https://www.utrechtjournal.org/articles/10.5334/ujel.bz/>, (accessed 12 May 2018).

²⁹ D. Owen, 'CSR After Enron: A Role for the Academic Accounting Profession', *European Accounting Review*, vol. 14, no.2, 2005, pp. 395-404.

ambition and greed culminated with its bankruptcy, leaving thousands of people unemployed. This scandal had unprecedented media coverage and ultimately proved, that even the giants can fall when they decide to deliberately circumvent the law for their personal benefit.

1.9 THE HEART OF CORPORATE SOCIAL RESPONSIBILITY

The third and final layer of the pyramid is without a doubt, the most cumbersome and controversial, but at the same time, it is also the most sophisticated and pertinent one. What immediately distinguishes the ethical domain, from the legal one, for example, is that we move from 'must' to 'should'. The ethical responsibility is not built on laws or regulations and consequently, cannot be strictly enforced. This first characteristic weakens the concept and creates a dangerous flexibility in how it should be perceived and most importantly, in how it should be tackled. What becomes quite evident from this dimension is that it is a proof in itself, that the world can not be seen through the usual black and white lenses, when it is in fact, also composed of a lot of different shades of grey. For this reason, and in a world where the ethical responsibilities are increasingly growing - although no consensus on their approach has been found - the expansion of the legal responsibilities appears to be the only way forward.

Even though the analysis of the ethical responsibility of CSR may seem too intricate and almost impossible to be untangled, that is what makes its discussion so significant. This top layer of the pyramid is the domain that goes above the legal and economic expectations and it is the one that is genuinely concerned about on how to contribute to the society's expectations. The ethical domain can be understood as the *heart* of the corporate social responsibility, since it entails the idea of going beyond, of actually going the extra mile, "A firm is not being responsible if it merely complies with the minimum requirements of the law, because this is what any good citizen would do".³⁰ In other words, the ethical layer is the CSR dimension that implies that companies should

³⁰ A. Voiculescu and H. Yanacopoulos, *The Business of Human Rights: An Evolving Agenda for Corporate Responsibility*, London, Zed Books 2011, p.31.

exceed their legal compliance and take into consideration – in every step of the process - other principles, such as justice and human rights and also, to conduct its business operations, always, according to high ethical standards.

1.10 THE MATERIALIZATION OF CORPORATE SOCIAL RESPONSIBILITY

This first chapter is an attempt to capture the intricacy of this concept by analyzing its historical evolution, understanding its controversy and lack of consensus, learning about its various ramifications, and also, by dissecting its core dimensions. The inherent complexity of the concept also implicates that a refined navigation system must be put in place, to ensure its clear comprehension. The struggle to erase the typical fragmentation of CSR needs to be answered through the achievement of common ground to move forward and that implies a general commitment and also, to find a certain level of harmonization in the whole process.

Observing closely the historical development of corporate social responsibility, some conclusions become quite evident. Firstly, it is now obvious that there is still a lot of room for discussion, and that nowadays it becomes even more urgent to trigger the debate and to decide on how to do it properly. Secondly, why we now witness more attention and interest on CSR, from the customers, civil society, regional and international organizations, and many other actors.

CHAPTER 2 - HISTORICAL OVERVIEW OF THE MAIN POLICIES ON CORPORATE SOCIAL RESPONSIBILITY AT THE EUROPEAN LEVEL

2.1 THE EUROPEAN UNION AND CORPORATE SOCIAL RESPONSIBILITY

As the executive of the EU and its driving force, the European Commission is the one in charge for addressing the topic of Corporate Social Responsibility. The EC as an active supporter of CSR understands its paramount importance for the competitiveness, sustainability, and innovation of the EU enterprises and the EU economy.³¹ The Commission, through its initiatives and publications, reinforces the benefits of CSR for business, in the areas of human resources management, risk management, cost savings, access to capital, customer relationships and cost savings.³² As previously mentioned, there is currently a common concern with the thematic of CSR from not only the civil society, but also from the regional and international organizations and this has resulted in the creation of extremely important documents on the topic. For this reason, the EC has drawn inspiration from some of these documents and therefore also promotes that enterprises adhere to international principles and guidelines. Taking this in mind, the approach of the European Commission on CSR has been built upon widely renowned international CSR standards and guidelines, in order to design a foundation as comprehensive and as well-structured as possible.³³

2.2 THE INTERNATIONAL UMBRELLA

The strategy of the European Commission has been shaped under the direct influence of five international principles and guidelines. Firstly, the “10 Guiding Principles of the United Nations Global Compact”.³⁴ The UN Global Compact, established in 2000 wants to support the dissemination of CSR by helping companies to

³¹ Commission (EC), 'A renewed EU strategy 2011-2014 for Corporate Social Responsibility' (Communication) COM (2011) 681 final, 25 December 2011., [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2011\)0681_/com_com\(2011\)0681_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0681_/com_com(2011)0681_en.pdf), (accessed 10 May 2018).

³² Ibid., p. 3.

³³ Ibid., pp. 6,7.

³⁴ United Nations Global Compact, *The Ten Principles of the Un Global Compact*, 2010, <https://www.unglobalcompact.org/what-is-gc/mission/principles>, (accessed 11 May 2018).

incorporate in their internal operations, principles that convey a commitment with social responsibility. Finding a principles based-approach to doing business - as the most suited response to CSR challenges - the UN strategy was, to design “The Ten Principles of The UN Global Compact” and to divide them into four key areas: human rights, labor, environment, and anti-corruption.

Secondly, we have the International Labor Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy”, also known as the MNE Declaration.³⁵ This Declaration was firstly adopted, almost 40 years ago, but has been constantly revised and adapted to the current challenges. The document is also divided into four main areas: employment, industrial relations, training and conditions of work and life. The focus of this policy is to give guidance for MNE's, governments, employers and workers organizations to outreach the full realization of decent work for all.³⁶

Thirdly, we have the “OECD Guidelines for Multinational Enterprises”, that were adopted in 1976 and revised several times, the most recent one, in 2011. The main areas of action of this document are human rights, environment, employment, information disclosure, combating bribery, consumer interests, science and technology, industrial relations, competition, and taxation. The Guidelines have two main particularities, firstly, they are the only government-backed recommendations for CSR, and secondly they created the “National Contact Points”.³⁷ The idea behind the National Contact Points is to raise awareness for the Guidelines, promote its effectiveness and to assess and mediate possible complaints, by establishing offices in the countries that are part of the document. Additionally, it must be underlined that the governments that have adhered to the Guidelines, have the legally binding obligation to set up the NCP's.³⁸

³⁵ International Labor Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (329th Conference Session Geneva March 2017), http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf, (accessed 11 May 2018).

³⁶ Ibid., p. 3.

³⁷ Organization for Economic Co-operation (OECD) 'Update of The OECD Guidelines for Multinational Enterprises' (29 June 2011), pp.68, <https://www.oecd.org/corporate/mne/48149536.pdf>, (accessed 18 May 2018).

³⁸ Ibid., p. 30.

The fourth document is the “ISO 26000 Social Responsibility”, launched in 2010 by the International Organization for Standardization, providing guidance to the public and private sector. ISO emphasizes seven core subjects of social responsibility: human rights, labor practices, the environment, fair operating practices, consumer issues and community involvement and development.³⁹

The fifth and final document is the “United Nations Guiding Principles on Business and Human Rights.”⁴⁰ The UNGPs issues a set of principles to define the responsibilities of governments and businesses by designing three main pillars: state duty to protect, corporate responsibility to respect and the third pillar, access to remedy.⁴¹

What all these documents have in common is the conscience that all businesses have an impact on society and that their impact can be positive, such as job creation, new infrastructures or economic development, but can also be negative, like for example, pollution, corruption or even child labor. Taking these factors into account, these principles and guidelines reinforce how crucial it is to establish effective CSR mechanisms to prevent the potential adverse effects of businesses impact - or to ensure they are efficaciously addressed - and also to promote good practices and disseminate a culture of corporate social responsibility.

Collecting and analyzing all these different international standards, the European Commission started by creating a modernized CSR definition, to provide clarity and a common understanding and also, to be aligned with all the mentioned international instruments. The EC definition of corporate social responsibility perceives it as “the responsibility of enterprises for their impacts on society”.⁴² Having this definition as the

³⁹ International Organization for Standardization (ISO) 'ISO 26000: Guidance on Social Responsibility', November 2010, p. 9.

⁴⁰ United Nations Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights: Implementing the "Protect, Respect and Remedy" Framework' (16 June 2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, (accessed 12 April 2018).

⁴¹ Ibid., p. 1.

⁴² Commission (EC), 'A renewed EU strategy 2011-2014 for Corporate Social Responsibility' (Communication) COM (2011) 681 final, 25 December 2011., [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2011\)0681/_com_com\(2011\)0681_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0681/_com_com(2011)0681_en.pdf), (accessed 10 May 2018).

basis, the Commission's policies on CSR are built upon an agenda for action covering eight distinct areas:

Figure VI: Agenda for Action⁴³



To better understand how the EC came to these set of goals, it is essential to analyze their commitment with the area of corporate social responsibility - from the beginning until the present time – and to understand how their policies have been evolving and under which premises that evolution has been made.

2.3 A BUSINESS-CENTERED APPROACH

The European Commissions' interest in the thematic of corporate social responsibility, started to be more evident in the 90's, albeit, their first official document was only published in 2001. In 1993, Jacques Delors - who was the Commissions'

⁴³ Ibid., pp. 8-13.

President at the time - fueled the discussion on CSR, by making an appeal to businesses, to have a more active position in fighting unemployment and social exclusion.⁴⁴ This important moment would lead to the release, two years later, of the “Manifesto of Enterprises Against Social Exclusion”, an initiative that came from the corporate sector, as a proof of their commitment to tackling the problem of social exclusion, and that became formalized through the creation of the European Network, that is now, commonly known as CSR Europe.⁴⁵ Another decisive occasion, occurred in 2000, at the EU Lisbon Summit, where the EU Governments and Heads of State renewed their appeal for a CSR approach, that should make Europe “capable of sustainable economic growth with more and better jobs and greater social cohesion by 2010.”⁴⁶ These significant moments culminated with the publication in July 2001, of the “Green Paper: Promoting a European Framework for Corporate Social Responsibility”.⁴⁷

The vision that the European Commission demonstrates in the Green Paper, on CSR, is quite different from their current modernized definition. On the Green Paper, the EC proposes to define CSR as a “(...) concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis.”⁴⁸ This first definition was significantly more narrow and, certainly neglecting some other essential aspects of CSR, however, that is also a result of the different time frames. What becomes also clear throughout the document is that the use of language entails some level of uncertainty, proving that at that point, the European Commission was still venturing into unknown territory. Taking into account the newness of the area of CSR, specifically inside the European Union, one of the main purposes of this document was to establish a consultation process - before being capable to propose specific actions - that more than just trigger the debate, should promote more research on the field. Albeit the patent distance from the current

⁴⁴ Commission (EC), 'Green Paper: Promoting a European Framework for Corporate Social Responsibility' COM (2001) 398 final, 18 July 2001, p. 4.

⁴⁵ D. Brennan, et al., *Corporate Social Responsibility: The Corporate Governance of the 21 Century*, Alphen aan den Rijn, Kluwer Law International, 2011, pp. 225-242.

⁴⁶ Ibid., p. 281.

⁴⁷ Commission (EC), 'Green Paper: Promoting a European Framework for Corporate Social Responsibility' COM (2001) 398 final, 18 July 2001.

⁴⁸ Ibid., p. 8.

mindset, this document was more than a response to the challenges of globalization, it was already a reaction to the media pressure on companies transparency, which had just started and additionally, also as a result of the increasing importance of the social criteria for consumers and investors.

The Green Paper addresses, in the external dimension of CSR, the interdependence between companies and the surrounding communities, reinforcing that the companies should pursue to have a positive impact in their local setting, which should also be translated in being environmentally aware and responsible. Strangely enough, in this external dimension, the EC makes a reference to the already outdated, philanthropic dimension, recovering the donations to charity initiatives back to the CSR discussion.⁴⁹ Also inside this external dimension, the document reflects on the importance of observing CSR through the whole supply chain, meaning that social responsibility should not rely only on the companies, but also - and equally as important - in all the other parties involved in the process. After discussing the external factors affecting CSR, the document follows to a crucial approach on human rights, starting with the statement that, “Corporate social responsibility has a strong human rights dimension (...).”⁵⁰ At this point, the document presents a rare moment of genuine honesty. After emphasizing the endeavor of the EC to raise the standards on human rights, it assumes the challenge that the European Union faces, to meet a coherent approach in this dynamic, acknowledging their navigating in turbulent waters, faced with the challenge of finding a balance between their development, trade and also with the private sector strategies.

Moreover, and still, inside the external dimension of CSR, the document discusses the increasing emergence of social and eco-labels and the danger that may entail, since there was still a lack of clarity and consensus in their meaning and a huge variety of different criteria, that needed to be harmonized. Finally, it tackles the potential of designing codes of conduct as an internal strategy for companies, while expressing the absence of a coherent and effective reporting system, that should be translated into a

⁴⁹ Ibid., p. 14.

