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Corporate Social Responsibility: A Way to Make Deregulation more acceptable?

1. Introduction

Before treating my subject, I have to confess one thing: I am not an addict to Corporate Social Responsibility (CSR). Presumably, readers will think that a German lawyer being at the side of the employees and their unions would be in favour of this concept: Is it not the contemporary way of adding social aspects to the profit-oriented market economy? Has this not been the traditional aspiration of those who want to modify the existent society? Is this not the main point for the only left which is left?

In my view, Corporate Social Responsibility is nowadays before all a means of propaganda. Multinational enterprises improve their reputation in giving themselves a code of ethics or concluding even an international framework agreement with an international union federation. “We are the good guys” – the multinationals can tell to the consumers and to the politicians: “If you want to criticize excessive exploitation in developing countries, please contact some of our competitors or some other enterprises which will perhaps follow exclusively the shareholder value concept.”

Normally, the codes and the agreements contain more than the legally binding obligations existing before. Ecological aspects are said to be observed in an extensive way, employees will be treated in a fair manner. All kinds of discriminations are forbidden, working time is flexible in order to make a work-

life-balance possible. Health protection at the work place is compulsory, measures of qualification are supported. Union activities must not be sanctioned. Can anybody be opposed to such a concept?

Yes, we can (even without Obama). Good principles are useful only if they have a practical impact on the environment or on wages and working conditions. Codes are as a rule without any binding force; they are a prominent example of soft law. International framework agreements often go farther and have a different, legally binding character.[1] They are real contracts which have to be fulfilled; a breach obliges to pay damages. But are there any mechanisms to control if they are really observed by the management? Only in some framework agreements you will find provisions about a monitoring system, but it would be absolutely exceptional if the committee entrusted with this task would be as independent as a panel of judges.[2]

Apart from this, there is no authority which defines what is really meant by the words of the code or the framework agreement. You will often find expressions like "encourage" a certain behaviour, or "try" to come to healthy working conditions – but who can really evaluate if these obligations have been fulfilled? And what do you understand exactly by fairness at the workplace? Hard law rules in national or in European Union law may sometimes have a comparable structure but they are in a certain way completed by judge-made law which makes them work – but there are no courts in the field of soft law rules whose vagueness remains therefore unchanged. Even in the case of binding framework agreements courts will not interfere – until now it is still a difficult thing to sue an employer for not having implemented a certain principle at – let´s say – British or Italian courts not to speak of countries where judges earn a high

[1] See Zimmer, Soziale Mindeststandards und ihre Durchsetzungsmechanismen. Sicherung internationaler Mindeststandards durch Verhaltenskodizes? Baden-Baden 2008, p. 158 ff.
[2] Zimmer, op. cit. p. 209, 294 ff.

percentage of their incomes by accepting bribes (which the German legislator kindly call “nützliche Abgaben” - “useful taxes”).

2. Abolishing the “codes” and “agreements”?

Shall we put away the whole concept? I can mention two examples from the German experience which seem to give a positive answer to this question.

Sec. 65 of the law on joint stock companies provided that the board of directors has to take its decisions in the interest of the shareholders, in the interest of the employees and in the interest of the common good. That is nothing else but a short description of corporate social responsibility. In 1965, the law was amended; its new version did not repeat these words but the reason given in the report of the Government was that this “pluralistic concept” of the enterprise needed not to be mentioned because it was commonly accepted. By this way, CSR is even part of “hard law” in Germany.

A foreign observer may ask if there are court decisions about bad governance. In seven decades, there was not even one case in which a board of directors had neglected its legal duties in this field. The rule of law was followed without any exception, German managers are obviously a very special kind of human beings. As the original law dates from 1937, apparently even the behaviour of German enterprises in foreign countries during the war could not be blamed. Everything was and is perfect – “what a bloody nonsense” would be the commentary of a person who has preserved some common sense. Which are the reasons for this lack of controversies?

Even in democratic times the courts acknowledge a huge margin of appreciation to the board of directors. Whatever their decisions may be – board members,

observers and judges will always find a sufficient reason why they had to pay special attention to the needs of the owners and the capital market. There is no legal responsibility if employees lose their workplaces because of unreasonable management decisions. And there is even no responsibility in cases in which the profits are replaced by losses threatening the existence of the enterprise. The crisis of the banking sector shows it with sufficient clarity. If a decision maker puts at risk 10, 50 or 500 billion dollars the bank may get bankrupt or the state must intervene and pay the debts in order to save the whole system. But the managers´ behaviour is not illegal because of the pure fact that it destroyed huge sums of money and indirectly of public goods. Only in cases in which an individual profit of a manager or an employee or illegal purposes are pursued damages have to be paid and penal law may be applicable.

