

The Role of Soft Law Methods (CSR) in Labour Law

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Abstract

Discussions about the dichotomy of hard and soft law that were initiated in academic circles more than a decade ago have not been closed yet, and their deeper analysis aims at providing the answer to the question whether soft law should be seen as a complement to hard law or as its opponent. In contrast, corporate social responsibility (CSR), with a greater or lesser degree of intensity, has been the focus of international organisations, scientific discussions and debates and consequently multinational companies for more than three decades. The author tries to answer the question in relation to the role of CSR as an ethical way of managing multinational companies in modern labour law and whether CSR should be seen as a soft law method or as creative potential and strength that encourages the creation of new sources of labour law. Moreover, the author also questions whether CSR is a practical tool/instrument or a potentially effective means hiding the properties of all of the aforementioned categories. Following an unambiguous role of the open method of co-ordination (OMC) as a new mode of governance within the European Employment Strategy, OMC stresses the need for interpreting and positioning/repositioning CSR in the system of labour law at the international, European and national level. Are we confronted with these dilemmas and issues in the same way or does a definitive answer referring to the role of CSR in labour law depend on the legal culture we belong to and the level of interpretation facilities available to national and supranational systems?

I. Introduction

The International Labour Organization (ILO) and the Organisation of Economic Co-operation and Development (OECD) are the first international organisations which identified the need for a deeper analysis and implementation of CSR in multinational companies during the sixties and seventies of the last century. In 1977, the former adopted¹ the *Tripartite Declaration of Principles concerning*

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¹ See Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) as amended at its 279th (November 2000) and 295th Session (March 2006); List of international labour Conventions and Recommendations referred to in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) as amended at its 279th

*Multinational Enterprises and Social Policy*², that has been amended several times so far, whereas a year later, the latter adopted *The OECD Guidelines for Multinational Enterprises*³ as part of the *Declaration on International Investment and Multinational Enterprises*. Those were the sources that represent first attempts to create international instruments dedicated to conduct for Multinational Enterprises (hereinafter referred to as: MNEs) and their relations predominantly with developing countries, where they carried out most of their production activities. The ILO guidelines addressed national governments, MNEs, workers and employers organisations, and they were dedicated to the field of employment, vocational training, living and working conditions, industrial relations and human rights, while the OECD recommendations *inter alia* focused on environmental protection, competition in the market, tax regulations as well as science and technology. The goal of the guidelines that has remained the same ever since is to promote the contribution that MNEs can make to economic and social development of the countries in which they operate, but also to environmental protection and sustainable development in general.

Attempts to promote a new approach and perception of the role of multinational companies in the development of society can be found earlier in the past, especially in American literature and the analysis of economic history, far back in the thirties and, in particular, the fifties of the last century.⁴ However, the modern concept of CSR originates from the 90-ies of the 20th century when after the *Conference on Environment and Development* (“Earth Summit”) held in 1992 in Rio de Janeiro, the United Nations (UN) invited MNEs to include provisions on the protection of workers, environment and human rights into international commercial contracts they sign. What the legal status and the legal nature of CSR have been since then, especially in terms of globalisation and the erosion of labour rights protection, could be analysed through the conceptual framework and status in international (labour) law.

II. Conceptual framework – from CSR to soft law

(November 2000) and 295th Session (March 2006); Addendum I to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 238th Session (Geneva, November 1987), as amended at its 264th Session (Geneva, November 1995) and 279th Session (Geneva, November 2000) and 295th Session (Geneva, March 2006); Addendum II to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 277th Session (Geneva, March 2000); and the Procedure for the examination of disputes concerning the application of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy by means of interpretation of its provisions, adopted by the Governing Body of the International Labour Office at its 232nd Session (Geneva, March 1986), in: International Labour Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, International Labour Office, Fourth Edition, Geneva, 2006.

² Ibid., pp. 1-17.

³ See Organisation of Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises*, Policy Brief, OECD, 2001, pp. 1-8. Available at: <http://www.oecd.org/investment/guidelinesformultinationalenterprises/1903291.pdf> (last visited: 1 September 2012).

⁴ See Archie B. Carroll, A History of Corporate Social Responsibility, in: Siegel, Donald S., Jeremy Moon, Dirk Matten, Abigail McWilliams, Andrew Crane, *The Oxford Handbook of Corporate Social Responsibility*, Oxford University Press, Oxford, 2008, pp. 19-46.

II.I. What is CSR?

