

Submission for the 2010 EU Multistakeholder Forum on CSR

Review and recommendations

I. INTRODUCTION

The European Coalition for Corporate Justice (ECCJ) was established in 2005, and brings together 250 NGOs, trade unions and coalitions promoting CSR and Corporate Accountability (CA) from all over Europe. Among these are sections of the leading NGOs in the areas of environmental, social and human rights, such as Amnesty International, the International Federation for Human Rights (FIDH), Friends of the Earth, Greenpeace, WWF and affiliates of Oxfam. NGOs from fifteen countries are represented within the coalition by their national platforms, including the UK based Corporate Responsibility Coalition (CORE), the Dutch MVO Platform, the German Network for Corporate Accountability (CorA), the French Forum Citoyen pour la RSE and the Spanish Observatorio para la RSC.

From mercury poisoning in South Africa to child labour in India, companies, including EU hosted Multinational Enterprises (MNEs), continue to get away with breaches of environmental and human rights standards. Regrettably, there currently exists no binding mechanism at the international level ensuring that companies are held accountable for violations they commit, or in which they are complicit.

In order to prevent further damage and to achieve justice for victims of corporate abuse, ECCJ believes that a regulatory approach, based on internationally agreed standards and principles is needed. ECCJ agrees that these should not exclude voluntary measures, which may in some cases be an ideal first step towards greater accountability of the corporate sector for their social and environmental impacts, but better regulation is needed to complement such actions. We believe that it is not either/or question but that both comprehensive legislation and voluntary schemes are necessary to improve the situation.

II. ECCJ INITIATIVES & RELEVANT WORK IN 2009-2010

Participation in the EC workshops on the disclosure of ESG information

ECCJ actively participated in the 5 multi-stakeholder workshops organised by the European Commission on ESG disclosure held between September 2009 and February 2010. ECCJ was asked by the Commission to prepare the workshop highlighting the perspectives of civil society. Together with other key stakeholder groups, we argued for mandatory disclosure and greater access to information on social, environmental and human rights impacts.

http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/reporting-disclosure/index_en.htm

Member of the steering group of the study on the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating outside the EU

ECCJ has played a prominent role on the steering committee of the recently published study "Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating outside the European Union". This study is instrumental to moving the EU agenda forward, and we hope it will play a central role during this 2010 Multi-stakeholder Forum on CSR and be reflected in the upcoming new Communication on CSR.

<http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human->

rights/index_en.htm

Submission to the public consultation on review of Brussels I regulation

The European Commission adopted on the 21 April 2009 a Report and a Green Paper on the review of Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (aka as Brussels I regulation), with the aim of launching a broad consultation among interested parties on how to improve the implementation of the Regulation and achieve an effective and accessible circulation of judgments in the European Union. Jointly with the EU office of Amnesty International, ECCJ submitted a position paper to this consultation and will be actively participating in the forthcoming review of this regulation.

<http://www.corporatejustice.org/eccj-position-paper-on-the.533.html?lang=en>

Court case against Shell in the Netherlands

ECCJ member Milieudefensie (Friends of the Earth Netherlands) launched a court case in the Netherlands against giant oil multinational Shell for the damage committed by their oil spills in the Niger delta area in Nigeria. The outcome of the case is significant as the court ruled that where the liability of a parent company is claimed, it does have jurisdiction over such company's foreign subsidiary.

<http://www.milieudefensie.nl/english/newsitems/shell-nigeria-tries-to-avoid-dutch-court>

Publication of a guide on recourse mechanisms for victims of corporate-related abuses

ECCJ member – the International Federation for Human Rights (FIDH)- published a comprehensive guide for victims and NGOs on available recourse mechanisms: "Corporate Accountability for Human Rights Abuses". This publication largely focuses on cases involving European companies and highlights the legal obstacles victims face in trying to access justice.

<http://www.fidh.org/Corporate-Accountability-for-Human-Rights-Abuses>

Panelists at the "Protect, Respect and Remedy" conference of the Swedish EU Presidency

Discussions at the conference (November 2009) were based on the report of John Ruggie, the UN Secretary-General's Special Representative on the issue of human rights and transnational corporations, 'Protect, Respect, Remedy - a Framework for Business and Human Rights' and how the EU could implement the framework. Two ECCJ representatives were invited to speak in different sessions of the conference, such as the plenary panel on the Corporate Responsibility to Respect and the parallel session 'The State as regulator'.

