

# CCBE Practical Issues for Bars and Law Societies on Corporate Social Responsibility

Guidance III

May 2017



# CONTENT

	Preamble .....	3
#1	Why should lawyers educate themselves on CSR? .....	4
#2	Do lawyers have to advise on CSR and may the omission of CSR-advice create liability? .....	5
#3	Could CSR give rise to any potential Insurance implications? .....	6
#4	Issues regarding a clients' request to a law firm to sign their CSR-Codes of Conduct as part of the retainer agreement? .....	7
#5	Do lawyers/law firms have to check before they accept a client whether their advice may be "linked with negative impacts" re CSR/human rights and do they have to reject the client or cancel an existing mandate if this is so? .....	8
#6	Are law firms, bars and law societies expected to control their supply chains? .....	9
#7	Is human rights a subject to be treated separately? .....	10
#8	Is CSR limited to "doing no harm" or is it also about "doing good"? ..	11
	Conclusion .....	12
	<i>Annex: guidance I - Corporate Responsibility and the Role of the Legal Profession</i> .....	13
	<i>Annex: guidance II - Corporate Social Responsibility and the Legal Profession</i> .....	26

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# Preamble

The Council of Bars and Law Societies of Europe (CCBE) represents the Bars and Law Societies of 32 countries (including the 28 EU Member States and Norway, Iceland, Liechtenstein and Switzerland) and a further 13 associate and observer countries, and through them more than 1 million European lawyers.

The CCBE has followed developments regarding Corporate Social Responsibility (CSR) for many years, and its specific impact on the legal profession.

In February 2013, the CCBE issued Guidance "Corporate Responsibility and the Legal Profession" ("Guidance I"), providing information about the definition, the basic concepts and the International, EU and national initiatives and norms regarding Corporate Social Responsibility (CSR).

In February 2014, the CCBE issued "Corporate Social Responsibility and the Legal Profession - Guidance II". Guidance II elaborates further on the CSR-implications of the specific role and position of the legal profession, the advice on CSR and the potential CSR-responsibility of lawyers/law firms as suppliers of services and as enterprises.

This Guidance III follows up on these issues by highlighting in short bullet form some of the challenges addressed in Guidance I and II. Guidance I and II provide the basis and Guidance III should be read in context herewith (see Annexes).

This Guidance III is meant to alert the Lawyers and the Bars and Law Societies that it has become urgent to deal with some essential questions which are relevant for lawyers dealing with CSR. For instance, potential liability and insurance cover has become an increasingly important issue in many countries. The potential liability for lawyers connected with CSR norms has not been addressed by any other Guidance so far.

Private initiatives are trying to engage law firms in the implementation of the UN Guiding Principles. The CCBE is keen to convey that the protection of human rights and fundamental freedoms to which all persons are entitled requires that all persons have effective access to legal services provided by an independent legal profession.

There is a diversity of approaches<sup>1</sup> and different views on the present state of the art. At this time we can only raise these essential questions in order to further the path to elaborating some answers. Guidance III is intended to inspire the national Bars and Law Societies to initiate action and to assist their members in navigating this new area of law.

We will follow up on the development, obtain information, and evaluate how best to exchange and share experience with a view to develop more practical recommendations at a later stage. Guidance III is only another milestone to assist Lawyers and the Bars and Law Societies to meet the challenges which are already on their desks.

The CCBE would like to thank the Chair of the CSR Committee, Birgit Spiesshofer, and the dedicated members of the CSR Committee, for all their work.

<sup>1</sup> See for example:

- IBA Business and Human Rights Guidance for Bar Associations,
- IBA Practical Guide for Business Lawyers on Business and Human Rights
- The Law Society of England and Wales, Business and Human Rights: A Practical Guide
- Business and Human Rights and the Australian legal profession.



## Why should lawyers educate themselves on CSR?

### LAWYERS

- » Given the definition by the EU Commission of Corporate Responsibility as covering compliance with applicable laws, soft law and voluntary codes of conduct, it is apparent that lawyers' core competencies are at stake. The EU Commission defined CSR as the responsibility of enterprises for their impact on society. Compliance with applicable law is the minimum. Enterprises should, in addition, integrate social, environmental, ethical, consumer, and human rights concerns into their business strategy and operation.
- » Lawyers will increasingly be called on to advise their clients on CSR matters in a multitude of respects, in particular, on labour, environmental and corruption aspects and on CSR-reporting, public procurement and Compliance. The attorney-client privilege can provide critical benefit to their clients, for instance, when they are requested to audit their clients' compliance with legal and self-imposed CSR standards.
- » CSR-norms are intertwined in a multitude of ways with hard law (e.g. "soft law with hard sanctions"); lawyers are in a unique position to inform the client - not only about the CSR-instruments and their implementation - but also on the potential legal consequences (e.g. liability according to Unfair Competition rules, tort, vicarious or parent liability).
- » Clients may expect their lawyers to advise them on prospective legal developments as part of their risk management. This has to include CSR. Lawyers may find themselves in a position where clients ask for advice on CSR and representation in courts, OECD-National Contact Point procedures and alternative dispute resolution.
- » Clients may contact law firms to provide information with regard to the client's reporting requirements acc. to the EU-CSR-Reporting-Directive and the corresponding national legislation.
- » Clients may ask law firms as supplier of services to sign their CSR Code of Conduct as part of the retainer agreement. The client's CSR Code of Conduct may not necessarily comply with the ethical and disciplinary rules of lawyers and may impose liabilities on lawyers with unforeseen consequences.
- » There is a discussion in the legal profession whether bar rules should provide that lawyers should advise on CSR issues where they are relevant.
- » Law firms may be requested to meet a "standard of expected behaviour" regarding CSR.
- » Lawyers should be aware that there is a political climate, in particular in Europe, which increasingly questions the traditional role of lawyers and asks to contribute to, and not frustrate greater public interest goals; the line between legality and legitimacy is blurred.

### BARS

- » Bars may wish to consider introducing training programmes on CSR and Bars may also wish to approach universities who may be interested in including or elaborating, as may be the case, on this as part of any studies.



# #2

## Do lawyers have to advise on CSR and may the omission of CSR-advice create liability?

### LAWYERS

- » CSR is a wide concept, encompassing not only hard and soft law but also non-normative issues like community investment, philanthropy and volunteering. Lawyers will usually be called to advise on hard and soft law. As hard and soft law are increasingly intertwined the question arises whether lawyers have to have knowledge about (normative) CSR, and whether they may or whether they have to include CSR into their advice, and, if the omission to do so may create any liability. As CSR covers a wide range of aspects, and as most CSR norms pursue a wide concept of "enterprise" (encompassing not only corporations but also other organisations), this question may affect a wide-range of lawyers.
- » The issue of whether liability arises is not clear at the moment, as it is not clarified whether and to what extent CSR-norms are considered law and included in "legal advice".
- » It is advisable to clarify expressly in the retainer agreement with the client whether and to what extent advice on CSR shall be included and to limit any potential liability.
- » It may, however, be unavoidable to advise on CSR as it may be interdependent with legal advice (e.g regarding the question of liability or liability avoidance by implementing certain risk management or compliance systems).