Different approaches to defining CSR largely depend on the focus of interest of each researcher. Hopkins suggests that CSR “is concerned with treating the stakeholders of the firm ethically or in a responsible manner”. “Ethically or responsible” implies “treating stakeholders in a manner deemed acceptable in civilised societies” and “social includes economic and environmental responsibility”.⁵ The European Union (EU) defines CSR 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”.⁶ Being socially responsible implies not only fulfilling “legal expectations”, but also going beyond compliance and investing “more” into human capital, the environment and the relations with stakeholders.⁷ Before the global economic crisis it was a challenge for the EU to determine how CSR can contribute to the Lisbon goals of building a dynamic, competitive and cohesive knowledge-based economy.⁸ A recent *renewed EU strategy 2011-14 for corporate social responsibility*⁹ sees CSR as a support in achieving the objectives of the Europe 2020 strategy for smart, sustainable and inclusive growth, including a 75% employment rate target, which at the same time provides space to European businesses to take part in achieving the goals of sustainable development and a successful and highly competitive social market economy.¹⁰ The term CSR has lately been updated and supplemented by new terms such as “corporate sustainability” and “corporate citizenship”, which have a similar focus of interest, and some authors insist on the term “corporate responsibility”, suggesting that the word “social” in the name itself directs the interest exclusively towards labour standards.¹¹ In contrast to this, opponents of the latter stress that this approach actually hides attempts of business and policy circles to focus the interest solely on the interests of the business sector, neglecting thereby the social and environmental dimension of CSR.¹² In turn, based on a historical discourse of a contemporary discussion of CSR, McCrudden sees the problem as the continuation of the old debate about the appropriate role of governments and the limits of markets that are “dressed in new clothes”.¹³ As highlighted by prominent McCrudden, CSR should be in everyone's interest.¹⁴

In these circumstances, CSR diverts the debate to questioning the relationship of voluntary and mandatory adoption of standards, on the one hand,

⁵ Michael Hopkins, *The Planetary Bargain – CSR Matters*, Earthscan, London, 2003, id: *Corporate Social Responsibility and International Development, Is Business the Solution*, Earthscan, London, 2007, p. 16.

⁶ EU Commission, Green Paper Promoting a European Framework for Corporate Social Responsibility, COM (2001) 366 Final, Brussels, 18 July 2001, p. 6.

⁷ Ibid.

⁸ Cf. Ibid., p. 5.

⁹ EU Commission, A renewed 2011-14 EU Strategy for Corporate Social Responsibility, COM(2011)681 Final, Brussels, 25 October 2011.

¹⁰ Ibid., p. 3.

¹¹ Jennifer A. Zerk, *Multinational and Corporate Social Responsibility, Limitations and Opportunities in International Law*, Cambridge University Press, Cambridge - New York - Melbourne - Madrid - Cape Town - Singapore - Sao Paulo, 2006, p. 32.

¹² Ibid.

¹³ Christopher McCrudden, *Buying Social Justice – Equality, Government Procurement, & Legal Change*, Oxford University Press, Oxford - New York, 2007, p. 366.

¹⁴ Ibid.

and reflections not on why CSR is needed, but on how it can be successfully implemented, on the other. The answer to these questions can be partially obtained through the summary analysis of soft law and its function.

II.2. Soft law

In the context of EU law, soft law implies instruments, such as guidelines, declarations and opinions, that are, as opposed to primary (treaties, etc.) and secondary (regulations, directives and decisions) legislation, not required of those who are addressed, but one should thereby distinguish between their lack of binding effect and the potential impact they have in practice.¹⁵ In other words, although the instruments and legal sources of soft law are not legally binding, their interpretative potential should not be underestimated. Just think of the transition of the legal status of the Charter of Fundamental Rights of the EU, that started as a kind of a soft law source with strong interpretive effect, and after the Lisbon Treaty it obtained an entirely new legal status identical to the founding treaties. Of course, as a supranational entity, the EU cannot *par excellence* represent the overall unit of measurement for the whole world, but in international law there are soft law initiatives such as the Voluntary Principles on Security and Human Rights promoting corporate human rights risk assessments or the Kimberly Process Certification Scheme aimed at preventing trafficking of blood diamonds from conflict zones¹⁶, that have the potential to replace, at the voluntary level, regulatory gaps and deficiencies *in favorem* the protection of human rights.¹⁷

As “rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects”¹⁸, soft law raises questions about the boundaries between public and private spheres, law and politics, and questions in relation to “power, authority, legitimacy, social practices, democracy and how organisations work”.¹⁹ Soft law in the EU clearly has the “progressive nature”²⁰ and its measures can be used by national courts of Member States to interpret national legislation. However, these measures cannot prevail as hard measures²¹ and hard law are opposed. Experiences referring to EU law and its transformation in certain areas deepen the debate on the role of soft law and consequently CSR in the international arena. The question that also needs to be answered is: “To what extent can international, European, and even national soft law sources be integrated into hard law or other formal legal sources?”. Giving answers is to a great extent reminiscent of Kelsen’s old claim of a somewhat vague term “sources of law”, thus making the term in question obsolete. Moreover, it provokes a

¹⁵ Brian Bercusson, *European Labour Law*, Second Edition, Cambridge University Press, Cambridge, 2009, p. 187.

¹⁶ See Henry J. Steiner, Philip Alston, Ryan Goodman, *International Human Rights in Context*, Third Edition, Oxford University Press, Oxford, 2007, pp. 1409-1410.

¹⁷ *Ibid.*

¹⁸ Francis Snyder, The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques, *Modern Law Review*, Vol. 56, Issue 1, 1993, p. 32.

¹⁹ Ulrika Mörth, Soft law and new modes of EU governance – a democratic problem? Paper presented in Darmstadt, November 2005, p. 4. Available at: http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/research%20groups/6/Papers_Soft%20Mode/Moerth.pdf (last visited: 1 October 2012).