<http://www.corporatejustice.org/the-eu-takes-a-significant-step.492.html?lang=en>

Members of the Coordination committee of the EU Multi-stakeholder Forum on CSR

ECCJ has been active as civil society representative in the coordination committee of the EU Multi-stakeholder forum on CSR. Through its participation in the committee's meetings, ECCJ provided input and feedback at every stage preceding and following the 2009 and 2010 Multi-stakeholder forums.

http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/multi-stakeholder-forum/index_en.htm

Submission to the EU2020 strategy consultation

ECCJ submitted a position paper to the EU2020 strategy consultation launched by the European Commission in early 2010. The submission highlights the importance for the EU2020 agenda to take into account the indispensable role that corporate accountability and CSR must play in ensuring a more competitive economy but also in ensuring that the achievement of EU's social, economic and environmental goals go hand in hand.

<http://www.corporatejustice.org/eccj-contribution-to-the-eu2020.629.html?lang=en>

Launch of the European campaign "Rights for People, Rules for Business"

ECCJ has launched a new campaign for corporate justice entitled "Rights for people, Rules for Business" which is running in more than 10 countries around the EU. Among many other activities, the campaign aims to collect at least 100,000 signatures until the Spring of 2011. We are calling on EU policy makers to ensure that laws be adopted to effectively hold European-based companies

operating both in and outside the EU accountable for any harm they cause to people and the environment.

<http://www.rightsforpeople.org/> AND <http://www.corporatejustice.org>

New report “Rights for Whom? Corporations, Communities and the Environment”

In the context of the “Rights for People, Rules for Business” campaign, ECCJ has published a new report illustrating some cases of corporate abuse in the global South by EU-hosted Multinational Enterprises and highlighting the need for ECCJ's legal demands to be integrated in EU law in order to improve access to justice for victims of corporate abuses.

<http://www.corporatejustice.org/new-publication-rights-for-whom.html?lang=en>

Dutch parliament resolution for a legal aid fund

In April 2010 the Dutch parliament has adopted a resolution that asks the government to establish a legal aid fund for people in developing countries that are negatively impacted by Dutch multinational companies. ECCJ member, Friends of the Earth Netherlands was the initiator of the resolution, as it is closely related to the court case it is running against Shell in the Netherlands in support of 3 local communities from Nigeria.

Swedish political parties say “Yes” to a legal framework on corporate accountability

An opinion poll conducted this summer by 40 NGOs in Sweden revealed that all political parties represented in the Swedish parliament answered Yes to the question ‘should there be a legal framework holding multinational companies accountable for their effects on human rights and the environment?’. The poll also revealed that all parties but one are in favour of having mechanisms to demand respect for human rights.

<http://www.va.se/nyheter/2010/08/18/sverige-bor-vara-forst/index.xml>

III. PROSPECTS FOR 2011 AND BEYOND

The European Union (EU) prides itself on promoting Europe’s economy alongside protecting the environment and caring for the people. Since the Treaty of Rome, Europe has expanded in size, and sphere of influence. The EU’s legal capacity has put it in an exceptional position to create and implement some of the best environmental and human rights laws internationally, yet the Multinational Enterprises (MNE) it hosts have continually and increasingly been associated with gross environmental and human rights violations within the EU and internationally, documented by civil society groups, academia and the EU itself. The reason for these continued violations of rights is complex and multifaceted, yet of central significance is the European law that governs these MNEs’ legal structure and accountability.

There is much the EU could do to reform these legal structures and accountability mechanisms and as identified by the Study of the Edinburgh university, there are two very relevant opportunities. First, the changes to the EU’s corporate reporting framework, in respect to companies’ duties to report on human rights and environmental impacts of their operations, would significantly improve accountability of EU hosted MNEs. The upcoming consultation on non-financial reporting announced by DG Internal Market offers a timely opportunity for the EU introduce reforms to ensure more transparency by MNEs it host. Second, ECCJ proposes changes to EU rules on private international law that would result in improvements for third-country victims of MNEs to access a remedy. Specifically, the proposals address law defining the competence of Member State courts to adjudicate private law disputes with a foreign element (governed by Brussels I Regulation, and the determination of applicable law in relation to such disputes (governed by Rome II Regulation).

However, the ECCJ recognises that in themselves, these reforms will prove insufficient to address the scale of the challenge. A comprehensive, long term, sustainable, legal and enforceable system for corporate accountability needs to be built. After three years of legal research which has been reviewed and developed by an array of high profile lawyers, academics and human rights advocates, ECCJ has identified three areas in which the EU could make a significant difference:

1. Improving the governance in the operations of MNEs concerning foreign subsidiaries and subcontractors
2. Improving disclosure of information
3. Mitigating the practical obstacles facing victims

The UN Secretary-General's Special Representative on the issue of human rights and transnational corporations, John Ruggie, has as well clearly identified the need for States to be more proactive in ensuring their duty to protect citizens against human rights violations. Moreover, the recently published study "Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating outside the European Union", done by the University of Edinburgh team and commissioned by the European Commission, also identifies some feasible avenues for the EU to lead on this matter. It is not a coincidence that both sources point out at some common lines of improvement, which coincide greatly with what ECCJ is proposing.