All this may be considered to be a logical consequence of the market economy which, for good reasons, does not want judges to make the final decisions. As long as multinational enterprises act in this framework, they remain in a certain way the real sovereign powers. Since the French Revolution, "princeps legibus solutus" has seemed to be an outdated principle, but is this really true? One of the problems is that we will have difficulties to find funds for a research dealing with the large power of enterprises and its actual and possible restrictions. On the contrary, if we ask the EU-Commission for financing a project on codes of ethics or international framework agreements the bureaucrats (as its representatives) will be quite open-minded. I come back to my subject: Even as part of company law, CSR does not really influence the behaviour of enterprises.

My second example stems from the German Basic Law, our Constitution. Its section 14 guarantees the right of property and specifies it in its second paragraph: "Property entails obligations. Its use shall also serve the public good." The word "property" comprises all kinds of assets– shares as well as the

goods owned by a company or a private person. The Constitution has a high authority in our political system. There is nearly no important question where constitutional aspects do not play a considerable role. In most of the cases, the definite decision is not taken by Parliament but by the Constitutional Court. To quote some recent examples: If the German army can act as we say "out of area" e. g. in Afghanistan, if a homosexual couple can form a kind of marriage or if smoking can be prohibited in restaurants – all these cases have been discussed broadly and then decided by the Constitutional Court. But what about Section 14 § 2 of the Basic Law? It is evoked from time to time by trade union leaders if they ask for more codetermination or – in present times - if they try to defend the existing form of codetermination. You will find no decisions of the Constitutional Court restricting the freedom of enterprise directly referring to this provision. It is no efficient rule in the sense that it would really influence the behaviour of the authorities, of enterprises and of workers. Corporate Social Responsibility transformed into Constitutional Law – Sec. 14 § 2 can be seen in this way but the results are as deceiving as in the field of company law.

3. Explaining the good image of CSR

The two examples seem to give a sufficient reason not to spend too much time with a subject like CSR. But why do so many colleagues concentrate on the topic? Even people who have read Marx and Engels at least in former times, people who are normally devoted to the interests of workers and not to the interests of capital?[3] You may explain it by a lack of concepts in Europe after the end of the Soviet Union and the fall of socialist governments in Eastern Europe. You may explain it by a very defensive position which tries to deal with subjects acceptable to the employers´ side – legal scholars are normally not characterized by a lot of courage or non-conformism. Exceptions confirm the

[3] One may cite as an example most of the contributions to the special issue of "Transfer" 14 (2008) Number 1 "Does good corporate governance need worker participation?"

rule. One has to be respected by colleagues and by the authorities – would it not be better to deal with CSR instead of studying state restrictions on market economy in Venezuela and in China or even ask for "economic democracy"? In 2008, I participated in a conference in Montevideo entitled: "Labour law in the era after neo-liberalism" (Derecho del Trabajo después del Neoliberalismo). At that time, it would have been hardly conceivable to organize a comparable conference in Europe; it would have sound like a misleading provocation far from reality. After the crisis, the situation seems to change, but critical publications are still a matter of interest for minor parts of legal scholars or politically active citizens.[4] But we are living in one world and it could be useful to concentrate a little bit more on Chávez than on Sarkozy despite the peculiarities that characterize both persons.

Lack of concepts and the fear of being considered "unreliable" or "exotic" cannot explain completely the interest, even the enthusiasm of certain persons who deal with the subject of CSR. Are there not at least some cases in which it may be useful to refer to CSR in fighting for social justice?

Codes of conduct and framework agreements apply normally to multinational enterprises with subsidiaries in developing countries. It may happen that working conditions are so bad that the contradiction to the principles of CSR is obvious for everybody. If 40 % of the employees fall ill, health protection is insufficient; if all union members are dismissed there will be some discrimination; if the wages are far from the minimum wage of the host country this fact can be explained clearly, too. As far as I know, it is not very probable that subsidiaries of European firms in Bangla Desh, in Sri Lanka or in Vietnam act in this way. Problems are created by the subcontractors – enterprises of the country which seem to escape the control of the multinational company. Their

[4] See the special issue of „Kritische Justiz" (=KJ) 43 (2010) Heft 4 (december 2010) focusing on "post-neoliberal legal order" (with question mark)

inclusion is, therefore, of high importance but rarely realized. On the other hand, it would be wrong to stop at this point leaving the enterprises of the host country in the role of the bad guys. In reality they are no capitalists of a less moral kind. In many cases, the multinationals dictate the prices in a way that there is no other alternative for the subcontractors than utmost exploitation.