### BARS

- » The CCBE and national bars may wish to elaborate further Guidance in this regard and provide clarification in the bar rules.



# #3

## Could CSR give rise to any potential Insurance implications?

### LAWYERS

- » CSR is a new and emerging field where we see increasingly strategic litigation claiming liability of corporate clients based on CSR norms and the use of OECD-National Contact Point (NCP) -procedures and soft procedures like naming and shaming if "standards of expected behaviour" are not fulfilled. There is little certainty at the moment, as there are a multitude of standards, the norms are mostly principled and generic requiring specification, and there is little case law available from courts, NCPs or bodies of alternative dispute resolution.
- » Malpractice insurance usually covers legal advice, sometimes restricted to national and EU law. The international, supranational and national CSR-norms promulgated by public or private organisations are mostly soft law or even only soft instruments which may not necessarily be considered "law" in the sense of the insurance policy.
- » Nonetheless this soft law or soft instruments can entail hard sanctions for the client and liability for the lawyer; e.g. the due diligence requirements of the United Nations Guiding Principles (UNGP) might be regarded as constituting negligence acc. to tort or criminal law when they are not adequately fulfilled. We observe, however, the claim that the control of a supplier or subsidiary acc. to the UNGP may constitute a master-servant relationship and trigger vicarious liability or parent liability respectively.

### BARS

- » National bars may wish to consider if insurance cover is an issue, and if so, assist their members in defining the scope of legal advice and in negotiating with the insurance companies that CSR advice is covered (e.g. master agreements).



# #4

## Issues regarding a clients' request to a law firm to sign their CSR-Codes of Conduct as part of the retainer agreement?

### LAWYERS

- » Companies increasingly impose CSR requirements on their suppliers, and as law firms are also considered suppliers of services they may be asked to comply with clients' codes of conduct. This raises a number of questions. Such a request from a client may lead to its code of conduct becoming part of the contractual relationship between the law firm and the client. In order to avoid becoming subject to a multiplicity of potentially conflicting policies and requirements, law firms have increasingly started to develop their own policies on CR issues.
- » Lawyers are independent and have an official role in the administration of justice and standards of behavior are defined by law and by bar rules. Clients have neither legitimacy nor authority to stipulate ethical standards for lawyers. However, the reference to Bar Rules and ethical standards is usually not an adequate answer to CR requests of clients as they cover different issues, or, to the extent there is an overlap, they address them in a different way
- » The clients' Codes of Conduct are not necessarily coherent, but require usually application to the whole law firm and all its members and employees and in all matters. The law firm may sign the first client's Code of Conduct, when more clients come with the same request and different Codes of Conduct the law firm may not be in a position to sign them without risking to breach retainer agreements of other clients.
- » The clients' supplier codes are usually not designed to meet the specific situations of law firms, in particular, confidentiality aspects.

### BARS

- » As there is a risk that clients may treat law firms as usual enterprises and suppliers and may mandate only under the condition that their Code of Conduct is signed, national bars may wish to assist their members with a list of issues that should be included in a generic code of conduct in order to address any client request in this regard - such Guidance may consider the size of law firms and contain a model policy which the client should be asked to accept as "equivalent".
- » In the meanwhile, Bars may wish to advise their members not to sign any client Code of Conduct in order to assist with a coordinated and uniform approach to client requests in this regard.



# #5

Do lawyers/law firms have to check before they accept a client whether their advice may be "linked with negative impacts" re CSR/human rights and do they have to reject the client or cancel an existing mandate if this is so?

- » The wide responsibility principles promoted by the UN Guiding Principles are according to their author Prof. John Ruggie "high level policy prescriptions", not a "toolkit its components simply to be taken off the shelf and plugged in"<sup>2</sup>. Although they leave bar rules and regulations legally untouched, they may nonetheless de facto undermine the clarity of the lawyer's responsibilities and role. In any event, they need to be further discussed before any Guidance in that regard can be promulgated.
- » As mentioned in the preamble, the protection of human rights and fundamental freedoms to which all persons are entitled requires that all persons have effective access to legal services provided by an independent legal profession. This includes that lawyers may not be identified with their clients or client's causes<sup>3</sup> nor may they be named and shamed for representing a specific client.
- » A lawyer may not act illegally or aid and abet a client's illegal behaviour or violate bar rules - these are the red lines for a lawyer's engagement and behavior.
- » In a lot of situations, the lawyer's discharge of his duties will unavoidably be "linked with negative impacts" of his client, e.g. an environmental lawyer representing clients in permitting procedures will always be linked to negative (but legal) impacts of the client.
- » It is for the individual lawyer to decide to accept or refuse a client.

<sup>2</sup> John Ruggie, Just Business, p.124.

<sup>3</sup> See also IBA Practical Guide for Business Lawyers on Business and Human Rights.





# #6

Are law firms, bars and law societies expected to control their supply chains?

## LAWYERS

- » Law firms, bars and law societies are usually not considered to be high risk enterprises - also with regard to their typical supply chain.
- » There are no general rules or Guidances available in this regard.
- » We are not aware that, at the moment, law firms and bars and law societies exercise substantial supply chain management, in particular, not beyond the first tier.
- » The size of the law firm is also considered to be a relevant criterion.

## BARS

- » Bars are usually not considered to be high-risk enterprises also with regard to their typical supply chain.

# #7

## Is human rights a subject to be treated separately?

- » In most of the relevant CSR-instruments (UN Global Compact, OECD Guidelines for Multinational Enterprises, ISO 26000) and EU-Directives human rights are one CSR element connected with others.
- » According to the EU Commission's CSR policy, compliance with national laws is the minimum corporate responsibility. Most human rights conventions and instruments have been adequately implemented in the EU into national law and can also be regarded as social or environmental issues. To fully meet their corporate responsibility, enterprises should have in place processes to integrate social, environmental, ethical, human rights and consumer concerns (beyond compliance).
- » The EU-CSR-Reporting-Directive and the EU-Procurement-Directives cover all CSR issues.
- » The clients have mostly integrated systems for non-financial reporting, due diligence and compliance systems.
- » Lawyers should be aware, however, that some clients may treat human rights as a separate subject, based on the UN Guiding Principles, treating them as "standard of expected behaviour". Enterprises are required to "respect human rights" according to the UNGP. What this means requires further specification - either by the legislator (e.g. UK Modern Slavery Act) or by the enterprise or other parties, in particular, in codes of conduct or contractual provisions. Concerning the legal uncertainties and dilemmas connected with this direct application of human rights see CCBE Guidance I and II.

# #8

Is CSR limited to "doing no harm" or is it also about "doing good"?

- » The UN Guiding Principles and respective Guidances are focused on the "doing no harm" aspect of enterprise responsibility.
- » Most CSR norms (e.g. UN Global Compact, OECD Guidelines for Multinational Enterprises, ISO 26000) encompass, however, both aspects and include the enterprises' responsibility towards their employees, the community and the environment. CSR is not restricted to operational policies of enterprises.
- » The European Legal Profession has been active since decades in both respects; promoting greater public interest goals, in particular human rights, has been and will be a prominent task both of law firms and bars and law societies.