⁵⁰ Ibid., p. 15.

key reflection of companies practices and not into a marketing strategy. In short, the Green Paper adopted a soft-law approach, focusing on its voluntary basis and business-driven, in detriment of the other relevant stakeholders.

2.4 THE IMPACTS OF THE GREEN PAPER

The Green Paper received divided opinions but most importantly, it did not collect a solid amount of feedback. The document received in total 261 responses, and from the fifteen member states at the time, only nine responded.⁵¹ In general terms, the limiting definition was considered problematic and the document was perceived as having too much focus on the businesses interests, disregarding the stakeholders perspective. Throughout the document there is a constant repetition of the voluntary basis or nature of CSR, and this element generated some controversy, with different opinions being raised.⁵² There was a general agreement between trade unions and NGOs that the voluntary approach was insufficient, and that consequently, a regulatory framework should also be designed, but on the side of the companies, the emphasis was on a policy of self-regulation, and against an attempt of a one size fits all approach, that in their opinion would restrict and suppress companies creativity.⁵³

In a nutshell, the Green Paper was a timid first attempt, from the European Commission to address the theme of corporate social responsibility and test the waters. Aware of its responsibility to keep the balance between a lot of different sectors, the European Commission opted for a soft law approach, using the voluntary basis as its shield and also, by asking key questions instead of proposing particular measures. On the investors' side, their major concern was to guarantee the enhancement of companies transparency and disclosure of their practices. In conclusion, there was a common agreement that the role at the European level, should be to encourage and highlight the

⁵¹ S. MacLeod, 'Corporate Social Responsibility Within the European Union Framework', *Wisconsin International Law Journal*, vol. 13, no. 3, 2005, pp. 1-9, <https://hosted.law.wisc.edu/wordpress/wilj/files/2012/02/vagts.pdf>, (accessed 13 May 2018).

⁵² Commission (EC), 'Green Paper: Promoting a European Framework for Corporate Social Responsibility' COM (2001) 398 final, 18 July 2001, pp. 4, 8, 10, 11, 12, 13, 16, 17, 20, 25, 26, 32, 35, 37

⁵³ S. MacLeod, 'Corporate Social Responsibility Within the European Union Framework', *Wisconsin International Law Journal*, vol. 13, no. 3, 2005, pp. 1-9, <https://hosted.law.wisc.edu/wordpress/wilj/files/2012/02/vagts.pdf>, (accessed 13 May 2018).

importance of CSR, and in fact, this commitment would result, in the publication from the European Commission, of a more clear strategy one year later.

It is certainly true, that the main purpose of a Green Paper is to be used as an instrument to stimulate the discussion by pointing out some specific issues and some potential courses of action, and not to be authoritative or to express final decisions. However, in this particular case, the language used in this document denoted uncertainty, and consequently, that weakened its impact and created some confusion and apprehension, that ultimately resulted in its very insipid feedback.

2.5 A MORE CONSCIOUS APPROACH

This European Commission contribution, “Corporate Social Responsibility: A business contribution to Sustainable Development”, moves from an inquisitive tone, used in the Green Paper, to a more assertive one, stating a role of different actions to ensure an effective promotion and dissemination of corporate social responsibility. Albeit the general criticism on their chosen CSR definition, the EC decided to keep it in this contribution, and even more, to reinforce its voluntary basis by stating - as the first principle of CSR in which the Commission would build its strategy, as its, “(...) voluntary nature.”⁵⁴ One of the first proposed actions, concerns the need for more research on the benefits of CSR, especially in developing countries. The document establishes the idea that by having more knowledge on CSR, it would be a starting point for fueling innovation, generating more trust in the corporate sector, but also, as a tool to ameliorate risk management strategies. Secondly, the document emphasizes the importance of disseminating good practices, which can consequently foster cooperation and also, by sharing common concerns, businesses can find common values and that can ultimately, facilitate some important consensus in different key areas of CSR.

A third suggested action, regards the development of CSR management skills. In this area, the Commission addresses the need for qualified training and education, since without a clear understanding on CSR and its benefits it would be impossible to invite

⁵⁴ Commission EC, 'Corporate Social Responsibility: A business contribution to Sustainable Development' (2002) 347 final, 2 July 2002.

companies to make the transition to a more responsible approach on doing business. Another proposed measure, has, as its main focus, the mainstreaming of CSR in Small and Medium Enterprises. When thinking about CSR, usually the first thought would be, on large companies, but the reality of Europe's landscape is that it is mainly composed of SMEs. Taking this in mind, the European Commission reflects on the importance of tackling their lack of knowledge on CSR - being the financial constraints one of the main barriers for that - and to transform their mainly ethical dimension into an effective commitment and into a more strategic mindset.

An additional suggested action, involves the need for a more concerted and transparent approach to CSR instruments and practices, to achieve a credible benchmarking, through common criteria and accessible and reliable information. This action should focus on the areas of codes of conduct, labels, socially responsible investment, management standards and, accounting, auditing and, reporting.⁵⁵ Another important measure recommended by this contribution was the creation of a Multi-Stakeholder Forum on Corporate Social Responsibility. Taking into account that one of the biggest criticisms on the Green Paper was the lack of an open dialogue - that should be facilitated by the EC - this Forum would finally answer that appeal. The Forum should be responsible for the design of a set of guiding principles, to address gender mainstreaming and the relationship between CSR and competitiveness, among other thematics.⁵⁶ Finally, the document suggested that corporate social responsibility should be inserted in all the EU policies. In this last step, the EC specifies, for example, the area of employment and social inclusion, as well as the environmental sphere, referencing important initiatives on these topics that should be supported and reflected upon. Still, in the area of employment, this document makes reference to a very hot topic at the time, which was, the restructuring processes. In the year 2000, there was more acquisitions and mergers than at any other period in history, which meant that a great number of businesses were under restructure.⁵⁷

⁵⁵ Ibid., p. 13.

⁵⁶ Ibid., pp. 16-17.

⁵⁷ Commission (EC), 'Green Paper: Promoting a European Framework for Corporate Social Responsibility' COM (2001) 398 final, 18 July 2001, p. 11.

Taking this in mind, this contribution emphasizes the importance of making these processes happen in a socially responsible manner, by preventing and calculating the potential harmful impacts and how they can affect all the different parties involved. In the environmental field, this document reinforces its support to other existing initiatives, such as the “European Eco-efficiency Initiative”, from the World Business Council for Sustainable Development or the “European Partners for the Environment”.⁵⁸ Inside this last proposed action - on the integration of CSR in the EU policies - there is one point that is particularly detailed and that deserves to be highlighted, the (...) external relations policies, including development policy and trade”.⁵⁹ The external dimension of the EC policies in the field of CSR gains more substance and more depth in comparison with how it was previously addressed in the Green Paper. At this point, the European Commission recognizes this specific area, as the one where the EU can have a leading role, mainly since it already had a unique set of agreements with the third countries which could facilitate a greater promotion on CSR.

2.6 THE OUTCOMES OF THE CONTRIBUTION

Just like it had happened with the Green Paper, also with this Contribution, the reference to a merely voluntary basis, was once more heavily criticized. And once again, this specific characteristic appears repeatedly throughout the document. What is striking, and used as one of the arguments for these critics, is the total absence of an explanation on the reasoning behind the choice for this approach. At the beginning of this contribution, several criticisms on the Green Paper are mentioned, and this one, is explicitly there, but the analysis of the whole document, proves it was not taken into consideration, and most importantly, no reasons were given on that decision.⁶⁰ On a more positive note, this European Commission contribution goes one step further on acknowledging the global nature of corporate social responsibility - which resulted from the Green Paper responses analysis. With companies becoming global organisms, also

⁵⁸ Commission EC, 'Corporate Social Responsibility: A business contribution to Sustainable Development' (2002) 347 final, 2 July 2002.

⁵⁹ Ibid., pp. 22-24.

⁶⁰ Ibid., p. 4.

their impacts become global, as a result of the market liberalization and the increasing tendency to find suppliers in developing countries.⁶¹

Another change on the EC approach, from the one witnessed on the Green Paper, was a certain retreat from the one size fits all approach and, a renewed awareness of CSR as a living concept, meaning its total standardization would most certainly not be possible to work in all its dimensions. Additionally, and also on a positive tone, this contribution acknowledges the criticism from the Green Paper concerning their too business-centric approach and transforms it, by stressing now, the importance of involving all the different actors in the CSR process. Finally, the European Commission reinforces the paramount importance of being aligned with the international standards, specifically with the OECD Guidelines and the ILO core Conventions. The support of the OECD Guidelines appears as particularly relevant since it was the only international document whose adherence entailed a binding obligation on the already mentioned creation of National Contact Points.⁶² In conclusion, this EC contribution demonstrates considerably positive approaches and proposed actions that would tackle some of the most substantive dimensions of CSR. However, the document remains inconsistent in some points, such as the awareness that a one-size fits all approach would probably be impossible to achieve and, at the same time, *demanding* a harmonization of the CSR instruments.

2.7 FIRST MULTI-STAKEHOLDER INITIATIVE

As one of the suggested actions from the European Commission, in their “Corporate Social Responsibility: A business contribution to Sustainable Development”, in October 2002, the EU Multi-Stakeholder Forum on CSR was finally launched.⁶³ This forum was set up with the aim to encourage transparency and to promote a concerted effort to achieve a harmonization on the CSR instruments, and consequently, to try to restrain

⁶¹ Ibid., p. 6.

⁶² Organization for Economic Co-operation (OECD) 'Update of The OECD Guidelines for Multinational Enterprises' (29 June 2011), <https://www.oecd.org/corporate/mne/48149536.pdf>, (accessed 18 May 2018).

⁶³ Commission (EC) Press Release 'Corporate Social Responsibility: Commission launches European Multi-Stakeholder Forum' (16 October 2002) EC Press/1487, p. 30.

their frantic proliferation. As a response to previous critics, this Forum would promote a multi-stakeholder participation and an open dialogue, as a channel to a more effective CSR dissemination. Taking this in mind, the Forum would sit around the same table, trade unions, NGOs and business organizations to discuss common strategies and to “widespread ‘ownership’ of the principles of CSR”.⁶⁴

The central mission of this forum, was to present before the summer of 2004, a set of guiding principles that should effectively tackle the following problematics: the relationship between business and competitiveness, address the particularities of the SMEs, built upon the contribution of CSR to the sustainable development, understand how to advance the potential of the codes of conduct, achieve common guidelines for labelling schemes, promote disclosure on pension and retail funds SRI policies, and finally and most importantly, design a set of guidelines and criteria for CSR tools and instruments.⁶⁵

In practical terms, the Forum would consist of a meeting at the high-level, that should happen at least once a year and a series of roundtables at the theme-based level. These roundtables should address different topics, such as the “development aspects of CSR”, or the “fostering CSR among SMEs”.⁶⁶ A Co-ordination Committee was set, to be in charge of the preparation of both the roundtables, as well as the high-level meetings. To make sure that all the different stakeholders were represented, this Committee had representatives of the Green Eight and the Platform of European NGOs, representatives of the European Trade Union Confederation and the Union of Industrial and Employer's Confederation and of course, members of the EC.⁶⁷ These roundtables were organized in three different waves, with each roundtable having at least three meetings, and, on the aftermath of each RT, a high-level meeting of the Forum would examine their progress and how to improve it.⁶⁸

⁶⁴ Commission (EC), *European Multi-Stakeholder Forum on Corporate Social Responsibility*, Luxembourg, Office for Official Publications of the European Communities, 2003. p. 5.

⁶⁵ *Ibid.*, p. 5.

⁶⁶ *Ibid.*, p. 8.

⁶⁷ *Ibid.*, p. 8.

⁶⁸ *Ibid.*, p. 9.

2.8 THE MAIN RESULTS OF THE EUROPEAN MULTI-STAKEHOLDER FORUM

The report on the work developed by the European Multi-Stakeholder Forum on Corporate Social Responsibility, came out in June 2004, just as it had been announced in the initial document at the time of its first release. The structure of the report was divided into three parts, the first one regarding the already existing international standards on CSR, the second analyzing internal and external drivers, obstacles and success factors, and the third part on future initiatives and recommendations.⁶⁹ On the first part of the report, the Forum reinforced its support to the usual three international documents on CSR, the “ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy”, the “OECD Guidelines for Multinational Enterprises” and the “UN Global Compact.” For the first time, in this final report on the EMS Forum, they went beyond these traditional documents, and gave their support to ten different others, concerning the areas of human rights, environment, rights at work and sustainable development.⁷⁰ In addressing this new list of texts on CSR - concerning a variety of different themes - it demonstrated how their understanding of the CSR dimensions was getting broader and less strict.

On the second part, the report starts by referring to the distinction between the internal and external drivers of CSR. In accordance with their learnings from the European Multi-Stakeholder Forum, the external dimension involves the expectations of the different stakeholders, consumers, investors, other companies, NGOs, trade unions and public authorities, and this driver is increasingly more important, resulting from the better knowledge on the business impacts on the environment and on the societies.⁷¹ The internal drivers derive from the mindset of the decision makers of each company and include their commitments and their values. Other internal values, involve for example, “reducing costs through eco-efficiency, anticipating, avoiding and minimizing risks and the associated costs, being an attractive prospect for investors or learning and

⁶⁹ Commission (EC), 'European Multi-Stakeholder Forum on Corporate Social Responsibility Results' (2004) final Forum Report, June 2004.