²⁰ Jo Shaw, *Law of the European Union*, Third Edition, Palgrave Law Masters, Basingstoke – New York, 2000, p. 248.

²¹ *Ibid.*, p. 247.

discussion of substantive and formal sources, and revives debate on whether each norm should be accompanied by a legal sanction in order to be considered legal.²² Since the role of MNEs may further complicate researched complex phenomenology of CSR, it is necessary to give a basic outline of their definition.

II.3. How should MNEs be defined

“Multinational corporation”, “multinational enterprise”, or “transnational corporation”, have an organisational structure that enables managerial control across national borders, despite different national circumstances of many operational elements of the group. They contain a number of competitive advantages because they do not trade across borders only with finished products, but also with a variety of inputs, raw materials, know-how technologies and management. Moreover, this occurs not only between the involved partners, but also in relations with third parties. Multinational companies and their constituents, each individually, have legal personality and national origin, but they are linked to centralised management and control managed by the owner.²³

MNEs undoubtedly play a key role in international economics and they affect economic growth through direct investment, trade, technology development, finance, investment in local infrastructure and employment. In times of economic crisis, they are the preferred partner in every society, in developed, developing and underdeveloped countries. Their impact on economic and social welfare of states in which they operate is unquestionable. However, due to permanent relocation of manufacturing processes to developing countries, in addition to positive roles, MNEs can have a number of negative roles as well: to encourage social dumping, to indirectly affect violations of labour standards, to exploit natural resources of developing countries irresponsibly, to avoid compliance with environmental regulations, etc. As unmistakable subjects of law, MNEs, like their national counterparts, are subject to the international legal framework and can play a significant role in encouraging good practice and promoting appropriate standards of responsible management and business activity operations. Law influences national and international environment in which MNEs operate in many ways. Moreover, the law that applies to the MNE can be the law of the state it is headquartered in or the one in which it runs its “principal operations”, i.e. the law of the host country in which it carries out “value-added activities”.²⁴ The dichotomy of true standards that exist in these relationships may not only affect their business performance and overall profits, but also reflect considerable differences in the level of standards applied in countries hosting their

²² Cf. Berislav Perić, *Struktura prava*, [in English: *The Structure of Law*], Informator, Zagreb, 1994, p. 37; Duško Vrban, *Država i pravo* [in English: *State and Law*], Golden marketing, Zagreb, 2003, pp. 345-348.

²³ See Cynthia Day Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization*, Martinus Nijhoff Publishers, The Hague, 2002, p. 9; Peter T. Muchlinski, *Multinational Enterprise and the Law*, Second Edition, Oxford University Press, Oxford, 2007, pp. 3-8; Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law, Multinational Corporation in Developing Countries*, Rutledge, Abingdon – New York, 2011, p. 7.

²⁴ Seymour J. Rubin – Don Wallace Jr., Introduction: Transnational Corporations and National Law, in: Seymour J. Rubin – Don Wallace Jr. (eds.) and John H. Dunning (gen. ed.) *Transnational Corporations and National Law*, United Nations Library on Transnational Corporations, Vol. 19, Rutledge, London – New York, 1994, pp. 1-2.

headquarters and countries in which their subsidiaries operate, which usually have lower national legal standards *inter alia* with respect to the protection of workers' rights. Moreover, without proper coordination we could also imagine conflicts of laws in the field of labour i.e. private law, between home and host countries²⁵ not only in regard to the application of international labour standards, but also specific contractual provisions, and employment status of management. Thus the role of CSR, its legal nature and CSR instruments can eventually become an important framework for achieving the protection of workers' rights in (international) labour law.

III. Legal nature of CSR

Taking into account the aforementioned, and in particular the elements contained in the definition of soft law as “*rules of conduct that are laid down in instruments which have not been attributed a legally-binding force as such, but nevertheless may have certain indirect legal effects that are carried out and may produce practical effects*”, that was proposed by Senden²⁶, we may conclude that CSR is a soft law method, i.e. the creative potential, that arises from ethical MNE management and can serve as the basis for creating instruments and sources of *inter alia* (labour) law with the possible direct and indirect effects on compliance with labour standards, but also on labour law and labour relations in general.

Although even today debates still start from the assumption that CSR is voluntary in nature, it should be borne in mind that CSR actually reflects how companies use law, i.e. how they respond to their legal obligations and use law to “enforce their rights”.²⁷ Moreover, the approach based on “voluntary” or “mandatory” CSR assumes the fact that many CSR-related issues referring in particular to labour law, have already been closely regulated by other legal sources²⁸ (international conventions, national legislation, regional sources). A legal standard may not be binding in order to be applied, since the theory of law teaches us that in some cases a sanction can be determined subsequently, *ex post facto*, if there is a body that could determine it. In the context of compliance with international labour standards, which are partly CSR, there is no doubt that such bodies exist. However, this does not mean that CSR does not contain elements that are metajuridical in their character, because the sources of law can generally be based on metajuridical categories (moral, interests, values). States sometimes comply even with non-binding legal instruments, so it is not unrealistic to expect the companies to do the same. The meaning of CSR is to go beyond what is provided in the spirit of social responsibility and the sense of sustainable development. By accepting CSR as a soft law method, we must bear in mind that the term soft law itself, according to Shelton, seems to contain a normative element that leads to “expectations of compliance”.²⁹ By its nature, CSR is international, although in different national systems it may have different sizes

²⁵ Ibid., p. 2.