If in a concrete case, the code or the framework agreement has been obviously violated, there is no legal sanction. For codes this is clear: Soft law is not compulsory. And a damage derived from a breach of contract can rarely be proved. Even if health and safety or economic rights are obviously neglected it will be difficult for workers to go to the labour inspection or to the court because this could be considered to be an unfriendly behaviour to the enterprise with all possible consequences it may provoke.[5] Even if such a threshold does not exist in the concrete case (the worker is one year before his retirement, has a specialised qualification etc.), labour inspections and courts often do not function in a way that guarantees relief in a reasonable time. In many cases, a national border would be between the responsible person and the victim creating additional obstacles: Workers having suffered physical damages tried to sue multinationals in the US but as far as I know without any success.[6] In Europe, such a project could perhaps have better chances, but until now nobody has seriously tried it. No practical impact can be found out as to the proposal to treat the behaviour of an enterprise in Europe as unfair competition if it is based on illegal forms of production[7] or on the untrue argument that a commodity has been produced in respecting a certain code of conduct.[8] An observer from

[5] Höland, Der arbeitsgerichtliche Rechtsschutz während des Arbeitsverhältnisses – einige Schwächen, ihre Gründe und ihre Folgen, AuR (=Arbeit und Recht) 58 (2010) p. 452 - 458
[6] Cf. Baylos Grau, La responsabilidad legal de las empresas transnacionales, Revista de Derecho Social – Latinoamérica 1 (2006) p. 69 ff.
[7] Cf. Däubler, Sozialstandards im internationalen Wirtschaftsrecht, in: Festschrift für Reinhold Trinkner, Heidelberg 1995, S. 475 ff.
[8] Cf. Kocher, GRUR (= Gewerblicher Rechtsschutz und Urheberrecht) 2005, p. 648 ff.

Canada remarks that “Codes are at best only a rough approximation of liberal legality, not a strict replication of it”.[9]

In some cases, there are at least social sanctions. If the multinational produces goods which are sold directly to the consumer, public opinion plays an important role. Food and textile industry could suffer a lot if press and television would report about inhumane conditions in their foreign subsidiaries. Nearly nobody would like to wear a T-shirt produced by persons working like slaves or buy a carpet produced by children. N the one hand, the profit does increase by giving bad conditions to workers in developing countries, but on the other hand it may decrease even more because of a bad publicity in industrialised countries. So you can call it a well conceived policy if multinational enterprises accept a code or a framework agreement.

To avoid these obvious (!) violations of elementary rights and interests in some cases may be called a success – viewed from a position of extreme weakness. How would be our reaction to a legal norm prohibiting extreme cases of mistreatment in some consumer oriented branches? It would at least create no enthusiasm and many scholars would criticize that the equality principle has not been respected. If the same is done by way of creating codes and framework agreements many people see a kind of new paradise coming. The ideology of “good governance” with its far reaching aspirations conceals effectively a sad reality.

4. Promoting Corporate Social Responsibility?

[9] Arthurs, Corporate Codes of Conduct, in: Conaghan-Fischl-Klare (ed.), Labour Law in an Era of Globalization. Transformative Practices and Possibilities, Oxford – New York 2000, p. 480.

In great modesty some people are very happy to find at least one field where CSR can be of some help. But before really reaching this goal there are important conditions to be met.

The image on the market is important only for certain enterprises. The sale of military equipment or steel constructions is not affected if newspapers write about disgusting conditions in foreign subsidiaries: The clients of those enterprises do not attach much importance to such things. We must therefore concentrate on firms being near to consumers.

The information of what happens in other countries is quite difficult to get. The foreign management will invite journalists only if nothing can be criticized or if a critique would be obviously exaggerated. If there is something to be hidden, they will do everything to prevent people from coming. Workers are anxious to speak about their conditions because they may risk dismissal or even worse sanctions. One needs a minimum of organisation and social experience before giving information to persons coming from outside.

Even if some information is available, there will often be a divergent view given by the management. Nobody knows exactly who is right and who is wrong – for a journalist the news becomes irrelevant. Readers want to have clear facts – not a pure suspicion which may be wrong or misleading. Controversial facts are interesting only for the courts (but not for the Times).

Even clear facts are not always transferred into newspapers or broadcasted by television. At least the German media are very much concentrated on Europe and the United States. What happens in China or Latin America is much less important. If these countries are mentioned bad news prevail: Restrictions to go to the internet in China, disorder in Bolivia, lack of freedom in Myanmar. Let

aside really extreme cases (which will nearly never happen) the behaviour of German and European enterprises will not be part of those bad news.

