Multi-national enterprises (MNEs) have provided substantial sponsorship for the Sochi Winter Olympic Games despite a host-country government that has recently enacted stunningly harsh legislation aimed at the Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) communities within Russia. This is a Corporate Social Responsibility (CSR) problem. Should Europe address it through voluntary corporate compliance, Europe’s historically preferred mode of promoting CSR? Or should Europe reconsider whether it can more effectively promote CSR compliance legislatively – and if so, by what kind of legislation? To honor the explicit and increased protections of human rights against sexual orientation discrimination in the Treaty of Amsterdam and the Charter of Fundamental Human Rights, more than voluntary, good intentions are needed. Particularly since the United States has effectively bowed out of enforcing CSR through the American federal courts, there now exists a regulatory lacuna that the European Commission is best situated to fill through the precision offered by judicious rulemaking. The article ultimately proposes an approach that combines the public-pressure engine that fuels voluntary CSR with public disclosures mandated by law to optimize the information and mobilization of public opinion and pressure – factors particularly noteworthy given the powerful “branding” benefits that MNEs seek through Olympic sponsorship.

Keywords: Corporate Social Responsibility; LGBTI rights; Olympic sponsorship; Russian Federation; European Commission; Treaty of Amsterdam; Charter of Fundamental Human Rights; California Supply-Chain Transparency Act; Mandatory Corporate Disclosure Laws

I. Introduction
Atos SE describes itself as “an international information technology services company with annual 2012 revenue of EUR 8.8 billion and 77,000 employees in 47 countries” that “delivers consulting and technology services, systems integration and managed services” across “Manufacturing, Retail, Services; Public, Health & Transports; Financial Services; Telecoms, Media & Technology; Energy & Utilities.” Atos boasts of having an “A+” rating in Corporate Social Responsibility through its voluntary reporting process. Atos also trumpets its sponsorship of the 2014 Winter Olympic Games in Sochi, Russian Federation. Indeed, its sponsorship is inextricably intertwined with an advertising campaign that fuses Atos’ identity as a major Sochi Games sponsor with Atos’ marketing aspirations: “Atos leads the technology effort for the staging of the Games.
This same effort and skills can help your company as you pursue record-breaking competitive advantage. By making the brand of Atos synonymous with "The Olympics," Atos has achieved a coup in marketing of which few multi-national enterprises (MNEs) can boast.

Yet in doing so, Atos—like the other MNEs that are sponsoring the Sochi Games—is aiding and abetting a host-country government that has recently enacted stunningly harsh legislation aimed at the Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) communities within Russia, as well as any non-Russians who, within the reach of Russian law-enforcement, speak out in any way supportive of the LGBTI community. This recent legislation in Russia is often referenced by the bland title "Article 6.21 of the Russian Code of Administrative Offenses," but nests within Part 6 of that Code, which is more revealingly captioned “Administrative Offences Endangering the Health and Sanitary and Epidemiological Well-Being of the Population and Endangering Public Morals." The Section itself carries the title, "Propaganda of Non-traditional Sexual Relations Among Minors."

Given some of the very serious allegations of aiding and abetting human rights violations that have been made against E.U.-based MNEs, the role of MNEs like Atos in supporting an international athletic competition that happens to be hosted in a non-E.U. member state that has passed a municipal law that restricts speech about matters of concern to the LGBTI communities in Russia and the E.U. might seem, by comparison, to be mild next to allegations of torture, extra-judicial killing, genocide, and mass imprisonment made against a wide array of other governments that MNEs have supported. However, when we examine the issue in its full context, the importance of the struggle by the LGBTI communities in Europe and elsewhere for recognition of basic human identities and human rights demonstrates that legislation targeting "disfavored" social groups must command our attention and elicit our great concern. The role of events like the Olympic Games as exercises in sanitizing the image of a national government which has embarked on persecution is too great to ignore or dismiss. Moreover, history itself commands that corporations confront the problem.