²⁶ See Linda Senden, Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?, *Electronic Journal of Comparative Law*, Vol. 9, Issue 1, 2005, pp. 1-27. Available at: <http://www.ejcl.org/91/art91-3.PDF> (last visited: 1 October 2012).

²⁷ Zerk, p. 35.

²⁸ Ibid, p. 34.

²⁹ Steiner - Alston – Goodman, p. 165.

and forms, so that its link with globalisation and the importance in the relations between international organisations³⁰ and other interest holders is indisputable. For trade unions, CSR can be a way to promote the culture of compliance with law and standards, but also a way to promote good industrial relations and reputation of unions.³¹

The difference between hard law and soft law obligations under international law is not so clear any more, and sometimes it is not possible to give a clear answer to the question as to whether the subjects comply with a certain rule because it is contained in the international source or a customary law obligation or because they closely follow the expectations of an organisation whose members they are.³² Therefore, we should bear in mind that CSR has a twofold dimension and action, inward and outward. After being accepted in a company, CSR becomes an integral part of both company management and its image. There are various motives that companies cite as reasons for adopting socially responsible behaviour, but the following ones are most frequently emphasised as the main factors of competition: the desire to recruit skilled and educated workforce, improving relations among staff, increased productivity and quality of work, an increase in consumer confidence and strengthening a company's brand image.³³

By its nature, CSR is undoubtedly a complex phenomenon implemented at the national level and within international organisations by means of various models of self-regulation and by using different instruments. However, we cannot deny its importance as a soft law method promoting a series of international labour standards, primarily because of the framework established through a specific constitutional architecture of the International Labour Organisation. At the universal level, there are mechanisms through the United Nations Global Compact, and the regional importance is recognised by the European Union and the Member States that implement CSR through the existing legal framework.

IV. CSR in ILO, UN and EU activities

IV.1. CSR and the United Nations

The United Nations, together with its specialised agencies, have surely occupied a central place in the development and advocacy of CSR at a global level. At this point, we will focus only on the most important activities, namely those promoted through the *United Nations Global Compact* that was launched in July 2000. The United Nations Global Compact (the UNGC) is a “leadership platform for the development, implementation and disclosure of responsible and sustainable

³⁰ Dwight W. Justice, Corporate social responsibility: Challenges and opportunities for trade unionists, in: Corporate social responsibility, Myth or reality, Labour Education, No. 130, 2003/1, p. 5.

³¹ Ibid.

³² Steiner - Alston – Goodman, p. 685.

³³ International Instruments and Corporate Social Responsibility, The Labour Dimension of CSR: from Principles to Practice. Project Sustainable Development through the Global Compact, 2007, p. 2. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/--multi/documents/instructionalmaterial/wcms_101247.pdf (last visited: 1 October 2012).

corporate policies and practices.”³⁴ The UNGC aims to align business operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption, and it includes more than 8,500 signatories from 135 countries worldwide. These principles include *inter alia* four based international labour law standards significant for the world of work, which were promoted under the ILO as early as in 1998 – i.e. freedom of association and the recognition of the right to collective bargaining, elimination of all forms of forced and compulsory labour, the effective abolition of child labour and the elimination of discrimination in the context of labour and employment. These principles are supplemented by two additional significant principles important for our discussion, because they are associated with general protection of human rights and not only workers’ rights: principle 1 - of the need to support and respect the protection of internationally proclaimed human rights, and principle 2 - to be safe not to participate in human rights violations. The UNGC, with the help of various tools, programmes and strategies, seeks to enhance two complementary objectives: mainstream the ten principles (other than those mentioned, these are the principles relating to environmental protection and anti-corruption) in business activities around the world and catalyze actions in support of the wider context of the United Nations objectives, including the United Nations Millennium Development Goals.³⁵ The UNGC is not a regulatory instrument, but a voluntary initiative that relies on public accountability, transparency and disclosure to complement regulation and to provide a space for innovation and collective action. This is a leadership initiative, because the company’s CEO may become its signatory, and, where possible, its main governing body as well.

The UNGC expects companies to take measures in accordance with their commitment to the initiative and to issue a public disclosure to stakeholders on progress achieved with regard to CSR. They can do that through a Communication on Progress (COP) as “a public communication to stakeholders (e.g., consumers, employees, organised labour, civil society, investors, media, government) on the progress the company has made in implementing the ten principles and, where appropriate, in supporting UN goals through partnerships”.³⁶ In the context of the UNGC, McCrudden asked a rhetorical question a few years ago whether the UN itself respected the principles promoted, since the organisational leadership decided on administrative practice which was mostly exhausted by raising awareness of potential UN suppliers.³⁷ However, the organisation itself made a step forward by demonstrating its commitment to the goals it promotes, because in 2005 the UN Procurement Department drafted the UN Supplier Code of Conduct that was adopted a year later, which confirms the goals promoted in the UNGC.³⁸

The UNGC and the methodology it covers have enormous potential to promote CSR at the global level, primarily through self-regulation, which is given a specifically defined international framework by the UN. Naturally, we could list

³⁴ For more information, see: <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited: 1 October 2012).

