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Costs if you do, costs if you don't
Promoting responsible business & reporting - challenges for policy makers

Bruce Byiers and Justin Bessems

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Mit Zusammenfassung in Deutsch

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Key messages

The growing interest from developing country governments, donors and businesses in linking business and development raises questions about how host and home country governments can encourage and/or ensure responsible business practices of international firms.

While the business case for responsible voluntary CSR reporting is growing and voluntary mechanisms can have legal effect through soft law, these often lack effective enforcement mechanisms for lagging firms whose incentives for responsible business is weaker.

Incentivising responsible firm behaviour and reporting therefore relies on finding a balance between the scope of activities for reporting, an appropriate regulatory mix, effective enforcement mechanisms and the related costs.

The potential costs and benefits of mandatory reporting vary widely across firms depending on size, value-chain complexity, sector characteristics and proximity to consumers. Any mandatory reporting must be adapted to these while converging with existing voluntary schemes to avoid overload.

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Acronyms

ATCA	Alien Tort and Claims Act
BDI	Federation of German Industry
CBI	Corporate Executive Officer
CFO	Corporate Finance Officer
COP	Communication On Progress report
CPA	Consumer Protection Act
DRC	Democratic Republic of Congo
EC	European Commission
EITI	Extractive Industries Transparency Initiative
ESG	Economic Social and Governance factors
EU	European Union
FDI	Foreign Direct Investment
FDL	Foreign Direct Liability
GIZ	*Deutsche Gesellschaft fur Internationale Zusammenarbeit*
GRI	Global Reporting Initiative
HP	Hewlett Packard
ICC	International Chamber of Commerce
IDH	Dutch Sustainable Trade Initiative
IIED	International Institute for Environment and Development
IISD	International Institute for Sustainable Development
IGO	Intergovernmental Organisation
ILO	International Labour Organization
IOB	Indian Overseas Bank
ISO	International Organization for Standardization
MNE	Multinational Enterprise
NCP	National Contact Point
OECD	The Organization for Economic Cooperation and Development
SDC	Swiss Agency for Development and Cooperation
SEC	Securities and Exchange Commission
SME	Small and Medium Enterprise
TBL	Triple Bottom Line
UNIDO	United Nations Industrial Development Organization
UK	United Kingdom
US	United States of America

Executive Summary

Introduction

This report presents the findings and conclusions from a study requested by the Swiss Agency for Development and Cooperation. It aims to capture, present and assess existing information on corporate responsibility reporting practices and experiences for multinational enterprises operating in developing countries.

While developing countries increasingly see global value-chain integration as a strategy for more and better jobs at higher levels of value addition, a growing number of multinational enterprises also recognise the inherent long-term commercial benefit of 'responsible business conduct'. As a recent Financial Times article states, "the business case for case for corporate responsibility strategies is becoming stronger" (Murray, 2015). Firms and their supply chains are therefore ever more important for development outcomes.

At the same time, not all firms adhere to responsible business conduct. In response to numerous cases of private sector abuse of human rights, non-governmental and civil society are increasingly vocal about the need to create stronger regulation and reporting requirements for international firms to oblige more responsible behaviour.

The resulting challenge for policy-makers is to establish the appropriate scope of standards to expect from firms and the right regulatory mix of instruments to implement them. In establishing this, policy makers have to take into account the incentives created for firm compliance in terms of net expected benefits, legal underpinnings and enforcement mechanisms in developing countries.

Addressing the above combination brings four key trade-offs in defining how policy makers can encourage or require corporate social responsibility (CSR):

1. Appropriate scope
2. Associated costs
3. The necessary regulatory mix
4. The related incentives and enforcement mechanisms for compliance

Outline

In order to capture the full range of responsible business initiatives, the study uses the CSR definition used by the European Commission in 2011: "*CSR is the responsibility of an enterprise for its impact on society*".

This study therefore:
i) *Discusses* definitions of corporate social responsibility and recent related trends;
ii) *Introduces* the concept of hard and soft law and their relation to responsible business standards and compliance;
iii) *Relates* these CSR definitions to the concepts of hard and soft law;
iv) *Describes* some of the key existing CSR standards as they apply to people, planet, profit and how they relate to the regulatory mix in terms of hard and soft law;
v) *Provides* a summary of different cost estimates associated with CSR initiative compliance and reporting; and
vi) Highlights *incentives and enforcement mechanisms* as key determinants of effectiveness and relates these to hard and soft law.

Main findings

Dynamic nature of CSR

- CSR has a dynamic nature as definitions and related requirements are changing fast in terms of both voluntary and mandatory reporting at country, regional and international level.
- CSR and CSR-related schemes differ widely in objectives, scope and enforcement mechanism as well as reporting requirements.
- Voluntary reporting schemes are increasingly the norm. With widely varying costs across firms, especially in relation to size, sector, value-chain complexity and whether or not firms are consumer-facing.
- Lead firms are complying with an ever-widening scope of responsible behaviour requirements and reporting as part of corporate strategy.

Trends

- There is a global increase in the number of initiatives for responsible business behaviour and reporting.
- The main drivers for this growth are consumer pressure, company peer pressure, growing business awareness of the potential benefits, and new reporting requirements.
- CSR initiatives can be viewed as a continuum from “do no harm” to “maximise benefits”.
- Evidence suggests there is mutual traction between mandatory and voluntary reporting initiatives.
- Societal expectations can shape the crystallisation of the CSR norms into all other forms of regulation.
- As of September 2014, European Union Member States have two years to transpose the Directive on the Mandatory Disclosure of Non-financial and Diversity Information for large firms; in early 2015 France voted to require large firms to conduct social and environmental due diligence.[1]

Benefits

- The business case for corporate social responsibility is ever more widely accepted, particularly in consumer-facing sectors.
- Many mainstream investment managers have included environmental, social and governance factors into their investment process.
- There is some evidence of the positive effect of CSR on company access to finance although this is ambiguous.

Costs

- There are real costs associated with complying and reporting on both voluntary and mandatory CSR standards and reporting.
- But costs estimates are hard to obtain and are of limited information given variations across firms.
- Voluntary as well as mandatory schemes involve a wide variety of costs according to scope and enforcement.
- Cost aspects seem unlikely to be determinant for firms’ decisions on behaving responsibly.
- Costs for non-compliance with responsible business initiatives are increasingly larger than compliance costs.
- Legal-costs and reputational costs of being discovered not complying with minimum human rights standards, are far more prohibitive than compliance itself.

[1] See here for example: http://www.euractiv.com/sections/development-policy/germany-ranked-5th-global-human-rights-violations-business-index-314347

Incentives and enforcement

- Voluntary CSR schemes can have legal implications through 'soft law'.
- Current systems designed for holding firms accountable in developing countries are relatively weak. Access to justice is poor.
- Mandatory reporting, targeted at specific firms above a certain size engaged in specific sectors would be beneficial in holding all firms to account.
- Enforcement is important in determining the potential cost to firms of not complying with responsible business behaviour and reporting commitments, whether voluntary or mandatory.

Conclusions

- Ultimately, the goal of any CSR reporting measure should be to go beyond minimising abuse to maximising the development impact of foreign investments.
- The burgeoning number of codes, schemes, principles and related reporting requirements are testament to the recognition by forms and governments of the need to ensure responsible business in developing countries.

Challenges

- Providing for access to justice where abuse is uncovered may be the real challenge for governments aiming to affect firm behaviour in developing countries

Zusammenfassung

Einleitung

Dieser Bericht enthält die Ergebnisse und Schlussfolgerungen einer von der Direktion für Entwicklung und Zusammenarbeit des Departements für Auswärtige Angelegenheiten der Schweizer Regierung in Auftrag gegebenen Studie. Er bezweckt die Erfassung, Erörterung und Evaluation von Informationen über Praktiken und Erfahrungen bei der Berichterstattung zu Fragen der gesellschaftlichen Verantwortung multinationaler Unternehmen, die in Entwicklungsländern aktiv sind.

Während die Entwicklungsländer vermehrt auf eine globale Integration der Wertschöpfungskette als erfolgreiche Strategie für mehr und bessere Arbeitsplätze mit mehr Wertschöpfungspotenzial setzen, anerkennen gleichzeitig immer mehr multinationale Unternehmen, dass verantwortungsvolle Unternehmensführung langfristig kommerzielle Vorteile bringt. So schrieb die Financial Times in einem kürzlich erschienenen Artikel, dass «die Bedeutung von CSR-Strategien in Unternehmen zunimmt» (S. Murray, 2015). Unternehmen und ihre Lieferketten spielen für die Wirksamkeit von Entwicklungsmassnahmen folglich eine zunehmend wichtige Rolle.

Andererseits verpflichten sich nicht alle Unternehmen zu verantwortungsvollem Handeln. Angesichts zahlreicher Menschenrechtsverletzungen im Privatsektor fordern Nichtregierungsorganisationen und die Zivilgesellschaft vermehrt eine strengere Regulierung und Vorschriften für die Berichterstattung von international tätigen Unternehmen, um ein verantwortungsvolleres Verhalten zu erwirken.

Die Herausforderung für politische Entscheidungsträger besteht darin, angemessene Mindeststandards für Unternehmen und entsprechende regulatorische Instrumente zu deren Durchsetzung zu definieren. Dabei müssen die politischen Entscheidungsträger den Anreizen Rechnung tragen, welche für die Unternehmen durch eine Einhaltung entstehen, wie z. B. erwarteter Nettogewinn und mehr Rechtssicherheit in den Entwicklungsländern.

Bei der Fragestellung, wie Wahrnehmung gesellschaftlicher Verantwortung von Unternehmen gefördert oder erzwungen werden kann, sind vier Abhängigkeiten gegeneinander abzuwägen:

1. Angemessener Umfang
2. Anfallende Kosten
3. Erforderlicher regulatorischer Mix
4. Anreize und Durchsetzungsmechanismen, um die Einhaltung zu gewährleisten

Überblick

Um die Initiativen von Unternehmen im Bereich *Gesellschaftliche Verantwortung der Unternehmen* (CSR) in vollem Umfang zu erfassen, stützt sich die Studie auf die von der Europäischen Kommission 2011 eingeführte Definition von CSR: «*CSR ist die Verantwortung von Unternehmen für ihre Auswirkungen auf die Gesellschaft*».

Diese Studie konzentriert sich auf folgende Aspekte:
i) *Präsentation und Diskussion* von Definitionen zum Begriff CSR und diesbezüglicher aktueller Entwicklungen;
ii) *Überblick* zu Konzepten freiwilliger Standards (Soft Law) und gesetzlichen Vorschriften (Hard Law) im Zusammenhang mit CSR-Strategien und deren Umsetzung;
iii) *Erörterung* der Definitionen von CSR im Vergleich zu den Konzepten von Hard Law und Soft Law;

iv) *Beschreibung* einiger der wichtigsten CSR-Standards in ihrer sozialen, ökologischen und ökonomischen Dimension sowie der Rolle der Standards bei der Festlegung von Bestimmungen im Hard Law und Soft Law;
v) *Zusammenfassung* von Kostenschätzungen im Zusammenhang mit der Einhaltung von CSR-Massnahmen und CSR-Berichterstattung; und
vi) *Identifikation* von Anreizen und Durchsetzungsmechanismen als grundlegende Faktoren für die Wirksamkeit dieser Standards; Differenzierung nach Hard Law und Soft Law.

Die wichtigsten Ergebnisse

Dynamische Eigenschaften von CSR

- CSR ist dynamisch – Definitionen und Anforderungen bei der freiwilligen als auch bei der obligatorischen Berichterstattung ändern auf nationaler, regionaler und internationaler Ebene rasch.
- CSR und CSR-ähnliche Massnahmen unterscheiden sich bezüglich Zielsetzung, Umfang, Umsetzungsmechanismen und Anforderungen an die Berichterstattung stark.
- Freiwillige Formen der Berichterstattung werden immer mehr zur Norm. Die Kosten für die Unternehmen hängen stark von der Firmengrösse, der Branche, der Komplexität der Wertschöpfungskette und dem Grad der Endverbraucherorientierung ab.
- Führende Unternehmen halten sich an stets umfangreichere CSR-Vorgaben und betrachten die diesbezügliche Berichterstattung als Bestandteil ihrer Unternehmensstrategie.