⁷⁰ Ibid., p. 7.

⁷¹ Ibid., p. 9.

innovating.”⁷²

Through the EMS Forum, some of the substantive barriers to the spread of CSR became more evident and the document sets a list forward. Firstly, the persistent lack of enough research on the area - that could facilitate the promotion of the benefits of CSR - and here, the report focuses on the Small and Medium Enterprises, that more than lacking these sort of knowledge, have scarce resources and scarce skills to effectively implement CSR strategies. The report also refers to the language of CSR as a potential obstacle, especially for SMEs, and consequently should be adapted to become more perceptible. Another significant point, identified, concerned the absence of a clear threshold on the extent of the responsibilities, and this marked the starting point of a bigger and endless discussion on the limits of accountability. The list of obstacles goes on, but there is one sentence that is particularly striking “Identifying or developing tools or practices, which suit the company’s particular and changing circumstances (...)”.⁷³ What is curious about this statement is that it goes in the opposite direction, of the traditional position of the European Commission, promoting a harmonization on the CSR policies. However, it is not totally surprising, since on the last EC contribution on CSR, this transformation was already started to be seen, “Common approaches and one-size-fits-all solutions may not be possible in all areas since CSR is a fluid concept (...)”.⁷⁴

After discussing the barriers to CSR, the report evolves to the analysis of the crucial success factors. Several examples are mentioned, such as the importance of having a clear commitment from the top level, the emphasis that should be put on a continuous learning process to foster innovation and creativity, and the need for more multi-stakeholder initiatives, where all the different stakeholders can be voiced and best practices can be shared. Between this extensive list, the report identifies a very particular issue regarding the developing countries, and of an utmost importance, which is, their need to have an enabling environment, with strong NGOs and trade unions, so

⁷² Ibid., pp. 8-9.

⁷³ Ibid., p. 10.

⁷⁴ Commission EC, 'Corporate Social Responsibility: A business contribution to Sustainable Development' (2002) 347 final, 2 July 2002, p. 17.

that their adherence to CSR strategies could become more effective.⁷⁵

The last contribution of this final report describes what should be the future initiatives and actions to ensure an efficient promotion of CSR, through a series of recommendations. Once again, and as one of the first suggestions, the report states the need to raise awareness on the international standards on CSR, mainly the already mentioned reference texts. The second recommendation addresses the dissemination of information on CSR and establishes a European Multi-stakeholder run internet portal, to collect this information and facilitate their access for all the different stakeholders. Thirdly, the report underlines the need for more research based on real case studies and with a broader scope, encompassing all the CSR distinct dimensions. Also to promote the mainstreaming of CSR, more initiatives should be launched, with the purpose of sharing experiences and best practices, as well as demand from the pioneer companies, to take their role as capacity-builders. The problematic of transparency is also reflected in these recommendations, as an area where companies need to invest through clear communication policies, independently of their size or field of action. The educational arena is also mentioned, with the recommendation to integrate CSR in the curriculum, especially for future managers. A final consideration goes to the crucial role of the European institutions and the governments, as main contributors to establish an enabling environment for the implementation of CSR strategies, and a competent legal framework.

In a nutshell, this report sheds light on some of the most palpable problematics on the progress of CSR and on how to possibly overcome them. However, some inconsistencies persist and the approach is mainly theoretical, lacking a more practical sense - and in more precise terms - on how to tangibly move forward.

2.9 A RENEWED AWARENESS

Two years after the final report on the European Multi-Stakeholder Forum, and after a great number of lessons learned, from that initiative, the European Commission

⁷⁵ Commission (EC), 'European Multi-Stakeholder Forum on Corporate Social Responsibility Results' (2004) final Forum Report, June 2004, pp. 10-11.

published a new communication, with the intention of going one step further on the mainstreaming of corporate social responsibility, while making sure, Europe would lead that path. In its introductory lines, the communication acknowledges the good work that some companies already perform in this field, but reinforces the urgent need to do more.⁷⁶ Also on the initial pages of the document, the European Commission affirms that the primary actors of CSR, are the enterprises and that consequently, the EC will support the launch of a European Alliance on CSR. This Alliance should embrace companies of all sizes and work as a “political umbrella” for already existing initiatives of this kind.⁷⁷ The communication proceeds by making an important reference to some of the top priorities of the EU, such as the achievement of sustainable growth and the amelioration of the employment situation. These priorities should consequently work as a response to the problematics of the aging population and the increasing global competition. Besides addressing these concerns, the document also reinforces how CSR can contribute - not substitute - public policies, and gives several examples, such as, how it can play a role in preventing social exclusion, promote “(...) greater respect for human rights, environmental protection and, core labor standards, especially in developing countries (...)”, or work towards the Millennium Development Goals.⁷⁸

In conclusion, this communication reveals a much more mature position from the European Commission on the field of corporate social responsibility. The approach proves that an exhaustive revision of their previous documents on the topic was carefully performed, and resulted in a more coherent and solid roadmap for the future. What is remarkable on this communication and deserves to be highlighted, is that for the first time, the EC justifies their choice for a voluntary basis on CSR, “(...) an approach involving additional obligations and administrative requirements for business risks being counter-productive and would be contrary to the principles of better regulation.”⁷⁹ In other words, this document demonstrates a serious and concerted

⁷⁶ Commission (EC) 'Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility' COM (2006) 136 final, 22 March 2006, p. 2.

⁷⁷ Ibid., pp. 2-3.

⁷⁸ Ibid., p. 4.

⁷⁹ Ibid., p. 2.

commitment on a long-term basis, an awareness of its own limitations and also, for the first time, the reference to the value of solidarity.⁸⁰

2.10 PROMOTING SYNERGIES

The essence of this European Alliance on CSR is on the concept of partnership, and, the enterprises adhering to this alliance, must share a common willingness: “(...) to make Europe a Pole of Excellence on CSR in support of a competitive and sustainable enterprise and market economy.”⁸¹ With the eyes on the future, this Alliance sees CSR as an opportunity for businesses and as an engine for win-win situations. The work of this European Alliance should rely on three focus areas: raising awareness and improving knowledge on CSR and reporting on its achievements, helping to mainstream and develop open coalitions of cooperation and, finally, ensuring an enabling environment for CSR.⁸²

On the first area, the document stresses the need to find new and creative ways to spread CSR, reinforcing education as a key factor, together with furthering more research. In what concerns, the development of partnerships, the Alliance should assist the SMEs to grow, help enterprises to integrate adequate CSR strategies, foster an open dialogue with all the relevant stakeholders, promote a CSR commitment inside and outside the EU borders, tackle the challenges of transparency, find creative responses to the problematic of the ageing population, and encourage the creation of sustainable technologies, services and, products. On the third and last area, the European Alliance should work as a driver for a business-friendly environment, that would enable companies to grow sustainably.⁸³ In sum, the European Alliance on CSR would rely on the commitment of the parties involved and on how they decided to make the best of this platform, but it certainly reflected how the European Commission was committed to “move up a gear”.⁸⁴

⁸⁰ Ibid., pp. 2, 5.

⁸¹ Ibid., p. 11.

⁸² Ibid., p. 11.

⁸³ Ibid., p. 13.

⁸⁴ Commission (EC) 'Time to move up a gear: The New Partnership for Growth and Jobs' COM (2006) 30 final, 25 January 2006.

2.11 A CONSTRUCTIVE CRITIC

Before *praising* the work developed by the European Parliament in the “Corporate Social Responsibility: a New Strategy”, it is essential to distinguish their role from the role of the European Commission. The European Commission has the intricate and at the same time, indispensable task to - as the heart of the administrative machinery of the European Community - work on European law proposals, taking into consideration, previous consultations with Member-States, Governments, unions, industry and other experts. After conducting these interviews, the European Commission has to take into account all those different and sometimes even conflicting interests, before submitting their proposals. The European Parliament has a very distinct role from the one played by the EC, and, by not having to go under the same processes, before reporting its views, the European Parliament, benefits from a more comfortable position to express their criticisms and to give further recommendations.

This document from the European Parliament commences by referencing, that this resolution took into account more than forty international documents, from a variety of different areas that touch upon the field of CSR, such as trade, transparency, sustainable development, bribery, globalization, labor, among others.⁸⁵ The EP acknowledges the current proliferation on CSR initiatives and defines it as equally positive and negative. On the positive side, this variety, allows companies to have a lot of options from where to draw inspiration from, but on the negative side, this can result in a level of confusion that dissuades companies from actually implementing CSR policies. On this resolution, the European Parliament congratulates the recent work from the EC, and how it fueled the debate on corporate social responsibility, however, it also points out, that some stakeholders, demonstrated some concerns with lack of transparency in its previous consultation process.⁸⁶ The EP also stressed the need to actually move forward and to transform the theory, and what is already on paper, in more practical terms - in results.

This introductory part of the resolution finishes with the European Parliament,

⁸⁵ European Parliament (2007) 'European Parliament Resolution of 13 March 2007 on Corporate Social Responsibility: a New Partnership' (2006/2133(INI)).

⁸⁶ Ibid., p. 49.

highlighting the leading role that the EU should have on assisting third countries in implementing and monitoring CSR and additionally, that corporate social responsibility should tackle new crucial areas: social inclusion, ethics, equal opportunities, lifelong learning, sustainable development and organization of work. The resolution continues, with the EP making a recommendation to the European Alliance on CSR, concerning the need for a unique point of coordination, to facilitate its initiatives and their visibility. In what concerns the work developed by the Commission through the Multi-Stakeholder Forum, the European Parliament affirms that the European Commission should build on the positive outcomes of this initiative, however, in the EP's point of view, this Forum should have been established earlier, if we consider the mammoth importance of having an open and comprehensive dialogue in the field of CSR.⁸⁷

The resolution also recommends that more attention should be addressed to the question of gender equality and on the enlargement of the participation level of the Multi-Stakeholder Forum, where investors, public authorities and, educators should also have a voice. In the systematically problematic area of transparency and accountability, the EP declares its support for “mandatory disclosure for corporate and other lobbyists (...)”.⁸⁸ The EP also reiterates the responsibility of promoting and ensuring social inclusion, while acknowledging the need to have precise competition rules to enhance a *fair game*. At this point, the resolution underlines two important concerns. Firstly, the urgency to further the debate on the possible conflict between, companies going after competitive sourcing strategies and, their CSR commitment to privileging long-term relationships with their suppliers. Secondly, if the EU wants to maintain their leading role in advancing CSR on third countries, it should also access the European companies' activities and of their subcontractors outside the EU borders.

In what concerns the CSR mechanisms, the EP repeats its proposal of an amendment to the Directive 78/660/EC of 24 July 1978, to include environmental and social reporting, to the existing financial reporting.⁸⁹ For the effective progress of CSR,

⁸⁷ Ibid., p. 50.

⁸⁸ Ibid., p. 50.

⁸⁹ Ibid., p. 51.

the resolution suggests the creation of a professional framework to ensure CSR measurement, certification and, social audits, and additionally, recommends that inspiration should be drawn from the Eco-Management and Audit Scheme, and extend it to the protection of labor and human rights. The EP requests the Commission to create a mechanism that would enable victims to submit complaints against European companies in the respective courts of the Member States.⁹⁰

As a final remark on the CSR instruments, the resolution suggests a further discussion on the possible creation of the figure of an Ombudsman on corporate social responsibility. In the process of mainstreaming CSR, the European Parliament suggests its integration in the educational curriculum for relevant areas, the importance of the work of the European Commission in fostering creativity and innovation, the continuous participation of all the different stakeholders in this process, and also the total compliance of CSR within the EU's trade policies. Reflecting on the particularities of the Small and Medium Enterprises, the EP recommends the realization of a holistic study on how the SMEs can effectively participate in CSR. In conclusion, this resolution from the European Parliament makes a number of critics to the work developed by the European Commission, while suggesting alternative ways to improve the dissemination of CSR and to move forward. The EP reinforces the imminent need to start thinking globally so that the outcomes can also reach a global scale, and to achieve this target, it reinforces the necessity to create solid partnerships and synergies, while supporting and bolstering already existing international standards and relevant policies on CSR.

