



The EU as regulator

Contribution by the European Coalition for Corporate Justice to the “Protect, Respect and Remedy – A conference on CSR”

Stockholm, 10 & 11 November 2009

The European Coalition for Corporate Justice (ECCJ) has welcomed the framework developed by John Ruggie as an opportunity to explore solutions to the global governance gaps that exist. I think it is no secret that what we NGOs like the most out of the “Protect, Respect and Remedy” is the fact that states have been put back in the picture and are actively called back on the negotiating table as key agents for change. Secondly, and even more important maybe, we are glad to see that redress for victims has been included in the framework as a nonnegotiable right. After all, the existence of affected communities who cannot get redress is the very reason why we are here today.

I want to thank the Swedish EU presidency and the European Commission for organising this conference and for inviting us to be part of the very panel which addresses the core of our work: the role of the EU as regulator in the context of the corporate accountability debate.

ECCJ is a unique initiative bringing together over 250 civil society organisations from all over Europe working on corporate accountability issues. We are present in 15 countries in the EU and our membership include trade unions, consumer organisations, and NGOs working in different areas such as human rights, development and the environment.

After extensive research and discussion with relevant stakeholders, ECCJ has pioneered the development of proposals aimed at the EU as regulator. The proposals of ECCJ for legislative reform to improve corporate accountability in the EU provide concrete measures that the EU and member states can take to articulate the Ruggie framework. It is important to underline right at the start that our proposals are strongly based on existing Member State and European law.

Of all the options enumerated yesterday by the Special Representative in regards to what the role of the EU could be in its position as regulator, ECCJ has chosen to concentrate mostly on addressing corporate law and access to justice issues in the EU as a way of proposing a solution to corporate abuse of European companies. It was sufficiently repeated yesterday that a combination of voluntary and legislative measures and a combination of non-judicial and judicial mechanisms is needed to move the agenda forward. Our choice responds to a very clear desire on our part to redress the skewed approach by the European Commission, which -until very recently- had only focused on a voluntary approach to the issue.

Thankfully we hope we can say now that those dark times are over. The financial crisis, for one, has clearly illustrated that self-regulation alone does not work and we are very pleased that the European Commission and some Member States are finally showing some willingness to work towards the articulation of the “Protect, Respect and Remedy” framework at the EU level. We hope that companies and trade unions will also be on board. ECCJ is ready and willing to work with you to achieve that very needed objective.

Our proposals make a strong case in favour of the State duty to protect by arguing that both other two pillars of the “Protect, Respect and Remedy” framework can only be successfully achieved by ensuring strong government involvement as well. It is important to mention also that our proposals to the EU have as an overarching goal to ease access to justice for victims of corporate abuse in European courts.

1. The EU duty to protect: enhancing direct liability of parent companies

We are thankful to Professor Ruggie for having reminded us yesterday about the very notorious elephant in the room: the issue of extraterritoriality. Increasingly more treaty bodies do encourage home states to regulate extraterritorial activities of businesses.

For example, the International Covenant on Economic, Social and Cultural Rights provides some language around this issue.¹ As well, the UN Committee on Economic, Social and Cultural Rights noted in several occasions that State parties have an obligation to protect the rights of people under the jurisdiction of other States when they would be threatened by the activities of private actors whose behaviour a State may decisively influence.²

As Professor Ruggie said yesterday, there are other norms with an extraterritorial reach but which are not being seen as such and are thus not cause of controversy. This is to say that there are already precedents – some of them identified in the ECCJ publication “Fair Law”- and that eventually it all boils down to political will.

In the case of European TNCs, the European Coalition for Corporate Justice believes that the most effective way to improve compliance with human rights and environmental standards by business enterprises, in particular in their out-of- EU operations, would be to enhance the direct liability of EU parent companies in their home states.

There are increasingly more civil cases brought against parent companies for their acts and omissions in relation to harm involving their foreign subsidiaries. In the EU, the UK and France have been examples of this. Among others, the issue of corporate veil, however, forms extremely difficult obstacle in such litigations.

Our proposal would entail to suspend the effects of the doctrine of separate legal personality in relation to the areas of human rights and the environment in order to overcome the challenge faced by the corporate veil. Responsibility for such violations should be allocated to the companies that are able to control the entity that actually violated the standards... To the company delivering the profits to the shareholders.

ECCJ proposes the introduction of European legislation to ensure that European parent companies and foreign parent companies of multinational enterprises having significant business operations in the EU can be held liable for the violations of their subsidiaries abroad.