Trends

- Bei der Berichterstattung zur verantwortungsvollen Unternehmensführung sind weltweit immer mehr Initiativen festzustellen.
- Diese Zunahme ist zurückzuführen auf Faktoren wie Kundenerwartung, Konkurrenzdruck, wachsendes Bewusstsein bezüglich möglicher Vorteile sowie neue Anforderungen an die Berichterstattung.
- CSR-Initiativen können als Spektrum betrachtet werden, das von „do not harm“ bis zu „Gewinnmaximierung“ reicht.
- Gewisse Erfahrungen belegen, dass zwischen obligatorischer und freiwilliger Berichterstattung Wechselwirkungen bestehen.
- Gesellschaftliche Erwartungen können die Überführung von freiwilligen CSR-Standards in andere Regulierungsformen beeinflussen.
- Die Mitgliedsstaaten der Europäischen Union haben seit September 2014 zwei Jahre Zeit, um die *Richtlinie im Hinblick auf die Angabe nichtfinanzieller und die Diversität betreffender Informationen durch bestimmte große Unternehmen und Gruppen* umzusetzen. Anfang 2015 hat Frankreich soziale und ökologische Sorgfaltspflichten für grosse Unternehmen beschlossen.[2]

Vorteile

- Die Relevanz der sozialen Verantwortung von Unternehmen ist immer stärker akzeptiert, namentlich in Wirtschaftssektoren und Branchen, die in einem direkten Bezug zu den Endverbrauchern stehen. Etablierte Investmentmanager haben ökologische, soziale und regulatorische Faktoren in ihre Anlageprozesse aufgenommen.
- Gewisse – indessen nicht eindeutige - Erfahrungen belegen, dass CSR den Kapitalzugang für Unternehmen erleichtert.

[2] siehe z. B. http://www.euractiv.com/sections/development-policy/germany-ranked-5th-global-human-rights-violations-business-index-314347

Kosten

- Bei der Einhaltung von CSR-Standards und CSR-Berichterstattung – ob freiwillig oder obligatorisch – entstehen reale Kosten.
- Kostenschätzungen sind jedoch kaum erhältlich und geben aufgrund starker Unterschiede zwischen den Unternehmen nur beschränkt Aufschluss.
- Sowohl bei den freiwilligen als auch bei den obligatorischen CSR-Programmen fallen sehr unterschiedliche Kosten an – je nach Umfang und Umsetzung.
- Kosten scheinen nur wenig Einfluss darauf zu haben, ob sich ein Unternehmen für ein Engagement im Bereich CSR entscheidet.
- Die Kosten für die Nichteinhaltung von CSR-Standards sind zunehmend höher als die effektiven Kosten einer Einhaltung.
- Rechtskosten und Reputationsschaden im Falle einer Verletzung menschenrechtlicher Mindeststandards sind immens höher als die Kosten der Einhaltung von CSR-Standards.

Anreize und Durchsetzung

- Freiwillige CSR-Programme können als Soft Law rechtliche Auswirkungen haben.
- Die bestehenden Systeme der Rechenschaftspflicht für Holding-Unternehmen, die in Entwicklungsländern aktiv sind, sind relativ schwach. Der Zugang zur Justiz ist mangelhaft.
- Eine obligatorische Berichterstattung für Unternehmen ab einer bestimmten Grösse in gewissen Branchen könnte eine Rechenschaftspflicht für sämtliche Unternehmen begünstigen.
- Eine Durchsetzung könnte aufzeigen, welche potenziellen Kosten den Unternehmen entstehen, wenn sie sich nicht an die freiwilligen oder obligatorischen Verpflichtungen von CSR und an die Berichterstattungsvorgaben halten.

Schlussfolgerungen

- Jede CSR-Berichterstattung sollte im Endeffekt darauf abzielen, nicht nur missbräuchliche Praktiken zu minimieren, sondern auch die Wirksamkeit jeder Auslandsinvestition für eine nachhaltige Wirtschaftsentwicklung zu maximieren.
- Die zunehmende Anzahl an Kodizes, CSR-Programmen, Grundsätzen und Anforderungen an die Berichterstattung zeigt, dass Unternehmen und Regierungen die Notwendigkeit einer verantwortungsvollen Unternehmensführung in Entwicklungsländern anerkennen.

Herausforderungen

- Der Zugang zur Justiz in Missbrauchsfällen dürfte die eigentliche Herausforderung für Regierungen darstellen, die auf das Verhalten von Unternehmen in Entwicklungsländern einwirken wollen.

1. Introduction – CSR as a challenge to policy-makers

A growing transparency agenda

Developing countries increasingly see global value-chain integration as a strategy for more and better jobs at higher levels of value-addition.[3] Development partner policies also increasingly seek to achieve development objectives by working with businesses, essentially operating at the other end of the value chain (Byiers and Rosengren, 2013). In doing so, both ostensibly require policies and approaches that minimise the potential harm from private investment and, if possible, maximise development impact.

A growing number of businesses, including multinational enterprises (MNEs), also recognise the inherent long-term commercial benefit of 'responsible business conduct', 'inclusive business', 'shared value' and having a positive social and environmental impact. Although levels of commitment vary across firms, sectors and legal form, this growing recognition is at least partly inspired by consumer demand for sustainable, 'good corporate behaviour' from firms, but also recognition of the role of CSR in promoting innovation and the potential negative commercial impact of poor CSR standards.[4]

Nonetheless, there are numerous cases of human rights and environmental abuse by firms operating in developing countries. In response, non-governmental and civil-society organisations, governments and citizens are increasingly vocal about the need for stronger regulation and reporting requirements on the activities of firms and for governments to go beyond voluntary measures to impose regulations on their firms.[5]

All this puts international firms and their supply chains at the centre of development outcomes. The fragmentation of production into global value chains or 'production networks' over recent decades raises the potential for foreign direct investment (FDI) and sourcing strategies to feed into or undermine processes of economic, social and environmental transformation.

Increasing transparency around firm behaviour through reporting can play a key role in promoting responsible business behaviour. This is true for policy-makers and implementers promoting and ensuring responsible behaviour, for firms building legitimacy for carrying out responsible business practices, and for consumers and others who wish to hold firms to account. Reporting on activities carried out and performance in relation to guidelines or standards is therefore central to promoting responsible business behaviour.

This study's approach

This briefing note comes amidst a proliferation of sustainability codes and standards: there are currently 458 internationally registered labels claiming some aspect of sustainability.[6] The study also comes in the context of the recent EU adoption of the directive on the disclosure of non-financial and diversity information for large firms, the recent approval of the Principles for Responsible Investment in

[3] See for example the UNECA Annual Economic Report, the AfDB/OECD Africa Economic Outlook and a range of regional and national economic development strategies.

[4] See here for example: http://www.csreurope.org/csr-europe-calls-new-eu-csr-strategy-2015-2019-support-move-csr-compliance-innovation

[5] The Berne Declaration is one example - a Swiss NGO views "CSR instruments with scepticism and is convinced that respect for human rights, compliance with socio-ethical, ecological and labour law standards, and the principle of supporting peace can only be guaranteed in the long term by legally binding rules" (cf. www.bernedeclaration.ch/topics-background/corporate-regulation/).

[6] Website: http://www.ecolabelindex.com/ecolabels/ accessed 15 December 2014.

Agriculture and Food Systems and the call for a revised European CSR Strategy in the December 2014 EU Council Conclusions on a Stronger Role for the Private Sector in Development Cooperation (CFS, 2014).[7] This is also all in the context of the EC's 2014 Communication on the same topic with an attempt to lay out some principles for engaging with firms and bringing greater harmony to EU approaches to engaging with the private sector for development (Byiers, 2014).

The study gathers existing information on CSR or responsible business reporting schemes, practices and costs, and the incentives this creates for MNEs operating in developing countries. It aims to shed light on the trade-offs described above in the context of developing countries and the implications for policy makers and legislators. While a pure cost-benefit analysis does not absolve companies of the need to operate responsibly, it is nonetheless an important factor for policy-makers in gauging what regulatory mix of rules and guidelines to put forward for firms. The deskwork for this study is also complemented by interviews with representatives from the private sector and CSR-related initiatives.[8]

We use the term CSR in line with the European Commission's 2011 Corporate Social Responsibility definition: *"CSR is the responsibility of an enterprise for its impact on society".* As elsewhere in the literature, the term "CSR guidelines" used here is therefore intended to capture the full range of responsible business guidelines, codes of conduct, reporting frameworks and other corporate social responsibility-related initiatives that aim to encourage or require responsible firm behaviour.

The challenge to policy-makers

The analysis presented here highlights the very dynamic nature of the CSR field. Definitions, requirements and initiatives are changing fast. Similarly, voluntary and mandatory reporting schemes and requirements are burgeoning at the country, regional and international levels. There is ever greater government and consumer pressure on firms to increase transparency and accountability, while many 'lead' firms are increasingly pushing towards greater reporting and transparency. While these lead firms potentially set the standard for others to follow, critics suggest that they may also shield other firms from pressure to operate responsibly.

As this paper describes, the challenge for policy-makers lies in reaching an appropriate combination of incentives and disincentives to motivate responsible business conduct while deterring bad behaviour. This implies balancing the following four issues:

i) Defining an appropriate ***scope*** for standards and compliance measures to minimise harm and promote developmental outcomes;
ii) Understanding the potential ***cost and expected benefits*** to firms associated with different CSR-related standards through their impact on investment, profits, and annual turnover;
iii) Arriving at an appropriate ***regulatory mix*** underpinning these in terms of mandatory compliance measures and voluntary schemes;
iv) Underpinning the above with workable ***enforcement*** mechanisms.

[7] European Commission Statement and links to relevant documents here: http://europa.eu/rapid/press-release_STATEMENT-14-291_en.htm. EU Council Conclusions on a stronger role of the private sector in development cooperation: An action oriented perspective: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/146174.pdf

[8] This includes representatives from the Global Reporting Initiative (GRI), Global Compact, the World Gold Council, Herbert Smith Freehills Paris LLP.

Different levels of ambition bring different potential costs and expected benefits attached that vary according to different firms operating in different sectors and contexts. This is important in considering voluntary and mandatory CSR schemes and reporting, while much depends on the incentives created for firms to implement different schemes. This underlines the important distinction between, and changes in, societal norms, soft law and hard law that can then be used to hold firms to account and govern their behaviour.[9] While the potential benefits may be enough to encourage higher levels of CSR compliance and reporting for some firms, enforcement is important in determining the potential cost to firms of *not* complying with responsible business commitments, whether voluntary or mandatory, and whether enforced through national or international institutions.

There are real costs to firms associated with complying with both voluntary and mandatory CSR standards and reporting, but estimates are hard to obtain and are of limited information. Compliance costs vary widely according to numerous factors such as the firm size and sector, supply-chain complexity, varying due diligence duties and of course, the depth of the ambitions and scope of the standards in the first place. How these costs relate to different levels of regulation are important for policy makers to consider. Moreover, estimates of costs must take into account the potential benefits enjoyed by firms that may mitigate if not surpass these costs.

While the literature on the benefits of CSR to firms is ambiguous, nonetheless the debate increasingly points *away* from these as a guide to finding an appropriate regulatory mix for incentivising and ensuring responsible business conduct. Firms are in any case constantly adapting to changing regulations, tastes, innovations, competition and exogenous shocks. CSR-related compliance and reporting costs are therefore just part of many factors firms have to take into account as part of their overall risk strategy. Instead, the literature points more to the benefits that stem from i) being seen by consumers as being transparent and ii) the knowledge created and systems that are put in place that can help identify new areas for innovation and efficiency. Some evidence also suggests ease of access to capital for firms complying with CSR reporting frameworks. Further, the fact that most developed countries increasingly now demand reporting suggests a groundswell in this direction even if some firms nonetheless protest.

The incentives for firms are also affected by the legal and other costs of being discovered *not* complying with minimum human rights standards or other CSR norms that are likely to be far more prohibitive than compliance itself. These relate to reputational costs, but the risk of unforeseen future legal costs and the broader ‘costs of conflict’ can also be exorbitant through stalled or lost business, also pushing firms towards adhering to stronger reporting principles. This then underlines the important role of enforcement mechanisms and access to justice in incentivising firms to act responsibly, but also the continuing ambiguity about legal responsibility for activities carried out in foreign jurisdictions by subsidiary, partner or supplier companies, with potential additional unforeseen costs. Consumer information and pressure has also been shown as important in incentivising firms to improve their corporate behaviour and provide information regarding this.