The specter of the 1936 Olympic Games in Berlin still casts a pall over the zone where international sport meets political power — as does the corporate sponsorship of those Games by the most iconic of American corporate brands, Coca-Cola. This is by no means to suggest a crude comparison between the Third Reich
and the Government of the Russian Federation, a false analogy readily refuted because it is grounded neither in logic nor in fact. Indeed, such a false analogy would be an *ad hominem* attack against the very people who gave their lives in the millions to defeat the persecutions of the Reich. However, the issue of corporate support for governments that significantly restrict human rights must be considered. The legacy of corporate complicity in the rise and persecutions of human-rights oppressing governments — whether the in 1930s Berlin, 1960s South Africa, or 21st century Russia — is a continuing problem to which we cannot close our eyes or our minds. It was, is, and always will be, a problem of Corporate Social Responsibility (CSR). The ultimate question examined in this article is whether this CSR issue should be dealt with through modes of voluntary corporate compliance, the historically preferred mode of promoting CSR in the E.U.; or whether the E.U. should take this opportunity to examine whether it can promote CSR compliance more effectively by legislation that requires CSR as a matter of E.U. law, at least with respect to the vindication of fundamental human rights.

This article concludes that the latter course has become appropriate, particularly for two reasons among others. First, the explicit and increased protections of human rights against sexual-orientation discrimination in the E.U. Charter on Fundamental Human Rights (the “Charter”) and the European Convention on Human Rights (“the Convention”) demand more of corporations headquartered or operating in the E.U. than voluntary, good intentions, given the enormous powers they wield; these protections are only meaningful if they are vindicated not only in government action, but also, in the business of MNEs, which can have an even more profound impact on preserving those rights. Second, since the United States has effectively bowed out of providing a legal means by which CSR can be enforced against MNEs in American federal courts, there now exists a regulatory lacuna that the European Commission is best situated to fill by the precision offered through judicious rule-making, rather than the haphazard and unpredictable course of litigation in the municipal courts of any country.

The discussion proceeds in six additional sections. Section II examines the E.U.’s traditional approach to CSR, particularly with its implications for promoting CSR in protecting fundamental human rights when that protection clashes with powerful economic motives of profit-making. In Section III, we consider the evolution of the legal recognition of LBGTI rights in the E.U., both through the Convention and the Charter, and in decisions of the European Court of Human Rights and the European Court of Justice. A closer examination of the 2013 Russian legislation is undertaken in Section IV, particularly from the perspective of its effect on the objectives of the Convention and the Charter, and the dilemma it creates for MNEs such as Atos. From that groundwork, we evaluate in Section V the efficacy of voluntary CSR for protecting LBGTI human rights when MNEs are faced with incredibly attractive opportunities as Olympic sponsors to overlook them or play down the effect of Russia’s legislation on them, and we consider whether a legal response by the E.U. would more strongly encourage compliance. Finally, in Section VI, a model for such

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12 See Arnd Krüger and William Murray (eds), *The Nazi Olympics: Sport, Politics and Appeasement in the 1930s* (U Ill Pr 2003).
15 <http://human-rights-convention.org/> For readers outside of the E.U., the distinction between the Charter and the Convention may be confusing. The Convention (circa 1950) applies to all 47 member nations of the Council of Europe (which includes Russia); the Charter (circa 2000) applies only in the 27 Council member nations that are also E.U. members. The ‘Charter’s prime objective is to make rights more visible,’ and rather than establishing ‘new rights,’ the Charter ‘assemble[s] existing rights that were previously scattered over a range of sources including the European Convention on Human Rights and Fundamental Freedoms (ECHR) and other Council of Europe (COE), United Nations (UN) and International Labour Organisation (ILO) agreements.’ While the Convention ‘is applied directly by the national courts of each Council of Europe country and by the European Court of Human Rights (ECHR) in Strasbourg,’ the Charter is enforced through rulings of the European Court of Justice (ECJ) in Luxembourg. However, the ECJ operates in a rather unique way with respect to the Charter, since it is typically not a court of first instance (except as to litigation by persons directly and individually concerned) by a measure of an E.U. institution or body, nor an international human rights court nor a court of appeal. Charter issues typically come before the ECJ when either the European Commission or an E.U. member’s national courts refer cases to the ECJ. The relationship between the ECHR and the ECJ has also not entirely been clarified. While envisioned as one of ‘mutual respect’ and ‘cooperation,’ observers expect that ‘there should be a right of appeal from the ECHR to the ECJ when an act of the EU is challenged for violation of a right enshrined in the Convention. See <http://www.euocharter.org/home.php?page_id=66>. The inter-relationships between the two courts are helpfully detailed in Elena Butti, *The Roles and Relationship between the Two European Courts in Post-Lisbon EU Human Rights Protection*, Jurist, 23 Sept 2013, <http://jurist.org/dateline/2013/09/elena-butti-lisbon-treaty.php>. As Ms. Butti notes, ‘cross-references between the two courts have been increasing over time,’ evidencing a determination by both EU courts to avoid conflict with and to demonstrate deference to the other court, contributing to the creation of a ‘uniform human rights standard.’ ‘Id.
regulation is proposed that strikes a careful via media between “suggested” and “coerced” CSR compliance. That model takes as its starting point the approaches taken by a both an E.U. nation, and a non-E.U. jurisdiction, in using non-coercive law to encourage MNEs to take CSR more seriously, and synthesizes them into an approach that combines the public-pressure engine that fuels voluntary CSR with public disclosures mandated by law to optimize the information and mobilization of public opinion and pressure – factors particularly noteworthy given the powerful “branding” benefits that MNEs, like Atos, seek through Olympic sponsorship. Section VII offers concluding thoughts.