## CONCLUSION

The CSR discussion has been accelerated most recently by a myriad of developments at the international, European and national levels, affecting also European lawyers, both in their capacity as diligent advisors to their clients and suppliers of services, and with respect to the qualification of law firms, bars and law societies as "enterprises" or even "multinational enterprises" to which CSR requirements apply. This trend is set to continue and there is a growing need which is being demonstrated in many forms, for lawyers to be properly acquainted with CSR issues and potential implications.

ANNEX  
CCBE GUIDANCE I:  
*CORPORATE RESPONSIBILITY AND  
THE ROLE OF THE LEGAL PROFESSION*

FEBRUARY 2013

Table of Contents

Preface . . . . . 14

Executive Summary . . . . . 15

I. What is Corporate Responsibility (CR)? . . . . . 15

    1) Definition . . . . . 15

    2) Triple Bottom Line ("People, Planet, Profit"). . . . . 16

    3) CR Developments at the International, European and National Level . . . . . 16

        (a) International Developments: . . . . . 16

            (1) UN Global Compact . . . . . 16

            (2) Business and Human Rights. . . . . 17

            (3) OECD . . . . . 17

            (4) ISO 26000:2010 Guidance on Social Responsibility . . . . . 18

            (5) Global Reporting Initiative (GRI) . . . . . 18

        (b) European Developments: . . . . . 19

        (c) National Developments: . . . . . 20

II. Why do lawyers, law firms, bars and law societies have to be aware of CR? . . . . . 21

    1) Advice on Corporate Responsibility . . . . . 21

    2) Corporate Responsibility of the Legal Profession. . . . . 22

        (a) Lawyers as suppliers of services . . . . . 22

        (b) Law firms, bars and law societies as "enterprises". . . . . 22

        (c) Essential elements of Corporate Responsibility of the Legal Profession. . . . . 22

III. What are the challenges and foreseeable developments? . . . . . 23

IV: Conclusion . . . . . 24

    Annex 1: Link to country reports . . . . . 25

    Annex 2: Link to the Charter of Core Principles of the European Legal Profession. . . . . 25

    Annex 3: Links to further Information. . . . . 25

# Preface

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

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

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

The CCBE would like to thank Birgit SPIESSHOFER (Chair – Germany), Alix FRANK-THOMASSER (Austria), Jean-Louis JORIS (Belgium), Kari LAUTJÄRVI (Finland), Florence RICHARD (France), Mary FLOROPOULOU-MAKRIS (Greece), Marco VIANELLO (Italy), Marc ELVINGER (Luxembourg), Coloma ARMERO MONTES (Spain), Claes CRONSTEDT (Sweden), and Simon HALL (United Kingdom) for their participation.

For your comments or further information, please contact the CCBE at: [ccbe@ccbe.eu](mailto:ccbe@ccbe.eu)

CCBE  
February 2013

# Executive Summary

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

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

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

## I. What is Corporate Responsibility (CR)?

### 1) Definition

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

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

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

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

<sup>2</sup> COM (2011) 681 final.

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

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

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

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

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

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

### (a) International Developments:

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

#### Initiatives from international organisations

##### (1) UN Global Compact

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

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

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

#### Human Rights

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

3 [www.unglobalcompact.org](http://www.unglobalcompact.org)



## Labor

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

## Environment

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

## Anti-Corruption

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

## (2) Business and Human Rights

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

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

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

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

## (3) OECD

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

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

5 A/HRC/17/31, 21 March 2011.

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

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

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

### Initiatives from private organisations

#### (4) ISO 26000:2010 Guidance on Social Responsibility

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

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

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

#### (5) Global Reporting Initiative (GRI)

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

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

The GRI Reporting Framework contains general and sector-specific content that has been agreed by a wide range of stakeholders around the world to be generally applicable for reporting an organisation’s sustainability performance<sup>8</sup>.

<sup>7</sup> Ibid, Part I Chap II – General Policies, par A.1.

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

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

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

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

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

(b) European Developments:

At the European level CR has been an issue since the mid 1990 's. The Council of Ministers and the European Parliament have both called on the EU Commission to further develop its CSR Policy<sup>9</sup>. On 25 October 2011 the EU Commission issued a Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, titled "A renewed EU Strategy 2011 – 2014 for Corporate Social Responsibility"<sup>10</sup> ("EU Strategy"). The EU Strategy contains significant changes in a number of respects. Besides the new definition of CR, the EU Commission lays out a complex and multi-layered approach.

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

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

The EU Commission highlights the multidimensional nature of CSR covering as a minimum human rights, labour and employment practices, environmental issues, and combating bribery and corruption. Community involvement and development, the promotion of social and environmental responsibility through the supply-chain, and the disclosure of non-financial information are also part of the CR agenda. The EU Commission has adopted a *Communication on EU policies on volunteering* in which it acknowledges employee volunteering as an expression of CSR<sup>11</sup>. Volunteering in this context includes "**pro-bono-engagement**" of the sort familiar to law firms.

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

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

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

1. Create in 2013 multi-stakeholder CSR platforms in a number of relevant industrial sectors;
2. launch a European Award Scheme for CSR partnerships;
3. address the issue of misleading marketing ("greenwashing") in the context of the Unfair Commercial Practices Directive;

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

<sup>10</sup> COM (2011) 681 final.

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

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

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

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

In accordance with Intention no. 11, the Commission has mandated in the meantime two human rights organisations to develop Human Rights Guidance for the Oil and Gas Sector, the Information Communications Technology (ICT) Sector and the Employment and Recruitment Agencies Sector<sup>12</sup>.

(c) National Developments:

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

<sup>12</sup> See [www.ihrb.org](http://www.ihrb.org); [www.shiftproject.org](http://www.shiftproject.org)

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

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

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

### 1) Advice on Corporate Responsibility

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

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

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

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

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

13 See *Kasky v. Nike Inc.* [www.businesshumanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/NikelawsuitKaskyvNikeredenialoflabourabuses](http://www.businesshumanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/NikelawsuitKaskyvNikeredenialoflabourabuses)

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

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

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

## 2) *Corporate Responsibility of the Legal Profession*

### (a) Lawyers as suppliers of services

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

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

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

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

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

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

### III. What are the challenges and foreseeable developments?

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

Private initiatives<sup>16</sup> are trying to engage law firms in the implementation of the UN Guiding Principles. The EU Commission has already procured for certain sectors the development of human rights guidance, which however, was not developed by the respective sectors but by two human rights organizations with the participation of stakeholders. To date the Commission has maintained its general standpoint that the development of CR Guidance should be led by enterprises themselves, or, at least by the respective business sectors which usually know best the specific risks and challenges of their business and can determine practical and proportionate responses to them.