Ensuring access to justice to hold firms to account for cases of abuse may be the real challenge for governments aiming to affect firm behaviour in developing countries. Evidence suggests that international firms are able to either work through or around local systems to avoid detection or redress for illegal actions. While in the long-run it is hoped that country institutions in developing host countries are able to hold international companies to account for their behaviour, demanding more from firms through

[9] Soft law means commitments made by negotiating parties that are not legally binding although they do carry some authority through the expectations created of commitment to try and comply.

international standards can help with mechanisms to ensure accountability in cases when those institutions are not in place or effective and in regulating complex cross-border activities and structures that transcend any particular host or home jurisdiction. This also creates pressure that will eventually become a norm.

For policy makers and legislators these point to the need for voluntary mechanisms to have more teeth for enforcement as well as enforceable mandatory measures. Mandatory standards and reporting requirements must find a balance between scope of compliance requirements, the firm-size and sector-specific potential costs and benefits, and build on existing CSR initiatives. Creating the right set of incentives and enforcement mechanisms may mean assisting lagging firms with the necessary know-how and resources to catch up with lead firms.

Ultimately, the goal of any CSR measures, voluntary or not, should be to go beyond minimising harm to maximising the development impact of foreign investment in low-income countries. As a recent Financial Times article quotes, "It's when you can shift the system that you get big sustainability gains - not just small, one-off corporate actions that only survive one business cycle" (Murray, 2015). Considerably more investment is required to provide the necessary resources to reduce poverty in developing countries. While efforts are on-going by donors to engage more with businesses through different financial and partnership instruments, perhaps the greatest impact on development will be found through the incentives created by greater transparency, better holding to account of firms and the impact this has on investment and jobs.

Report structure

The remainder of this report is organised as follows: Section 2 presents a brief overview of the evolution of CSR-related concepts, key CSR and reporting initiatives and firm-level reporting trends. Section 3 looks at the overall 'carrots and sticks' affecting firms in terms of the scope and regulatory mix, the potential benefits and the expected costs, and enforcement mechanisms. Section 4 points to some of the challenges and conclusions.

2. Context: Evolving concepts and trends

This section summarises the origins of CSR before discussing some of the key CSR-related initiatives and the evolution of the CSR concept and the trends in firm reporting that have accompanied this. These contextual factors highlight the complexity and fast-changing nature of the topic that add to the challenge to policy-makers.

CSR origins & key initiatives

The roots of CSR can be tracked to post-war 1940s and 50s when businesses were encouraged to pursue social responsibilities in order to bring credibility to free-market capitalism over Soviet Communism (Carroll and Shabana, 2009). A more serious academic and political discussion took place through the 1960s and 70s on the pros and cons of businesses taking responsibilities beyond benefiting their shareholders.[10] This was also the period of the rise of MNEs and growing concern over their activities in developing countries. As developed countries' regulatory frameworks grew to encompass environmental,

[10] There was an intense political debate at that time around the demand for a 'New International Economic Order' backed by an UN resolution in 1974. This led to the creation of the United Nations Commission on Transnational Corporations (UNCTC) which prepared a UN Code for transnational companies but it never passed the General Assembly.

labour, and human rights concerns, the gap between MNE impacts in developed and developing countries grew ever wider.

This period saw the first international agreements that referenced MNEs' ethical duties including the ILO's Tripartite Declaration and the OECD Guidelines for MNEs in 1977. The ILO Tripartite Declaration Principles for MNEs, Governments, and Employers' and Workers' organisations is the basis for many CSR-related frameworks. It covers areas such as employment conditions, training, conditions of work and life, and industrial relations, all of which have potentially related costs (and benefits) to compliant firms, whether through sunk costs to improve working conditions through new installations or improved infrastructure, or recurrent costs through higher wages and benefits. Its provisions are reinforced by certain international Labour Conventions and Recommendations "which the social partners are urged to bear in mind and apply, to the greatest extent possible".[11]

In contrast, the OECD Guidelines for Multinational Enterprises are binding for *governments* to promote among MNEs that are nationals of their country, but are not legally binding for enterprises themselves. Importantly for discussions on mandatory reporting, both the ILO and OECD Guidelines themselves lay down human rights due diligence *recommendations,* to assess impact on human rights, track responses of supply chains and communicate corporate human right policies - this raises questions regarding the extent of the supply chain that due diligence might cover, and the degree of control of a firm for parts of its supply chain. Both of these then influence the costs associated with reporting on this.

Beyond this, the 1992 Rio Declaration specifically outlined the roles multinationals can play in sustainable development. It endorsed enterprises "already implementing 'responsible care' and product stewardship policies and programmes, fostering openness and dialogue with employees and the public and carrying out environmental audits and assessments of compliance" (UN, 1992) The rest of the 90s saw a mass expansion in instruments and organisations devoted to CSR. The World Business Council for Sustainable Development, Businesses for Social Responsibility, and CSR Europe are all organisations established in the 90s by businesses to encourage corporate responsibility.

The UN Global Compact launched in 2000 covers several existing international agreements including the aforementioned OECD Guidelines, the 1998 ILO Declaration and the 1992 Rio Declaration on Environment and Development. It nonetheless differentiates from these by explicitly focusing on effective implementation. The compact is about mainstreaming ten principles into business practice: two on human rights, three on labour, three on the environment, and one on anti-corruption. The Global Compact refers to implementation over a company's "sphere of influence" without being clear what this entails, akin to the supply-chain problem mentioned above. However, the Global Compact emphasises that it is not truly designed to monitor or assess performance. Rather, it claims to offer basic principles under which companies can voluntarily organise more practical strategies.

Building on these, the 2007 G8 Summit in Heiligendamm, Germany, referenced three global standard setting initiatives that remain core today and are the focus of this study. These are:

- United Nations Global Compact[12]
- OECD Guidelines for Multinational Enterprises[13]
- ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy[14]

[11] http://www.ilo.org/global/lang--en/index.htm
[12] https://www.unglobalcompact.org/
[13] http://www.oecd.org/
[14] http://www.ilo.org/global/lang--en/index.htm

In addition to these, the Ruggie Principles, or UN Principles on Business and Human Rights, include the 'Corporate responsibility to respect human rights" (UN, 2011). This "second pillar" states that firms must seek to prevent or mitigate adverse impacts by expressing a policy commitment, also known as human rights due diligence. This must contain an impact assessment, integration of human rights policies, tracking performance and establishing effective grievance mechanisms. Numerous initiatives are set up along these guidelines, while principle 13B also introduces supply chain responsibility and endorses the OECD guidelines for Multinational Corporations. Again, the associated costs are likely to relate most to setting up systems to capture the relevant information.

In terms of reporting against such schemes, the Global Reporting Initiative, launched in 1997, provides guidelines in the form of a Reporting Framework for the design and formatting of CSR-related reporting. This includes Sustainability Reporting Guidelines, specific Sector Supplements and a Technical Protocol. It is estimated that some 1600 companies worldwide report using GRI standards while there is now a partnership between OECD and GRI to build consistency between the two.[15] The guidelines are free, while following them allows a lot of flexibility for firms in deciding on focal areas and practices and therefore on the associated costs.

Beyond these, ISO 26000 is a private standard for which a socially responsible organisation should account for its actions and its compliance with a range of principles.[16] These relate to organisational governance, labour practices, environment, fair operating practices, consumer issues, and community involvement. For each one, the organisation should identify the most relevant actions for its activity with regard to its impacts on society and the environment, stakeholder expectations and its constraints and opportunities. Clearly each of the areas incorporates a range of potential measures with associated costs for setting up and changing organisational structures, gathering relevant information, and potential costs for reporting and auditing.

At a European level, the European Parliament has adopted two sets of resolutions on Corporate Social Responsibility. On "Corporate Social Responsibility: accountable, transparent and responsible business behaviour and sustainable growth" and "Corporate Social Responsibility: promoting society's interests and a route to sustainable and inclusive recovery", these highlight the importance of company transparency in these fields (European Parliament, 2013, 2013a). In addition to the three standards referenced by the G7, these also reference the ISO 26000 Guidance Standard on Social Responsibility and the UN Guiding Principles on Business and Human Rights.[17]

In addition to these voluntary measures, the European Parliament also adopted a mandatory directive on disclosure of non-financial and diversity information by certain large companies and groups on 15 April 2014. The directive will enter into force once adopted by the Council and published in the EU Official Journal.[18] This refers explicitly to the Global Reporting Initiative (GRI)[19] and national level CSR Guidelines and requirements.

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[15] The GRI Guidelines: https://www.globalreporting.org/reporting/G3andG3-1/Pages/default.aspx

[16] http://www.iso.org/iso/home/standards/iso26000.htm

[17] http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm

[18] The most important implications and changes are: Increase relevance, consistency and comparability of NFI by strengthening and clarifying existing requirements (no new requirements or EU standard); increase diversity in boards (management and supervisory) through enhanced transparency (age, gender and geographical diversity, educational and professional background); increase the company's accountability and performance (transparency requires adequate organisation of aspects in management) and efficiency of the Single Market (level playing field); NFI-statement in annual report on policies (flexible, 'comply or explain') and results regarding environment, social and employment, human rights and bribery; Threshold: 500 employees and €20 million balance sheet or €40 million net turnover.

[19] https://www.globalreporting.org/Pages/default.aspx

The US Dodd Frank Act chapter 1502 is another important mandatory reporting mechanism of particular relevance in terms of traceability reporting on value-chains in the extractive sector. Chapter 1504 of this requires extractive companies listed at US-securities exchanges to disclose all payments made to host country governments on a country-by-country and project-by-project basis.

The increase in reporting requirements extends to developing countries. India recently introduced a requirement for sustainable reporting by state-owned companies to complement existing accounting legislation and principles. The Côte d'Ivoire code of corporate governance (2012) aims to ensure companies' sustainable growth through a management system based on "transparency accountability and fairness".

Wide and changing definitions

The rise in responsible business measures and codes has taken place in a context of rapidly evolving concepts and definitions. Indeed some have talked of the evolution of CSR through five different phases: Defensive, Charitable, Promotional, Strategic and Systemic (Visser, 2011). This captures the widening scope of CSR from relatively narrow expenditures to fend off potential fines or regulatory pressures to pet project, to brand promotion, to application of codes and CSR processes and reporting, to full business model innovation to tackle sustainability issues. These "strategic" and "systemic" approaches are very much in line with the Shared Value concept espoused by Porter and Kramer (2011), who define shared value as "policies and operating practices that enhance the competitiveness of a company while simultaneously advancing the economic and social conditions in the communities in which it operates."[20]

The term CSR is now increasingly used interchangeably with that of responsible business conduct or sustainable investment. The ISO 26000 guidelines define CSR as (OECD, 2011):

> *'The responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that:*
> *a) Contributes to sustainable development, health and the welfare of society;*
> *b) Takes into account the expectations of stakeholders;*
> *c) Is in compliance with applicable law and consistent with international norms of behaviours, and;*
> *d) Is integrated through the organization and practiced in its relationships.*

This evolution reflects the aspiration of CSR-related standards being core elements of business strategy rather than add-ons. The introduction to the ISO 26000 standard states that *"Social responsibility is not a new policy in addition to sustainable development. Implementing a social responsibility policy in an organisation means taking actions and measures to take account of the requirements of sustainable development. It is also the logical extension of existing measures: Quality, Safety and Environment policies are both forerunners and components of a social responsibility policy."*[21] CSR guidelines or frameworks therefore refer to a wide range of guidelines, codes of conduct, initiatives, standards, frameworks and reporting mechanisms that frame how firms engage with society and their environment.[22]

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[20] This contrasts with the pure shareholder value model, in which companies pursue maximising profits for the shareholders, which may, but need not, be compatible with shared value and responsible business behaviour. Nonetheless, enterprises should identify, prevent and mitigate their possible adverse impacts, with specific attention to human rights, which according to the Commission has become a significantly more prominent aspect of CSR. In contrast to *maximising benefits*, this approach is more about *minimising harm.*

[21] http://www.diplomatie.gouv.fr/en/IMG/pdf/Introduction_to_ISO_26000_on_social_responsibility_for_small_and_medium-sized_organisations.pdf

[22] This encompasses both normative and operational understandings. The extensive literature on CSR and CSR-related issues discerns between CSR in a normative sense – 'the responsibility of the corporation to meet the

Firm reporting trends & motivations

With the rise in different voluntary and mandatory reporting initiatives, the number of firms now reporting on CSR in some form is increasing rapidly. KPMG released its first corporate responsibility reporting survey in 1993, finding that 13 percent of the top 100 companies in 10 countries produced reports on their corporate responsibility efforts. The last decade has seen a marked increase in the number of companies participating in CSR, as well as a renewed focus on labour and human rights issues. Of the 34 countries in KPMG's 2011 report, 64 percent of companies report their corporate responsibility activities. Of the 250 largest companies in the world, 95 percent currently report in some way, and mostly on a voluntary basis.