2.12 A NEW DEFINITION

The first striking impression that comes from the introductory part of this “Renewed EU Strategy 2011-14 for Corporate Social Responsibility”, is the change on the traditional rhetoric. Ten years after the Green Paper, this new chapter of the European Commission, proposes a more visible and substantive approach, and the proof lies, that the document starts by highlighting the benefits of adopting a CSR strategy,

⁹⁰ Ibid., p. 55.

such as, on attracting investors, gaining or regaining costumers trust, increasing creativity and innovation, and the list goes on. Also, in a more broad sense, CSR is explained as a tool to alleviate the effects of the existing economic crisis, while contributing to the sustainable development goals and enhancing a competitive market economy.⁹¹ The European Commission continues by revealing some of its progress in the field through some indicators, and stresses the growing number of signatures by EU enterprises, on some of the most important CSR international principles, as well as their rising number of published reports, and also their enhanced participation in different CSR initiatives. After acknowledging the positive outcomes, the EC lists some of the crucial challenges that must be addressed in the future, from which two deserve to be emphasized, firstly the urgency to focus more on human rights, as a “(...) significantly more prominent aspect of CSR” and secondly, to understand the importance of complementary regulations to progress the CSR in a more conducive way.⁹²

This renewed strategy brings finally, a new definition on CSR. After years of intense criticism on its narrow scope and on the excessive weight directed to its voluntary basis, the European Commission, at the long last, understood the importance of broadening the scope and erasing the voluntary part, and come up with CSR as “the responsibility of enterprises for their impacts on society”.⁹³ This reformulated definition finally encompasses the areas of human rights, labor, bribery and corruption and, environment, with all the sub-areas being recognized, such as gender equality, health and well-being or climate change. On this document, the EC also reinforces that enterprises should always be the primary actors of CSR and that the public authorities and regional organizations should have a supporting role. This agenda for action, 2011-2014 has, as one of its leading missions, to close the existing gap between consumers expectations and the actual business behavior and practices, by rebuilding citizens trust on the European enterprises and their conducts.⁹⁴

⁹¹ Commission (EC), 'A renewed EU strategy 2011-2014 for Corporate Social Responsibility' (Communication) COM (2011) 681 final, 25 December 2011, p. 3.

⁹² Ibid., p.5.

⁹³ Ibid., p 6.

⁹⁴ Ibid., p. 9.

Moving away from the merely voluntary approach on CSR, the EC reaffirms the need for better and more effective self and co-regulation. In this sense, and in what concerns environmental and social information disclosure, the European Commission intends to present a legislative proposal that should help to ensure a common understanding. Acknowledging that the educational sector can be an engine for CSR, the EC will also invest in research and innovation to enhance this field. Towards the end of this renewed strategy, the EC claims, once again, the need for a more concrete alignment between the European and the international approaches on CSR. In other words, the European Commission advances that will monitor the commitment by the European enterprises with the most substantive international principles on CSR, such as the UN Global Compact, the OECD Guidelines for Multinational Enterprises or the ISO 26000 Guidance Standard on Social Responsibility.⁹⁵ Additionally, it gives special focus to the implementation of the UN Guiding Principles on Business and Human Rights, and its continuous process of monitoring and assessment. One of its final remarks concerns the area of trade and development, where the Commission intends to improve its CSR promotion within other countries and regions in the world, through “(...) a mix of global advocacy and complementary legislation.”⁹⁶

In conclusion, this renewed strategy presents positive and negative aspects. On the positive side, the most striking aspects are the new definition on CSR, that finally privileges a holistic view on the field, and a more coherent and concerted agenda for action. However, the EC does not pay enough attention to the moment of crisis that Europe was living and how that affected companies commitment to CSR. In other words, this strategy neglects the importance of finding binding measures, that should complement the existing voluntary ones, to effectively promote the progress of CSR.

After analyzing the evolution of the main CSR documents at the European level, it becomes quite clear how the initial definition and the inappropriate choice of discourse, were two of the most substantial barriers for its mainstreaming. However, the last documents also bring to the surface a shift in that paradigm.

⁹⁵ Ibid., p. 13.

⁹⁶ Ibid., p. 14.

CHAPTER 3 - CASE STUDY: PORTUGAL, SPAIN AND THE UNITED KINGDOM AND THEIR TRANSPOSITION OF THE 2015/95/EU DIRECTIVE

3.1 DIRECTIVE 2014/95/EU AS REGARDS DISCLOSURE OF NON-FINANCIAL AND DIVERSITY INFORMATION BY CERTAIN LARGE UNDERTAKINGS AND GROUPS

The last years mirrored a concerted move from a mere voluntary - and some would argue, extremely flexible and consequently weak - approach to the field of corporate social responsibility at the European level, to a more mature, objective and robust vision. This increasing awareness was explicitly demonstrated on the European Commission's renewed strategy, where a legislative proposal was put forward, concerning the disclosure of social and environmental information, and this EU Directive materialized those concerns. Through this Directive – that came into force in December 2014 - the investors and the consumers will now be able to make more conscious decisions since, they will have access to social and environmental information on businesses impacts and consequently, have the possibility to obtain the complete picture.

The non-financial reporting has the same meaning as other known terms, such as sustainability reporting, corporate social responsibility reporting, corporate citizenship reporting or triple bottom line reporting. This category involves the disclosure of environmental, economic and social impacts, caused by companies everyday activities. In reality, a reasonable number of companies in Europe were already producing annual reports on corporate social responsibility, however, they mostly lacked meaningful information, especially in the key areas that this directive calls up as the vital ones and, they were not aligned with any internationally recognized framework. The compliance with this directive will enable companies to better measure and also communicate their economic, social and environmental impacts and consequently, provide them with the required data to make necessary changes and set new goals while managing their performance more effectively. With this initiative, the EC also intends to create a key

platform for the diffusion of best practices worldwide and to better prevent possible violations and detrimental impacts from the business sector.

In order to achieve an adequate level of consistency, the statements should include information on the following areas: social and employee-related matters, environmental, human rights, anti-corruption, and bribery. The report should also contain, a description of the business model as well as of the policies adopted with regards to non-financial matters and their results, the main risks related to the company's activities and non-financial performance indicators of their specific area of work. On the social and employee-related matters, the undertakings are expected to report on themes such as trade union rights, gender equality, implementation of ILO core conventions, working conditions, among others. In what concerns, respect for human rights, statements must contain how their violations are being prevented and for bribery and anti-corruption, which instruments are in place to fight them. Finally, in the environmental area, information must be provided on a variety of different problematics, for example, greenhouse emissions, health, and safety, air pollution, renewable energy or water use.⁹⁷

The undertakings subjected to this directive have the freedom and the flexibility to decide which framework to rely on – the directive does not dictate a specific standard. When providing this information, they can choose from the Union-based Eco-Management and Audit Scheme to the international frameworks, such as the OECD Guidelines for Multinational Enterprises, UN Global Compact, ISO 260000, ILO Tripartite Declaration of principles concerning multinational enterprises and social policy, or other recognized international frameworks.⁹⁸ After choosing one of the mentioned frameworks, companies have to make sure what and how should they be disclosing, assess possible gaps and how to close them, and finally, to ensure that all the different stakeholders are included to that specific standard. Member-States should consequently guarantee the necessary means and an enabling environment that will ultimately lead to the full compliance with this directive and most certainly, using a

⁹⁷ Council Directive (EC) 2014/95 as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2013] OJ L330/1.

⁹⁸ Ibid., p. 2.

recognized standard and framework will be essential to drive the reliability of the reporting and to promote credibility to the users of the information.

The scope of application of this directive concerns large undertakings who are public-interest entities, with more than 500 employees, however, this should not prevent member-states to demand this type of information from undertakings which not exactly fall under this scope.⁹⁹ These entities include insurance companies, credit institutions and all the undertakings whose specific characteristics fit into the mentioned scope of application. If a group of entities discloses non-financial information with reference to the consolidation boundaries, each individual subsidiary companies will be exempted from this reporting obligation.¹⁰⁰ To facilitate and support this disclosure of information, the European Commission is required to design a series of guidelines - based on recognized best practices, previous successful initiatives, international progress on CSR and through a holistic consultation process - to be fully equipped, to advance key performance indicators. In what concerns, the auditors, the directive requires member-states to consult these assurance providers, to control the accomplishment of the presentation of non-financial reporting, however in what concerns the quality of the contained information, the directive leaves the question open to the member-states to decide whether or not to do require it.

In a nutshell, this EU Directive stipulates that the undertakings under its scope of application, have to include in their management reports, a non-financial statement that must be in accordance with the stated requirements in the three areas of action: environment, social and employee-matters and human rights, bribery and anti-corruption. The undertakings that decide not to report on one of these areas, will be under the “comply or explain principle”¹⁰¹, which means, they will have to provide a plausible explanation for their absence of compliance. The idea behind this requirement is that member-states will hopefully avoid using it since it would reduce their

⁹⁹ Ibid., p. 4.

¹⁰⁰ Ibid., p. 5.

¹⁰¹ Deloitte, 'Disclosure of Non-financial and Diversity Information - Get Ready', 2014, https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/strategy/lu_regulatory-newsalert-disclosure-non-financial-diversity-information_24112014.pdf, (accessed 21 May 2018).

competitive advantage in an area where transparency compels action. As mentioned before, the EC is expected to design non-binding guidelines that will provide the necessary guidance for the undertakings, to be effectively equipped to provide an adequate and high-quality non-financial statement and to ensure that the information can be helpful and comparable.

The main purpose of the creation of the Guidelines on non-financial reporting by the EC was to harmonize the process without standardizing it and to make sure that the information provided would be relevant and of added value to the progress of corporate social responsibility. These guidelines do not promote a one-size-fits-all approach - which was one of the initial critics that the European Commission received on its first approaches to CSR - on the contrary, they take into consideration the huge variety of different business sectors and create a structure that acknowledges this broad spectrum. This methodology reflects on the most fundamental factors that must be met to ensure a successful report, such as, collecting all the relevant information while making sure it is precise and understandable, pursue a stakeholder-oriented approach or maintaining a future-looking strategy.¹⁰²

In what specifically concerns the diversity policies, all the EU listed undertakings have to integrate into their corporate governance statement, a description of the policies they implemented in relation to the composition of the supervisory bodies, as well as the administrative and the management. The description of the diversity policies must include how the following themes have been addressed: gender, age, educational and professional background, the main goals of the policy and how exactly it has been implemented and which were the results of the concerned period. When the undertakings do not apply a diversity policy, they are not obliged to put one in place, however, in their corporate governance statement, they have to provide a clear explanation for this absence.

The deadline for the member states to transpose this innovative directive into their national legislation has passed, and now it becomes relevant to understand how the

¹⁰² Commission (EC) 'Guidelines on Non-financial Reporting' COM [2017] OJ C 215.

countries approach differ and to what extent. It is important to always take into consideration that a lot of external factors will influence how countries translate these directives into their domestic legislation. Variants like, specific, cultural, social, economic and political contexts will consistently impact on the strategies chosen and on the steps to reach their establishment. Another factor that influences the differences in the reporting landscapes, is the still existent lack of clear knowledge of the benefits of this type of reporting. In other words, certain organizations are still unaware that pursuing policies on corporate social responsibility can, in fact, assure a more solid stakeholder trust, prove their effective commitment, generate improvements from the challenges that emerge from the report assessment and enhance long-term profitability while promoting environmental protection and social justice. Also on the companies scope, member-states have different definitions on what they consider a large undertaking or a public interest organization, and that is another reason why the European Commission designed the guidelines, to work as a balance and to try to level out the variations.

In what respects the requirements from producing the reports, the undertakings can choose between an international, an EU-based or a national framework. The disclosure format can be as a separate sustainability report or included in the management report within the traditional context of the annual report. That separate report must be filed within six months after the balance sheet date and made publicly available on the company's website.¹⁰³ The member-states can finally decide if the reports should be verified by competent independent auditors and if penalties should be applied in case of failing the report requirements.

In other words, this directive intends to increase transparency as a short-term goal and to contribute to a sustainable global economy, as a long-term goal. More than placating the possible commitment of violations in the areas defined in this document, this reporting also aspires to prevent them, “(...) reporting makes abstract issues tangible

¹⁰³ Council Directive (EC) 2014/95 as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2013] OJ L330/1, p. 5.

and concrete (...).”¹⁰⁴ However it is still important to realize that this new approach determines a shift in how companies have been collecting, analyzing and reporting information and as any other major shift, it is challenging and implies a series of adjustments.¹⁰⁵ This non-financial reporting directive represents the emergence of a constant cycle, where companies have to continuously evaluate stakeholders needs and also, to find the most effective mechanisms to communicate with them. This decision from the European Commission puts a definitive end to the usual excuses given by companies to circumvent this type of reporting, such as being too costly, taking too much time and particularly, not having that obligation. This directive is expected to work as an agent of change, for a more transparent, responsible and diligent scenario in the business landscape and to reinforce the leadership of the European Union in advancing the field of CSR by disseminating best practices and working towards a more sustainable and future-looking economy.

3.2 CASE STUDY: PORTUGAL, SPAIN AND UNITED KINGDOM

At the beginning of 2017, the listed EU entities initiated this process, after their respective governments, having had a two-year period to transpose this directive into their national legislation. The following part will analyze how Portugal, Spain and the United Kingdom conducted this task. Portugal and the United Kingdom have already transposed the directive into national legislation and Spain has presented a first draft.¹⁰⁶ The United Kingdom had the particularity of having opted for an early adoption, meaning that the companies under the directive were unable to select some aspects of the legislation that would be more advantageous, in other words, this meant that all of the provisions included in the document had to be applied. The definition of some specific categories was problematic and highly debated by the member-states, and an

¹⁰⁴ A. Fernández and J. Gaztea, 'Comply or Explain in the EU, or the New Human Rights Reporting Obligation: Analysis of Directive 2014/95/EU', *Cuadernos de Derecho Transnational*, vol. 9, no.1, 2017, <https://e-revistas.uc3m.es/index.php/CDT/article/viewFile/3622/2190>, accessed 9 May 2018).

¹⁰⁵ J Silva, 'Diretiva 2013/34/UE - The Accounting Directive' *Vida Económica* (1 July 2016) <https://www.occ.pt/fotos/editor2/ve_1julho2016.pdf> (accessed 3 June 2018).