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

It should also be taken into consideration that in highly regulated areas like the EU and the USA human rights and social and environmental requirements are defined in detail by legislation, administration, courts and arbitration tribunals. Therefore the question arises to what extent there is space at all for a separate regime parallel to the legal regime enterprises have to comply with. National constitutions like the German Constitution do not provide for the direct applicability of human rights between private parties but only an indirect application of the national constitutional rights in the context of the interpretation and adjudication of civil law. The reasons why a direct applicability of human rights between private parties is considered inadequate is that most human rights guarantees in the national constitutions, the European Charter of Fundamental Rights and the UN and European Human Rights Conventions are spelled out in general terms which require further specification by the democratically legitimized legislator, administration and the courts in order to be operational. Direct applicability might be acceptable in cases where the prohibition is spelled out clearly and in an absolute way, e. g. the prohibition of slavery and forced labor (see Art. 5 European Charter of Fundamental Rights); it is not clear, however, for an enterprise what it has to do when an employee's right to healthy, safe and decent working conditions is guaranteed (see Art. 31 European Charter). It also has to be taken into consideration, that in certain national constitutions, the UN and European Conventions on Human Rights rank below the corresponding national constitutional guarantees.<sup>17</sup>

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

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

<sup>16</sup> e.g. Avocats for international development "Law firms' implementation of the Guiding Principles on Business & Human Rights" discussion paper, November 2011, see [www.a4id.org](http://www.a4id.org).

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

## IV. Conclusion

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

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



## Annex 1: Link to Country reports

[http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/30\\_01\\_13pdf1\\_1361954850.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/30_01_13pdf1_1361954850.pdf)

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

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

[http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_Code\\_of\\_conductp1\\_1306748215.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1306748215.pdf)

## Annex 3: Further Information

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# ANNEX

## CCBE GUIDANCE II:

### *CORPORATE SOCIAL RESPONSIBILITY AND THE LEGAL PROFESSION*

FEBRUARY 2014

## Preface

The CCBE issued on February 7, 2013 the Guidance "Corporate Social Responsibility and the Legal Profession" ("Guidance I"), providing information about the definition, the basic concepts and the International, EU and national initiatives regarding Corporate Social Responsibility (CSR).<sup>1</sup> Guidance I also addressed the questions "Why do lawyers, law firms, bars and law societies have to be aware of CSR?" and "What are the challenges and foreseeable developments?" Guidance II follows up on these questions and provides further consideration of the issues.

The CSR Committee is convinced that CSR will not merely be the subject of a transitory stage between soft and hard law but will generate new forms of soft and hybrid regulation forming part of an emerging global governance. The practice of lawyers will have to be adapted accordingly, providing new opportunities for lawyers on the one hand, raising questions, e.g. of insurance coverage and the scope of engagement, on the other. As CSR is a fast developing and changing area in flux, the CSR Committee will have to amend, modify and specify its considerations in the future to keep pace with the ongoing developments.

The following Guidance II does not aim to impose on any lawyer a particular standard of behavior, nor does it claim to be comprehensive or conclusive. Its purpose is to alert lawyers and bars and law societies to the new opportunities and challenges of CSR and highlight practical issues which require consideration, and which offer bars and law societies the opportunity to provide leadership and guidance on these matters. It also highlights the issues of concern for bars and law societies, and suggests areas in which their leadership and guidance is desirable.

The CCBE would like to thank the members of its CSR Committee for all their assistance in developing this Guidance - Birgit Spießhofer - Chair, Alix Frank-Thomasser, Carl Bevernage, Jean-Louis Joris, Kari Lautjärvi, Florence Richard, Mary Floropoulou-Makris, Marco Vianello, Marc Elvinger, Joanna Wisla-Plonka, Coloma Armero Montes, Claes Cronstedt and Simon Hall.

For your comments, or further information, please contact the CCBE at: [ccbe@ccbe.eu](mailto:ccbe@ccbe.eu)

CCBE  
February 2014

<sup>1</sup> See: [http://www.ccbe.eu/index.php?id=94&id\\_comite=54&L=0](http://www.ccbe.eu/index.php?id=94&id_comite=54&L=0)

# Executive Summary

1. Any CSR policy for the legal profession has to take into account the specific role and situation of law firms and bars, in particular, in the administration of justice.
2. We see increasingly clients who expect their lawyers to provide advice on CSR matters. As CSR is a new emerging area of lawyers' activities, encompassing soft and hard law, a lot of issues need further clarification, in particular, the exact scope of the mandate, the insurance coverage (is advice on international soft law "legal" advice?), potential liabilities and their limitation in client agreements.
3. The lawyer as supplier of services may be confronted with various dilemmas, in particular, a multiplicity of potentially conflicting policies of various clients, client's requests to audit its books and records and to comply with barely defined standards, and client's requests (e.g. concerning intensive working hours) conflicting with its own supplier policy.
4. Sole practitioners, law firms and bars qualify as enterprises in the sense of the international, European and national CSR instruments. As a minimum, responsible business means compliance with applicable rules and regulations. The EU Commission asks, however, that enterprises do more on a voluntary basis.
5. To the extent a law firm maintains activities in countries with weak governance zones it may be advisable to develop a CSR policy consistent with its European standards.
6. The potential inconsistency between the client's supplier code of conduct, applicable to all kinds of businesses, and the CSR policies reflecting the specific role of the legal profession, needs to be addressed.
7. CSR claims regarding the client relationship have to take into consideration the specific role of the lawyer in the administration of justice. Claims concerning supply chain management have to be proportionate and avoid overly bureaucratic burdens.

## Introduction

The European Commission stipulated in its CSR Strategy Paper of 25 October 2011<sup>2</sup> that enterprises, including law firms and bar organisations, should deal with CSR, in particular:

- All large European enterprises are invited to make a commitment by 2014 to take account of at least one of the following sets of principles and guidelines when developing their approach to CSR: the UN Global Compact, the OECD Guidelines for Multinational Enterprises, or the ISO 26000 Guidance Standard on Social Responsibility;
- All European-based multinational enterprises are invited to make a commitment by 2014 to respect the ILO Tri-Partite Declaration of Principles concerning Multinational Enterprises and Social Policy;
- The EU Commission expects *all* European enterprises to meet the Corporate Social Responsibility to respect Human Rights as defined in the UN Guiding Principles.

As anticipated in the CSR developments described in Guidance I<sup>3</sup>, we increasingly see publications suggesting, for consideration, far-reaching duties for the legal profession regarding CSR.<sup>4</sup>

It is important that the legal profession determines its own future in the area of CSR and develops policies and practices which are fit for purpose, proportionate and take account of the imperative of our role, in particular, in the administration of justice, and are consistent with our regulatory regimes.

<sup>2</sup> See Guidance I, p. 8 seq.

<sup>3</sup> Chapter I

<sup>4</sup> See e.g. Advocates for International Development (A4ID): "Law firms' implementation of the Guiding Principles on Business and Human Rights", [www.a4id.org](http://www.a4id.org) A4ID suggests i.a. that law firms should carry out a human rights due diligence, assessing the actual and potential adverse human rights impacts of prospective or current clients. Law firms should also assess how they may actually or potentially cause, contribute or be directly linked through their services to a client's adverse human rights impact. The concepts of "adverse human rights impact" and "linkage" are construed in a broad way. According to A4ID, in the event a human rights risk is identified the law firm should use its leverage to effect change in the wrongful practices of its client, and if necessary refuse to accept a mandate or cancel it. The paper also advocates that law firms should publish a commitment to respect human rights in a statement of policy. A4ID suggests that bars and law societies consider an amendment of their codes of conduct to include i.a. a provision that lawyers have to respect human rights, that the duty to the client includes the consideration of the client's responsibility to respect human rights, and that the lawyer shall not act or counsel a client nor assist the client with conduct the lawyer knows constitutes a violation of internationally recognized human rights. Bars are recommended to consider how to address situations where the client limits the scope of work of the lawyer and thus excludes advice related to international human rights. Bars are also asked to consider whether the concept of 'best interest' of the client would include human rights, whether a withdrawal by a lawyer from a retainer for 'good cause' should include a client's failure to respect human rights, and whether disclosure of information should be permitted when necessary to respond to a serious complaint or proceeding against a lawyer of involvement or complicity in a client's adverse human rights impact.