We are also requesting company directors to be made legally responsible for the wrongs committed by their company and subsidiaries. Inspiration is already found in the UK's Companies Act.

Be reassured that our final goal with this proposal is not to start a court case rush but to establish a mechanism which in the long run could act as deterrent towards more abuses. Thus it could be considered a preventive measure.

ECCJ is at the moment finalising a study which will be available soon and which will discuss those options in more detail.

¹ Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

² U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health, U.N. Doc. E/C.12/2000/4 (2000), para. 39; U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The right to water, U.N. Doc. E/C.12/2002/11 (26 November 2002), para. 31. See among others O. Deschutter, Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations*, December 2006.

2. The responsibility to respect by European companies: mandatory duty of care

In line with Professor Ruggie's due diligence concept, ECCJ is proposing the EU to enhance the duty of care of a company in order to influence the operations of other companies that are not formally part of the company group but are economically dependent on the group (i.e. Joint Venture, supplier relationship).

This duty to care would mean that the company would have an obligation to ensure the right management systems are in place to investigate the risks of human rights and environmental abuses and to take all reasonable steps to prevent or mitigate the abuses.

The proposal of ECCJ to introduce a mandatory duty of care, attempts to address the complexities around the notion of the sphere of responsibility/ and that of "sphere of influence". As the Special Representative has suggested, it is not possible to provide an exhaustive definition of scope of responsibility. However, building on the work of Professor Ruggie factors of control, causation and benefit and the duration and severity of the human rights impact should be taken into account when assigning the responsibility.

Secondly, we also believe that this required duty of care should entitle the introduction of mandatory human rights and environmental reporting requirements. We advocate for a standardised mandatory reporting scheme at the EU level, which would also be applicable to companies having significant operations in the EU internal market.

The EU reporting requirement should:

- a) build on already existing best practices
- b) have sectoral indicators developed jointly by the relevant stakeholders
- c) identify the sphere of responsibility of a company (subsidiaries and suppliers worldwide)
- d) report on the human rights and environmental impacts in such sphere
- e) report on the potential human rights and environmental risks of the operations
- f) make company directors responsible for the report

The current situation in which some EU member states have mandatory requirements (which are quite different from each other) while others don't is creating an unlevelled playing field which is not in line with internal market principles of equal competition.

A standardised scheme is needed in order to ensure comparability between the performance of different companies and also to assess progress done by an individual company throughout the years. We are convinced that investors, consumers, public authorities, workers, local communities but also the same companies would clearly benefit from much clearer rules in this regard.

3. Effective Remedies in EU courts: access to justice for non-EU victims

Our two previous proposals would already ease access to justice of non-EU victims into EU courts -when the wrong is committed by a European company- by:

- . facilitating information to the plaintiffs which is normally kept confidential by the company and thus impedes access to justice
- . switching the burden of proof from the victim to the company as it will be the company the one responsible to prove that it has taken all necessary steps to prevent a specific violation from happening, and not the victim who has to prove that a wrong falls on the responsibility of the parent company

On top of that, the EU is very well placed to introduce some changes to already existing EU legislation such as Brussels I (which is actually being reviewed next year) and Rome II which will significantly improve access to justice. These would have the potential to allow ATCA type of jurisdiction in the EU.

In this respect, some other concrete proposals being developed at the moment by ECCJ would include:

- . Class actions
- . Protective cost orders
- . Right to discovery
- . Punitive damages
- . Citizen suits

Let me **conclude** by saying that the current European legal framework on human rights and the environment applicable to European companies' worldwide operations and supply chains is characterised by lack of protection and access to justice for victims, risk and legal uncertainty for companies, and incomplete and/or poorly enforced public policies and regulation. The framework put forward in 2008 by the Special Representative addresses these issues and has given new momentum and direction to the business and human rights agenda.

The European Union and its Member States have welcomed the Ruggie framework and played an important role in the renewal of his mandate. Now is the time for the EU to consider how best to contribute to the further articulation of the Special Representative's framework, and introduce legislation to ensure the legal framework in the EU ensures the three pillars are implemented coherently throughout the EU. The European Union's own commitments to tackling climate change, promote human rights, support sustainable development and contribute to the Millennium Development Goals, or to the Lisbon strategy on growth and jobs won't be met unless integration happens in a coherent manner. The proposed legal reforms developed by the ECCJ provide concrete and realistic opportunities for the EU to show their commitment to articulate the Special Representative's framework.

We look forward to continue discussing them in more detail with EU institutions and key stakeholders so they can become a real support for those suffering of corporate abuse around the world.

For more information and to read our publications please visit: www.corporatejustice.org