¹⁰⁶ Ministerio de Industria, Energía y Turismo' Disposiciones Generales' (14 April 2016), <https://www.boe.es/boe/dias/2016/04/14/pdfs/BOE-A-2016-3539.pdf>, (accessed 7 June 2018).

example of that, was with regards to the concept of the “net turnover”, which in the case of Portugal was changed to something much more specific and prescriptive, “(...) the amount from the selling and service delivery after deducting of discounts, sales rebates, VAT and other sales taxes, but if the other income is significant (this is determined to be the case when turnover excluding other income is less than 75% of the entity’s total income), the other income should be added to net turnover, as long all income deriving from transactions with third parties are included in the definition of income”.¹⁰⁷

Another controversial and non-consensual topic was the definition of the size thresholds. As expected, the three member-states that had decided on an early adoption - Germany, the Netherlands, and the United Kingdom - also decided to increase their thresholds to the maximum level allowed. This meant that the U.K established a limit of 12 million euros for turnover, 6 million for assets and 50 employees. Conversely, Spain and Portugal went for the base limits within the directive, which corresponded to 8 million for turnover, 4 million for assets and also, 50 employees.¹⁰⁸

In what respects, the maximum harmonization, and the points for disclosure to be stated in the financial statements, member-states had five disclosure points, accordingly, movements in fixed assets, details of the consolidating parent company, off-balance sheet of arrangements, related party transactions and finally, events after the balance sheet date. Spain and the United Kingdom decided to have the five disclosures, enabling, consequently, a more comprehensive and all-encompassing information disclosure. From all the five disclosures, Portugal selected four, leaving out just the one on the “(...) details of the consolidating parent company.”¹⁰⁹

Another interesting fact is that Portugal, Spain, and the United Kingdom, in what concerns the accounting options, have all decided that the financial statements and the

¹⁰⁷ M. Lang and R. Martin, 'The New Accounting Directive: A Harmonized European Accounting Framework?' *European Federation of Accountants and Auditors for SMEs*, 31 May 2016, p.2, https://ueapme.com/IMG/pdf/EFAA_Accounting_Directive_Survey_2016.pdf, (accessed 9 May 2018).

¹⁰⁸ Corporate Social Responsibility Europe and Global Reporting Initiative, 'Member State Implementation of Directive 2014/95/EU: A comprehensive overview of how Member States are implementing the EU Directive on Non-financial and Diversity Information', (3 May 2017), pp. 27, 29, 30, https://www.globalreporting.org/resource/library/NFRpublication%20online_version.pdf, (accessed 10 May 2018).

¹⁰⁹ *Ibid.*, p. 4.

accompanying disclosures, should be prepared under the principle of “substance over form”, which meant that these disclosures should mirror the reality of the accounting transactions. The accounting treatments covered a series of different matters, such as hedge accounting, revaluation of fixed assets, the period for amortization of goodwill, among others. Having the possibility to choose, led for a huge variety of different approaches, and the only areas where some consensus was found, were, the capitalization of interest costs, merger accounting and the recognition of development costs.¹¹⁰

As with any other implementation and transposition of this kind, some problems arise and the idea of reaching a common agreement throughout such a diverse landscape of themes starts to get easily dissipated. Additionally, to the size thresholds, the audits and the definition of turnover, other problematics have been emerging during this process. The intangible asset of goodwill, was also one of the most debated, together with the “true and fair view”, regarding the integrity of the companies performance.¹¹¹ The United Kingdom devoted particular importance to this question and reached the conclusion that to assure this principle, further disclosure requirements were needed. With this in mind, the 'United Kingdom Standard Setter' choose five additional categories that companies may decide to include in their statements – as a measure to strengthen the true and fair principle. The decision of the application or non-application of fines, and if so, to what extent, also generated a variety of different positions. Some member-states took more extreme views, as in the case of Ireland for example, where the failure to comply with the reporting requirements, can even result in a short-term imprisonment.¹¹² Oppositely, the three countries here used as case studies decided from different consequences. Spain has not yet specified the type of fines that will be applied in case of non-compliance, Portugal decided for fines that can go between 50 and 1500

¹¹⁰ Ibid., pp. 4,5.

¹¹¹ Ibid., p. 5.

¹¹² Corporate Social Responsibility Europe and Global Reporting Initiative, 'Member State Implementation of Directive 2014/95/EU: A comprehensive overview of how Member States are implementing the EU Directive on Non-financial and Diversity Information', (3 May 2017), p.23, https://www.globalreporting.org/resourcelibrary/NFRpublication%20online_version.pdf, (accessed 11 May 2018).

euros and that should be imposed to the responsible person, as well as the United Kingdom but the values are not specified and should be decided in a case by case assessment.¹¹³

To provide the required information from this directive, member-states could chose to rely on an international, EU-based or national framework, and both Portugal and the United Kingdom maintained this range of options, in contrast, Spain decided to be more restrictive and provided a specific list, namely, EMAS, UNGC, ISO 26000, OECD, UNGPs, GRI or the ILO Declaration.¹¹⁴ Also, in what concerns the type of information that should be included in the report, Spain goes once again for a more particular approach and adds a point - which both Portugal and the United Kingdom do not make a reference to - the need for an explanation on the sums included in the financial report which are substantive to the field of corporate social responsibility.

Another interesting remark was that all the member-states extended the restrictions on the type of entities that could use the Directive, namely, in the case of Portugal and the United Kingdom, credit, financial institutions, charities and insurance undertakings were excluded.¹¹⁵ In what regards the disclosure format, Portugal was the only one of the three countries in analysis that kept the three different options offered by the directive, in the case of Spain companies have to publish a separate report with the management report, and in the case of the United Kingdom, companies have to publish it as a consolidated management report.¹¹⁶

3.4 A SIGNIFICANT STEP FORWARD NOT A GAME-CHANGER

The 2014/95/EU Directive is a product of the striking and prominent effects of

¹¹³ Ibid., pp. 27, 29, 30.

¹¹⁴ Ibid., p. 29.

¹¹⁵ M. Lang and R. Martin, 'The New Accounting Directive: A Harmonized European Accounting Framework?' *European Federation of Accountants and Auditors for SMEs*, 31 May 2016, p.6, https://ueapme.com/IMG/pdf/EFAA_Accounting_Directive_Survey_2016.pdf, (accessed 9 May 2018).

¹¹⁶ Corporate Social Responsibility Europe and Global Reporting Initiative, 'Member State Implementation of Directive 2014/95/EU: A comprehensive overview of how Member States are implementing the EU Directive on Non-financial and Diversity Information', (3 May 2017), p.19, https://www.globalreporting.org/resourcelibrary/NFRpublication%20online_version.pdf, (accessed 11 May 2018).

globalization, particularly the globalization of companies operations and of this new business world where everything has a global impact, both in positive and negative terms. An increasing competition - quite often bringing aggressive methods and strategies - accompanied by consecutive decades of a certain economic uncertainty, and also, and not less importantly, the growing concerns on climate change, resulted in a change of perspective, from the companies side, as well as the shareholders, consumers and investors. The traditional exclusively, financial reporting, that was required from companies, is currently insufficient, inadequate and unsuitable for the needs of all the parties involved in this process. From all the different pieces that compose the business spectrum, there is a visibly growing need for more information, easily accessible, easily comparable and integrated, meaning much more than numerical outcomes and profit margins. This state of affairs created fertile soil for the emergence of this directive, answering consumers, investors and stakeholders needs, to access credible and comparable data and consequently, being able to make informed and sound decisions. Additionally, this complementary reporting, also reflects the impacts of business on society, particularly on the profit-oriented strategies repercussions.

This EU Directive relies on the European Commission's Communication on “Smart Regulation in European Union”¹¹⁷. Aware of the urgent necessity to reduce burdens on businesses - specifically on small and medium enterprises - and learning from past experiences, the European Commission, transforms the regulation agenda into a simplified and smart regulatory policy across the policy cycle. In addition to this EC communication, this directive also builds on two resolutions from the European Parliament, the first one “Corporate Social Responsibility: accountable, transparent and responsible business behavior and sustainable growth”, and the second, “Corporate Social Responsibility: Promoting Society's interest and a route to sustainable and inclusive growth”¹¹⁸. Building upon all the lessons learned from the different documents

¹¹⁷ Commission (EC) 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Smart Regulation in the European Union' COM (2010) 543 final, 8 October, 2010.

¹¹⁸ Parliament Resolution (EP) 2012/20198 of 6 February 2013 'Corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth' [2013] OJ C 024/06.

and initiatives produced on this area and their correspondent strengths and weaknesses, this directive proposes a concerted change from its traditional patterns. Having acknowledged that the merely voluntary approach, or in other words, to simply rely on companies goodwill is insufficient, the European Commission brings a renewed approach to corporate social responsibility.

The EC has been reluctant in producing legislation to cover this area, which has resulted in an evolutive process, happening at a very slow pace, on what concerns the law-making on CSR. However, the 2014/95/EU becomes a turning point in this respect and reinforces the legislation in this area as a measure to strengthen social and environmental matters. This directive intends consequently to increase the trust level on businesses, from the various stakeholders and shareholders, to identify risks as well as prevent their appearance, to define strategies to control their impacts, and finally, to enhance comparability and consistency inside the European Union. This approach sets aside the usual perspective on corporate governance as a voluntary concept and converts it into something more solid and tangible.

The directive calls for action, by increasing the companies' reporting obligations to potentiate and ameliorate the insight on their specific strategies and policies on CSR, ensuring more transparency and confidence inside the business world and also, by transforming this momentum in a value-driven process for shareholders. Complying with this procedure will help companies brand reputation, competitive advantage, better risk management and also, increasing consumer loyalty. With this document, the European Union also wants to set a benchmark for all member-states and to reinforce its pioneering position on the mainstreaming of corporate social responsibility and on the dissemination of a fair and transparent way of doing business. Another important objective of this legislation is to better demonstrate the benefits of ensuring greater transparency and an improved governance while creating new opportunities for businesses, supporting enterprises internationalization and guaranteeing an enabling environment for doing business. All of these goals should be met while maintaining a healthy competition climate that will indirectly lead to job creation and safeguarding

sustainability at all levels.

3.5 REPORTING PROCESS: COMING OF AGE

This amending directive comes from the 2013/34/EU Accounting directive and introduces the rules on the disclosure of non-financial and diversity information. This rapid sequence of events reflects, on one hand, the pertinence of this topic and on the other hand, its topicality, coming from a major transformation in social interests and expectations. This new legislation, more than introducing a duty to report on a variety of different matters within the area of corporate social responsibility, goes beyond the solely financial scope, setting a new development in EU Law, and the definitive crack with the traditionally voluntary nature of the policies in this field. In 2011, with the publication from the European Commission, of the “A renewed EU strategy 2011-2014 for Corporate Social Responsibility”, we witnessed the first moment when the EC started to step aside the voluntary route, by erasing that specific reference from the CSR definition, but this directive represents the ultimate change of course and the final erosion of the voluntary basis.¹¹⁹ Moreover, the emergence of this policy also comes as a consequence, of a change that was expected from the corporations and, whose absence, forced the European Commission to draw this directive, leaving behind the traditional soft-law approach.

One of the main objectives of this directive was to level the playing field and to establish some harmonization, that would allow a consistent degree of comparability between the companies that fall under its scope of application. Until now and taking into account the current data - particularly the member-states here analysed as case studies - the level of comparability achieved, is merely sufficient, which means it is far from ideal. Albeit, this directive appears as a ground-breaking document, that ends with the usual approach of the European Union in the area of corporate social responsibility, it also reflects that old habits die hard. Even though this directive represents an important change and a step forward on the progress of CSR, it still presents too much flexibility and the emphasis on how to report, instead of on how to conduct corporate

¹¹⁹ Commission (EC), 'A renewed EU strategy 2011-2014 for Corporate Social Responsibility' (Communication) COM (2011) 681 final, 25 December 2011, p. 6.

governance. Additionally, the flexibility and the non-prescriptive approach - assumed by this legislative instrument - also represent an attempt to avoid being too intrusive and to leave room for compromise. In other words, the EC wanted to give companies a perspective instead of an exact procedural guidebook, while hoping they would find their unique ways of leveraging these processes of reporting. Consequently, even though, the obligations established by this legislation are of great relevance, the whole rhetoric is still covered in terms of *should, could or may*.¹²⁰

Putting forward this legislation is in itself a proof that years of preaching a voluntary approach, resulted in very limited achievements and, in a very small percentage of concrete progress. This means that having finally a legislation in place, that actually obliges companies - even if only a specific number - to comply with this kind of reporting is already a significant transition, however, it is clear that some rough edges still need to be smoothed. This document privileges quantity over quality, meaning it gives greater importance to the number of reports received, and not enough to the substance contained in those same reports. This gap between a mere numerical score and a qualitative assessment, gives companies a certain margin to use these reports as a propagandistic tool instead of an effective chance to make a change and to engage in serious socially responsible strategies. Even though this non-financial reporting directive asks companies to give fuller information on their behaviors, it does not pay enough attention to the content of the reporting itself, as much as it does to its mere submission since the audit on the information enshrined is not a mandatory requirement. The lack of a compulsory assessment of the subject matter of these reports can be extremely detrimental for the actual aim of this directive, since, if the information provided is vague it would not be helpful and the validity of the whole initiative is jeopardized.