Despite these positive trends, a European Commission report from 2013 finds that the coverage of CSR guideline compliance and reporting is patchy. Based on 200 randomly selected EU companies, although 68 percent of the sample companies make reference to "corporate social responsibility" or an equivalent term, only 40 percent refer to at least one internationally recognised CSR instrument.[23] Further, only 33 percent of the sample companies meet the EC's call made in its 2011 Communication on CSR to refer to at least one of the UN Global Compact, OECD Guidelines for Multinational Enterprises, or ISO 26000. Only 2 percent of the sample companies meet the European Commission's call to refer to the ILO MNE Declaration while 3 percent of the sample companies refer to the UN Guiding Principles on Business and Human Rights, which the European Commission expects all enterprises to implement with regard to the corporate responsibility to respect human rights. According to the EC (2013), Danish, Spanish and Swedish sample companies refer to internationally recognised CSR instruments more often than the average EU sample company.[24]

Firms who currently sign up to and adhere with voluntary guidelines on responsible business can be seen as lead firms. These are the firms who have either spotted the market opportunity offered by such mechanisms as a way of differentiating themselves from competitors, have been pushed through the efforts of shareholders or high-level staff or see a motivational or other advantage. Giovanucci et al. (2014) point to four specific factors that act as incentives for firms to voluntarily apply responsible business requirements and report on these:

1. The structure of the value chain in which production takes place;
2. The extent to which demand for a firm's products relies on its brand identity;
3. The possibilities for collective action by consumers, workers, or other activists;
4. The extent to which commercial interests of firms align with social and environmental concerns therefore affect the relative cost-benefit of reporting firms, and the motivation for working with CSR-related frameworks.

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legitimate expectations of society to conduct its businesses in ways that produce economic, social and ecological benefits to all its stakeholders and society at large and the operational sense: "*A structured and systematic approach in which corporations are embedding all aspects of the CSR norms in their daily operations at all levels, monitor compliance and results and report to all its stakeholders and society at large*"' Michael Blowfield and Alan Murray, Corporate Responsibility, A Critical introduction, Oxford University Press, 2011, (p.7-38). This is similar to the EC (2011) definition of CSR as: "the responsibility of enterprises for their impacts on society" . . . To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical and human rights concerns into their business operations and core strategy in close collaboration with their stakeholders (p.6).

[23] The report presents statistics on the extent to which 200 randomly selected large companies (over 1,000 employees) from 10 different EU member states make publicly available policy references to certain internationally recognised CSR guidelines and principles. The ten member states are the Czech Republic, Denmark, France, Germany, Italy, the Netherlands, Poland, Spain, Sweden and the UK.

[24] Dutch, French and Italian companies were about average for the sample, and Czech, German, Polish and UK companies in the sample refer to CSR instruments less frequently that than the average.

These aspects are cited as important for numerous large, international brands. Giovanucci et al. (2014) cite "Sara Lee, Mars, and Tchibo and global retailers such as Ahold, IKEA, and Rewe [that] work closely with UTZ Certified and have all significantly grown their business with the UTZ Certified label from year to year especially in coffee, cocoa and tea". But these firms are notably large.

Firm size is therefore regularly cited as a key factor in determining ability (or willingness) to adopt responsible business conduct guidelines. An IISD (2008) survey found that 41 percent of SMEs and 37 percent of consultants and UNIDO representatives working on "cleaner production" responded that "liquid capital prevented SMEs from investing in systemic improvements and new technologies that were inherent to the social responsibility debate" (Perera, 2008). These SMEs viewed increasing social compliance costs as a constant barrier to improving competitiveness while the lack of economies-of-scale did not justify investments in social and environmental improvement. At the same time, according to the EC (2013), very large companies from a sample of 200 firms (those with over 10.000 employees) are about three times more likely to refer to internationally recognised CSR instruments than companies with between 1,000 and 10,000 employees. Firm scale is therefore a key factor in determining the motivation of firms in adopting responsible business reporting practices.

The above discussion underlines the complexity of the quickly evolving CSR and reporting field. In discussing the origins, key initiatives and recent trends in CSR and responsible business reporting, the main points from this section can be summarised as follows:

- There is a global increase in the amount of policy and regulation for organisational reporting;
- The main drivers for this growth are stakeholder pressure, peer pressure, crisis, a growing awareness and new mandatory reporting requirements;
- Different firms face different incentives to voluntarily report on their sustainability and social impacts.

As these points suggest, CSR can therefore be seen as a continuum from "do no harm" to "maximise benefits". The position of a firm on the continuum will depend on changing market dynamics, consumer concerns and adaptive business practices. However, as growth in mandatory reporting requirements underline, the legal basis for different schemes is also likely to be important in affecting firm behaviour and decisions. This is discussed in the next section along with the discussed costs and benefits to firms of CSR compliance and reporting as part of the overall set of incentives facing firms regarding CSR.

3. Combining carrots and sticks

The above discussion already indicates the potential difficulty of finding an appropriate balance of voluntary and mandatory guidelines to promote responsible conduct across heterogeneous firms. Nonetheless, a key difference across the different initiative discussed above, and therefore a challenge for policy makers, is to understand the combined incentives for firms created by: the scope covered by responsible business requirements; perceived expected benefits and associated costs of meeting them; the regulatory mix of soft and hard law, mandatory and voluntary reporting underpinning them; the firm's starting point with regards to socially and environmentally responsible behaviour (so the degree of 'catch-up' required); and the enforcement mechanisms that determine the full cost of *non*-compliance. While the costs and benefits will determine the potential net benefits (the 'carrots') of undertaking CSR, coverage of

firms and indeed credibility may depend on its legal underpinnings and potential enforcement - the strength of the ‘stick’.

This section therefore introduces the concepts of hard and soft law and how these relate to CSR voluntary and mandatory reporting schemes. It then summarises key points from the literature on the costs and benefits to firms of compliance. Together, these determine the conditions under which firms have to operate and therefore the incentives to comply and report voluntarily, or the potential need for mandatory reporting.

Different strengths of stick

Along with the rise in voluntary reporting mentioned above, recent reports show a global increase in the amount of government regulation for business reporting (UNEP et al, 2013). As stated by IISD et al. (2014), “the ability of voluntary standards to [promote investment in sustainable technologies and practices] depends fundamentally on the credibility and objective accuracy of such initiatives in linking product sustainability claims to truly sustainable outcomes on the ground”. As such, voluntary initiatives are increasingly accompanied by increasing emphasis on a *combination* of complementary voluntary and mandatory approaches, with mandatory and voluntary approaches found to create mutual traction (ibid.). Figure 1 illustrates the growth in mandatory reporting from 58 percent of overall reporting firms in 2006 to 72 percent in 2013. Of the 180 national reporting policies identified in the KPMG report, approximately two thirds are mandatory.

Figure 1: Worldwide Sustainability Reporting Initiatives

Source: UNEP et al. (2013).

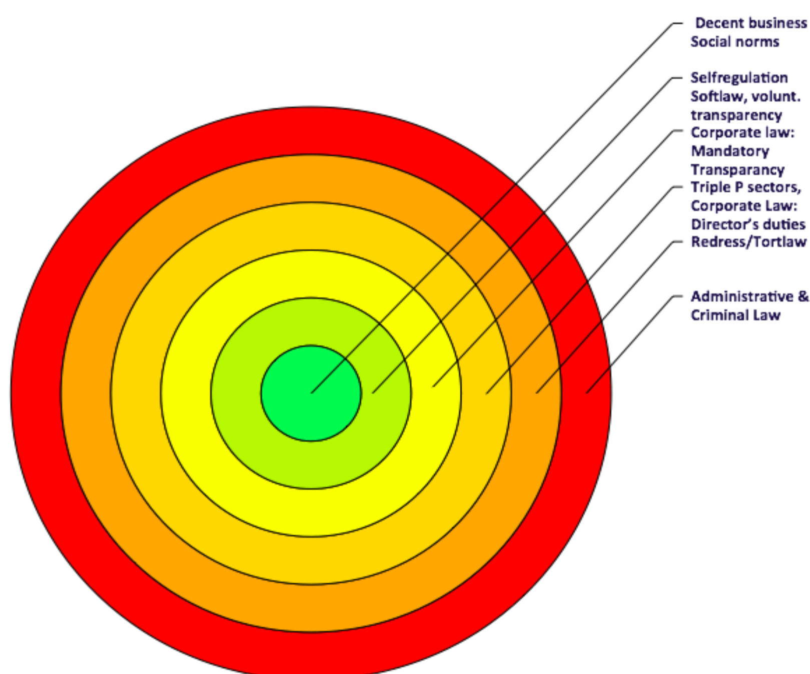
The increase in mandatory reporting is especially visible in the extractive and financial sectors, where mandatory and voluntary approaches often overlap. The Danish and French governments in particular have reported positive outcomes in terms of volume and quality of reporting as a result of their sustainability reporting laws.

Mixing hard and soft law

But even voluntary CSR schemes contain both elements of soft and hard law. Before soft law, 'social norms' reflect the basic ethical, societal expectations citizens have of firms and how they treat people and their surrounding environment – these are likely to vary through time and indeed across countries. Beyond this, 'soft law' includes commitments made by firms that although not legally binding can carry some authority through the expectations created of commitment to try and comply. Some soft law involves self-regulation, through individual or group regulation, including through certification and standards, while 'hard law' then refers to legally binding rules and regulations. These different degrees are illustrated in Figure 3.

While this reflects a range of legality, it is also increasingly an evolution through time, with societal expectations of good behaviour hardening into hard law through time.[25] What are initially non-binding instruments and documents drawn up by international organisations may nonetheless be used in the creation and development of international law norms - they can start from being social norms and evolve into formal treaties and laws.

Figure 3. From a soft law core to hard law shell



[25] Examples of migration from hard to soft law and *vice versa* include: the criminalisation of insider trading, bribery and competition law and of the sanctioning of financial reporting failures (e.g. SOX) and the regulation of directors' compensation. These are examples of hardening migration. An example of softening migration is the financial deregulation by which the prohibition of the combination of investment banking and retail banking was undone. Some scholars claim this was one of the major causes of the financial and economic crisis. http://cje.oxfordjournals.org/content/33/4/563.short

Guidelines therefore need to be seen as standard setting: although not binding in essence, they can have legal effects, with implications for discussions on voluntary versus mandatory reporting. This distinction is important in understanding the evolution of CSR. For example, the EC's 2001 CSR definition only referred to CSR beyond law, as it stipulated CSR's voluntary character. In its 2011 definition the EU Commission no longer refers to a voluntary character for CSR and adopts a more pluralistic approach, introducing the concept of CSR as a regulatory mix.

The different levels of legality and the constantly evolving nature of norms towards legal liability confirmed in interviews increasingly push firms to examine their own social and wider impact through a range of instruments.[26] As van Opijnen et al. (2011) state, although CSR starts from compliance with local laws, the voluntary aspect of CSR or doing more than the law requires in developing countries or areas where these are not enforced is equally important to the concept and raises its own challenges.

Scope: People, planet, profit

The regulatory mix, ranging from societal expectations and soft law, to various forms of hard law, can be looked at in relation to the 'triple bottom line' of people, planet and profit (Elkington, 1997):

> **People:** all subjects covered by Human Rights, including basic notions of prohibition of genocide, war crimes, piracy and slavery as subject of *ius cogens*, but also subjects covered by the ILO-convention. Depending on the set of substantive norms these are addressed by self-regulations, soft law, or hard law.
>
> **Planet** relates to the preservation of natural sources and the protection of the environment. Most international treaties require implementation or automatically form part of national law, this is hard law. In comparison, international certification systems (e.g. Forest Stewardship Council) that are to be adopted voluntarily by corporations are examples of self-regulatory initiatives in the 'planet' realm.
>
> **Profit** deals with subjects related to the ways companies realise their profit (e.g. fair competition, no bribery, financial accounting and reporting), which are mostly reflected in hard law instruments.

