

Corporate Social Responsibility and the Legal Profession

Guidance II

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).¹ 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, Simon Hall.

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¹ See: 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 2011² 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 I³, we increasingly see publications suggesting, for consideration, far-reaching duties for the legal profession regarding CSR.⁴

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.

² See Guidance I, p. 8 seq.

³ Chapter I

⁴ See e.g. Advocates for International Development (A4ID): "Law firms' implementation of the Guiding Principles on Business and Human Rights", 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.⁵

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

⁵ 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.

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.⁶

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

⁶ 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.

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 .

2. Advice on CSR

As pointed out in Guidance I⁷ 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 Enterprises⁸ or the Equator Principles⁹ “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 law¹⁰. In fact soft law, as precursor of hard law¹¹, 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.¹² 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

⁷ P. 10 et seq.

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

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

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

¹¹ 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/RAPPORT%20ETUDES/droit_souple_4-propositions_021013.pdf

¹² 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.

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.¹³

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.¹⁴ 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/client¹⁵; 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

¹³ 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.

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

¹⁵ 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.

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.

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 issues¹⁶ 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 conduct¹⁷ or reporting on CSR matters including goals and targets. Despite the firm's existing but alternative approach to CSR the client

¹⁶ See Guidance I, Part I, p. 4.

¹⁷ A code of conduct can create a cause of action against the firm.

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.

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.¹⁸ The EU Commission stipulates in its

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

Communication “A renewed EU strategy 2011-2014 for Corporate Social Responsibility” of 25 October 2011¹⁹ 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*²⁰, 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.²¹ Laws, Bar Rules and CCBE Guidances 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.²²

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:

¹⁹ See Guidance I, Part I, 3b.

²⁰ Edition 2010,

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.

- (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 organisations²³ 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

²³ See A4ID Fn. 4.

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.

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.²⁴

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

- employee education, training and well-being, part-time arrangements etc.

²⁴ 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>

- 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.

6. Outlook

The CSR Committee will *update the country table*²⁵ 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.

²⁵ See: http://www.ccbe.eu/index.php?id=94&id_comite=54&L=0

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

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 forms 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?
- (i) What are your recruitment policies – are they open to all?

- (j) Does your firm participate in community investment and volunteering programmes?
- (k) 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?