

**RETHINKING CORPORATE SOCIAL RESPONSIBILITY: FROM  
SOFT LAW TO REGULATION**

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**REPENSER LA RESPONSABILITE SOCIALE DES ENTREPRISES : DE LA  
SOFT LAW À LA RÉGULATION**

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**RETHINKING CORPORATE SOCIAL RESPONSIBILITY: FROM  
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The purpose of our study is to highlight the legal status of corporate social responsibility (CSR) and to demonstrate that, initially resting on soft law, the reluctance of enterprises to make a commitment towards the community leads to rethink the concept. Soft law as the fundamental basis of CSR is no longer able to let this normative instrument serve entirely its role. Now the need is ever more apparent to opt for an effective regulation.

**KEY-WORDS: CSR, Soft law, Regulation.**

**RÉSUMÉ**

L'objectif de cette étude est de mettre en avant le statut juridique de la responsabilité sociale des entreprises (RSE) et de démontrer qu'initialement reposant sur la soft law, la résistance des entreprises à s'engager à l'égard de la communauté mène à repenser le concept. La *soft law* en tant que fondement sur lequel repose la RSE ne permet plus à cet instrument normatif de servir pleinement son rôle. Aujourd'hui la nécessité se fait sentir d'opter pour une véritable régulation.

**MOTS-CLÉS : RSE, Soft law, Régulation.**

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### INTRODUCTION

Looking at the atrocities experienced by communities, it is obvious that businesses are responsible for social, financial and environmental disasters. Indeed, the liberalization of the global economy, which has given companies unprecedented power, has played a major role. "This rise has not been accompanied, at the same time, by a development of the law aimed at establishing the international legal responsibility of these companies" (Bourdon, 2010). In this sense, the debate on Corporate Social Responsibility is more and more significant (Boidin, Postel, Rousseau, 2009).

Referred to by the acronym CSR<sup>1</sup>, this concept is understood by virtue of the international Social Responsibility ISO 2600 frame of reference and in accordance with the definition of the European Commission's Green Paper, of "social responsibility (employees), societal (populations living on territories impacted by the activity of the company), environmental (our biosphere), economic and governance "(Dubigeon, 2015) of companies. The innovative idea of Howard Bowen, founding father of the concept of CSR, wants firms to assume moral obligations towards the community (El Malki, 2014). Consequently, the enterprise which was only considered as an economic actor is all the more envisaged as an institution embedded in the social (Gendron, Girard, 2014).

However, after several years of its application, CSR as initially shaped, today seems powerless to remedy the persistent problems. "The clamor for more ethics in the world is growing day by day" (Kliksberg, 2015). Indeed, the information gathered about corporate irresponsibility urge us to rethink the whole fabric of CSR. This leads us to an intriguing issue: is not the legality of CSR a sufficient reason to reconfigure the concept by means of effective regulation?

To answer this question, we will first try to elucidate the legality of CSR **(1)**, before highlighting, secondly, the need to regulate CSR **(2)**.

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<sup>1</sup> Corporate Social Responsibility (CSR)

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### 1. LEGALITY OF CSR

#### 1.1 THE CONCEPT OF "RESPONSIBILITY" WITHIN THE MEANING OF CSR

It should be emphasized that the lawyer should in no way endeavor to define Corporate Social Responsibility through civil law. In its purely legal sense, civil liability divided between civil and tort liability, and contractual liability, arises respectively from the commission of a fault or breach of the duty to honor the commitments entered into. However, when liability is established, the obligation to repair the damage caused is created. Of course, these provisions, which flow from a law initially designed for natural persons, can be validly transposed to companies, which remain bound towards third parties. The right to compensation is closely linked to civil liability (articles 77 et seq. Of the DOC and articles 230 et seq. Of the DOC).