Table 1 breaks down the scope of the key CSR-related frameworks discussed above, according to their characteristics, where they are situated in relation to hard and soft law, and the associated reporting mechanism. The scope includes whether or not they address social and human rights aspects ('people'), environmental aspects ('planet') and economic aspects relating to corruption and payments etc. ('profit'). It also highlights the related enforcement mechanism, while beginning to look at where the different schemes sit in terms of soft to hard law.[27] This will be important in discussing the costs and benefits to firms of adopting different sustainable business standards and reporting frameworks.

Linking back to Figure 3, the societal expectations that govern firm behaviour have no binding instrument beyond reputation, citizen concern and their ability to pressure companies. Moving

[26] Presented by Professor Mr. A.J.A.J. Eijsbouts during a lecture series for the Law Master course 'Corporate Social Responsibility' at Maastricht University, Law Faculty May 2014.

[27] Similarly to this table, Columbia Centre on Sustainable Investment (CCSI) also provides a useful taxonomy of individual home country measures aimed at regulating foreign investment. These cover development, environment and human rights, but also anti-bribery, competition, sanctions, securities, tax, and capital controls. Country measures cover a range of laws, guidelines, and requirements to submit CSR-related strategies, reflecting the broad mix of CSR-related frameworks that companies must deal with.

outwards, the legal basis becomes harder as one progresses outwards through soft law statements of intent to self-regulation and corporate and criminal law. Responsible business standards often relate to social expectations, which are “soft” in terms of the degree to which they constrain business behaviour, but can also inform and crystallise into ‘harder’ law and strict repercussions as one moves out towards self-regulation, mandatory corporate laws, towards administrative and criminal law. Different CSR-initiatives and instruments are situated at different places within this diagram. At the same time, soft and hard laws can exist in parallel. Firms are subject to hard law independently of whether they have made CSR-related commitments.

As Table 1 and the discussion of hard and soft law reflects, an important factor in the overall incentive set for firms in complying with responsible business commitments or requirements is the related enforcement mechanism. For self-reported and regulated systems, while flexible, the charge is that these have ‘no teeth’ if firms are not held accountable for non-compliance. Under the Global Compact, there's an obligation for firms to submit a yearly communication on progress in implementing the ten principles and put it on their website for their stakeholders (so-called COP), on penalty of being listed as non-communicating or being delisted altogether, whereas the OECD guidelines go further when stipulating what supply chain due diligence encompasses. However, the argument is also made that this very soft law approach is not enough to alter the behaviour of socially or environmentally irresponsible firms - a firm that fails to provide its annual report for the Global Compact can simply exit the scheme. While this may have some reputational consequences, the legal consequences appear minimal, therefore lowering the cost to firms as well as the potential effectiveness of this kind of scheme. What voluntary and soft-law initiatives have in common is that there is no direct legally binding effect.

Table 1: Examples of range of reporting mechanism, objectives and legal frameworks for companies

		People	**Planet**	**Profit**	**Reporting / enforcement mechanisms**
Hardening scale ↓	**Societal expectations**	Do no harm	Do no harm		Reputation, citizens,unions
	Soft Law	OECD guidelines (Chapter 4) ILO Tripartite Declaration of principles concerning multinational enterprises and social policy	OECD guidelines (Chapter 6) UN Guiding Principles on Business and Human Rights – Pillar 2 (co. responsibility to respect)	OECD guidelines	National contact points (in case of complaint) UNGP Reputational – with own reporting format, referencing GRI
	Soft Law - Self regulation, individual & collective	Global Reporting Initiative Extractives Industries Transparency Initiative ISO 26000 UN Global Compact	Global Reporting Initiative Extractives Industries Transparency Initiative ISO 26000 UN Global Compact	Global Reporting Initiative Extractives Industries Transparency Initiative ISO 26000 UN Global Compact	Annual report in GRI format on selected areas (also used for soft law categories) Annual report with disclosures on payments etc. ISO certificate audit Annual Communication on Progress
	Hard Law	Contract Law	Environmental Law	Company Law	EU Directive 2013 ‘Accounting directive EU Directive 2014 *‘mandatory*

		UN Guiding Principles on Business and Human Rights – Pillars 1 & 3 (gov. responsibility to protect & access to remedy			*disclosure for Non-financial*[28] Dodd Frank Act 1502 and 1504[29] Securities and Exchange Act (SEC)[30] National and international courts

Nonetheless, even voluntary self-regulation through firm-specific corporate codes of conduct or commitments, or collectively through industry standards or instruments have a *potential* legal effect. This stems from the voluntary acceptance of the norms and the promise to abide by them. Collective self-regulation through adherence to industry codes of conduct, for example, can be regarded as 'evidence' of generally accepted practice, creating legitimate expectations through 'soft law'. Similarly non-adherence to these industry codes may be considered evidence of negligent conduct, with the result that adherence is not longer effectively voluntary. Moreover, when codes of conduct are published on the company's website, the company can be held liable for providing the consumers with misleading information, a specific tort.[31] The binding effect may therefore derive from the promises third parties infer, which may be classified as misleading advertisement and result in tort liability, as in the Nike-Kasky case. The OECD National Contact Point cases offer an example of this (see Box 1).

Box 1: OECD Guidelines National Contact Points

National Contact Points (NCP) are formal institutions within the OECD framework aimed at promoting the Guidelines. They are connected to national government bodies and countries have certain flexibility to organise their NCP (OECD, 2008). They can be constituted as single or multiple government, bipartite (business and government), tripartite (business, trade unions, government) or quadripartite (business, trade unions, NGOs, government) bodies.

The NCP also assists with mediation in "specific instances" (Procedural Guidance, I.C.). This is intended to serve as a forum of discussion for business community, employee organisations and other parties.

The procedure starts with an inquiry/complaint raised by a party concerned. This initial complaint requires only rudimentary information in such a way that the NCP is able to make an initial statement. The initial statement contains a decision about whether the case needs further examination. If yes, the NCP enters into a confidential mediation process where parties and, if necessary, other relevant institutions can be heard. If an agreement within this mediation process cannot be reached, the NCP issues a final statement and, if applicable, makes recommendations. This final statement is publicly available and expresses the view of the NCP on the issue raised. There is no "appellate body" that has the competence to revise this statement. Interesting to note here is the tension between the NCP's function as a mediator between the parties and as "quasi- legal" authority issuing a final statement.

Pros

1. NCP offer mediation between parties before making a decision. They are not strictly bound by formal

28 http://ec.europa.eu/finance/accounting/non-financial_reporting/index_en.htm
29 http://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml
30 http://www.sec.gov/
31 The Kasky versus Nike case was a US based case in which Nike was being sued for false statements in their corporate code on their website. So the perils of voluntary disclosures lay in the risks for the company that third parties can successful claim that these disclosures constitute statements with possible legal effect.

procedural rules, but can contribute to an effective solution for all parties.

2. Even if no agreement can be reached, final statements issued by the NCP are non- binding and contain recommendations only.
3. Recommendations can serve as guidance for business on how to interpret the guidelines and how to improve their behaviour along social expectations.
4. In contrary to ordinary court proceedings the NCP procedure is, except the final statement, not held in public.
5. With regard to the institutional arrangement, business can play an active role within the NCP. In some countries, NCP are constituted as bi- or tripartite bodies, where business is represented within the NCP.
6. Even where NCP are not constituted as bi- or tripartite bodies, NCP can within a "specific instance" procedure seek advice from representatives of the business community and relevant experts.

Cons

1. Although the mediation process is confidential, NCP are obliged to issue a final statement if consensus cannot be reached. Because this final statement is publicly available, it can be an obstacle for successful mediation. Corporations have to be aware that information within the mediation process can serve as a basis for the final statement.
2. If a NCP issues a statement, it can contain a clear decision about (non-)compliance. Although this statement is formally non-binding, NCP can be attributed a "quasi-judicative" function.
3. Businesses can be concerned that this statement of compliance can be used in other proceedings.
4. Besides the provisions within the OECD Guidelines, there is no clear procedural guidance for the NCP. This means, that NCP can rather "creatively" interpret the Guidelines, particularly with regard to burdens of proof, evidentiary rules and participation within the process. This makes the procedure and its outcome less predictable for parties.
5. Organisation and procedure of NCP varies from country to country, which makes it more difficult for business to estimate the value of a specific instances procedure. It can lead to contradictory decisions between different contact points.
6. Depending on the institutional arrangement of the NCP, there can be a collision of interest. The main drivers of NCP are national government with specific political interests.

Summary

As this discussion highlights, the evolving context of CSR concepts and reporting frameworks along with incomplete firm coverage raise numerous challenge for policy makers. This relates to finding an appropriate regulatory mix of hard and soft law through voluntary and mandatory measures to ensure responsible behaviour, while also covering an appropriate scope. There are suggestions that there is mutual traction between mandatory and voluntary initiatives.

As also discussed, societal expectations can shape the crystallisation of the CSR norms into other forms of regulation. These can then be used by courts in the implementation of open or blanket norms in hard law (such as good management in corporate law and societal opinions in tort law). Hard law can in turn cause companies to develop or adopt self regulatory instruments individually or collectively in business sectors or to adhere to these norms (e.g. on a "comply or explain" basis).

The benefits of responsible business conduct

To some, "the business case for corporate social responsibility is widely accepted".[32] Transparency offers a channel for company differentiation from other similar companies, thereby increasing their competitiveness. According to interviewees and supporters of CSR reporting, the systems required for CSR reporting are often also useful tools for company management and innovation, not just a cost burden. Indeed, interviewees point to the potential for "new discoveries" through reporting requirements, for example in terms of cost cutting through reporting on energy efficiency.

As such, while studies have found mixed effects, "many mainstream investment managers simply have included environmental, social and governance (ESG) factors into their investment process without waiting for academic evidence" (Grene, 2014). Grene cites one Asset Manager whose research suggests "a remarkable correlation between diligent sustainability business practices and economic performances": 90 percent of studies reviewed show cost of capital is lower for companies with higher standards of sustainability practice; 88 percent find "solid ESG practices" have a positive impact on operational performance; and 80 percent find a positive correlation between sustainability practice and stock price performance. Some studies show that firms with better CSR ratings exhibit cheaper equity financing. Investments in improving responsible employee relations, environmental policies and product strategies contribute substantially to reducing firms' cost of equity (El Ghoul, 2011).

While that may be the case, Reinhardt et al. (2008) find more ambiguous evidence linking the effect of CSR to company access to finance. Citing a meta-analysis of 167 studies of the relationship between financial performance and socially responsible business practices (ignoring the mechanism and direction of causality), they find that 27 percent of the analyses show a positive relationship, 58 percent show a non-significant relationship, and 2 percent show a negative relationship. While some therefore argue that the evidence indicates that CSR, in general, has little effect on profitability, it is also argued that companies that are profitable are more likely to engage in more CSR activities. They conclude that, "investing in CSR is not profitable (in the sense that it does not generate economic rents), but neither is it a losing proposition. Instead it means that for most firms, CSR "pays for itself."

It is also argued that CSR initiatives do not change companies' underlying economic fundamentals. Hence, when investors support corporate sustainability unrelated to economic fundamentals, stocks of all companies can be expected to become more volatile. Moreover, the stock of sustainability leaders can become overvalued in what might be called a 'sustainability bubble' (Orlitzky, 2013). In contrast, another study showed that when companies are innovative and have a good product quality, CSR improves customer satisfaction, increasing financial returns. For a company with a market value of roughly US$48 billion, a modest increase in CSR ratings resulted in about US$17 million more average profits in subsequent years (Luo and Bhattacharya, 2006).

Other benefits of CSR to firms also differ according to firms and sectoral markets. Martinuzzi et al. (2010) look at the links between CSR and competitiveness across three sectors. As they state, "At first sight, a number of similarities between the three sectors could be found: high importance of low production costs and, on the other hand, niche market strategies for high end products." However, they also find that the driving forces of competitiveness differs strongly from sector to sector: the chemical industry is driven by innovation and the challenges of responsibly handling dangerous substances while the construction sector has to balance an enormous pressure for low costs on the one hand and societal

[32] http://www.pwc.com/gx/en/ceo-survey/2014/key-findings/purpose.jhtml

demands on the other. On the other hand, the textile sector is shaped by global competition, leaving two main market niches for European manufacturers: industrial textiles and high-end fashion.