How can we overcome these obstacles? International unions can play a certain role in transferring information to those who can distribute them in the industrialized countries. But other NGOs like attac or Greenpeace seem to be more important in this context. They may be more flexible and without any need to take into account some interests of capital in order not to breach compromises which have been reached in the past.

NGOs and public opinion as new agents in industrial relations? Yes, but in a very small field and with very limited possibilities.

5. CSR as part of a concept?

Deregulation of labour law has been an over-all phenomenon in nearly all European countries for more than 20 years. It comprises exclusively provisions protecting workers in order to give more freedom to the market. Rules restricting collective actions are not concerned and therefore completely uphold; market freedom is not extended to collective agents.

The majority of labour lawyers and legal scholars do not support this development. They fear the social element of the market economy getting too weak. This may even destabilize the political system – a development which is considered to be a big evil. But their voice is rarely heard by the authorities; resistance comes in some countries from the courts.[10]

What will labour lawyers do in such a situation? They are quite happy to find a new field where they can do their traditional work. Will the changing legal order

[10] Cf. Auvergnon (dir.), Les juges et le droit social. Contributions à une approche comparative, Bordeaux 2002

not become much more acceptable if the protection of workers can be realized by other means? Should we not be flexible enough to take the new path? Is it not even more promising than the traditional labour law, which did not really touch the autonomy of the employer? Now all activities of the enterprise are at stake – what a progress!

6. Alternatives?

As we have seen, establishing rules for the behaviour of an enterprise is only a way to fight extreme injustice in very limited cases. It is insufficient if we want to include stakeholders´ interests into the decision-making process. More effective ways are conceivable.

Firstly, one can change the decision-makers and replace them by other persons. This was the approach of the German co-determination on enterprise level after the Second World War. Originally, the supervisory board of companies in the mining and steel sectors had a kind of tri-partite composition: Four representatives of labour and four representatives of capital had to find two persons representing public interests and one "neutral" who was not involved in possible conflicts.[11] Afterwards this model was transformed in a way that each side got five "seats" and had to agree about the so-called eleventh person. The supervisory board elects the board of directors which is responsible for the management of the enterprise. This can give place to decisions which are not dominated by profit seeking but represent compromises between divergent interests.

In practice, the model did never reach its goal. The workers´ representatives could not find a sufficient number of managers to be on their side – they were satisfied to elect the human resources manager whereas the capital elected de

[11] See Eberhard Schmidt, Die verhinderte Neuordnung 1945 – 52, 2. Aufl., Frankfurt/Main 1972, S. 183 ff.,

facto all other members of the board of directors. Secondly, the model was implanted into a market economy where all other enterprises had a traditional structure – to follow different principles was at least difficult if not impossible. Thirdly, mines and steel industry were branches in crisis ten or fifteen years after the establishment of the system - no good condition for promoting a better politics of the enterprises.[12]

The second way seems to be a quite traditional one: if certain interests are neglected, the consequence will be a lack of necessary cooperation. The strike is the best-known instrument to correct a behaviour which is unacceptable to workers. Other stakeholders can use other means. Shareholders and banks do not need an additional legal protection, they can use their economic power. The public interest, however, which comprises the ecological dimension must be protected by law and other government action which may reflect the desires of the population. Consumers are given certain rights by a special set of rules complemented by their power to buy or not to buy a certain product. These interests constitute the framework an enterprise has to recognize and to observe.

In contrast to the "pluralist model" described above, it is not sufficient just to admit that an enterprise has to consider the different interests. It is absolutely necessary to balance them, to give adequate instruments to each stakeholder in order to avoid the predominance of one of them, especially the shareholders. For employees who are in the weakest position the right to stop cooperation is therefore essential: Without a right to collective action which can question even management decisions they remain a small junior partner. Consumers should have the right to act collectively, especially to boycott certain commodities. Under these really pluralistic conditions it will be an urgent necessity for management to take into account all interests which are touched by their politics.

[12] For more details see Däubler, Das Arbeitsrecht 1, 16. Aufl., Reinbek 2006, Rn. 1281 ff.

This model which still needs a lot of discussion should not be called “corporate social responsibility”, an expression already occupied by the concept described above which is restricted more or less to moral appeals. To avoid misunderstandings it would be preferable to use the words “stakeholder model” which implies that stakeholders have some power and can, therefore, influence the decision making of the management.

These interests must be organized in a national framework and in the global world. This is a big task for the future. But even a long travel starts with a first step.