However, the exact meaning of Corporate Social Responsibility differs from purely legal jargon. The innovation of the concept was at no time linked to the desire to make the company responsible for its actions in the legal sense but emanated from the sole desire to raise awareness of the company in terms of ethics and morals (Gendron, Girard, 2013). Indeed, in the absence of a universally official definition of this still incomplete concept and of an overall legislation, we can only refute CSR, drawing its roots from the current of Business Ethics (Boidin, Postel, Rousseau, 2009), is based on the idea of volunteering (Boidin, Postel, Rousseau, 2009) so as to encourage the company to unilaterally take the initiative of becoming responsible towards the social community outside of any obligation imposed by law. In other words, to the extent that the law does not expressly provide otherwise, the CSR approach is only preventive (Bourdon, 2010) unlike the law of civil liability for curative purposes. However, there are many interpretations that intertwine CSR with the law of liability. In Anglo-Saxon law, during the study of the concept, sometimes the term accountability is used which covers the fact for the company to account for its actions without necessarily assuming the consequences, sometimes that of responsibility, in which case the company incurs a penalty imposed on it given the non-performance of an obligation (Boidin, Postel, Rousseau, 2009).

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Better yet, attempts to claim CSR to triumph over the principle of reparation for damage are at the height of the confusion. In this sense, the civil society maintains that it is a question of the obligation for the company to answer for the faulty behavior emanating from its activity and its social leaders, a contrario for the economic actors for which, the "Responsibility" which derives from CSR only designates the obligation to prevent risks likely to harm the community instantaneously or in the future by implementing precautionary measures intended to avoid destructive dangers (Boidin, Postel, Rousseau, 2009; Gendron, Girard, 2013; Bourdon, 2010).

If one is content to analyze the concept of "Responsibility" taken in isolation to decide on the scope of the principle of CSR, it seems that the concept will remain eroded among proponents of its definition by reference to the obligation of compensation and between supporters of the lighter sense, that taken in the sense of prevention. This strong tension between adopting a heavy or flexible meaning is at the heart of debates on CSR. However, to overcome this dichotomy, it is still necessary to detach from the terminology and derive the sense of the will sought behind the establishment by the company of a CSR policy, especially since in the current state, no law decides on the legal qualification of the concept.

### 1.2 CSR LEGALLY QUALIFIED OF SOFT LAW

The company that implements a CSR policy voluntarily chooses to assume a number of obligations in order to pass for an imitable model of good citizenship (Gendron, Girard, 2013). In doing so, the number of companies, ranging from smaller SMEs to multinationals, which allude in their general instructions to the intention of integrating a CSR policy, continues to grow. Note that a nuanced palette of names is given to these instructions. The term "code of conduct" is mainly encountered, but this does not prevent other companies from using different nouns; code of ethics, ethical charter, deontological charter, principles of action, declaration of intention, policy, value or ethical guide (Boidin, Postel, Rousseau, 2009). Whatever its name, the commitments contained in these forms of internal company regulation are "freely decided by the governing bodies under the corporate governance policy" (Decaux, 2010). When they restrict CSR principles, the firm demonstrates the

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responsible commitment to internalize certain externalities, namely environmental, social and societal (Dubigeon, 2015; Boidin, Postel, Rousseau, 2009; Gendron, Girard, 2013).

It remains to be clarified that by reference to the formulations which they use, a number of companies devote the tangle between the general instructions often called codes of conduct and principles of CSR. However, codes of conduct - the expression commonly accepted to designate general instructions - and CSR are of different natures. The codes of conduct correspond to the self-produced provisions of the company governing the way it plans to conduct itself (Pereira, 2005). Concretely, this is the statement of principles and standards that a company declares to respect in its activities and to have respected by its contractors, sub-contractors, suppliers and concessionaires (European Commission, Green Paper, 2001). This standard-setting instrument is based on the goodwill of the company (Mathilde, 2013). However, devoid of quantified or quantified objectives, codes of conduct have general values (Boidin, Postel, Rousseau, 2009). In addition, CSR acts are assimilated to the implementation of the company's responsible commitment to improve the social environment, the living conditions of human populations, or to promote environmental protection. Not only does this management tool allow firms to gauge the benefits of their actions upstream in order to remedy them effectively, but it also widens the field of corporate responsibility. "Actors are positioned to do what they understand is expected of them" (Huët, 2012). In this regard, CSR as an efficiency is based on precise, quantifiable and quantifiable objectives (Boidin, Postel, Rousseau, 2009). In reality, this is the decisive point of distinction between the two concepts. In fact, if the company decides to embark on a CSR policy, the codes of conduct are only limited to stating the principles. In fact, we can only attest that a company applies a CSR policy to the extent that it has a strategy for applying the principles set out in the code of conduct, which requires specific objectives, a plan for action with deadlines, and a suitable budget (Boidin, Postel, Rousseau, 2009).