Beyond the firm, evidence suggests that CSR is unlikely to have a significant impact on poverty in developing countries, "except in a limited number of rather specific cases" (Jenkins, 2005). This is because of the relatively limited number of people employed in developing countries by the leading MNEs adopting CSR policies. On the consumption side, most of these companies do not produce goods for the poor. A recent evaluation of the Dutch Sustainable Trade Initiative (IDH), working with multinational firms to adhere to sustainability standards also finds that the "evidence so far suggests that the new generation of voluntary standards has positive, albeit rather modest effects on the ground in developing countries. Mainstream standards like Better Cotton, RA and UTZ Certified accomplish bigger market shares than Fairtrade and have positive effects related to their scale, but they appear to lack the substance to be a major influence on local poverty and the environment in developing countries" (IOB, 2014).

In this context it is also important to take account of different market demand in different sectors. In Kenyan tea production, Rainforest Alliance certified smallholders "achieved a 30% yield increase, compared to a 15% yield increase achieved by non-trained farmers (IOB, 2014). However, because of increased costs for hired labour for more frequent tea plucking the effect on the farmer's net income was far smaller." If it is true that typically only between one third and one half of sustainability-compliant production is sold as such this oversupply compared to demand at current prices may lower the incentive for firms to maintain responsible standards (Potts et al, 2014).

This is not to deny that a positive impact is preferable to the potential harm that firms might cause, and that exposure to human rights risks may vary by sectors. Nonetheless, this brief summary highlights the potential challenge of convincing reluctant firms of the potential benefits of promoting the wider integration of environmental and social considerations into core business strategies.

The potential costs of CSR frameworks

The incentives to firms to implement and report on responsible business conduct also relate to the potential associated costs. To say more about these, this section looks at the types of costs involved with some of the key CSR-related mechanisms introduced above before summarising some related estimates (ibid.).[33]

Different types of costs

A recent paper suggests that CSR has three major related costs: sunk costs, recurrent costs and opportunity costs (GIZ, 2012). While sunk costs include any initial investments to improve safety or update technology to reduce harmful outputs, recurrent costs include the costs of maintaining compliance as well as those related to reporting, namely data collection, report-writing and publishing costs, auditing or certification costs, and training costs (CSES, 2011). Opportunity costs include any activity that could not have been undertaken due to capital and labour being bound to the CSR activity. However, these costs are not always distinguishable.

Depending on the scope and requirements of the reporting scheme/initiative, sunk compliance costs relate to adapting the business model to comply with the standards established. This may include investments in new technology and machinery to meet environmental commitments, raising wages,

[33] Where possible, any cost-benefit analysis would ideally look beyond the direct financial costs and benefits to firms to include social and environmental costs of production (IISD, 2014).

adapting institutional mechanisms within the firm etc. By way of example, in the aftermath of the Rana Plaza disaster in Bangladesh, Accord and Alliance inspections have identified thousands of deficiencies in the factories that fall within their inspection programs. But to date, none of the major brands or retailers has made a public commitment to fund the upgrades and repairs that are needed. According to one report, "The Alliance estimates an average cost of US$250,000 per factory. That's more than US$400 million for Accord and Alliance factories alone." (Business and Human Rights Resource Centre, 2014). These sunk costs are particularly difficult to measure and to separate from technological upgrading or investments to improve working conditions as part of a broader business strategy.

Recurrent costs relate to those required to maintain compliance, as well as reporting, auditing and certification. GIZ (2012) estimate that the costs of certification based on international voluntary sustainability standards and codes of conduct can range from around US$575 to around US$1000 per work day. The costs of duration of audits can take from 1 to 13 days, depending on, *inter alia*, the physical size of the facility, the number of employees, and the type of certification or audit - this is considerably below the costs estimated by French authorities, again signalling the difficulty of interpreting the estimated costs associated with different schemes. Estimates for these different costs are discussed below in further detail for the cases of the EU Non-Financial reporting Directive, and for the Dodd-Frank Act. The gradual hardening of soft law to hard law regarding standards and expectations placed on firms, further highlights that *maintaining* compliance may also mean gradually increasing costs as the scope of initiatives required to stay compliant become more demanding.

An additional challenge to firms relates to the emergence of multiple reporting schemes and initiatives and reporting demanded by buyers, themselves subject to different codes and CSR-initiatives. As Newitt (2013) points out, while there is near universal acceptance of the ILO core labour standards, basic health and safety requirements and provisions on wages and working hours in voluntary codes, different CSR-initiatives often have different and potentially conflicting standards and monitoring systems. According to EcoLabel, there are currently 458 registered labels claiming some aspect of sustainability.[34] "Supplier factories often complain about dealing with a multiplicity of codes and standards, which can lead to 'audit fatigue' and high compliance costs (particularly where compliance criteria differ between one another and go beyond national regulatory requirements). Producers and exporters bear differing cost burdens depending on the standard, but often multinational companies do little to share these costs" (Newitt, 2013).

But clearly the costs vary considerably by instrument. The following two sections focus in particular on the EU Non-financial reporting directive and Dodd-Frank Act.

EU Non-financial reporting cost estimates

The European Parliament adopted a Directive for the Mandatory Disclosure of Non-financial and Diversity Information for large firms in April 2014.[35] 'Public-interest' companies with more than 500 employees will be required to disclose certain non-financial information in management reports, affecting some 6,000 large companies and groups across the EU according to EC estimates.[36] Required information will include "relevant and material information on policies, outcomes and risks, including due diligence that

[34] Website: http://www.ecolabelindex.com/ecolabels/ accessed 15 December 2014.

[35] The European Council subsequently adopted this in September 2014. Member states will have two years to transpose the Directive into national legislation. http://ec.europa.eu/internal_market/accounting/non-financial_reporting/index_en.ht

[36] Public interest entities (PIE) are listed companies, credit institutions, insurance undertakings or any other entity designated by an EU member state as a PIE (for example because they are of significant public relevance due to the nature of their business or size).

they implement, and relevant non-financial key performance indicators concerning environmental aspects, social and employee-related matters, respect for human rights, anti-corruption and bribery issues, and diversity on the boards of directors" (EC, 2014a).[37]

The EC states that: "Costs associated with the required disclosures are commensurate with the value and usefulness of the information, and with the size and complexity of the business. It varies according to the internal use and external visibility." While the Directive does not require comprehensive reporting on environmental and social aspects (although "the Commission encourages it") the EC presents estimates that the required disclosure "of certain information on policies, outcomes and risks" will result in "an additional direct cost for large companies of *less than €5,000 per year,* i.e. less than €30 million euro on an EU basis" (ibid.).[38] This is based partly on the EU Council estimates that the cost of the proposed disclosure is estimated to be between *€600 and €4300* per year per company.[39]

While the meaningfulness of the above figure is hard to judge, a study carried out as part of the consultative process for the EC arrives at different estimates. According to these, the costs of non- financial reporting for large companies is in the range of *€155,000 to €604,000* and for smaller companies in the range of €8,000 to €25,000 (CSES, 2011). Expressed as a cost per employee, the reporting costs for smaller companies (€68 to €212) are substantially higher than those for larger companies (€3 to €13). These figures are summarised in Table 2.

The same report estimates that larger companies spent between 35 and 100 days on collecting *new* data, a cost of between €8000 and €23,000.[40] This is a one-off cost, based on published non-financial reports by 71 companies in eight countries and including firms in banking and financial services, food and agriculture, textile, consumer goods, extractive and other sectors.[41] Further, CSES (2011) estimate that companies incur costs on report design varying between €10,000 and €100,000 for larger companies and between €1,000 and €2,000 for smaller companies. In addition, some companies incurred external processing costs, the largest amount being €97,000. For most companies the costs were much lower, under €20,000. Adding together the staff costs and other costs, CSES (2011) arrives at a range of between €91,000 and €331,000 for report drafting by larger companies (the highest and lowest quartile are excluded), and €9000 and €12,000 for smaller companies.

[37] Further, large listed companies will be required to provide information on their diversity policy, such as, for instance: age, gender, educational and professional background of board members.

[38] Importantly, they state: "To be clear, this Directive does not require companies to comply with integrated reporting. The Commission is monitoring with great interest the evolution of the integrated reporting concept, and, in particular, the work of the International Integrated Reporting Council."

[39] EC Council Impact Assessment etc. - COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the document Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups /* SWD/2013/0127 final */http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013SC0127

[40] 58 of the companies have more than 250 employees and 13 have less than 250 employees.

[41] The countries are Germany, Denmark, Spain, France, Italy, the Netherlands, Poland and the UK.

Table 2: Estimated costs for EU Non-financial reporting

Cost heading	Large Companies		Small companies		Notes
	Low	High	Low	High	
Report drafting	*€91,000*	*€331,000*	*€9,000*	*€12,000*	Depends on the complexity of the company. Small companies can produce a short report for much less
Publication	*€34,000*	*€131,000*	negligible	*€1,000*	Depends on the publication strategy used - a high number of printed reports, or a special website means high costs
External assurance	*€22,000*	*€114,000*	nil	nil	Typically large companies only
Additional data	*€8,000*	*€23,000*	negligible	negligible	Typically large companies only
Training etc.	*€0*	*€5,000*	negligible	negligible	Typically large companies only

Source CSES (2011).

The Federation of German Industries also finds that the Commission cost estimates for its non-financial reporting directive are too low. They state that the EC estimates fail to take into account "amongst others, the sunk costs of introducing the corresponding structures and capacities to collect the necessary data, or the external auditing of the additional information in the management report." In their view, more realistic estimates put the costs at *between €155,000 and €604,000* per year (BDI, 2013). However, a UK report from the Confederation of British Industry (CBI, 2013) on the same directive estimates £30,000 per firm (*approximately €40,000)* in the first year, based on responses from 90 UK businesses and business organisations, and over 20 business organisations across Europe.[42]

Beyond investments in complying and gathering information, and report-writing itself, CSR reporting increasingly requires external auditing to ensure its validity. This was a major part of the French business submission to the EC Consultation on non-financial reporting. They cited figures of between €50,000 and €200,000 per firm for data collection, internal processing and consolidation; between €50,000 and €100,000 for data publication in the management report; and between €100,000 and €750,000 for external verification of reporting processes (mandatory in France as of 2012) and of CSR data (on a voluntary basis). This depended on "the number of indicators verified and the extent of work undertaken by the independent third-party body (high or medium assurance level, review of systems and processes for collecting and processing the non-financial information, interviews, local inspections, etc.).[43]

The EU non-financial reporting directive gives an example of how enforcement can be encouraged with flexibility. This relates to the "comply or explain" approach: if a company does not pursue policies in any of the areas, it must provide a clear and reasoned explanation for not doing so, thus potentially also avoiding onerous monitoring mechanisms and costs. But companies may also use any national, EU or international framework for reporting as the Directive does not prescribe the use of common, specific indicators which would have ensured a minimal level of comparability as regards, above all, of measurable environmental impacts (ECCG, 2014).

[42] These estimates are similar in range to estimates made in consultation with UK extractive firms on the EU Accounting Directive which would require reports on payments they make to governments in all their countries of operation. The UK government estimated transition costs to set up systems, and on-going costs in 2014. Based on reported estimates, and extrapolating across the 251 UK extractive firms, UK government estimated transition costs of between £11.9m (roughly €15m) and £13.1m (EUR16.5m), and on-going costs of £6.6m (EUR8m). Shared across the 251 firms operating in the extractive sector this averages €60,000-65,000 per firm for transition costs and €33,000 of on-going costs.

[43] http://www.afep.com/uploads/medias/documents/Consultation_europeenne_information_non_financiere_0111.pdf

As this short summary suggests, estimates of compliance and reporting costs vary widely according not only to the scale of firms, but also the aspects of compliance and reporting included in estimates.

Dodd-Frank Compliance Cost estimates

Chapter 1502 of the Dodd Frank Act[44] directs the SEC to require companies to report on the sources of minerals inputs. Firms that manufacture products containing tin, tantalum, tungsten, and gold—collectively referred to as "3TG" or "conflict minerals"— are required to document if any 3TG in their products have been purchased from Covered Countries where armed groups are suspected of committing human rights violations. The three-step procedure to be followed is:

1. Assessment whether conflict minerals are necessary to functionality or production of products manufactured in the reporting year.
2. Conducting a reasonable country of origin inquiry to determine whether any originate in the DRC or adjoining countries
3. If so, conducting supply chain due diligence in accordance with internationally recognised due diligence framework – presently only available the OECD Due Diligence Guidance in Weak Governance Zones - and issue a Conflict Minerals Report.