An example of the possible consequences of this absence can be clearly seen in the Volkswagen Case. This global scandal, that becomes public in September 2015,

¹²⁰ A. Nichols, 'Has it got any teeth, the EU non-financial Reporting Directive', *Ab...Reporting* London, 3 January 2017, <https://www.ab-reporting.com/blog/got-teeth-eu-non-financial-reporting-directive/>, (accessed 14 May 2018).

illustrates a complete defeat of what should be the essence of corporate social responsibility and its founding principles: transparency, accountability, and authenticity. This giant, German automaker company had basically put in place, a fraudulent - but certainly sophisticated mechanism - to circumvent the emissions tests. Moreover, the shocking fact about this particular case - and which emphasizes the dangers of this directive - is that before the scandal erupted, Volkswagen had actually won a series of awards in the area of CSR, such as, the 11th best in the world for its CSR work, ranked by the Reputation Institute, the overall global winner in the car industry for its commitment to the environment, according to Dow Jones Sustainability Index or even, Gold Medal Award for Sustainable Development from the World Environment Center.¹²¹

In conclusion, this new directive sets a clear path towards a business landscape that is concerned in furthering the values of accountability, transparency and a more authentic type of reporting, going beyond the solely financial disclosure. Moreover, by shedding a light on companies practices, it empowers citizens by giving them the opportunity to hold companies accountable for their harmful impacts on society and demanding change. In general terms, this amending directive will assist states to better scrutinize corporate activities and transparency and to identify and address specific challenges and problematics. With this new legislation, some of the most important features of corporate social responsibility, are no longer an alien idea of how companies are expected to conduct their business but are finally internalized in their *modus operandi*, so that they can be externalized to the public realm.

Even though, this Directive was not exactly groundbreaking in the sense that for example, France and Denmark had already been the pioneers inside the European Union, to advance with sustainability reporting, it was certainly groundbreaking in the sense that, for the first time, an economic bloc, and a very large jurisdiction was making such specific requirements, and also acknowledging and firmly referencing to the

¹²¹ M. Lynn, 'Corporate Social Responsibility has become a racket – and a dangerous one' (London 28 September 2015), *The Telegraph*, <https://www.telegraph.co.uk/finance/newsbysector/industry/11896546/Corporate-Social-Responsibility-has-become-a-racket-and-a-dangerous-one.html>, (accessed 22 May 2018).

impacts and risks coming from the business sphere.¹²² What is also, revolutionary about this legislation is that it breaks the conventional notion of CSR, as only the image companies built around their business, or how they are perceived – which can be totally artificial and a complete fabrication in itself – and obliges them to actually explain how they are implementing their CSR policies and commitments. Additionally, the substantive amount of leverage of this new directive is that it will contribute to gathering a consistent and accessible set of data. Alone, this perspective makes already this initiative as something revolutionary, particularly in an area that has been constantly neglected and whose development has been slow and hesitant.

What is also important to highlight, is that the Directive also reveals an increased awareness particularly in what concerns climate change. The relationship between climate and financial is becoming much more evident, and the usual vagueness associated with the environmental area is growingly being replaced by a more palpable and measurable perspective, and the mainstream financial investors are also coming together in the relevance they are now attaching to this notion.¹²³ In the words of Mark Carney, Chair of the Financial Stability Board, “You now have the mass of the financial sector saying, 'We want to distinguish between those who can see the opportunities, those who can manage the risks, and companies that just don't know the answers,'” Carney said. “It's going to be more awkward to be in that last group.”¹²⁴ “As well as this increased attention to climate change, other topics, such as data protection, ethics, artificial intelligence, and sustainability are also reaching new stages. As a consequence of these emerging new challenges, it is therefore abundantly clear, the current need for the companies, to have Chief Sustainability Officers, not only dedicated to the field of CSR but also to keep pace with those changes”.¹²⁵

Albeit all the positive outcomes of this new development, the aforementioned

¹²² Interview with Thomas Dodd, Policy Officer, Non-financial Reporting, European Commission (7 June 2018). For the interview questions, see Annex I, p. 88.

¹²³ Ibid.

¹²⁴ J. Berke., 'The biggest players in finance are factoring a new type of risk into their decisions - and it's long overdue', *Business Insider*, 1 January 2018, <http://www.businessinsider.com/blackrock-jp-morgan-banks-factoring-climate-risks-into-decisions-2017-12?IR=T>, (accessed 7 June 2018).

¹²⁵ Interview with GRACE, Portuguese Non-Profit Association dedicated to CSR, (20 June 2018). For the interview questions, see Annex I, p. 88.

negative ones, together with the possible misuse of the principle of comply and explain, still carry a lot of weight, and if the general aim should be applauded and supported, the same cannot be said about the totality of the designed procedures. Essentially, even if the step in itself is a positive remark on this sinuous journey of CSR, there is still a long way to go to finally reach a safe haven. It is undeniable that this directive represents an important step towards greater transparency in terms of social responsibility. However, its design still carries specific constraints, that ultimately limit its full potential as a transforming directive. One of the most significant challenges involves the scope of application - only applicable to big corporations - being particularly detrimental for countries whose business fabric is largely composed by small and medium enterprises and whose application is hence significantly narrowed.

Even if adulthood is still a distant prospect to make a real breakthrough, it takes time and it encompasses a long process. In other words, this moment can be perceived as a coming of age, as the reporting process is undeniably becoming more robust, more accurate and less callow, and as a step forward in furthering a corporate social responsibility mindset, however, the focus on the importance of the quality of reporting, needs peremptorily to be elevated.

The analysis of this EU Directive and, its national transposition from the three selected countries, brought light to the most relevant particularities of this legislation, underlining its positive and negative characteristics. Drawing definitive conclusions is still premature, taking into account their recent application by the member-states. However, it is already evident, that even if it should be acclaimed as a considerable step forward it still lacks some robustness, that can only come through a more broader and strict approach.

CHAPTER 4 - CSR AND HUMAN RIGHTS

4.1 THE STATE OF PLAY

The recent decades, and particularly the last five years, brought an indisputable awareness, that the conventional mindset of business needed to be changed. More than in any other period in time, society has been empowered by having the necessary information, accessible and immediate, and consequently, by having the possibility to make better choices, and to demand more transparency and a more diligent behavior from the business companies. The business world has been growing exponentially and that increased power does not translate solely in economic terms, but also in their capacity to make an impact. At the same time that we witness this booming inside the business world, of growing power and resources, we also witness, the exact opposite occurring in a great number of States. As a consequence of a variety of different factors, mainly resulting from financial constraints, States find themselves in a position where the lack of the necessary resources, leads them to act with negligence in the fulfillment of internationally recognized human rights, and in complying with the principles of corporate social responsibility. This state of affairs hinders States capacity to supervise business activities, who take advantage of that void, committing gross misconduct and compromising the most basic principles of CSR and human rights.

The increased power and influence inside the business environment, has not seen a corresponding increase in a more responsible and diligent behavior from the companies, nor from the States whose primary responsibility should be to ensure their compliance with the international standards concerning human rights and, by fostering corporate social responsibility. The States failure to ensure companies' compliance, together with a negligent behavior from the companies themselves - as a direct result from a growing competition where anything goes in the race to make more profit - have resulted in major human rights violations, where any notion of CSR is completely absent. Acknowledging this concerning new reality, the recent years have seen the emergence of new policies and legislation - moving away from a traditionally soft-approach - and

intending to prevent this hazardous tendency through the design and implementation of stricter rules.

4.2 A WAKE-UP CALL

In August 2017, the Committee on Economic, Social and Cultural Rights, published the much-anticipated, “General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities”.¹²⁶In line with the aforementioned pressing problems, that have been arising from the business sector, this general comment intended to provide a more clear interpretation of those particular provisions and to address the cross-cutting issue of the States obligations in these regards.

The main goal of this document was to provide some clarity on the States duties and to consequently prevent and tackle, the potentially detrimental impacts coming from business activities, within the area of human rights. An initial attempt had already been done in 2011, with the “Statement on the obligations of the State Parties regarding the corporate sector and economic, social and cultural rights”.¹²⁷ This Statement appeared as a response to the process of globalization and to the adverse effects appearing from the corporate sector, whose growing role was becoming more patent. Taking this into account, the publication of the General Comment No. 24 can be seen as a complement to this previous statement, carrying now a more precise understanding of the scale and scope of those effects. The complementarity of these two documents is also a proof in itself of the strict connection that exists between the field of corporate social responsibility and the area of human rights. Also, bringing support, to the notion that one area, should not replace the other, but quite the opposite, emphasizing, that the real added value, emerges from establishing a solid synergy between both fields.

This General Comment provides a holistic approach on its scope of application,

¹²⁶ UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', 23 June 2017, E/C.12/GC/24.

¹²⁷ UN (CESCR), 'Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights', (12 July 2011), E/C.12/2011/1.

encompassing “(...) all activities of business entities, whether they operate transnationally or whether their activities are purely domestic, whether fully privately owned or State-owned, regardless of size, sector, location, ownership, and structure.”¹²⁸ In what concerns the obligations of non-discrimination, the document provides additional clarity, and reinforces the increased attention that should be aimed at the disproportionately affected groups, from the negative impacts of business activities, inter alia, children, women, and indigenous peoples, people with disabilities and ethnic and religious minorities.¹²⁹ As a tool to ensure a more efficient protection of these particularly vulnerable groups, the document stresses the importance of making a better use of the National Action Plans on Business and Human Rights, as an instrument to implement the UNGPs.

A critical feature of this General Comment is the emphasis on the three specific situations, where States can be held directly accountable for the action or inaction from the corporate sector, “ (i) if the entity concerned is, in fact, acting on that State Party’s instructions or is under its control or direction in carrying out the particular conduct at issue, as may be the case in the context of public contracts; (ii) when a business entity is empowered under the State Party’s legislation to exercise elements of governmental authority or if the circumstances call for such exercise of government functions in the absence or default of the official authorities; or (iii) if and to the extent that State Party acknowledges and adopts the conduct as its own.”¹³⁰

Another thriving problematic that deserved further discussion on this document was the question of privatization. This Comment reflects on the possible damaging consequences of this growing tendency, namely on how it can make goods and services - that are essential to the fulfillment of fundamental economic, social and cultural rights - too expensive and with lower quality, under the premise of maximizing profits. Within these challenges, brought by this growing privatization, there is a special focus on the

¹²⁸ UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', 23 June 2017, E/C.12/GC/24.

¹²⁹ Ibid., para. 8.

¹³⁰ Ibid., para. 11.

educational sector, where two main risks arise, firstly the transformation of high-quality education in a privilege, and secondly the risk of having a lack of regulation, that can jeopardize the fulfillment of economic, social and cultural rights.¹³¹

Reaching the middle of the document one of the most controversial topics arises - the extraterritorial obligations. The pertinence of addressing this topic results from the escalation of the activities of transnational corporations, and therefore, to the appearance of the global supply chains. On the Statement from 2011, the Committee had already reinforced that the States obligations “(...) did not stop at their territorial borders.”¹³² Moreover, the General Comment, explains that “(...) such extraterritorial obligations of States under the Covenant follow from the fact that the obligations of the Covenant are expressed without any restriction linked to territory or jurisdiction (...)” and on how conflicting it would be, to actually enable States to stay silent, while corporations domiciled in their territories or jurisdictions were committing violations abroad.¹³³

One of the other themes, that was also in focus on the document, was the need for improvement in terms of international cooperation. The emergence of transnational cases can easily create a legal uncertainty, that can ultimately prevent or delay their resolution. Taking this in mind, in the section concerning the extraterritorial obligation to protect, the importance of strengthening mutual assistance and cooperation is highlighted, as one of the key preventive measures for conflicts of jurisdiction. Still inside the extraterritorial obligations, but in respect to fulfill, an utmost importance is given to disclosure and accountability, by pointing out to the dangers of the reduction of corporate taxes, as a measure to attract economic activity, and how it usually leads to sacrificing basic economic, social and cultural rights.

In the concluding pages, corporate accountability is enhanced, the possible constraints of the *forum non conveniens* doctrine, in some jurisdictions, that can lead to forum shopping is presented, the possibility of using administrative sanctions to prevent

¹³¹ Ibid., para. 22.

¹³² Ibid., para. 26.

¹³³ Ibid., para. 27.

possible violations, and also, the need to empower the national human rights institutions. The document finishes by evoking the UNGPs and the NAPs, as fundamental tools to effectively address human rights principles, non-discrimination, accountability, transparency and gender equality, and by acknowledging the added value of having civil society organizations and NHRIs aboard, throughout the whole process.¹³⁴

4.3 THE OPENING STAGE

Less than two months after the releasing of the General Comment No. 24 from the Committee on Economic, Social and Cultural Rights, the open-ended working group, established by the resolution 26/9, launched the “Elements for the Draft of Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.” The resolution 26/9, spearheaded by South Africa and Ecuador, from July 2014, established the creation of this OEIGWG with the mandate to design a legally binding instrument to regulate the activities of transnational corporations and other business enterprises.¹³⁵ The Elements was composed as a basis to foster further discussion and negotiation, providing the States, other relevant stakeholders, and actors, with some essential food for thought - more than dictating strict directives.