³⁵ Ibid.

³⁶ United Nations Global Compact, *After the Signature, A Guide to Engagement to in the United Nations Global Compact*, UN Global Compact Office, January 2012, p. 19. Available at: http://www.unglobalcompact.org/docs/news_events/8.1/after_the_signature.pdf (last visited: 2 October 2012).

³⁷ McCrudden, pp. 379-380.

³⁸ Cf. Ibid., p. 382.

a number of advantages and disadvantages of such approach to the holders of interest and the involved subjects, which we talked about on several occasions, but we should not underestimate the fact that each method has its own way of maturing and penetration into efficient implementation, a path that has many routes, but which undoubtedly leads to the domain of labour law and the philosophy of its new resources in the process of transformation.

IV.2. CSR and the International Labour Organization

The role of the ILO in the implementation of a labour law dimension of CSR is indisputably great and goes back into the past of the organisation. At the international level, no other international organisation has done so much to build a system of international labour law standards through conventions as central sources of international labour law, as well as their corresponding recommendations, which often contain technical and implementing instructions for the implementation of solutions contained in the conventions. The ILO is by no means an ideal international organisation and it has reasonably tolerated criticism in the context of the lack of effective supervision over compliance with the rights guaranteed by numerous international conventions. However, its new constitutional architecture created by the adoption of the *Declaration on Fundamental Principles and Rights at Work* in 1998 (that have been previously mentioned) is important for the CSR system, as the aforementioned fundamental principles and rights are considered at the same time to be UNGC principles, which all states are obliged to comply with, regardless of whether they have ratified any of the fundamental conventions or not. The sources of labour law that emerged within the ILO framework are the results of the tripartite action at the international level, i.e. a social dialogue between the representatives of governments, trade unions and employers. Of course, in addition to binding legal sources, the ILO provides a series of guidelines, codes of practice, declarations and the like that can facilitate the implementation and realisation of international labour law standards which do not have a binding character.

The *ILO Declaration on Fundamental Principles and Rights at Work* was adopted, it should be noted, on the basis of conclusions of the Ministerial Conference of the World Trade Organisation (WTO) held in Singapore in 1996, which emphasised the willingness and obligation to respect internationally recognised labour standards and expressed support for their further progress within the ILO. Since the prohibition of forced, compulsory and child labour, the prohibition of employment and workplace discrimination and the freedom of association and the right to collective bargaining were identified as fundamental principles and rights, the adoption of the Declaration imposed fundamental obligation on the Member States to comply with them, even in cases when provisions of relevant international conventions do not apply to the employees of a Member State because they have not been ratified. The Declaration defined the fundamental commitments that draw their strength from the membership in the Organisation and the principles enshrined in its Constitution, and not in the ratification of the so-called core conventions established in 1995. Its content and follow-up created a significant foundation for a decentralised system for the implementation of labour standards which reduces the hitherto strong responsibility of governments and encourages different factors from MNEs to consumers, in defining, promoting, and even implementing core labour

standards.³⁹ In fact, this is where today's potential of CSR and its instruments as sources of labour law lies. The *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* of 1997 mentioned in the Introduction along with the *Declaration on Principles and Fundamental Rights at Work* becomes the backbone of MNE's behaviour in the context of functioning of labour-related issues as part of CSR.

IV.3. CSR and the European Union

Sustainable development and creation of new and better jobs was the EU imperative even before the outbreak of the global economic crisis. Following this, in 2005, the European Commission identified a possible central role of CSR in commitment to sustainable development as well as capacity building and strengthening of the market position of the Union, wanting to turn it into "a pole of excellence on CSR".⁴⁰ Progress has been registered in this field since the Lisbon Council and the establishment of the EU Multi-Stakeholder Forum on CSR composed of representatives of business, trade unions and civil society, and with a facilitating role of the Commission. However, initial discussions and activities related to CSR in the Community date back to the nineties of the last century. The CSR Forum has played an important role in the acceptance of the definition of CSR and its development within the EU and globally. Social dialogue, especially at sectoral level, was used as an effective means of promoting CSR initiatives, and the European Work Council played an important role in developing best practices in CSR.⁴¹ It is particularly important that the Commission recognised the necessity of taking over CSR not only in the EU, but also globally, requesting from European companies to behave responsibly, even when they operate outside the EU, in line with international standards and principles and in particular European values. Moreover, the European Alliance for CSR was established as a "political umbrella" for new or existing CSR initiatives by large companies, small and medium enterprises (SMEs) and their stakeholders.⁴²

Under the influence of perception and importance of CSR, but numerous analysed criteria as well, *A renewed EU strategy 2011-14 for CSR* has redefined the CSR as "the responsibility of enterprises for their impacts on society", whereby respect for relevant legislation, and for collective agreements between social partners, represents the main prerequisite for meeting that responsibility.⁴³ European policies to promote CSR according to a new strategy must be based on the guidelines of all relevant organisations: OECD Guidelines for Multinational Enterprises, the ten principles of the United Nations 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 United Nations Guiding Principles on Business and Human Rights. In

³⁹ See Philip Alston, Core Labour Standards and the Transformation of the International Labour Rights Regime, *European Journal of International Law*, Vol. 15, Issue 3, 2004, p. 460; Francis Maupain, Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights, *European Journal of International Law*, Vol. 16, Issue 3, p. 451.