The fact remains that at the heart of the distinction between the aspirations sought behind the development of codes of conduct or the effective implementation of CSR actions, we identify a common denominator between the two, in this case the nature legal standards

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created by the company. These initiatives, unilaterally carried out in the name of ethics and not of law, constitute a corpus of standards gathered under the term of Anglo-Saxon origin soft law (Gendron, Girard, 2013). Admittedly, the most frequent manifestations of soft law are in the public domain, moreover, the texts adopted by international organizations are the perfect illustration, but the fact remains that the domain of soft law also includes well the codes of conduct and CSR acts emanating from private bodies (Boidin, Postel, Rousseau, 2009). To take up the conclusions of Andrew T. Guzman and Timothy L. Meyer, "everything that is law-like, everything that looks like law, can be classified in the soft law category" (Gazala, 2011). It is designed to complement, add to or replace existing legislation (Boidin, Postel, Rousseau, 2009). That said, unlike the law, soft law constitutes: "The set of rules whose normative value would be limited either because the instruments which contain them are not legally binding, or because the provisions in question, although appearing in a binding instrument, would not create an obligation of positive law, or would only create obligations that were not very binding "(Gazala, 2011).

Indeed, the legal scope of the provisions voluntarily issued by companies is limited (Gazala, 2011). In other words, as stimulating as it is, soft law only obligates and constrains exceptionally. In this sense, to take advantage of the absolutely non-binding character, the formulation of these standards is often general or even ambiguous and rarely contains dates or figures or any other minute precision (Huet, 2012). These ethical texts sometimes cultivate ambiguity since they can be mitigated by derogations, restrictions or reservations (Boidin, Postel, Rousseau, 2009). In addition, the flexible aspect of soft law explains its heterogeneity and adaptability (Boidin, Postel, Rousseau, 2009). The reversal of the standards establishing CSR is a highly conceivable scenario, the actors can at any time increase, reduce or withdraw from their promises without consequences incurred (Huet, 2012). On the other hand, to say that soft law does not commit the author in any way is a false statement. As Dean Carbonnier wrote, by soft law we should "mean, not the absolute vacuum of law, but a more or less considerable drop in legal pressure" (Bernheim, 2011). Actors who constitute themselves as subjects responsible for their acts place themselves under the constraint of their own word (Huet, 2012). Their possible insincerity or the failure of this word can in certain cases be



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received by internal law and be the subject of legal action (Boidin, Postel, Rousseau, 2009). This extremely rare situation is generally encountered in social law where the code of conduct creates rights, advantages or guarantees for the benefit of employees and binds the employer by its own formal commitment formed unilaterally (Boidin, Postel, Rousseau, 2009). In this case, even before the courts, it is no longer the labor code - hard law - that applies, but the internal regulations - soft law. This measure is also expressly provided for in our labor code, Article 11 provides, in fact, that the provisions of the labor code "do not prevent the application of more favorable provisions granted to employees by the statutes, the employment contract, the collective labor agreement, the internal regulations or the customs ". In any event, the non-legality of soft law and hence of the ethical texts demonstrating commitment to a CSR policy remains the principle, the exception is only exhaustively encountered. Apart from these rare situations, the only sanctions that are likely to be imposed on them in the event of violation of their commitments under a code of conduct or following the non-execution or poor execution of a CSR action are of order social or commercial such as disavowal, boycott or termination of international relations (Gendron, Girard, 2013).

CSR, in the field of soft law, crystallizes a new management mode ensured by a voluntary approach of companies (Huet, 2012). However, in view of the extremely limited legal scope of soft law, the reconfiguration of CSR is essential, which requires real regulation.