II. The Traditional E.U. Approach to CSR Revisited from a Human Rights Perspective
A. Preliminary Note on the Varying Definitions of CSR, and the Working Definition for this Article

CSR has been described in an almost disorienting variety of ways. For example, CSR has been described in terms of its “primary elements” as composed of “human rights, environment, labor, and anti-corruption priorities.” Others have defined CSR through statistical examination of definitions gathered through literature review, out of which “five dimensions of CSR were identified through a content analysis of the definitions” and distilled as the environmental dimension, the social dimension, the economic dimension, the stakeholder dimension, and the voluntariness dimension. The first four dimensions “are merely different categories of impacts from business” — which in sum total reflect “the recognition that business, as a producer of economic wealth, does not only have economic impacts” — while the fifth dimension “implies that the business should perform above regulatory requirements … [that] set the minimum performance level deemed acceptable.” Still others have defined CSR as

…the core idea that it reflects the social imperatives and the social consequences of business success. Thus, CSR (and its synonyms) empirically consists of clearly articulated and communicated policies and practices of corporations that reflect business responsibility for some of the wider societal good. Yet the precise manifestation and direction of the responsibility lie at the discretion of the corporation.

Corporate discretion is exercised through the relative weights given to each element when managing the business “with regard for financial performance, environmental consequences, and social impact.” The ways in which management of any given corporation uses its discretion in striking a balance is reducible to a number of archetypes: [1] the corporation that has “no ambition to be socially responsible and in fact [may] be out of compliance with applicable law; [2] the corporation that merely “complies with applicable laws and perhaps engages in small amounts of generic corporate philanthropy, but does little beyond that”; [3] the corporation that “moves beyond bare compliance but only does so where it would be profitable,” “view[s] CSR primarily as a public relations matter, for particularly in consumer-focused industries, social responsibility attracts customers and social irresponsibility repels them,” and “incorporate[s] CSR considerations at all levels of their operations and decision making, but only act[s] upon them when it would benefit their financial bottom line”; [4] the corporation that “routinely balances economic, social, and environmental considerations” for reasons beyond compliance and profit out of a “motivation to do good” both for “constituencies and for the planet – while still producing returns for their shareholders”; [5] corporations that “integrate social responsibility principles into their strategy and business processes … such that CSR becomes ‘built in, not bolted on’”; and [6] corporations in which CSR “is fully integrated and embedded in every aspect of the organization,” in that these “companies also redesign or ‘reengineer’ their business models, financial institutions, and markets to identify and root out any underlying causes inconsistent with social responsibility.”


ibid p 6.


Miriam A Cherry and Judd F Sneirson, ‘Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster’ (2011) 85 Tulane L Rev 983, 1010.

ibid at 1010-1013.
Considering what has been identified as CSR’s “primary elements”, “five dimensions,” and “archetypes” of balancing among “financial performance, environmental consequences, and social impact,” it becomes clear that CSR is “context specific for each individual business” and thus turns on the questions of “what are the specific CSR issues to be addressed and how to engage with the stakeholders” affected by those issues. Thus, it can be fairly said that CSR is itself defined by an overriding question of “how CSR is socially constructed in a specific context.”