⁴⁰ See COM(2006) 136 Final, p. 5.

⁴¹ Ibid.

⁴² Ibid., p. 6.

⁴³ COM (2011) 681 Final, p. 6.

addition to the protection of human rights, the multidimensional nature of CSR must, what is also *inter alia* significant for our discussion, cover both labour and employment practices (such as training, diversity, gender equality and employee health and well-being).⁴⁴ In the context of the importance of CSR as a soft law method it is important that the strategy encourages further development of self- and co-regulation processes in terms of codes of conduct and their adjustments in certain sectors.

Sustainability Reporting was systematised in the Union by the State of Play, and for each Member State it is possible to find information on how it promotes CSR, ensures transparency and develops policy in support of CSR.⁴⁵ Within the Commission, CSR-related issues are coordinated by the Employment, Social Affairs and Equal Opportunities DG and DG Enterprise and Industry. It should also be borne in mind that the supra-national employers' organisations (EUROCHAMBRES or UEAPME) engage in fostering the spread of CSR across Europe, and several cross-national networks have been established (European Alliance on CSR, the European Environment and Sustainable Development Advisory Councils (EEAC), the European Business Ethics Network (EBEN), etc.

At the normative level, pursuant to Directive 2003/51/EC⁴⁶, European law requires companies to the extent necessary for an understanding of the company's development, performance or position, to include in the analysis in the annual review "both financial and, where appropriate, non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters."⁴⁷ In 2011, the Commission assumed the obligation to create a "new legislative proposal on the transparency of the social and environmental information provided by companies in all sectors" (Single Market Act, SEC (2011)467), from which further commitment to the development of CSR on the territory of the EU and the promotion of employee matters are obvious. Moreover, at the European Union level, a lot has been done not only through CSR, but also through concrete tools aimed at raising customers' awareness of the importance of products not produced by child and forced labour, by informing and education that promoted *inter alia* international labour standards. EU foreign policy should keep in mind that workers' rights as part of human rights constitute general principles of European Union law incorporated in its foreign policy,⁴⁸ confirming thereby requirements by the European companies on corporate social responsibility in their activities around the world.

V. CSR instruments/tools relevant to labour law

⁴⁴ Ibid., p. 7.

⁴⁵ See Corporate Social Responsibility; National Public Policies in the European Union, Italy, 2007; Katelijne van Wensen - Wijnand Broer - Johanna Klein - Jutta Knopf, The State of Play in Sustainability Reporting in the European Union, European Union, 2011.

⁴⁶ Directive 2003/51/EC of the European Parliament and the Council of 18 June 2003 on amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings. OJ L 178/16, 17.07.2003.

⁴⁷ Article 46(1)b.

⁴⁸ Tonia Novitz, The European Union and International Labour Standards: The Dynamics of Dialogue between the EU and the ILO, in: Philip Alston (ed.) Labour Rights as Human Rights, Oxford University Press, Oxford, 2005, p. 214, 219.

Codes of conduct are the most important instrument for promoting CSR, because nowadays they certainly occur *inter alia* as a source of labour law. Various stakeholders have clearly differentiated interests and motives in the creation and application of voluntary codes of conduct. MNEs have introduced them not only because of the commitment or the impact of CSR on the development of codes of conduct, but also as a response to political and consumer pressure, or as part of building and improving the image of a company acting in a socially responsible manner.⁴⁹ Today they should definitely not be viewed as an isolated phenomenon, but in correlation with the methods of corporate ethics and governance, and probably as the most powerful instrument of self-regulation in the implementation and reception of labour standards through CSR. Codes of conduct are becoming sources of soft law and a practical tool for contemporary globalisation that national governments are trying to integrate into legal systems through formal legislation and their institutionalisation.⁵⁰ Of course, they should not be viewed as the almighty sources, because in terms of labour law abuse through labour exploitation in form of subcontracting, work at home or various forms of outsourcing is possible.⁵¹ Codes of conduct are implemented by application in practice, and their efficiency is much higher if you provide some form of monitoring of their implementation.⁵² Then you are not left with a nice set of desires or verbally proclaimed principles, but they get a more extensive, real impact on relations within the wider community.

In addition to codes of conduct, social labelling has had some impact, primarily on consumer awareness, especially in the context of the fight against child and forced labour, and consequently their reduction in developing countries. However, in the sequel, we will primarily focus on the central source of CSR.