# 1. The Situation and the Role of the Legal Profession

Any discussion on CSR for the Legal Profession has to take into consideration the specific role and situation of the legal profession in order to generate expectations which are realistic, adequate and proportionate, in particular, regarding the client-relationship.<sup>5</sup>

## **a) The Situation of the Legal Profession in Europe**

The vast majority of European bar members are sole practitioners and small and medium sized law firms, servicing mostly national and European clients. The European Union and its Member States are deemed to have robust environmental and social governance, legislation systems and institutional capacity designed to protect their people and the natural environment. The Equator Principles for the project finance industry qualify e.g. most of the EU Member States as 'Designated Countries'; for projects located in these countries compliance with the respective laws, regulations, permits and the EU and national stakeholder and grievance mechanisms shall suffice. This does not preclude, however, the opportunity to do more on a voluntary basis, as recommended by the EU Commission, and expected increasingly by clients and young professionals. The situation is considered to be different, however, when the law firm, the client and/or the project is located or active in weak governance zones where the level of protection is considerably lower than in Europe.

The European legal market can, in general, be regarded as a saturated market with over capacity, meaning that law firms, in particular, larger commercial ones, servicing multinational clients, have to make substantial efforts to acquire clients and mandates. Multinational enterprises "use" specific law firms for specific purposes, invite law firms to apply for mandates and panels, thereby creating a situation of permanent competition. Long term and exclusive client relationships where the attorney is the client's trusted advisor in a wider sense, entailing influence on a client beyond a specific task, are, in reality very limited, at least in so far as multinational clients are concerned.

## **b) The Role of the Attorney/Law Firm and the Administration of Justice**

The lawyer/law firm is on the one hand advisor and supplier of services to the client, and on the other hand, the attorney has a crucial function in the day-to-day operation of the rule of law.

As advisor and supplier of services the lawyer/law firm is in general dependent on the client's definition of the scope of work. The attorney may alert the client that other issues such as human rights should also be taken into consideration. It is, however, in the client's sole discretion what services he would like to obtain (and pay for). The attorney has an advisory role which means that the client may or may not follow his advice. Therefore, the attorney can in general only be held responsible for his own advice and service, not for the client's conduct.

The attorney has a unique position in the promotion and implementation of the rule of law. One of the basic principles of the rule of law is that every person is entitled to be represented by a lawyer, and, that the lawyer has a role on his own distinct from the client's decision and conduct. Due to this official function, the attorney is not only subject to generally applicable laws, applying to all persons and businesses, but also to specific bar rules and regulations, i.a. special confidentiality requirements, attorney-client-privilege, limitations regarding the termination of the client relationship and, under certain conditions, the obligation to represent a client in court. These essential and precious requirements should be guaranteed and protected. Even massive violators of human rights such as mass murderers are entitled to legal representation and a fair trial. A lawyer may represent them, although their behaviour is inconsistent with the lawyer's own moral or social standards. This is part of a lawyer's official function and professional role without which the justice system could not function. It is an essential element of the rule of law.<sup>6</sup>

## **c) The Role of Bars and Law Societies**

Bars and Law Societies are, in general, bodies of self-organisation of attorneys and law firms. They represent their interests, in particular, vis-à-vis the government, parliament and public authorities. They provide training and contribute to civil society by way of commenting on proposed legislation, amicus curiae briefs, or by issuing public statements on legal matters including human rights. Some bars have regulatory and disciplinary authority regarding bar matters and an individual attorney's conduct. Most European bars do not have a general political mandate but an authorisation limited to the representation and organisation of bar matters. Thus, they are contributing to the implementation of the rule of law by ensuring that clients get access to competent, professional legal advice from lawyers who act independently from outside influence, with integrity and subject to high ethical standards.

<sup>5</sup> Certain far-reaching expectations, established by NGOs and other organisations (see e.g. Fn.4), are based on assumptions which are not coherent with our understanding of the role and the situation of the legal profession in Europe.

<sup>6</sup> See Assessing the Economic significance of the professional legal services sector in the European Union, George Yarrow and Christopher Decker, Regulatory Policy Institute, August 2012, pp. 14-16: As noted by Professor Yarrow in the report prepared at the request of the CCBE on the economic significance of the professional services sector in the European Union, one way in which international organizations such as the World Bank, UNDP, and USAID have sought to promote economic development and improve economic performance has been by advocating the adoption of the 'rule of law' in developing or transitional countries. Various commentators, however, have assessed efforts by international bodies, such as the World Bank, to assist in building the 'rule of law' in developing or post-conflict societies as disappointing. The rule of law can't come from top down planning. It needs the support of intermediate institutions and a community of judges, lawyers and scholars who can shape law into reality. It follows that depriving companies and institutions with weak human rights records from competent, independent legal advice would weaken the promotion of the rule of law instead of strengthening it, contrary to the objectives of those seeking to promote CR.

## 2. Advice on CSR

As pointed out in Guidance I<sup>7</sup> we increasingly see clients, in particular, multinational companies who expect their (external and internal) lawyers to provide advice on CSR matters, CSR developments and soft and hard CSR “law”. This is not an established standard (yet). As CSR is a new emerging area of lawyers’ activities a lot of issues need further clarification, e.g. are soft law guidelines such as the OECD Guidelines on Multinational Enterprises<sup>8</sup> or the Equator Principles<sup>9</sup> “law”? Is advice on soft law considered “legal advice”?

When giving advice on CSR matters to clients, lawyers may participate in the tailoring of their CSR policy and normative framework. This role is of extreme importance as the CSR commitments undertaken by companies are likely to be assessed by national courts; they may form a basis for liability, even if these commitments are considered as soft law<sup>10</sup>. In fact soft law, as precursor of hard law<sup>11</sup>, can be regarded as part of the global normative dimension that impacts companies’ behaviors and may be controlled and taken into account by judges. When they act as counsel, lawyers may have therefore a duty to provide relevant advice on CSR soft law. Lawyers are likely to be called upon to assist companies in compliance, i.a. with the new reporting requirements regarding human rights, environmental and employment issues suggested in the draft Accounting Directive.<sup>12</sup> As a consequence, law firms have started to establish teams, sometimes of a multidisciplinary nature, to answer these demands.

Example: project finance transactions may entail advice on the Equator Principles, the International Finance Corporation Standards on Environmental and Social Sustainability and the UN Guiding Principles on Business and Human Rights (UNGP).