With these parameters in mind, this article sets out to “socially construct” CSR “in the specific context” of its human rights dimension. Because of the centrality of human rights to the E.U.’s very existence, the author’s CSR working definition in the human rights context treats CSR’s imperative to go beyond the minimal in protecting and promoting human rights to at least the level of the corporation that “routinely balances economic, social, and environmental considerations” for reasons beyond compliance and profit out of a “motivation to do good” both for “constituencies and for the planet – while still producing returns for their shareholders.”

B. The E.U.’s Approach to CSR

While CSR had been discussed to varying degrees in E.U. countries for a number of years, the “launch” of “a wide debate on how the European Union could promote corporate social responsibility at both the European and international level in the E.U.” is the much-discussed Green Paper of 2001. The Green Paper has been described as “neither binding nor explicit in its suggestions” since “EU green papers, by nature, are policy papers intended to stimulate discussion among interested non-governmental actors in a specific policy area.” The debate sought here was discussion of the merits of a possible corporate code for the E.U., and from that discussion the objective was to “provide impetus for subsequent legislation.”

On the subject of human rights, the Green Paper clearly envisions a dynamic area of CSR, one meriting great attention as CSR “has a strong human rights dimension” in which “[c]ompanies face challenging questions” such as “how to identify where their areas of responsibility lie as distinct from those of governments … and how to approach and operate in countries where human rights violations are widespread.” The Commission also recognized that “[t]he European Union itself has an obligation in the framework of its Co-operation policy to ensure the respect of human rights.” The link between CSR and the E.U.’s own self-conscious efforts to expand human rights protection is clearly established in the Council’s observation that “[a]t a time when the E.U. ‘endeavours to identify its common values by adopting a Charter of Fundamental Rights, an increasing number of European countries recognize their social responsibility more and more clearly and consider it as part of their identity.” However, the E.U. Commission did not go farther, even as to human rights, in as much as it declared that “[a]t this [2001] stage the Commission does not wish to pre-judge the outcome of the ‘debate on new ways of promoting corporate social responsibility’ that would have inevitably

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21 See Dahlsrud (n 17) 6.
22 ibid at 7.
23 ibid at 6.
27 ibid at 769 (quoting European Union Documents, Documents of Individual Institutions: European Commission).
29 ibid.
30 ibid para 8, p 4. These observations are congruent with the definition of ‘Human Rights’ offered in the Green Paper’s appendix:

Human Rights are based on the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. They are defined in the Universal Declaration of Human Rights (1948). At the European level, Article 6 of the Treaty on European Union reaffirms that the European Union “is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” In addition the European Convention of Human Rights adopted by the Council of Europe is legally binding in all Member States. Moreover, the European Charter of Fundamental Rights adopted in Nice in December 2000 is the instrument inspiring respect for fundamental rights by the European institutions and the Member States where they act under Union law.

ibid, p 24.
resulted had it “ma[de] concrete proposals for action.”32 Rather, the Commission posed sets of questions for consideration by various constituencies and on various specific issues33 – and about the E.U. itself, the Commission posed the following questions:

The Role for the EU

What could the European Union do to promote the development of corporate social responsibility at European and international level? In particular, should the EU add value and complement existing socially responsible activities by:

- Developing an overall European framework, in partnership with the main corporate social responsibility actors, aiming at promoting transparency, coherence and best practice in corporate social responsibility practices?
- Promoting consensus on, and supporting, best practice approaches to evaluation and verification of corporate social responsibility practices?
- and/or by which other means?34

Some of the ideas that the Commission hoped would come out of the kinds of debate it foresaw in the wake of the 2001 Green Paper were articulated in a separate undertaking by the United Nations, a U.N. Human Rights Council-sponsored report released in 2011, known by the name of the Special Representative, John Ruggie, who authored it, as the “Ruggie Report.”35 The Ruggie Report has been described as the U.N.’s “most recent and ambitious attempt … to develop a human rights framework to tame global capital.”36 In the Report’s view, “the root cause of today’s human rights disasters is not the profit-maximizing imperatives of corporate capitalism but [rather] a ‘governance gap’ specifically created by globalization,” which [1] governments, for their part, can address “through market pressure—statutes to make ‘bad’ behavior cost more—and through laws ‘responsibilizing’ high level corporate officials, by increasing corporate and individual liability,” and which [2] MNEs, for their part, can address by implementing proactive measures that effectuate a corporate responsibility to “‘respect’” human rights, including by avoiding, through due diligence, “‘contribut[ing] to abuse’” of human rights.37