The Resolution 26/9 was highly acclaimed and supported by a great number of civil society organizations, that together formed the Treaty Alliance, however the proposal within the 47 members, it only received the support of 20, while facing the opposition of 14 and the abstention of the other 13 member-states of the Human Rights Council. Curiously, on the next day, the HRC adopted a resolution, tabled by Norway, Ghana, Argentina, and Russia, clearly in straight line with the principles established by the UNGPs, reinforcing the need for the States to adopt the NAPs on business and human

¹³⁴ Ibid., paras. 58-59.

¹³⁵ UNGA, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (14 July 2014) 26th Session UN Doc A/HRC/RES/26/9, 2014.

rights, and this time, obtaining a consensus.¹³⁶

The Elements document, dedicates its preamble, to the existing instruments, conventions, principles, legislation, and resolutions, affecting the area of business and human rights and reaffirms their inclusion in this future instrument. On section 1.2, it is important to emphasize a highly-sensitive point, set by this document, where it declares, as one of this instrument's principles, the “Recognition of the primacy of human rights obligations over trade and investment agreements”, and this particular point, is mentioned again in the section, on the objectives of the document.¹³⁷

On section 1.3, regarding the purpose of this instrument, there is a focus on, access to justice, effective remedy, the reinforcement of international cooperation, the obligation to prevent, guarantees of non-repetition and the extraterritorial obligations of the State parties. If, on one hand, the scope of application, even though it carries a broad perspective, does not demand a legal definition on TNCs or OBEs, on the other hand, it considers that this future instrument, “(...) should cover all human rights violations, or abuses resulting from the activities of TNCs and OBEs that have a transnational character, regardless of the mode of creation, control, ownership, size or structure.”¹³⁸ Moreover, and still within the same section, the Elements document, identifies that the acts subject to its application, include “(...) their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them”, and the actors comprehend, natural persons, TNCs and OBEs and States and organizations of regional economic integration.¹³⁹

The third section, regarding the General Obligations, is divided between, obligations of the States, obligations of the TNCs and OBEs and finally, the obligations of the International Organizations. The first set of obligations is the most extensive one - as a

¹³⁶ O. Schutter, 'Towards a Legally Binding Treaty on Business and Human Rights', *Cellule de Recherche Interdisciplinaire en Droits de l'Homme*, WP 2015/2, <https://cridho.uclouvain.be/documents/Working.Papers/CRIDHO-WP-2015-2-TNCs14July2015-revODS-1.pdf>, (accessed 23 May 2015).

¹³⁷ United Nations Human Rights Council, 'Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', (29 September 2017).

¹³⁸ *Ibid.*, p. 4.

¹³⁹ *Ibid.*, p. 5.

result of the primary responsibility of States to protect human rights violations. Immediately after, the fourth part tackles the preventive measures, whose remarkable feature, concerns human rights due diligence, and affirms that “(...) the real added value of this section would be precisely to give a legally binding nature to the adoption of such measures or minimum standards by TNCs and OBEs”, and consequently putting an end to impunity.¹⁴⁰

The next segment, on legal liability, basically reinforces the circumstances, where State parties can be held responsible for the action or omission of TNCs and OBEs, a point aforementioned, enclosed within the General Comment No. 24. The sixth part - and one of the longest ones - concerns the access to justice, effective remedy, and guarantees of non-repetition. After mentioning some of the major challenges to an effective access to justice, the document sets an extensive list of proposed elements, such as enhancing non-judicial mechanisms, reducing regulatory barriers or guaranteeing the accessibility of relevant information on the existing remedies.¹⁴¹

On the seventh section, the Elements document addresses the question of jurisdiction. In this particular section, the feature that is worth being stressed, is the proposed broader concept of jurisdiction, as an attempt to prevent TNCs and OBEs, of continuously making use of the limitations established by territorial jurisdiction, and consequently avoiding being prosecuted. Taking this into account, the suggested concept of jurisdiction is “(...) any TNC or OBE which has its center of activity, is registered or domiciled, or is headquartered or has substantial activities in the State concerned, or whose parent or controlling company presents such a connection to the State concerned.”¹⁴²

The eight-part of the document reinforces the need for more effective cooperation at the international level to ensure that possible abuses are properly addressed, and on the ninth section, a series of mechanisms, at the national and international level, judicial and non-judicial are proposed. At the national level, the document suggests the

¹⁴⁰ Ibid., p. 7.

¹⁴¹ Ibid., pp. 9-11.

¹⁴² Ibid., p. 11.

establishment of national human rights institutions and Ombudsperson institutions. At the international level, there is a proposition for the creation of an International Court on TNCs and Human Rights or the creation of special chambers in existing courts. Finally, in what concerns the non-judicial mechanisms, the establishment of a Committee on Business and Human Rights is set forward.

4.4 THE THIRD SESSION OF THE OPEN-ENDED WORKING GROUP

The third session of the open-ended working group started with the election of the new Chair-Rapporteur, Guillaume Long, Permanent Representative of Ecuador. In his opening statement, he underlined, as the central points of the document “(...) the protection of victims of business-related human rights abuses, the elimination of impunity and access to justice.”¹⁴³ Following his speech, the former Chair-Rapporteur, Maria Espinosa Garcés, in her opening statement, decided to highlight the visible insufficiency of the traditional voluntary rules, concerning corporate human rights abuses, and how it is crucial to close that gap in international law, as well as to find effective preventive measures for those violations.

One of the first voiced concerns, from the subsequent general statements, concerned the date of publication of the Elements document - only three weeks before the session - and on how that could have negatively impacted the process, since most delegations agreed that they did not have had enough time to properly analyze it, and to come with official positions on its substance. Some delegations also affirmed that, before debating on a legally binding instrument, it would make more sense to wait for the full implementation of the UNGPs, while other delegations, acknowledged as the best solution, to have a mix of voluntary and binding measures.¹⁴⁴

In what concerns the general framework presented by the Elements document, and particularly to its preamble, the positions were divided. Some delegations argued that the list of instruments was too extensive, while others argued that some instruments

¹⁴³ UNGA, 'Report on the third session of the open-ended intergovernmental working group on Transnational Corporations and other Business Enterprises with Respect to Human Rights' (24 January 2018) UN Doc A/HRC/37/67, 2018, para. 8.

¹⁴⁴ Ibid., para. 26.

were missing. One of the most controversial topics, concerned the recognition of the primacy of human rights obligations over trade and investment, with some delegations, questioning the legal basis of that statement. Another divisive concern, involved the extraterritorial obligations, with some NGOs and delegations applauding this recognition, and with others, raising the question of how this could contradict the sovereign equality and territorial integration of States, presented in the Preamble.¹⁴⁵

The section B in what respects the acts subject to its application, some delegations and NGOs demonstrated some concerns, agreeing that a more clear definition should be found to ensure the effectiveness of the future instrument. In the following point, concerning the actors subject to its application, the positions were again divided. Some delegations considered that only States should be subject to its application, others argued that TNCs and OBEs should be subject but not national companies, and finally, others, oppositely said that national enterprises should be included under its scope.¹⁴⁶

The third panel discussed the general obligations proposed by the Elements document. On this section, a series of suggestions were presented, as possible additions to the document. These suggestions included, more clearness concerning the extraterritorial obligations, a specific reference to the protection of human rights defenders and to conflict areas and also, to compulsory gender impact assessments.

On section E, on legal liability, some delegations argued for the need of more concise minimum standards on the measures that should be taken by the States in this area, while others valued the flexibility provided. On the sixth panel, addressing the topics of, access to justice, effective remedy, and guarantees of non-repetition, one of the panelist made an interesting suggestion, to create, “(...) an online resource that would provide information to victims, such as the relevant law and the applicable burden of proof, and would link victims to NGOs and legal aid.”¹⁴⁷ A great number of delegations reinforced the urgency to close the existing legal void and to establish a concerted effort to reduce the regulatory barriers and to make a better use of the non-

¹⁴⁵ Ibid., para. 44.

¹⁴⁶ Ibid., para. 59-60.

¹⁴⁷ Ibid., para. 93.

judicial mechanisms.

The section G, corresponding to the seventh panel, on jurisdiction, started with the discussion, on the doctrine *forum non conveniens*, with one of the panelists, inclusively, proposing its removal, since it had been used in several occasions to delay and to hamper the judicial process. Some panelists reinforced their concerns with a potential contradiction emerging from the broader concept of jurisdiction since it could violate the principles of territorial integrity and sovereign equality of States referred to in the preamble. Another curious suggestion from one of the delegations was to further address the jurisdiction over online enterprises.¹⁴⁸

The eight-panel presented the discussion on the topic of international cooperation. Some delegations and NGOs suggested the inclusion of provisions on technical and legal assistance, as well as on cross-border investigation. Regarding the proposal of creating an International Court on TNCs and Human Rights, the positions were divided. Some approved the idea, while others raised concerns involving budgetary and political matters.¹⁴⁹

In conclusion, there was a general agreement, demanding more detail, precision and clarity in some of the provisions of this document, to avoid misleading interpretations and unexpected outcomes. Throughout this report is evident the constant concern with the wording used on the Elements document, and also, a generalized criticism on its use of language, where vagueness and lack of substance were constantly presented, creating confusion and apprehension from a great variety of the participants in this session. On the attempt to establish such a broad umbrella, as an answer to the close, the current legal void inside the area of business and human rights, the Working Group may have gone too far and consequently jeopardizing its possible efficiency.

4.5 THE POSITION AT THE EUROPEAN LEVEL

The document, “Towards a Binding International Treaty on Business and Human

¹⁴⁸ Ibid., para. 99.

¹⁴⁹ Ibid., para. 121.

Rights”, from the European Parliament, starts with some background information, acknowledging, how the general concerns involving abuses from the corporate sector, are not exactly a recent question, but, on how they are in fact, a recurrent topic on the last decades.¹⁵⁰ On the second paragraph, it defines some of the main factors that make this issue so concerning, such as, the constraints surrounding the access to justice, obtaining redress, the absence of efficient non-judicial mechanisms, or even, how in States facing high levels of corruption, the businesses involved in those cases can easily use intimidation methods to prevent the victims to seek for justice. At the end of this first section, there is a special focus on how the EU has been among the frontrunners, on the implementation of the UNGPs, particularly the National Actions Plans, and highlighting in very clear wording, the utmost relevance of those Guiding Principles in the field of business and human rights.

From the very beginning of the document, and consistently throughout it, the European Parliament states the complexity of discussing a legally binding instrument in this field. When describing the first steps of the open-ended working group, it clearly mentions how in the beginning, the support received was very fragile, underlining that “(...) It was rejected by the industrialized members, including the EU Member States sitting on the UNHRC.”¹⁵¹ Following this section, the document tackles one of the most problematic barriers in what respects the relationship between business and human rights - piercing the corporate veil.

In regards to the possible limitations of having this binding treaty, the European Parliament argues that many experts in the field, also agree on the complexity of the topic in itself - business and human rights - and on how, in trying to be so broad and general, that could actually act as a disadvantage for its full realization, since it would imply a considerable length of time. On these grounds, the EU has voiced its concerns with an “all-encompassing treaty”, and instead, reinforced its preference on

¹⁵⁰I. Zamfir, 'Towards a Binding International Treaty on Business and Human Rights' *European Parliament Research Service*, 2018, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI\(2018\)620229_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI(2018)620229_EN.pdf), (accessed 30 May 2018).

¹⁵¹ *Ibid.*, p. 4.

strengthening existing norms on this field, and on finding more concise international instruments, based on those norms.¹⁵² Another criticism concerns the possibility opened by this future treaty, to be used by States, to avoid their responsibilities or to hide their inabilities to protect human rights by targeting TNCs, and consequently moving the attention away from them. The EP concludes this section, by acknowledging, that even if in the past the positions were mostly divided, with some supporting the binding treaty and others against it, this division has been decreasing, and there is a growing consensus on the potentialities of having a complementarity between the UNGPs and this legally binding instrument.

The following section addresses the core content of the proposed treaty and the specific points that have aroused more controversy. After briefly mentioning the need for more clarity on the extraterritorial obligations of States in respect to business human rights, the European Parliament devotes a more extensive explanation, on what it considers, to be the most challenging and controversial topic, *inter alia*, the scope of application, being limited to TNCs and OBEs. From the very beginning of this debate, the EU has firmly declared its position on this question, considering that all business enterprises should be included, which means, also the national ones. Another controversial issue, also tackled in this document is the broad approach proposed by the Elements document, covering all internationally recognized human rights, and how having such a holistic approach can ultimately hinder the feasibility of this treaty. Finally, in this section, the EP tackles the question concerning the actors subject to its application, making a specific reference to natural persons. On this particular point, the document emphasizes the complexity encompassed by this proposal to hold business enterprises, directly liable, since it goes against the traditional approach of international law.¹⁵³

The subsequent part describes some of the binding legal initiatives that had been put in place at the European level. On the EU level, there is a focus on the Directive, 2014/95/EU on non-financial and diversity information, whose provisions contain

¹⁵² *Ibid.*, p. 5.