The first reports were submitted to the SEC in June 2014. The associated costs again depend on supply chain investigation and mapping costs, requiring human resources and organisational systems in place. Further, Chapter 1504 of the Dodd-Frank Act requires extractive companies listed at US-securities exchanges to disclose all payments made to host country governments on a country-by-country and project-by-project basis, also requiring specific systems in place.

Importantly for the Dodd-Frank Act, value chains can now be so complex that just to establish exactly what products are used in the production of one specific part of, say, an automobile, can itself be a major exercise. This is even before attempts are made to establish their origins, and then move to improving the various conditions around there. Companies still face many challenges when trying to manage social and environmental issues in the supply chain, including a lack of traceability of raw materials and products in the supply chain, the large number of supply chains a company may be part of, and the lack of legislation or enforcement of legislation in some of the supplier countries, particularly developing countries (ICC, 2007).

The US Securities and Exchange Commission (SEC) estimated initial compliance costs of US$3 billion to US$4 billion for the Dodd-Frank Act as end users of the four conflict minerals attempt to find out the origins of their raw materials (Tysiac, 2013). While this is the total cost to the economy, the SEC estimates that 6,000 US issuers are directly affected by the new requirement to trace the conflict minerals (gold, tantalum, tin, and tungsten) in their supply chains, suggesting an average cost between US$500,000 and US$667,000 per firm (ibid.).[45] This is in line with another report on Dodd-Frank reporting costs that estimates the total aggregated and extrapolated expense of 1,300 issuers to comply with Dodd-Frank Section 1502 at 709.7 million by June 2014. Thus on average, an issuer spent US$545,962 to comply with the law, while total compliance costs for small issuers - with less than US$100 million in revenue - was US$20,429,989.[46] This then illustrates the importance of taking firm size into account, but

[44] https://www.sec.gov/about/laws/wallstreetreform-cpa.pdf
[45] However, the cost to individual firms clearly depends on supply-chain complexity – e.g. Hewlett Packard estimates that about 1,000 suppliers in its chain ultimately provide a product to them that may contain one of the conflict minerals.
[46] http://www.payson.tulane.edu/welcome-tulanes-dodd-frank-section-1502-post-filing-survey-2014-presentation

also suggests considerably higher costs to firms than the estimates for the EU non-financial reporting directive.

Bayer and de Buhr (2011) present a further model focusing on the burden of Dodd-Frank compliance on the affected issuers *and* their first tier suppliers. They estimate that the actual cost of implementing the law is US$7.93 billion, quite different to the above estimates. US$3.4 billion of the estimated costs relate to in-house company personnel time with the rest comprising outflows to third parties for consulting, IT systems and audits. Comparing the costs to the issuers versus the suppliers, they claim that 65 percent of the total costs, US$5.1 billion or 65 percent, would be incurred by suppliers (not included in the SEC analysis), while the smaller portion of the total, US$2.8 billion or 35 percent, would fall on the issuers. As such, they conclude that in fact the implementation costs would be borne by thousands of individual firms in a range of mineral-using industries such as industrial, aerospace, healthcare, automotive, chemicals, electronics/high tech, retail and jewellery industries.[47]

The discussion of cost estimates of both the EU Reporting Directive and the Dodd-Frank Act highlight the wide range of potential costs and the difficulty of making sense of such estimates. They also underline the wide range of firm characteristics that can impact on costs, with the EU non-financial reporting directive suggesting lower compliance costs than the Dodd-Frank Act, potentially due to the different level of information requested.

Opportunity costs of reporting and competition

Beyond the actual financial burden of complying and reporting on different CSR-related schemes, a key concern for firms and indeed governments is the effect on the competitiveness of their companies. In the UK's Impact Assessment Implementation of Chapter 10 of the EU Accounting Directive (2013/34/EU) it states that "It is possible that complying with this measure will place UK companies at a competitive disadvantage. Whilst disclosing payments to governments will not give direct insight into the levels of turnover, costs and profits that an extractives company generates in a particular area, there may be instances when confidential business data will be revealed or can be deduced from such data". [48] According to the German Federation of Industry in reference to non-financial reporting, "These additional financial burdens would put European companies at a serious disadvantage with regards to their international competitiveness, and should therefore be avoided on all accounts." In contrast, an IISD (2008) survey finds that 38 percent of SMEs and 60 percent of consultants suggested that social responsibility-related investments "did not present additional cost-burdens, provided that the mix of social responsibility strategies was suited to the firm's immediate priorities."

Toledano and Topal (2012) point out that claims that demands of the Transparency Amendment contradict host country confidentiality laws are ill placed as most countries allow for exceptions based on stock exchanges' disclosure demands. This is also an argument that has been used against reporting at the EU level, particularly in the case of the Accounting Directive proposing country-by-country reporting. According to the consultation that was carried out, "Some stakeholders submit that the

[47] Dodd-Frank Chapter 1504 requires different types of information and reporting, relating to payments to host governments at a detailed level. While supporting the Extractive Industry Transparency Initiative (EITI), the corporate lobby reportedly opposes the SEC rules for allegedly causing high implementation costs, opposing legal demands and a comparative disadvantage for US-listed companies. Toledano and Topal (2012) cite estimates that implementation costs may exceed US$50 million since firms will have to re-devise their accounting instruments to disclose project-based and non- material information. However, they also relate that civil society and *The Economist* have contested the accuracy of this figure as much information is already collected. Further, they gave the example that US$50 million is little more than 0.1% of ExxonMobil's last year's revenue.

[48] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/341986/bis-14-1024-implementation-chapter-10-eu-accounting-directive-impact.pdf

introduction of country-by-country reporting could create level playing field concerns and that the additional disclosure requirements could decrease the attractiveness of the EU as a location for investment (due to the associated administrative burden and cost). However, most stakeholders agree that [it] will not affect the willingness of reporting institutions to remain in the EU." (EC, 2014b).[49] Nonetheless, the German Federation of Industry complain that "there is no empirical evidence for the claim put forth by the Commission that greater transparency and a mandatory reporting of non-financial information will not affect competitiveness on a global scale'' (BDI, 2013).

Costs of non-compliance

While compliance with CSR-related frameworks may have costs, the costs are increasingly larger for firms who do *not* comply with different CSR standards and reporting. The costs associated with redress clearly depend on whether or not a firm i) abides by its commitments, ii) is caught or identified if it does not, and iii) can be held liable and accountable for harm caused or other legal redress. As the above discussion highlighted, all three of these depend largely on the scheme adopted, and the degree to which firms can genuinely be held legally accountable for failure to comply. However, as interviewees underlined, even the lawyer fees involved for remedy cases are likely to overshadow any costs for reporting, while reputational costs for firms with high levels of consumer exposure can be very high. Lost production due to disputes is also costly as recent examples have highlighted for example in the extractive sector.

While reputational costs and production losses may be sufficient deterrents for firms, the threat of redress depends on being able to establish a firm's responsibility for violations committed by supplier firms. As Ruggie has commented, the scope of responsibility is a narrower concept than the 'sphere of influence', meaning that firms are obliged to go 'beyond the law' in dealing with CSR, something which is clearly a challenge with its own costs, and something which affects the cost estimates cited above. As cited in van Opijnen (2011), frontrunner firms in responsible supply chain management reportedly use several instruments to involve the majority of their suppliers in responsible practices in the supply chain through Supplier Codes of Conduct. Nonetheless, balancing the need to ensure access to redress for harm committed in developing countries while at the same time relying as much as possible on host (developing) country legal institutions is a challenge.

In their research on ' Costs of Company-Community Conflict in the Extractive Sector', Davis and Franks (2014) identify the types of costs that companies may experience as a result of conflict with local communities. The paper argued that extractive companies do not currently identify and aggregate the full range of costs of conflict; instead they tend to be rolled into local operating costs, whereas actions in effort to prevent such losses result in direct costs. The paper furthermore concludes that the most overlooked cost is staff time spent managing conflicts with local communities. Most frequent costs are those arising from lost productivity due to temporary shutdowns or delays, whereas the greatest costs identified were the opportunity costs in terms of the lost value linked to future projects, expansion plans and losing future trade deals.

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[49] General assessment of economic consequences of country-by-country disclosure requirements set out in Article 89 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013. http://ec.europa.eu/internal_market/company/docs/modern/141030-cbcr-crd-report_en.pdf

Types of costs that may be experienced by extractive companies as a result of conflict with local communities (Davis and Franks, 2014)	
Security	• Payments to state forces or company security contractors. • Increased operational costs of security: fences, patrols, escorts, transport, alarm/leak monitoring systems, reduced mobility. • Increased security training and management: staff time, lost production, cost of programs.
Project modification	• Design modification costs: application, redesign, legal. • Additional works.
Risk management	• Insurance: higher premiums and coverage, risk rating, withdrawal of coverage. • Legal and conflict expertise: specialist training for staff, additional staff.
Material damage	• Damage or destruction to private property or infrastructure.
Lost productivity	• Operations discontinued: voluntary closure or enforced through injunction. • Temporary shutdown of operations. • Lost opportunity for future expansion and/or for new projects. • Disruption to production: temporary or indefinite delays, absenteeism. • Delays in deliveries/supplies. • Greater regulatory burden/scrutiny.
Capital	• Loss of value of property: full write-off, other depreciation, sale at a loss, theft. • Inability to repay debt or default on debt. • Difficulty raising new capital. • Share price instability/loss in value (within relevant time period).
Personnel	• Staff time spent on risk and conflict management. • Costs of remediation: meetings, negotiations, mediators. • Hostage-taking: ransom payments, rescue operations, compensation. • Arrests of staff. • Injuries to staff and fatalities. • Low morale and stress-related effects. • Retention: higher salaries, compensation packages, bonuses. • Recruitment: advertising positions, screening, interviewing, induction training.

Access to remedy

Notwithstanding, holding firms to account even where reporting mechanisms and potential enforcement mechanisms are in place is still a challenge in developing countries. This is reflected in a recent report on the third pillar of the Ruggie Principles on Business and Human Rights and access to justice relating to human rights abuse (Skinner et al., 2013). This means increased transparency through reporting is only useful when provided in such a way that companies or local communities are able to use it and secure remedies.

This is particularly important for developing countries where government institutions regulating or providing citizens direct avenues to seek relief for harms caused by MNEs are often weak, or difficult to access. The challenges, for example, of maintaining a sophisticated administrative program capable of monitoring and evaluating environmental impacts can be daunting for a country with limited human and financial resources. Moreover, the difficulties for any single government to ensure its citizens have access to justice to secure relief from harms by MNEs are also exacerbated by patterns of international business and corporate structures, which can effectively place the responsible actors and corporate assets out of the reach of host country courts. Consequently, local communities need better instruments at home and abroad to protect their Human and Socio-economic Rights.[50,51]

In this respect the NCP procedure of the OECD guidelines is one welcome instrument but lacks real enforcement power, as described above. However, there are some other legal avenues victims of harms caused by MNEs can use to seek more powerful remedies. Some of these are described in Box 2.

Box 2: Additional common law regimes for remedy

Tort law

For companies operating from common law countries, if a company directly causes harm abroad, or their subsidiary causes harm abroad, they can be sued in its "home" country on the basis of tort negligence law.[52,53] The rules of the different home jurisdictions, however, will shape the extent to which its courts can hear the claims over any given member of the corporate family, what types of conduct constitute negligent or other wrongful conduct, and what type of relief can be ordered. In some countries, for example, in order to be able to hold a (parent) company liable for harms abroad, the following conditions have to be met: foreseeability, proximity and fairness.[54] Depending on the relevant home country where tort liability is sought, the conditions for establishing jurisdiction and liability, and the remedies available for victims may effectively put relief out of reach. Relatedly, the fact that victims have to sue the (parent) company in its home country, can lead to high costs that are potentially prohibitive.