Critics, however, have questioned whether “adopting voluntary, non-binding recommendations with no independent monitoring process, really constitute[s] evidence of ‘success’?”38 They assert that “there is minimal evidence that” such approaches have “transformed, or will transform, the behaviors of Multinational Corporation (MNCs),” which function as “profit-seeking ‘amoral calculators,’”39 Among the reasons for such a gloomy assessment include the sheer economic power wielded by large MNCs and the “increasingly symbiotic relationships” between states and MNCs, which have become “the institution[s] [on which the state] now relies upon to provide employment, prosperity and economic growth (not to mention electoral success for the party in power).”40

The problems with voluntary CSR—as currently understood to protect core European values from diminution by corporate activity (especially by corporate support of regimes that do not share those values)—is illustrated in this article by means of a case study of corporate support for Russia’s Sochi Olympic Games in the face of recent Russian legislation that a key European legal authority has found “incompatible with the underlying values of the” Convention “and to be violations of Articles 10, 11 and 14 of the” Convention. In

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32 ibid, para 93, p 23.
33 ibid, para 92, pp 22-23.
34 ibid, p 23.
37 Bittle and Snider, (n 36) at 181-182.
38 ibid at 185.
39 ibid at 186.
40 ibid at 187. The last point is one that has attracted much attention in America after its Supreme Court ruled that corporations have free-speech rights that protect unlimited corporate financial support for candidates seeking elective office. See Citizens United v. Federal Election Commission, (2010) 558 US 310.
Section III, we examine the recognition of LGBTI rights in the E.U. We consider the Russian legislation at issue in Section IV. With this background and in this specific context, the viability of the E.U.’s completely voluntary approach to corporate social responsibility is evaluated in Section V.

III. Evolving Recognition of LBGTI Human Rights in the E.U.

A. Section 13 of the Treaty of Amsterdam, and Rulings by the European Court of Human Rights (ECtHR)

Some of the first rulings of the ECtHR to find that the Convention prohibits discrimination against gay persons came at the turn of the last century. The Treaty of Amsterdam’s Section 13 empowered the European Commission to prohibit discrimination against LGBTIs, but the Commission has legislated slowly, and in a piecemeal fashion. Nonetheless, the Commission inaugurated nearly 15 years of progress to the present, in which LGBTI rights have taken on enhanced significance within the E.U. For example, commentators have recognized the strong role played by the decisions of the ECtHR in catalyzing change in member nations:

The ECtHR has become increasingly progressive on LGBTI issues. It has found violations of the European Convention against countries that criminalize consensual same-sex conduct, that impose a higher age of consent for gay men, that prohibit lesbians and gay men from serving in the military, and that restrict the ability of transsexuals to change identity documents or to marry someone whose sex is opposite to their newly-acquired gender. For all these issues, the Court reversed one or more earlier decisions rejecting challenges to these policies. This pattern suggests a high degree of judicial discretion or “agency.” Yet these shifts in ECtHR jurisprudence also track similar progressive trends in the national laws and policies of Council of Europe (CoE) member states.

The ECtHR’s work has affected the legal work of other bodies in the E.U. For example, in October 2013, the European Court of Justice ruled that gays count as a “social group,” who are eligible for asylum in E.U. member countries if they can demonstrate persecution. "Faced with asylum requests from three gay men from Senegal, Sierra Leone and Uganda, the Dutch State Council asked the CJEU whether homosexual people were considered a 'particular social group' within the meaning of the Directive [on Asylum Qualifications].” That Directive provides that refugee status may be claimed by “any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avails himself of the protection of that country.” In response to the Dutch State Council, the EC ruled that “[h]omosexual applicants for asylum can constitute a particular social group who may be [considered]