¹⁵³ *Ibid.*, p. 7.

human rights performance, as well as the concept of due diligence. On the level of the EU Member-States, there is a reference to France, and to its adoption in March 2017, of the 'Law on the Duty of Vigilance', “(...) imposing on large French companies the requirement to assess and prevent the negative impacts of their activities and of those of their subsidiaries, suppliers and subcontractors on the environment and on human rights.”¹⁵⁴ And additionally, to the adoption from the Dutch Parliament, of a 'Child Labour Due Diligence Law', for companies.¹⁵⁵

The concluding section of this document, discusses the stakeholders, the European Union and the European Parliament's position on this binding treaty. For the first group - the stakeholders - the EP starts by pointing out to the Treaty Alliance and how it has been supporting this process, to (...) stipulate the primacy of human rights law over corporate rights.”¹⁵⁶ As one of the opponents to the treaty, there is a reference to the Organization of Employers, whose explanation was, that firstly, it would undermine the UNGPs and secondly, that the main reason for this gap was coming from the States, arguing lack of legal enforcement, corruption, and a weak judiciary. On the concluding notes of this section, the EP argues that a great number of the organizations that had also demonstrated their support to the treaty had additionally made a series of recommendations and suggestions for some changes. Nonetheless, it acknowledges that there is a growing number of supporters from a variety of different stakeholders, such as civil society organizations, academics or politicians.¹⁵⁷

In regards to the EU position - who was clearly reticent at the beginning of this process - the document states the two requirements that it has declared, the first one concerning the incorporation of all companies in the scope of application, and the second, concerning that the treaty should be “firmly rooted on the UNGPs”, whose implementation, should not be undermined or weakened in favor of this instrument. ¹⁵⁸

Finally, on behalf of the European Parliament, there is a clear demonstration of full

¹⁵⁴ Ibid., p. 8.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid., p. 10.

¹⁵⁷ Ibid., p. 10.

¹⁵⁸ Ibid.

support to this binding treaty, and furthermore, there is even a reference to its efforts on making sure the EU stays as an active participant throughout this process.¹⁵⁹

4.6 THE FUTURE OF CSR: A MOMENTUM FOR BUSINESS AND HUMAN RIGHTS

The publication of the 'General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', more than bringing this debate to the surface, brought clarity and a more comprehensive understanding on the States obligations under the treaty. This document is a clear example of how the idea behind the publication of the General Comments, is to go beyond the rights and to provide an interpretation of the provisions of the treaties, by giving a clarification of their core elements, while, in this particular case, also recalling on State obligations. Even though they do not possess a legally binding force, there is a legal obligation to seriously take them into account, and States can only benefit, from having this source as a guide while implementing the treaties. Taking this in mind, the General Comment No. 24, becomes particularly relevant in this area of business and human rights - where a lack of knowledge still persists - and consequently, where some minimum level of harmonization is needed to the advancement of the human rights protection and prevention.

The pertinence of these recent documents, particularly - the ones concerning the draft of a legally binding instrument on business and human rights - clearly illustrates the increased recognition that, firstly, there is a concerted awareness of the ineffectiveness of the non-binding instruments available, and secondly, on the undeniable relationship between business and human rights. If during a really long period, there was a general reluctance and uneasiness in advancing with a legally binding instrument, today, with the consciousness of the persistent human rights violations being committed by the corporate sector, keeping that resistance can only be perceived as a form of complicity to those abuses.

¹⁵⁹ Ibid., p. 11.

This new awareness has created this window of opportunity, to finally debate on a renewed and more robust approach to the problematic of business and human rights, however, this should not be understood as the end of CSR. Some will certainly argue that the increased recognition of human rights and the broad scope that they entail, can most certainly lead to the overthrow of CSR. However, a closer and more comprehensive observation of these two concepts can easily bring to the surface, the considerable potentialities of a combination of each others strengths, through the building up of a solid synergy between them.

There is an evident interdependence between human rights and CSR. The core values of corporate social responsibility, inter alia, transparency, accountability, reliability, respect, and trust, form part of some of the crucial elements, that can ensure an effective protection of human rights abuses. The last decades have visibly shown that a traditional CSR approach is currently not enough. The conventional approach, where businesses benefited from great flexibility in basically choosing which particular issues to address, is just not possible under the current circumstances.

The future of human rights and CSR, does not forecast the definitive exclusion of the first, however, there is a great possibility, that the broader scope of human rights, will ultimately result in the incorporation of CSR as one of its branches, instead of remaining as a separate sphere. The central concern in this discussion must be, how to effectively guarantee the protection of human rights from the abuses of the corporate sector, and that may implicate, acknowledging that, (...) human rights is the most legitimate and universal framework for determining the social dimensions of business responsibility and issues of corporate governance.”¹⁶⁰

¹⁶⁰ C. Avery, 'The difference between CSR and human rights' *Corporate Citizenship Briefing* (August/September 2006), <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Avery-difference-between-CSR-and-human-rights-Aug-Sep-2006.pdf>, (accessed 1 June 2018).

CONCLUSION

The process of globalization brought incommensurable changes to peoples *modus vivendi*. And if the benefits of having an open world - where suddenly everything seems closer and accessible, immediate and mainstreamed - is of general agreement, that the detrimental effects of this societal shift, entail a much deeper analysis. A variety of factors have contributed to the current awareness of those harmful effects, with a particular emphasis on the revolution of social media. However, even if that awareness exists - and for some decades already - the process of creating effective solutions and concerted strategies to tackle these problems, has been too lengthy. The decision-making powers, have been blindly holding to their particular views on the subject - sometimes driven by personal interests and political influences - neglecting the pertinence of these pressing problems, and ultimately, undermining the implications of this wait and the number of victims that will keep growing in the meantime.

One of the most striking findings that emerged, throughout the development of this dissertation, was how the debate on corporate social responsibility, and on business and human rights in general, is still perceived as inconvenient, and more acute given the severe consequences of persistently avoiding its discussion, or in this case, to constantly building walls around a future concerted strategy. Conversely, even if it is evident that there is still a long way from achieving the main goal, it is also true, that some necessary changes for that result, have already started to occur. There is a clear shift, in terms of translating the substantive research and theory on the topic, into concrete action, particularly by acknowledging that “(...) by reviewing the past achievements, we are better equipped to assess the emerging scenarios.”¹⁶¹ Taking this in mind, it becomes clear, the trend to move from a usually isolation, especially in what concerns the main subjects acting in and for this area, to a mainstreaming of the creation of partnerships and the strengthening of mutual cooperation and assistance. Moreover, and

¹⁶¹ O. Schutter, 'Towards a Legally Binding Treaty on Business and Human Rights', *Cellule de Recherche Interdisciplinaire en Droits de l'Homme*, WP 2015/2, p. 44, <https://cridho.uclouvain.be/documents/Working.Papers/CRIDHO-WP-2015-2-TNCs14July2015-revODS-1.pdf>, (accessed 23 May 2015).

one of the most relevant changes, is the moving from a traditionally reactive approach, to a preventive one.

In what concerns, the first question imposed by this thesis, on the development of the field of corporate social responsibility and the factors that have been shaping it, it became very patent, the major impact of the globalization process, and of all the various outcomes of that same process. In more general terms, it became evident from all the distinct angles of analysis, that all the substantive societal changes had an immediate effect on the evolution of corporate social responsibility. At the same time, it was also straightforward, how the complexity of defining CSR ended up, leading to its fragmentation, and how that reinforced the urgency to find some kind of compromise and some minimum harmonization, to enable its progress to happen.

The second question, concerning the main policies and relevant documents on the field of CSR at the European level, proved beyond doubt, that the EU has been one of the pioneers on tackling CSR, spearheading some of the most influential and innovative documents and bringing important clarity on the topic. However, even if its contributions have been unquestionably beneficial to the mainstreaming of CSR, the development of this dissertation, also demonstrated very vividly, that their choice of discourse when addressing these questions have not been wise. There was a clear perpetuation of a sort of preaching in their use of language, which ultimately led to some failures on delivering better outcomes and on effectively reaching new opportunities for the development of the field.

The analysis of the Directive 2014/95/EU, on non-financial and diversity information, and more specifically, the examination of the transpositions process of Portugal, Spain, and the United Kingdom, became crucial to achieving a better understanding of the potentialities of having this sort of directive. However, it is essential to acknowledge, that having a comprehensive picture of its exact outcomes, is still premature, since its first evaluation has not been published yet, and also considering how recently, the reporting process has started to be put in place. Acknowledging these important limitations, some consequences of this amending Directive can certainly be

underlined. By closely examining this directive, it became clear, how it still entails a certain flexibility, which can be positive in finding room for compromise, but at the same time, can also be misused by the business community. Consequently, this flexibility can damage the primary objective of this directive, which means, hindering the fostering of more transparency, accountability and due diligence, from the corporate sector. Finally, even if this directive cannot be perceived as exactly a breakthrough in the field, it was undeniably an essential step forward, in finding more robust strategies to address and prevent abuses from the corporate sector, and additionally to reinforce the role that can and must be played by businesses, particularly, in protecting human rights.

The final question was undoubtedly the most complex to address. In an area that is moving at the speed of light, it becomes increasingly difficult to draw - with a considerable range of certainty - what will the future bring. Albeit, these evident constraints of trying to practice futurology in such a rampant field, the analysis of the most recent documents on the field of business and human rights, brought to the surface some relevant conclusions, that can help the forecasting. The first conclusion and one of the most important for the purposes of this dissertation concerns the relationship between human rights and corporate social responsibility. With the debate on business and human rights, gaining momentum, the idea of the end of CSR arises. Nevertheless, the conclusions coming out of this research anticipate, not the end of CSR, but the incorporation of CSR within the framework of human rights. In what concerns, the main challenges for business and human rights, it became very obvious that the major constraint at the moment is the development of this binding treaty. The complexity of the topic will imply a very arduous and intricate negotiation process and will certainly take a considerable amount of time.

In the process of verification of the hypothesis established by this thesis, and based on the analysis, of the fundamental international standards and instruments in this field as the main sources, with the key focus of attention, on the ones developed at the European level, this dissertation found substantial arguments, that strongly support its

validity and relevance. Throughout the process of documentary analysis - that was realized for the purpose of answering the proposed research question – and also, the interviews conducted as a complement, the conclusions that have driven from this study, firmly supported the soundness of the initial hypothesis.

Considering the evolution of this field, analyzed throughout this research, the shift of paradigm, from a traditionally soft-law approach to the process of drafting a binding instrument, comes as no surprise. The failures, the miscalculations, the poor choice of discourse, among other factors, have certainly contributed, to a general agreement on the inadequacy of maintaining a voluntary approach, with no legal force. Taking into account, the last decades, marked by important attempts, but whose impact, has never reached the intended effect, the prospect of finally having a binding instrument has to be perceived as a historic achievement.

This binding treaty on business and human rights has the potential to bring the long-awaited, breakthrough moment in this field. Firstly, by contributing to the protection and fulfillment of human rights, at a worldwide scale and at the long-term. Secondly, by also having the capacity to put an end to the impunity that has been favoring the corporate sector and, to dismantle the unprecedented power, that has been growing within the business sphere, contributing to unprecedented violations.

The field of business and human rights has recently started to gain the rightful attention - unfortunately as an immediate consequence of some dramatic incidents where human rights abuses from the corporate sector were exposed - and this momentum will certainly be decisive for the future of this field. Considering the European Union, as an economic superpower, with a very large jurisdiction, and therefore, the paramount influence it reflects on the rest of the world, it is crucial that the EU demonstrates its commitment to this instrument and, actively engages in its negotiation process. The EU's requirements and concerns, regarding this instrument, should not become a hindrance to its involvement, on the contrary, the European Union must keep a proactive approach to have the opportunity to continue voicing its considerations and reservations.

Taking into account, this current wave, where the field of business and human rights seems to finally be finally up for discussion, and as one of the priorities on the international agenda, this window of opportunity should be properly seized. The research on this living area - where new ideas, solutions, changes and also, constraints emerge very rapidly - should be fostered, especially by the academic sector, that should strongly promote the debate, further analysis and the development of investigation projects on this evolving field. Having a binding instrument is essential to close the legal void, to create solid preventive mechanisms and to effectively support the victims of the abuses from the corporate sector, however, that will not close the gap between the available information and awareness on the topic, and the concrete actions in place to tackle it. By having a sturdy and resistant umbrella at the international level, that should not mean that the work at a smaller scale is superfluous, quite the contrary. There is an important loophole, that must be filled, through a solid synergy between academia, business, and governments, working together and widening the range of opportunities in this field. We should never undermine the potential impacts of acting at a smaller scale. All initiatives count, however small they may sound, and sometimes, unexpected achievements may arise from the most remote places.

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APPENDIX I

LIST OF QUESTIONS PERFORMED IN THE INTERVIEWS:

1. What is the current stage of Corporate Social Responsibility in Europe and its main challenges?
2. Was the 2014/95/EU Directive, regarding disclosure of non-financial and diversity information by certain large undertakings and groups, a revolutionary Directive?
3. What role should the European Union play, in the mainstreaming of Corporate Social Responsibility? Is there a need for more legislation in the field?
4. What is your opinion on the UN Treaty on Business and Human Rights?
5. What is the future of Corporate Social Responsibility?