What follows is a summary of the new legal publication by ECCJ "Principles and pathways: Legal opportunities to improve Europe's corporate accountability framework" which will be available during the 2010 Multi-stakeholder forum on CSR.

<http://www.corporatejustice.org/new-legal-report-principles-and.html?lang=en>

1. Improving disclosure of information

"The EU and the EU Member States could further specify existing reporting requirements on environmental and social impacts, and clarify when and under what conditions human rights risks and impacts should be disclosed, including human rights and environmental impacts of third-country subsidiaries and suppliers of European corporations."

Study of Edinburgh University on the legal framework for human rights and the environment applicable to EU companies operating outside the European Union

As noted above, the the upcoming consultation on non-financial reporting announced by DG Internal Market offers a timely opportunity for the EU introduce reforms to ensure more transparency by MNEs it host. ECCJ proposes the EU should specify legal requirements for MNEs to report on the impacts of their operations both in the EU and internationally, with the mandatory introduction of clear, audited, comparable and enforceable standards for large and medium-sized companies. Greater transparency by reforming reporting requirements can help to establish human rights and environmental protection as core business concerns.

The EU legislation should provide people with the right to access the information that is held by companies and that is required for the exercise or protection of their rights. The principle of mandatory reporting of non-financial data is already recognised in EU law, however, this lacks clarity and effective enforcement, and does not provide victims with legal standing to request the withheld information. Thus, it is difficult for affected people, general public, consumers, investors or even the very management of these enterprises to understand the scope and impact of corporate operations on legally protected public interests and the respective responsibilities of the corporate actors and directors involved.

2. Mitigating the practical obstacles facing victims

"[N]otwithstanding concerns raised by a number of Member States during the consultation process, it could be considered to extend the Brussels I Regulation to corporations not domiciled in the European Union. One possibility would be to amend Article 6 Brussels I Regulation, in line with the law of some EU Member States, to enable claimants to sue a subsidiary domiciled in a third country together with the European parent corporation... It could also be considered to create additional grounds of jurisdiction, including forum necessitatis."

ECCJ also considers changes to private international law that would result in improvements for third-country victims of MNEs to access a remedy. Specifically, the proposals address law defining the competence of Member State courts to adjudicate private law disputes with a foreign element, and the determination of applicable law in relation to such disputes. These rules are central to any review of the effectiveness of existing legal frameworks governing remedy of violations caused by companies operating outside the EU. ECCJ acknowledges the role of Brussels I Regulation in enabling third-country victims of corporate human rights and environmental abuses to sue corporations in a Member State. The new legal report of ECCJ makes suggestions as to how this regulation could be improved through reforms enabling claimants to sue a subsidiary domiciled in a third country together with the EU based parent corporation and through the creation of additional grounds of jurisdiction, including forum necessitates. The report also considers the role of Rome II Regulation, in determining applicable law. It suggests how this regulation could be reformed to ensure that manifest breaches of human rights are never excused.

Apart from this, the victims both from third-countries and Member States (MS) face various barriers created by **civil procedural law**, including obstacles stemming from time limitations, financial costs, non-availability of public interest litigation and mass tort claims, and provisions on evidence. The reform of these rules, while crucially important to the ability of victims to exercise their rights, does not have an extraterritorial effect and as such does not conflict with principles of international law. This issue has been highlighted and MS have been encouraged to reform their law both by the work of John Ruggie and the Study of Edinburgh University.

3. Improving the governance in the operations of MNEs concerning foreign subsidiaries and subcontractors

“Exceptions to the doctrine of separate legal personality recognised in the corporate laws of the EU Member States could provide the basis for further clarifying under which conditions parent corporations should be liable for human rights and environmental abuses committed by their subsidiaries. On this basis, it could be considered to impose, through domestic regulation and in appropriately limited circumstances, a requirement on European parent corporations to exercise oversight or control over its subsidiaries in third countries, and to hold them responsible for failure to do.”

ECCJ proposes that parent companies be required by law to exercise oversight and control of their subsidiaries and business partners in third countries in regard of their compliance with the international standards of human rights and protection of the environment. This would reflect the distribution of decision-making powers within MNE and would enable victims from third countries to bring civil claims before the courts in the EU were they unable to access justice in their own State. On the basis of general legal principles common to all Member States such responsibility already exists. However, because its standards are not clarified it is too risky for victims to try to hold parent companies accountable before courts of Member States. It follows that it would be desirable to harmonise these standards using EU law.

If the EU is to become sustainable and successful for all its citizens, while respecting the rights of the people and the protection of the environment around the world, urgent change to the legal frameworks governing MNEs it hosts is required. ECCJ's report “Principles and pathways: Legal opportunities to improve Europe's corporate accountability framework” is designed to provide a comprehensive, relevant and realistic legal tool kit to empower the EU to deliver this necessary and urgent reform.