VI. The role of CSR and its sources/tools in labour law

Codes of conduct can be classified as sources of labour law into autonomous extra-contractual (professional or self-regulated) sources of labour law. However, the implementation of the solutions contained therein, i.e. the protection of law, principles and freedoms promoted therein, is actually possible through the provisions of collective agreements and/or employment contracts as contractual, autonomous sources of labour law. Reception of solutions into a broader contextual framework of collective agreements and/or employment contracts denotes the beginning of their transformation from soft to hard law. Although not legally binding, the legal character of codes of conduct, as noticed by Kocher, originates from their integration into private law contracts, on the one hand, and the legal context of competition and consumer law, on the other hand.⁵³ CSR therefore represents an undoubtedly creative background or rather a normative

⁴⁹ Rhys Jenkins – Ruth Pearson – Gill Seyfang, *Corporate Responsibility and Labour Rights, Codes of conduct in the Global Economy*, Earthscan, London –Sterling, 2002, pp. 3-4.

⁵⁰ Cf. Jill Murray, *Corporate social responsibility: an overview of principles and practices*, Working Paper No. 43, Policy Integration Department, World Commission on the Social Dimension of Globalization, International Office, Geneva, 2004, pp. 6-8.

⁵¹ *Ibid.*, p. 9.

⁵² Jenkins – Pearson - Seyfang, p. 21.

⁵³ Eva Kocher, *Private Standards between Soft Law and Hard Law: The German Case*, *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 18, Issue 3, 2002, pp. 265-280.

potpourri that is realised through CSR instruments, in particular codes of conduct. The aforementioned transition is characterised by the transformation of fundamental legal principles, rights and freedoms into contractual provisions that give them an immediate sense and the status of immediate subjective rights.

If we focus only on the aforementioned fundamental labour standards of the ILO of 1998, we can easily identify freedoms (freedom of association), rights (the right to collective bargaining) and principles (the prohibition of forced and compulsory labour, the prohibition of child labour and the prohibition of workplace and employment discrimination). Freedom of association does not impose any obligation,⁵⁴ because each individual can abstain from this freedom, or opt to enjoy negative freedom and non-membership of a trade union or other interest group. However, the right to collective bargaining imposes *post festum* an obligation on the legal order to provide the protection of rights guaranteed by collective agreements, but also the primary responsibility on workers and employers to meet each other counter-prestations as a prerequisite to enjoy guaranteed benefits. The prohibition of forced or compulsory labour is part of the freedom to work and the right to work as senior gender concepts, i.e. in comparative legal systems usually constitutional principles on work. The prohibition of child labour is directly related to determining a minimum age for employment that creates an immediate subjective right enforceable before a body competent for the protection. Moreover, the prohibition of child labour and claims that rigid regulations of the minimum age for employment of underage workers may limit the right to work are limited and substantially suppressed by the universal standard of respecting the “best interests of the child” from the Convention on the Rights of the Child of 1989, because there is no absolute freedom of the right to child labour, even in those cases that reached a minimum age for employment established by international sources. Recognition of the concept of specific age groups when it comes to child labour clearly enables differentiation of child work and activities for the purpose of socialisation into the role of adult members of society and exploitative and prohibited child labour. The prohibition of discrimination is, however, an integral part of the right to equality and it has recently developed into a very dynamic segment of rights and the judicature of the Court of the EU, which transformed a legal principle into a fundamental human right to non-discrimination.⁵⁵

Transposed into contractual provisions, part of fundamental international labour standards has a strong interpretive potential through the mechanisms of international law (ILO conventions) or sources of secondary EU legislation (Young Workers Directive, etc). By accepting the previously mentioned analysis by Eva Kocher on the legal character of codes of conduct, which also derives from contract and private law and the context of competition and consumer law,⁵⁶ and by trying, in the wake of all these factors, to put codes of conduct in the context of

⁵⁴ Cf. Ivana Tucak, *Rethinking the Hohfeld's Analysis of Legal Rights*, *Pravni vjesnik*, Vol. 25, Issue 2, 2009, pp. 31-41.

⁵⁵ See Mario Vinković, *Recepcija osnovnih međunarodnih radnopravnih standarda kao temeljnih socijalnih prava Europske unije* [in English: *Reception of the Basic International Labour Standards as Fundamental Social Rights of the European Union*], in: Nada Boridoga Vukobrat – Sanja Barić (eds.) *Socijalna prava kao temeljna ljudska prava* [in English: *Social Rights as Fundamental Human Rights*], Tim Press, Zagreb, 2010, p. 75, pp. 78-80; Mario Vinković, *Dječji rad u međunarodnom, europskom i poredbenom radnom pravu* [in English: *Child Labour in the International, European and Comparative Labour Law*], Tim Press, Zagreb, 2008, pp.1-239.

⁵⁶ Kocher, loc. cit.

collective agreements and employment contracts, we may be able, thanks to Trubek's doctrine of hybrid hard and soft law,⁵⁷ to say that codes of conduct are such hybrid or that they are on their way to become one. Moreover, according to Mückenberger, CSR may be viewed as part of "hybrid global labour law" or "a source of transnational social standards", and core labour standards as "a catalyst of hybridisation" and "something like common law".⁵⁸

In developing countries the situation can be more complex because of the practice of lower labour standards, which are often predicted by ILO conventions, and the insufficiency of the national legislature, in which MNEs find their economic interests. An ethical discourse of CSR, i.e. codes of conduct, has the potential to indirectly push the boundaries of legal protection and enhance mechanisms of local labour-protective legislation supported by the interpretive and protective legal bases contained in international law. International (labour) law is therefore an unambiguous ally of CSR on this way.