Prof. Ruggie, the author of the UNGP, pointed out: we are manoeuvring re UNGP to a large extent in a “sparkling grey zone” (this applies to CSR in general). For a lawyer this means moving on challenging grounds and potential liability. A lot of concepts developed in the CSR discussion to describe the scope of responsibility, such as “negative human rights impact”, “linkage”, “complicity” or “sphere of influence” are very broad and require further definition, determination and clarification. What it means to “respect human rights” in a specific situation and context may be hard to define if the claim for respect goes beyond compliance with national laws and court decisions and clear “black or white” cases. The content may be defined by persons applying the UNGP e.g. in project finance decisions, by “expert panels” in complaints procedures, or by NGOs claiming that a company does not respect human rights sufficiently.<sup>13</sup>

Human rights are usually spelled out in rather general terms in the various and by no means coherent Human Rights Conventions, designed to address States (which are obliged to break them down to behavioral standards). At least in Europe the doctrine is established that direct applicability of human rights between private parties can be assumed only under exceptional circumstances when the human right is defined in such a specific way that no further specification by legislation, administration or courts is required.<sup>14</sup> If the relevant human right lacks such specificity, the person or entity applying or advocating the human right defines its content, limitations and the delineation of conflicting human rights, very often with no possibility to challenge that assessment in any court and to obtain certainty of outcome. This raises questions re democratic legitimacy and the rule of law.

The publication of a human rights policy commitment on the website, as requested by the UNGP, may be used as a basis for a cause of action against the company/client<sup>15</sup>; an audit or due diligence process may generate information that can be readily used by a public prosecutor as no protective or “safe harbor rules” apply (unless the information is protected by attorney-client-privilege).

### Recommendations:

1. Clarify with the client the scope of advice, i.e. whether the advice is to encompass only traditional hard law, or, also the soft and informal guidelines relevant to the matter.
2. It might be advisable to address the innovative character of CSR advice and the uncertainties connected therewith in the client agreement and to limit the lawyer’s/law firm’s liability for CSR related advice specifically or in the general limitation.
3. Clarify with the lawyers insurers whether only legal advice in the traditional sense, in particular, regarding the applicable national and EU laws is covered, or, whether also advice on soft and informal instruments including UN, OECD, IFC and international business organisations’ recommendations is included in the coverage.
4. It might be advisable (for lawyers/law firms/bars and law societies assisting their members) to negotiate master amendments to the insurance coverage standards re CSR advice and representation in case of insufficient coverage.
5. It might be advisable for *bars/law societies* to offer consistent courses on CSR, informing about the latest developments, as part of their ongoing (voluntary or mandatory) education programmes. It might also be advisable to introduce CSR into the university and professional training programmes.
6. If a law firm elects to publish a CSR policy the potential liability that could flow from publication must be recognized, but it will only be an issue if the policies are not adhered to.

<sup>7</sup> P. 10 et seq.

<sup>8</sup> <http://www.oecd.org/corporate/mne/>

<sup>9</sup> <http://www.equator-principles.com/>

<sup>10</sup> For instance, these could be the case before a “Conseil des Prud’hommes” in France.

<sup>11</sup> See on the importance of soft law the annual report from the French “Conseil d’Etat” published on 2 October 2013, available at : [http://www.conseil-etat.fr/media/document/RAP-PORT%20ETUDES/droit\\_souple\\_4-propositions\\_021013.pdf](http://www.conseil-etat.fr/media/document/RAP-PORT%20ETUDES/droit_souple_4-propositions_021013.pdf)

<sup>12</sup> Commission Legislative Proposal for a Directive amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of nonfinancial and diversity information by certain large companies and groups.

<sup>13</sup> The National Contact Points, based on the OECD Guidelines on Multinational Enterprises, could be developed into such an instance although they have not been widely called upon so far.

<sup>14</sup> This is discussed e.g. for the prohibition of slavery (Art. 5 European Charter of Fundamental Rights) and child labour (Art. 32).

<sup>15</sup> E.g. based on Unfair Competition, see Nike vs. Kasky ; we see courts already considering such website publication as a self-commitment and as a basis for a cause of action for parties claiming that the commitment was not fulfilled.

### 3. The Lawyer/Law Firm as Supplier of Services

An essential part of companies' CSR compliance is the supply or value chain management. As lawyers are suppliers of services they may be asked to sign the *client's code of conduct* as part of the retainer agreement or panel appointment.

This can entail:

- a commitment to adhere to the client's conduct requirements re CSR issues<sup>16</sup> with regard to all firm members and all matters;
- an obligation to impose the same standards on the law firm's suppliers and their suppliers;
- an obligation to have regular compliance audits executed at the law firm's cost, both of its own compliance and its suppliers' compliance;
- an obligation to allow the client to audit the law firm and its books regarding compliance with the client's code of conduct, even without prior announcement;
- the right of the client to terminate the retainer agreement in case of non-compliance with the above.

#### **Critical questions/dilemmas:**

(1) *How do you avoid becoming subject to a multiplicity of potentially conflicting policies of various clients?*

Some law firms have started to develop their own CSR policies which may include a code of conduct<sup>17</sup> or reporting on CSR matters including goals and targets. Despite the firm's existing but alternative approach to CSR the client may insist that the law firm signs its policy as standardized engagement and sales conditions, otherwise the firm will not be regarded as eligible to become a supplier. The occasionally uttered comment "we sign everything", meaning that a potential breach of the retainer agreement is consciously taken into consideration, cannot be a satisfactory answer to the dilemma. Compliance management with diverse codes of conduct may, even when there are no obvious conflicts, entail an enormous bureaucracy which only large firms can afford. The same applies to costly audit requirements on law firms and their suppliers although the legal profession and its office suppliers are generally not regarded as high risk sectors. It appears that these requirements could lead to a market distortion excluding smaller firms from the global value chain. This can also lead to the exclusion of small and medium enterprises as suppliers from less developed countries which are otherwise regarded as the backbone of sustainable development in these countries.

#### **Consideration:**

As individual law firms does not have the market power to resist such client claims if they want to be eligible as suppliers, it might be advisable that the *CCBE in conjunction with the national bars* develops guidance for law firms how to deal with clients' requests to sign their codes of conduct, and to submit to their typical supply chain and audit requirements.

(2) *Is the client's request to audit the law firm's compliance with its code of conduct, in particular without prior notice, feasible at all?* Clients are often not aware of the specific role of law firms and their ethical and confidentiality obligations which do not allow the client to check the firm's books and records and enter the premises and start investigations, in particular, without prior notice.

#### **Recommendation:**

If a law firm wants to accept such an audit obligation it has to make sure that it is restricted to information and documentation not breaching any ethical or confidentiality duties, or which will give rise to a loss of privilege. Suitable confidentiality undertakings should be provided by those conducting the audit. Consideration should also be given to imposing on the client responsibility for the actions of agents they engage to conduct such an audit.

(3) *The client's code of conduct may contain broad obligations relating to CSR, by way of example "to respect human rights as defined in the UNGP" – as the UNGP refer only to UN Human Rights Conventions without defining the material standards of behaviour any further, how can a law firm make sure that it is "compliant", in particular, taking into consideration the sanction that in case of "non-compliance" the retainer can be terminated?*

The expected standards of behavior would need ideally to be better defined in the retainer agreement which is, however, extremely burdensome and time consuming. For law firms and mandates in Europe it should be sufficient to refer to compliance with the applicable EU and national laws implementing environmental, employment and human rights requirements, or if the law firm is a UNGC signatory by referring to the commitments that it imposes.