## 2. THE NEED FOR REGULATING CSR

### 2.1 SOFT LAW DESUETUDE WITH REGARD TO CSR

"CSR begins where the law stops" (Boidin, Postel, Rousseau, 2009). Obviously, the law and the principles of CSR coexist so that the voluntary recruitment regime recalls the obligation to respect the legislation in force (Boidin, Postel, Rousseau, 2009). However, CSR goes beyond the legal norm by concretizing everything that companies can do beyond legal constraints (Boidin, Postel, Rousseau, 2009). However, on examining the specifications of the calls for tenders issued which increasingly prescribe compliance with CSR criteria (Decaux, 2010), we confirm the reduction in the proactive aspect of the adoption of a CSR policy. It is even



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indubitable that "the border between the two normative universes is increasingly porous" (Gendron, Girard, 2013).

These private initiatives foreign to the normative activity of States and to international organizations mark the emancipation of new standards likely to contribute to the creation of a law halfway between soft law and hard law (Bourdon, 2010). The fact remains that the idea is not favorably received by all economic players

At a time when companies are wisely adopting a CSR approach, where despite the criterion of volunteering they strive to achieve the objectives expected by the community, where they require their partners to adopt the same pace, many are those who engage in facade voluntarism. This is the case with companies that adopt codes of good conduct without bringing to life through a management strategy, the principles linked to CSR set out in the code. The CSR commitment is meaningless. The emptiness is all the more glaring if the code is content to define rules with minimum scope that minimize the company's commitment (Bourdon, 2010; Boidin, Postel, Rousseau, 2009). Moreover, "during COP 22 in Marrakech, many observers were moved by the suddenly very societal discourse on the part of certain companies which until then had been little inclined to CSR! (Brun, 2018). The purpose of minimized voluntarism is clear, on the one hand, the launch of a CSR approach even remaining a dead letter, will aim to improve the image and reputation of the company, and on the other hand , "Many market players will always prefer to accommodate the implementation of soft law even if it had not planned, if this is the price to pay to avoid the risk of hard law" (Thomas Brown, 2018).

The CSR situation is delicate. If it progresses in the minds, this does not prevent it provoking strong resistance in practice to such an extent that the evaluation of its execution is negative. Despite the fact that people in various countries are acquiescing in the increased importance of CSR in the sense that it "creates actions whose value is aligned with the interests of society", (Kliksberg, 2015), it remains considered as a commitment not kept by companies that are ultimately assimilated to marketing (Kliksberg, 2015). The source of the dissatisfaction does not come from the idea of CSR, but from the reluctance to be able to translate it into vigorous

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entrepreneurial policies (William Bourdon, 2010). It would be wise to conceptualize a solution capable of making effective application of the commitments deriving from CSR prevail in order to benefit the community from its advantages.

It has turned out that we cannot rely solely on the willingness of companies to promote improvements in the social, societal and environmental framework. "Soft law cruelly shows its limits when the damage caused [...] is in territories where the victims, totally destitute have access neither to justice nor to the media" (William Bourdon, 2010), it then presents itself as a sterile tool, powerless to punish those responsible for the crimes and offenses committed. Moreover, it is estimated that the period elapsed since the multiplication of codes of conduct, that is to say from 1990, is largely sufficient to judge of the necessity of the intervention of the States in the name of the general interest in order to regulate the CSR (William Bourdon, 2010). This is, moreover, the path that the European Commission seems to be advocating, approving that CSR requires "a strengthening of direct regulation through binding rules applicable to businesses and a framework for so-called" self-regulation "or" co-regulation mechanisms. "" (Gendron, Girard, 2013).