At national levels, both in developed countries and developing countries, the biggest problem may, in our opinion, lie in the obstructing local legal culture and local interpretive capacities of competent authorities. Namely, soft law sources have a strong interpretative potential, which, along with skilful legal skills can become a relatively potent mechanism, while the solid, grammatical interpretation, which neglects a teleological meaning and the purpose of a legal source, has the power to obstruct its implementation by making it more impotent than he really is. Therefore, differentiation in perception and the implementation of CSR and its mechanisms/resources at national levels is significant as a result of conditionality by the local legal culture. In other words, legal systems that rely on a teleological interpretation of rights and resources, we believe, can provide to CSR and corporate codes of conduct a far greater momentum than traditional corporate cultures based on a strictly dogmatic, grammatical interpretation which accepts only the rigid legal norm but not the overall socio-economic environment and the socio-legal basis of the very same standard. The goal of such opinion is not to expose traditional legal systems and traditional labour law experts to inappropriate and unnecessary criticism, but to emphasise that a teleological interpretation greatly strengthens and expands interpretive limits and potential of not only hard but also, in particular, *soft law* sources. Unlike the old European democracies, traditional systems such as the Croatian or Hungarian one, are more difficult to adapt to the teleological approach to interpretation of legal standards, because their recent legal and political history has not allowed for enough interpretive freedom for such approach to the interpretation of law. Therefore, in such societies, more mental transition towards observation and re/interpretation of law and sources of law through a teleological focus is probably necessary, and only then minor perception of larger interpretive potential of soft law sources, including codes of conduct. From the perspective of Croatia as a future EU Member State, as known to the author, it seems quite difficult to expect a court

⁵⁷ David M. Trubek – Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: the Role of Open Method of Co-ordination*, *European Law Journal*, Vol. 11, Issue 3, 2005, pp. 343-364; David M. Trubek – Patrick Cottrell – Mark Nance, "Soft Law", "Hard Law" and European Integration: Toward a Theory of Hybridity, Jean Monnet Working Paper 02/05, New York School of Law, New York, 2005, pp. 1-44. Available at: <http://law.wisc.edu/facstaff/trubek/hybriditypaperapril2005.pdf> (last visited: 5 September 2012).

⁵⁸ Ulrich Mückenberger, *Global Labour Law*, In: Roger Blanpain – Frank Handrickx (eds.), *Labour Law between Change and Tradition*, Liber Amicorum Antoine Jacobs, Wolters Kluwer, 2011, pp. 99-106, 109-113.

decision that in its broader interpretive basis *inter alia* also relies on the provisions of some national or multinational code of conduct, when there is an apparent deficiency in the teleological interpretation of national hard law sources.

Should the stakeholders take responsibility in this regard? If we take into account Däubler's opinion on the "stakeholder model" instead of "corporate social responsibility", it seems that their strength and influence may *pro futuro* affect "decision making of management".⁵⁹

VII. Concluding remarks

Soft law methods and soft law in general are having a significantly greater influence on contemporary social relations, whose overall effectiveness is not measured through the focus on necessity or stipulated sanctions, but through the interpretive function and the overall socio-economic importance. CSR and its central source within the MNE's code of conduct has been transformed into a classic, extra-contractual source of law, to which private law and contractual relations may provide indirect realisation, and in some cases even a sanction. The role of soft law and CSR *pro futuro* becomes much more important, because different tools and methods will be primarily used in the transformation of labour relations in practice to which hard law will only *post factum* give a legal framework. CSR and its instruments, i.e. sources, should not be seen as forms that need to replace traditional sources of labour law, but as those having a supplementary function in a broader interpretive sense. Basic (international) labour standards are the best proof of the aforementioned since their foundation, implementation and legal protection is provided thanks to the international, European and national legal sources. Moreover, in the wider sense of the word, by direct and indirect reception, they have undoubtedly become an integral part of collective agreements and employment contracts, and for more than a decade they have also been an integral part of CSR.

Sooner or later, modern labour law will accept these changes in relation with CSR and codes of conduct, despite resistance and aggravating factors referring to the lack of the interpretive capacity or specific legal culture in societies in which the teleological interpretation is neglected, as the creative potential of creating legal sources and sources of law. Past experience with the soft law methods and sources seems to be in favour of such opinion, and until then CSR will slowly become *lex mercatoria* of labour law, or better said supranational *lex laboris* in the field of the protection and promotion of fundamental international labour law standards.

⁵⁹ Wolfgang Däubler, Corporate Social Responsibility: A Way to Make Deregulation More Acceptable? In: Roger Blanpain – Frank Handrickx (eds.), *Labour Law between Change and Tradition*, Liber Amicorum Antoine Jacobs, Wolters Kluwer, 2011, p. 57.