<sup>16</sup> See Guidance I, Part I, p. 4.

<sup>17</sup> A code of conduct can create a cause of action against the firm.

**Consideration:**

As an individual law firm's market power is too limited it might be advisable that the CCBE in conjunction with the national bars develops an "interpretive guide" for law firms regarding typical CSR code of conduct requests.

- (4) *It is not unusual that a client asks a law firm to sign, on the one hand, its contract/code of conduct containing provisions such as "no excessive working hours", "right to a family life" etc., which conflict on the other hand with the client's demands to have round the clock negotiations, drafts amended over the weekend, and to "get the deal done".* The law firm is again in an impossible conflict (and technically in a breach of the retainer agreement) and will usually disregard the code of conduct in favour of the results requested by the client.

**Consideration:**

An honest discussion of the situation and the dilemma with the client may be advisable.

- (5) *Clients are increasingly requesting information from law firms on CSR practices through the use of supplier questionnaires.* They usually require details of economic, social, and environmental behavior, including diversity statistics, carbon footprint data, details of any accreditations such as ISO standards, copies of CSR reports, internal policies, and the firm's approach to procurement. The score on these requirements can be a factor in the selection of the appropriate advisor.

**Consideration:**

As many of these questionnaires are based on the UN Global Compact or other international guidelines there is a significant advantage in being able to show that the firm has policies in place based on such guidelines.

## 4. The Lawyer/Law Firm Responsibility as Enterprise

The sole practitioner/law firm qualifies as an "enterprise" in the sense of the international, European and national CSR instruments.<sup>18</sup> The EU Commission stipulates in its Communication "A renewed EU strategy 2011-2014 for Corporate Social Responsibility" of 25 October 2011<sup>19</sup> that each enterprise is responsible for its "impact on society".

### a) Compliance

As a minimum, responsible business means *compliance* with applicable laws and regulations; for lawyers this includes compliance with *Bar Rules* regulating attorneys' responsibilities and ethical standards, and, with the *CCBE Charter of Core Principles* of the European Legal Profession and *Code of Conduct for European Lawyers*<sup>20</sup>, covering the economic and governance side of lawyers' responsibilities, in some areas further spelled out in specific guidelines e.g. on anti-money laundering and insider trading.

Any CSR-related claims of NGOs and other stakeholders for more stringent or other standards regarding topics covered by these bar specific rules should not be dealt with under a separate CSR regime but should be discussed in the context of whether the existing rules should be amended or modified.<sup>21</sup> Laws, Bar Rules and CCBE Guidelines are the relevant benchmark for the legal profession.

To the extent CSR-related matters are covered by existing CCBE rules and guidelines we consider them for the time being as comprehensive. This does not preclude the possibility that the CCBE CSR Committee may revisit existing CCBE CSR-related guidance at a later stage and submit suggestions for amendments, based on the latest CSR developments.

### b) Additional (voluntary) CSR responsibilities

According to the EU Commission enterprises should develop an approach to CSR that is appropriate to their circumstances, in particular, the size of the enterprise and the nature of its operations. Large enterprises and enterprises at particular risk of having negative impacts (e.g. chemical or extractive industry) are encouraged to carry out risk-based due diligence, including through their supply chains (which may encompass law firms). For most small and medium sized enterprises the CSR process is likely to remain informal. As a minimum, human rights, labour and employment practices, environmental issues, and combating bribery and corruption should be covered.<sup>22</sup>

18 See Guidance I, Part I, 3, and Part II, 2b.

19 See Guidance I, Part I, 3b.

20 Edition 2010, [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_CCBE\\_CoCpdf1\\_1382973057.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf)

21 See e.g. the recommendations of A4ID addressed to the bars to include human rights related obligations, Introduction.

22 See Guidance I, Part I, 3b.

As the EU, and in particular the European legal profession, is a highly regulated area, most CSR topics are already covered by existing compliance requirements.

Additional CSR responsibilities which are discussed are:

- (1) Human Rights, Social and Environmental Responsibilities
- (2) Client relationships
- (3) Supply chain management
- (4) Pro bono/Charity Engagements

#### (1) Human Rights, Social and Environmental Responsibilities

In Europe, *human rights* are spelled out in detail by legislation and national courts, the European Court of Justice and the European Court of Human Rights. A separate human rights regime for businesses built (by whom?) on the basis of direct recourse to UN Human Rights Conventions (as suggested by the UNGP) creates, as indicated above, uncertainties and potential conflicts with the established and elaborate European human rights regime and the rule of law, which delineates the spheres of freedom and responsibility for business and potentially affected parties and provides for detailed procedures in which stakeholder interests are to be considered.

To the extent a law firm maintains activities in *countries with weak governance zones* where compliance with the respective national laws provides for a level of protection far below the home standards, it may be advisable that the law firm develops a policy providing for equivalent protection for its overseas activities. This issue requires further consideration and will be discussed at a later stage.

Despite existing legislation, the legal profession has identified particular *areas where it can do more* to enhance the situation which are to be encouraged (again on a proportionate basis relative to the size of the law firm):

- Foster employee health and wellbeing, e.g. psychological support to avoid burn-outs, to master depression and personal crises, physiotherapy and exercise programmes to avoid back aches etc.
- Gender and Diversity issues, e.g. conscious recruitment, mentoring and coaching, programmes for female professionals, targets for employment and equity partnership, continuing education programs, technical equipment to provide flexibility regarding the work place, paternity and maternity leaves for both sexes, part-time arrangements, disability policies, etc..
- Environmental enhancements, e.g. reduced paper consumption, reducing or compensating for their carbon footprint, electronic file keeping, waste reduction measures, energy saving devices, recycling friendly computers, reduced business travel etc.

For larger firms it may be advisable to develop written guidelines and policies and/or to report on a regular basis; for small and medium sized firms, taking into consideration the relatively low risk potential, it should suffice to deal with these issues in a more informal way. It should be mentioned, however, that CSR policies can be a *competitive advantage* in the war for talent and with regard to the firm's attractiveness for CSR-conscious clients. In either case, to effect change or development in this area, the law firm's governance structures need to provide support and incentives.

Set out in the **Appendix** is a list of questions that law firms might seek to address when seeking to develop their CSR activities.

It should be mentioned that the CSR requirements described above may differ significantly from the requirements imposed on a law firm as supplier of services by a client, as the latter are usually less differentiated applying to all kinds of businesses. In that regard the goal should be that the law firm's supplier responsibilities should converge with the stand-alone-responsibilities.

#### **Consideration:**

A discussion with the client of the specific situation of lawyers and the dilemma created by inconsistent CSR requirements may be advisable.

#### (2) Client Relationships

NGOs and some other organisations<sup>23</sup> raise far reaching duties for law firms to examine, influence and sanction a (potential) client whose behavior has or may have a "negative human rights impact". It is an established rule that a lawyer may not *aid and abet* a client in illegal behavior. So far, we are on solid ground. The much further reaching NGO recommendations, however, potentially conflict with the role of the lawyer as described above. In our densely populated areas there are few commercial or industrial operations which do not have a "negative impact" on someone's property or health. Planning, zoning and environmental law define in detail which and to what extent negative impacts have to be borne by affected parties. Any environmental lawyer will, by advising and representing a client in a permitting procedure "cause", or "contribute" or will be "directly linked" to the client's "negative impact" which is, however, considered acceptable by the applicable laws. A lawyer may suggest choosing less burdensome alternatives to the extent they are available. Advice within the boundaries of the law should not be considered as a violation of CSR or human rights. Otherwise the foundations of the legal profession are at stake.