The need for CSR regulation is imminent. Far from being assimilated to legal regulation, regulation is understood to be a "system of constraint and guidance of the action of economic agents, whether it be public intervention, social standards, systems contractual or, again, management rules imposed by the tools "(Gendron, Girard, 2013). If the basis of rigid regulation is "the obligation-control-sanction cycle" (Gendron, Girard, 2013), the issue here is not limited to the conversion of soft law into hard law. The regulation is much broader. It is based firstly on the institution, that is to say the definition of a framework by the public authorities at international, regional and state level, then on the implementation by appealing to incentive policies and by giving a place to the various economic agents being the best placed to choose the best solutions during the development of the content, and finally, on the control, or, starting from the principle that a company can't proclaim itself responsible, the establishment of a supervisory authority is therefore essential (Boidin, Postel, Rousseau, 2009).

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### 2.2 FOR AN EFFECTIVE CSR REGULATION

Many efforts should be made to promote CSR. Thus, the government could support CSR by awarding distinctions to companies that adopt a CSR policy, granting priority in terms of public tenders to those that stand out in this area, tax exemptions (Kliksberg, 2015) or even the adoption of a favorable tax regime for the benefit of companies taking into account the CSR parameters, as well as the accounting reform to include their extra-financial performances (Bourdon, 2010). In addition, we could proceed, like the French legislator, to adopt a law called "the law on the duty of vigilance of multinationals" which would require that large companies having their head offices in Morocco establish and publish a vigilance plan, to prevent risks in terms of the environment, human rights, but also corruption, in their own activities, including those of their subsidiaries, subcontractors and suppliers, in Morocco and abroad (Henryot, 2018).

Some authors will even go further by considering that the significant legal framework for CSR should not be the sole responsibility of national legislators at the internal level and that insofar as it is incontestably everyone's business, the all States must jointly work to establish a binding international legal framework for CSR in order to universalize its effects all over the world and to all public or private, national or transnational companies (Bourdon, 2010; Decaux, 2010 ). For him, a national or regional benchmark would not guarantee the effective application of the principle of CSR, risking to benefit only certain companies which, in the West in particular, are already engaged in human and environmental development (Bourdon, 2010; Decaux, 2010). They therefore call for a universal frame of reference with a view to effective regulation of CSR since "it is from this legal interaction that a normative framework could be born likely to have a lasting impact on the behavior of economic actors, in order to prevent - and punish if necessary - market crimes "(Bourdon, 2010). In reality, this vision seems justified. The transnational company enjoys a double advantage, one offered by company law, based on the principle of the legal autonomy of each company and the other, offered by international law, want the transnational company is not considered a subject of international law; these two situations taken together lead to the multinational being protected from any questioning of

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its legal responsibility (Gendron, Girard, 2014). Being legally elusive, "no text of international law allows it to be penalized directly for extraterritorial damage in which it would be involved directly or indirectly. Only national law and, first and foremost that on the territory of which the damage occurred is in principle applicable. Many damages therefore go unpunished under local law and rare are those which could have given rise to compensation under the law of the headquarters of the transnational company "(Gendron, Girard, 2014). It follows from this situation that one of the proposals is to regulate the intervention of multinationals in the countries of their establishment so that they can reach them legally. In other words, on the one hand, in the context of adapting the legal framework to the internationalization of companies, it would be wise to recognize the legal responsibility of the parent company of a group with regard to the action of its foreign subsidiaries, to make the parent company responsible for the actors in its supply chain, and on the other hand, by way of implementing tools to repair violations of human rights and the environment, it would be appropriate to extraterritorialize the law and guarantee access to justice for associations fighting against environmental damage and against corruption (Bourdon, 2010).

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### CONCLUSION

It emerges from the study of the legality of CSR that it is basically a question of soft law almost devoid of legal constraint. In this regard, companies are perfectly free to choose whether or not to promote human and environmental development. That said, the practice reveals the emergence of two disparate trends. The first tends to stiffen the soft law on which CSR is based to impose on its employees strict compliance with the ethical standards set up by the company. In contrast, the second advocates the invasion of soft law to counter the establishment of legal standards or even calls for a categorical rejection of involvement in the creation of social values. As such, regulation appears to be an inescapable need. The challenge would be to immerse CSR in a law halfway between soft law and hard law. The jurist will thus contribute, alongside the economist, to shaping a solution that will ensure the sustainability of both society and the company by ensuring the current and future legality of its actions, in this case, by development of a single and universal CSR framework.

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