Foreign Direct Liability (FDL)

Another possible remedy is trying to apply the concept of Foreign Direct Liability (FDL). FDL refers to the direct liability of the parent company of a multinational group before the courts of and on the basis of the substantive tort law in its home country for violations, directly or by subsidiary companies, of human rights or socio- economic rights of third parties in foreign countries, based on a duty of care as relevant factor in the application of the substantive tort law in the parent company's home country. The liability of parent companies for acts or omissions by their subsidiaries can be construed on the basis of so-called piercing the corporate veil (of the subsidiary) on the liability of the parent company as principal of the subsidiary company as agent, as contractual basis, or a direct duty of care of the parent company towards the victims of the subsidiary's operations, a tort law basis. The concept is only not yet proven in practice. There are significant hurdles[55] to overcome before this concept will be widely applicable.

Alien Tort Claims Act (ATCA)

US congress adopted the Alien and Tort Claims Act as early as 1789. It was created to target international piracy and offences against diplomats. In 1980 the ATCA was brought back to life in the

[50] http://www.theguardian.com/global-development-professionals-network/2015/jan/21/
[51] https://www.opendemocracy.net/openglobalrightsopenpage/
[52] Lord Atkins in: Donoghue versus Stevenson.
[53] UK Case Chandler-Cape.
[54] UK Case Caparo.
[55] E.g. forum *non-conveniens* rule and *lex loci delicti.*

Filartiga v. Pena-Irala case. It allows non-US citizens to bring tort suits against both natural and legal persons before a US court, for abuses that took place outside the US. However, settlements,[56] as the ACTA has been interpreted and applied by US courts, it has a relatively limited reach abroad that. For one, the ACTA is only applicable to worst cases of human rights abuses, that are breaches of customary international law ius cogens.[57] Secondly, another issue is that pursuant to the forum non conveniens doctrine, courts can decline to hear a case when they think there exists a foreign court more appropriately situated to hear the matter. These and other aspects of ACTA and case law interpreting have significantly restricted its use as a tool for victims to successfully secure remedies for harms caused by MNEs abroad.

In summary

This section linked discussion of the scope and underpinnings of different responsible business frameworks to costs, benefits and enforcement. Although frameworks vary according to scope, legal basis and enforcement mechanisms, this chapter has shown that a range of different factors (sector specific aspects, value chain linkages, business - consumer or business to business, technology and market related aspects) are all likely to influence the costs to firms, making cost estimates a very difficult basis for policy-makers to go on.

It is possible to break potential costs down, and estimates have been made, for example for the EU Directive on Non-Financial Reporting, and the Dodd-Frank Act. Compliance costs emerge as depending largely on the sector the company is operating in. For example, the SEC has estimated that initial compliance costs for the Dodd Frank Act amount up to US$4 billion, as companies need to find out the origin of their raw materials, whereas the European Commission estimated that larger companies have to pay up to €23,000 to comply with the new Directive on disclosure of non-financial information. On-going costs also differ from company to company. We have seen that funding upgrades to factories under the Bangladesh Accord can amount up to US$250000 per factory, whereas report-writing cost (also a form of ongoing costs, as reports are recurrent activity) vary between €10,000 and €100,000 for larger companies and €1000- €2000 for smaller companies.

So it is safe to say that costs vary dramatically over different companies, sectors, and depend heavily on the sort of framework. Furthermore costs relating to transparency and monitoring are not as high in comparison to other sorts of compliance costs, especially when we consider that increased transparency can also lead to benefits (e.g. financing and the business case for CSR). As discussed, estimates and evidence on benefits and costs vary widely across different mechanisms and firm types, relating to compliance itself as well as the different stages of reporting, auditing and certification. Nonetheless, according to lead-firms, the benefits often outweigh the costs, particularly when enforcement mechanisms 'have teeth'.

[56] US Case: Bhopal.
[57] Such as: genocide, war crimes, piracy and slavery.

4. Conclusions

The central role of firms in development, and international firms in particular, imply that the behaviour of firms with respect to their surrounding environments is a key issue for development policy. As an interviewee for this study stated, "Doing good is now no longer about firms building schools or health centres, but about looking ahead and dealing with the potential consequences of their actions on the local community environment". Although varying across firms, often depending on their exposure to consumers and the nature of the sector, there is therefore wider recognition that responsible businesses can go beyond minimising harm or pet projects, and that firms can also maximise their development impact by adapting their traditional core business. This has implications for donor country governments in particular to i) ensure coherence with development objectives and ii) engage more with the private sector for development.

The burgeoning number of codes, schemes and guiding principles are testament to the recognition by firms and governments of the need to ensure responsible business in developing countries. Given the particularly high levels of technical know-how, human and financial resources, and political will necessary to effectively regulate investment in certain industries such as the extractive industries or generation and distribution of power, many developing country governments face challenges in holding international firms to account. These challenges are exacerbated by today's modern corporate structures, which can obscure the identities of and access to actors, assets, and liabilities. Relatedly, major questions exist on when voluntary or mandatory CSR measures developed by the host country, home country, or international entities are necessary and appropriate to supplement basic local regulations in place. Even where mandatory measures are imposed, there are questions about the legal strength required, and the impact of these on the ground.

The main issue for policy-makers discussed in this paper is the need to establish the appropriate balance between the following: the scope of standards to adhere to, the **regulatory mix** to use, while taking into account the **costs and benefits of compliance and reporting**, and the different implications of hard and soft law in ensuring **enforcement** in developing countries, particularly given i) developing country ambitions to promote economic transformation; ii) evidence of difficult access to justice for victims of corporate abuse and; iii) a long-term ambition to build legal accountability and developing country justice.

Based on existing literature and interviews, this paper summarises key aspects of the debate on responsible business reporting. It discusses definitions of corporate social responsibility and recent related trends before relating these to the concepts of hard and soft law as they relate to responsible business standards and compliance. It describes some of the key existing CSR-standards as they apply to people, planet and profit, looked at in terms of hard and soft law while highlighting the importance of enforcement as a key determinant of effectiveness and relates these to hard and soft law. The paper then provides a summary of different cost estimates associated with CSR-initiative compliance and reporting and some of the cited benefits, also referring to the potential cost of *not* adhering to existing responsible business frameworks.

In a nutshell, the main findings are as follows:

1. **Governments have a duty** to ensure that firms behave responsibly in whatever country they operate, be it by mandatory requirements, voluntary schemes or a mix of both.
2. Existing responsible business related schemes and reporting **frameworks differ widely** in objectives, scope, obligations and enforcement mechanism - while this can be seen as being

positive, offering choice to firms, it is not clear that this is positive for ensuring responsible firm behaviour beyond lead firms in this field.

3. **Voluntary and mandatory schemes involve costs,** and these vary according to the scope of the initiative and how it is enforced. They can be sunk, reporting, verification costs, and also vary widely according to sectoral characteristics.
4. These costs are important - costs to firms of the Dodd Frank Act may amount to US$4 billion, whereas the European Commission estimated that larger companies have to pay up to €23,000 to comply with the new Directive on disclosure of non-financial information.
5. But **compliance cost estimates are difficult to interpret** given the wide variation across firms even of a similar size and sector.
6. Compliance **costs also seem unlikely to be determinant** for firm decisions on behaving responsibly and may be a distraction from the responsibility of firms for their actions.
7. While increasingly the norm across firms, even **voluntary reporting schemes can have legal implications through 'soft law'.**
8. Lead firms are complying with an **ever-widening scope of responsible behaviour** with reporting as part of corporate strategy anyway, even if they would benefit from some **harmonisation of codes**.
9. For those firms *not* behaving responsibly in developing countries, whether committed to a responsible business framework or not, **current systems for holding firms to account are relatively weak.**
10. **Access to justice is generally poor** where violations do take place, again suggesting the need for clearer rules and legal recourse to hold international firms to account.
11. **Mandatory reporting, targeted at specific firms above a certain size, engaged in specific sectors** appears to be beneficial in holding all firms to account and heightening the potential for international investment to contribute further towards promoting economic and development goals.
12. Mandatory reporting should aim to build on existing **voluntary mechanisms to ensure maximum possible alignment with existing firm practices and systems, thereby potentially incentivising firm compliance more easily, not least through a lower cost burden.**
13. **Incentives for responsible business behaviour may be more important** than regulations in developing country contexts with relatively weak legal institutions, underlining the role that required reporting and transparency can play, also in affecting consumer demand.
14. The **difficulty of establishing legal responsibility** in a world of complex production networks cannot be ignored.
15. Additional pros and cons of mandatory reporting are presented in the following table:

Pros and cons of mandatory reporting	
Pros	**Cons**
• changing the corporate culture – leaders will continue to innovate above minimum requirements • need for consistent policies and implementation throughout group including internal reporting (Disclosure Control Procedures) • incompleteness of voluntary reports • comparability • disclosure of negative performance • legal certainty • cost savings • standardisation • equal treatment of investors	• knowledge gap between regulators and industry • one size does not fit all • inflexibility in the face of change and complexity • lack of incentive for innovation • additional costs • exposure to claims • disclosure of competitive information

Although this paper has focused on firms, ultimately it is also hoped that responsible business compliance and reporting assist developing country governments and/or civil society actors to better hold firms to account. While different levels of government official and public actors (such as the police) are sometimes complicit in abuse, international guidelines that improve accountability and recourse to justice are important remain a feasible alternative. Mandatory reporting designed in a way that builds on existing voluntary mechanisms appears to offer the advantage of aligning public and private interests.

The long-term goal must remain that developing country governments and institutions are themselves able to hold firms to account according to local laws, and reap the benefits for development through their own policies and regulatory frameworks. In a similar vein, existing reporting mechanisms whether voluntary or mandatory should aim to support and promote the institutional reform required in developing countries so that the benefits of private investment are more widely spread.

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Annex I

Standards and Initiatives: An overview[58]

Trade Related issues

Thematic Cluster	Issue	Product / Commodity Group	Self Regulation and Soft Law Standards	Hard Law Standards	Organisations
Transparency of financial flows		Minerals	Extractives Industries Transparency Initiative Global Reporting Initiative (sector supplements) UN Global Compact	Dodd-Frank Act, Section 1504 Accounting and Transparency Directive	- Publish What You Pay - World Bank Institute - Revenue Watch Institute - Revenue Watch Institute - Global Financial Integrity - Global Witness
Speculation		All		Dodd-Frank Financial Reform Act	- Oxfam
Transparency of Company structure and Accounting Practices	Tax Avoidance, Tax Evasion	All	OECD Guidelines for MNE's	Various National Enhanced Disclosure Initiatives	- Tax justice (network) - Association for Accountancy and Business Affairs (AABA) - Global Forum on Transparency and Exchange of information for Tax purposes - Fair Tax Campaign - Tax research UK
Sourcing Transparency		All	UN Guiding Principles on Business and Human Rights OECD Guidelines for MNE's	Dodd-Frank Act	
	Fueling of Conflicts	All / conflict minerals	OECD Due Diligence Guidance for Responsible Supply Chains of minerals from Conflict-Affected and High Risk Areas OECD Risk Awareness Tool for MNE's in Weak Governance Zones	Dodd Frank Act, section 1502, Conflict Minerals Provision for the DRC	- Responsible Jewellery Council
		Gold	Conflict free Gold standard		- Gold Council

58 Table adapted from Wettstein et al. (2013).

			OECD Due Diligence Guidance for Responsible Supply Chains of minerals from Conflict-Affected and High Risk Areas, supplement for gold		
		Diamonds	Kimberly Process		
Supply Chain Responsibility	Workplace Safety and Working Conditions	All	ILO Tripartite Declaration Global Compact Principles 3-6 OECD Guidelines for MNE's	ILO Safety and Health in Mines Convention	- Fair Labour Association
	Child Labour, Forced Labour	All	Global Compact 4-5 ILO Tripartite Declaration OECD Guidelines for MNE's		

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ECDPM was established in 1986 as an independent foundation to improve European cooperation with the group of African, Caribbean and Pacific countries (ACP). Its main goal today is to broker effective partnerships between the European Union and the developing world, especially Africa. ECDPM promotes inclusive forms of development and cooperates with public and private sector organisations to better manage international relations. It also supports the reform of policies and institutions in both Europe and the developing world. One of ECDPM's key strengths is its extensive network of relations in developing countries, including emerging economies. Among its partners are multilateral institutions, international centres of excellence and a broad range of state and non-state organisations.

Thematic priorities

ECDPM organises its work around four themes:

- Reconciling values and interests in the external action of the EU and other international players
- Promoting economic governance and trade for inclusive and sustainable growth
- Supporting societal dynamics of change related to democracy and governance in developing countries, particularly Africa
- Addressing food security as a global public good through information and support to regional integration, markets and agriculture

Approach

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