It might well be that a law firm may not want to advise a client with a proven track record of gross human rights violations, e.g. for reputational reasons. This should be left to the individual law firm's decision, and due diligence in that regard may be part of a "*know your client*" policy. It is, however, also respectable and in line with the basic requirements of the rule of law that someone like the mass murderer Breivik or the Nazis in the Nuremberg trials, accused of the worst atrocities, or companies accused of using child labour, were represented by lawyers. The attorney's official function is also to ensure a fair trial.

23 See A4ID Fn. 4.



To the extent a lawyer has an influence on a client ("leverage") he can try to steer the client in a direction to minimize or avoid negative impacts. When the client decides, however, that he does not want that advice, or, for whatever reason cannot or does not want to avoid legal but negative impacts, the lawyer's leverage is at an end. Neither the lawyer nor the bar can impose on the client an obligation to obtain unsolicited advice and, as noted above, obliging a lawyer to withdraw in such circumstances would not necessarily promote the rule of law and may breach the relevant regulatory requirements.

### (3) Supply Chain Management

Taking into consideration that the European legal profession and its typical suppliers are not a high risk sector and that supply chain management including audits along the value chain can entail substantial bureaucratic burdens and cost, small and medium sized law firms may, but should not be required to, establish a formal supply chain management.

Large multinational law firms may be asked by their multinational clients to have a formal supply chain management in place if they want to work for this client. This can include formalized procurement policies, supply and service contracts containing specific CSR requirements, and regular audits. It should be taken into consideration, however, that it is undesirable that these supply chain policies lead to market concentrations, eliminating small and medium-sized suppliers which may not be capable of complying with the bureaucratic challenges and of bearing the cost.

### (4) Pro bono and community investment

The CSR Committee will consult the Access to Justice Committee.

## 5. Bars and Law Societies as Enterprises

Bar organisations have their own role to play, consistent with their position and functions.

There are already bars which develop CSR policies including the publication of CSR reports, based on the UN Global Compact or other CSR guidelines.<sup>24</sup>

(1) Like law firms as enterprises, bar organisations may establish CSR policies including

- employee education, training and well-being, part-time arrangements etc.
- adequate reflection of gender and diversity in their administration, committees and chair and top management functions; this may include stipulations in the bye-laws of the organisation limiting the office term, the reelection possibilities, the maximum age, to allow for permeable structures; it may include provisions that the number of women or other under-represented groups shall be proportionate to the membership of the bar organisation on all levels of hierarchy including bar academies and the like;
- optimising their environmental impact regarding waste generation, energy and resources including paper savings etc..
- bar organisations may establish CSR committees assisting them and their members in the development and implementation of CSR policies.

(2) Bar organisations may assist their members

- by providing guidance on CSR matters, in particular, regarding CSR critical questions and dilemmas
- by providing education on CSR matters, to their members and at universities;
- by encouraging lawyers to discuss and collaborate with other lawyers on the development of CSR policies and practices.

(3) Bar organisations may promote CSR in a multitude of ways, e.g. by establishing a human rights and/ or CSR committee, by protest letters, by raising human rights and other CSR issues in the press, by cooperation agreements with bars in countries with weak governance regimes (e.g. the Belgian Bar and African Bars), by supporting Avocats sans frontieres or other CSR initiatives.

(4) Bar organisations may establish rules for pro bono advice and support community engagements of the bar and its members.

<sup>24</sup> E.g. the Paris Bar, see <http://www.avocatparis.org/home/presentation-et-missions/developpement-durable.html>  
<http://dl.avocatparis.org/com/anais/rse/RapportRSE.pdf>



## 6. Outlook

The CSR Committee will *update the country table*<sup>25</sup> as the EU Commission's Action Plan 2011-2014 for CSR provides for a host of actions which shall be completed by the end of 2014, in particular, the EU Member States are required to come up with National CSR Action Plans.

The CSR Committee suggests developing further guidance regarding the *Considerations* raised above concerning dilemmas and critical questions the legal profession faces.

The CSR Committee will consult with the Access to Justice Committee regarding guidance on pro bono and community investment.

<sup>25</sup> See: [http://www.ccbe.eu/index.php?id=94&id\\_comite=54&L=0](http://www.ccbe.eu/index.php?id=94&id_comite=54&L=0)

# APPENDIX

## **Key Questions to address.**

For law firms at the beginning of thinking about what CSR means in practice for them, below is a list of useful questions to ask and determine where some initial gaps might be.

### **General/Governance**

- (a) Does your firm know what its key social and environmental impacts are? Have these been identified through a formal review process?
- (b) How does your firm manage its different social and environmental responsibilities? Does it have any policies in place and published internally? Are these based on the UNGC/ISO 26000/UNGP?
- (c) Do you have formally allocated resources with defined responsibilities and accountability in all aspects of CSR?
- (d) Have you developed a plan of action and set targets?
- (e) Do you measure the return on investment / impact of your social and environmental initiatives?
- (f) Have you identified your key stakeholders – employees, clients, local community, bar/law society? How do you interact with them on these issues?
- (g) Have you linked performance on CSR related objectives within the appraisal process of key employees?
- (h) Do you wish to report any non-financial information publicly?

### **Employees**

- (a) What is your firm doing about your employees' health and wellbeing?
- (b) Does your firm measure its employee demographics?
- (c) What is your firm doing about diversity and inclusion in the workplace?
- (d) What is your firm doing about developing the skills of its employees?
- (e) How does your firm educate and engage employees on the firm's CSR aspirations and core values?
- (f) Does your firm offer work experience or other opportunities for developing aspirations of young people from non-traditional backgrounds?
- (g) What are your recruitment policies – are they open to all?
- (h) Does your firm participate in community investment and volunteering programmes?
- (i) Do you have a formal pro bono programme?

### **Environment**

- (a) What can you do to reduce your environmental impact – consumption of paper, power, water, reduction/offset of carbon footprint, reduction of waste, recycling opportunities?
- (b) Are there benchmarks you can cross check with?
- (c) Have you set targets over the next few years? Who will review the progress?

### **Client Relationships**

- (a) Do your client and new matter introduction processes involve a level of diligence and scrutiny (proportionate to the size and resources of the firm) to see if there are any issues of human rights abuse relating to the client or the specific matter?
- (b) Are you able to advise on soft/hard law relating to CSR? Should you include /exclude it as part of your offering to clients

### **Supply Chain**

- (a) Do you have in place your own responsible procurement guidelines?
- (b) Have you reviewed your existing supply chain for its compliance with your values and objectives?
- (c) What obligations are you under to your clients in this respect?

### **Community Investment**

- (a) What contribution are you making to the community (ies) in which you operate?
- (b) Are there particular areas of need to which you could contribute or to which your legal and non-legal staff's volunteering activities could be directed?
- (c) Do you have a matched giving programme?