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persecuted on account of their sexual orientation," and "[i]n that context, the existence of a term of imprison-ment in the country of origin sanctioning homosexual acts may constitute an act of persecution per se, provided that it is actually applied."48 In addition, the ECJ emphasized that in evaluating asylum requests from LGBTI persons, an E.U. member state "cannot reasonably expect, in order to avoid the risk of persecu-tion, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation."49

B. The E.C.’s 2010 “Toolkit” to Promote LGBTI Human Rights, and the Director-General’s Report on Trans and Intersex People Discrimination on the Grounds of Sex, Gender Identity and Gender Expression

The ECtHR’s rulings have also anticipated regulatory policy-making by the European Commission. After the European Commission introduced a “non-binding toolkit to promote LGBTI people’s human rights in June 2010,”50 a panel of experts advising the European Commission’s Directorate-General for Justice issued their landmark report on Trans And Intersex People Discrimination On The Grounds Of Sex, Gender Identity And Gender Expression.51 In that report, special note was made of the strength of protection under E.U. human rights law for the LGBTI community, both in Art. 19 TFEU (which is the most general legal provision on non-discrimination in the Convention, entitling the E.U. to take action to combat “discrimination based on sex... or sexual orientation”), as well as in international human rights law, which reflects growing “recognition that gender identity and gender expression constitute a separate ground of discrimination” and “that the ECtHR has recognised transsexuality as a protected stand-alone ground under Art. 14 ECHR.”52 The report observed that “[s]adly, discrimination against trans and intersex people remains wide spread and takes many forms” and that “at the level of EU law itself,” it should be “argued” that the term ‘discrimination on grounds of sex’ should be interpreted even “more broadly”, so as to include more forms of discrimination on grounds of gender identity as well as discrimination on grounds of gender expression and discrimination against intersex people.53 The next, and most recent, step on this path occurred in 2013, when the “E.U.’s 27 foreign affairs ministers adopted a ground-breaking global policy,” called the LGBTI Guidelines, which instructed E.U. diplomats around the globe “to defend the human rights of LGBTI people.”54 As described by the European Parliament’s Intergroup on LGBTI Rights, “[t]he Guidelines will be binding,” and “[t]he EU’s diplomatic efforts will revolve around four priorities,” which include “[e]liminat[ing] discriminatory laws and policies, including the death penalty”; “[p]romot[ing] equality and non-discrimination at work, in healthcare and in education”; “[c]ombat[ing] state or individual violence against LGBTI persons”; and “[s]upport[ing] and protect[ing] human rights defenders.”55

Europe has shown resolve in making good on these missions. However, challenges remain, particularly among their new E.U. members in Eastern Europe.56 The latest test, and first after adoption of the Guidelines, came at the end of November 2013, when Ukraine was scheduled to sign an association agreement with the E.U. -- but this would have obligated Ukraine to embrace the LGBTI Guidelines and to make appropriate

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48 Judgment in Case C-199/12, C-200/12, C-201/12 X, Y, Z v Minister voor Immigratie en Asie. However, as noted in the pages of The Economist, ‘[t]he notion of “benign criminalisation” is extremely dangerous’ and that ‘the court missed a chance to say’ that ‘that criminalising people “for who they are” is itself persecution.’ ‘Homosexuality And Asylum: Bigotry By Degrees—The Level Of Persecution Determines When Gays Can Claim Asylum In Europe’ (Economist, 16 Nov 2013) <http://www.economist.com/news/europe/21589914-level-persecution-determines-gays-can-claim-asylum-europe-bigotry-degrees>.
49 Meps Welcome New Toolkit To Defend LGBTI People’s Human Rights (30 June 2010) <http://www.LGBTI-ep.eu/press-releases/meps-welcome-new-toolkit/>. The purpose of the toolkit is described as to permit the future European External Action Service (EEAS) and EU Member States to actively work towards the decriminalisation of same-sex relations throughout the world, to further denounce discrimination on grounds of sexual orientation and gender identity, and to support human rights defenders in repress-ive area’, Id.
50 Silvan Agius and Christa Tobler, Trans and Intersex People: Discrimination on the Ground of Sex, Gender Identity and Gender Expression (June 2011)[report financed by and prepared for the use of the European Commission, Directorate-General for Justice].
51 Ibid., at 5, 87.
52 Ibid.
53 Ibid, at 87.
55 Ibid.
amendments to domestic legislation in order to comply. Calling it a tango between E.U.-responsibilities and public opinion in Ukraine, an editorialist recently observed that “[a]lthough the government submitted a bill in April which would amend the labour code and prohibit discrimination based on sexual orientation in the workplace, the [Ukrainian] parliament has not yet managed to bring it to a vote’ and in fact, is stalling because of national elections in 2015 and a ‘highly conservative’ electorate, 79.4 percent of whom ‘are against same-sex relationships.’”57 Under threats of crippling Russian sanctions on Ukraine’s imports if Ukraine joined the E.U. as scheduled on 29 November 2013, Ukraine’s then-president, Viktor Yanukovych, renounced the previously negotiated association agreement,58 insinuating instead that Ukraine might join a rival customs union organised by Russia.59 While LGBTI rights were not the only (nor probably even the decisive) factor in Ukraine’s decision to walk away from the association agreement, Russia obviously wishes to exercise cultural and moral, as well as economic, sway within the former Soviet sphere of power. Indeed, the signal that the E.U. took human rights in Ukraine quite seriously came most strongly from what the E.U. might have done—but in fact did not do—to appease the Yanukovych government; in the words of an editorialist:

_ [T]he EU has—just—emerged from this squabble without seriously compromising its attachment to the rule of law and human rights. Having unwisely been drawn into a tug-of-war with Russia, it was tempted, for example, to ditch its demand for the release of Yulia Tymoshenko, the opponent whom Mr Yanukovych has imprisoned. Doing so would have suggested to both current and aspirant members of the EU that its talk of rules and democracy was so much cant.60

It is no great stretch of the imagination to see that the participation of major E.U.-based corporations in sponsoring Olympic Games in Russia — on the heels of the most breathtakingly and blatantly discriminatory anti-LGBTI message sent in Russia’s post-1917 history — risks, in equal measure, reducing the E.U.’s blossoming commitment to LGBTI rights to just “so much cant.” Clearly, particularly as studies such as those of O’Dwyer indicate61, change in attitude and treatment of LGBTI communities within parts of the E.U. itself will take economic action, in addition to political progress. And that economic action best comes from the power of Foreign Direct Investment (FDI) that sits in the hands of Western Europe’s great MNEs.62

IV. Russia’s “Scarlet Letter” Legislation Directed Against the LBGTI Community Specifically and Advocates for Human Rights Generally

Often referenced by the bland title “Article 6.21 of the Russian Code of Administrative Offenses,”64 but codified within Part 6 of that Code (‘Administrative Offences Endangering the Health and Sanitary and Epidemiological Well-Being of the Population and Endangering Public Morals’65), Article 6.21 proclaims its subject

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60 ibid.


63 The reference is to one of the most famous enduring literary works of the 19th century, authored by Nathaniel Hawthorne. The letter was affixed to the clothing of women in Puritan communities in Colonial New England as a form of shaming punishment for adultery. See Dennis Foster, The Embroidered Sin: Confessional Evasion in The Scarlet Letter, 25 Criticism 141 (1983) <http://digitalcommons.wayne.edu/criticism/vol25/iss2/4>.


unreservedly as “Propaganda of Non-traditional Sexual Relations Among Minors,” but its true legal effect requires more discerning examination. A fascinating opportunity for Russia to explain this new law transpired at the Parliamentary Assembly of the Council of Europe at Strasbourg in October 2013, where Sergey Naryshkin, Speaker of the State Duma of the Russian Federation made the following remarks:

Another law that is often criticised abroad concerns propaganda about non-traditional sexual relations among minors. Many who comment on this law – whether deliberately or not – omit or forget the words in the title “among minors.” That is a distortion of the content and the motivation for the law’s adoption. Concerns have been voiced that it could become an instrument of discrimination against minorities. I do not share those concerns, not only because there is a lack of relevant examples. People of non-traditional orientation do not face any restrictions on any grounds in their work, education, social or political activities. They are free to shape their life in accordance with their preferences. However, before they come of age, children should not be forced into anything or subjected to propaganda.

Of course, when pressed to articulate “the evidence that the State Duma” relied on in enacting Section 6.21, “especially in regard to the Venice Commission’s clear statement that children need objective, relevant information on sexuality,” the Russian Speaker replied, “I am ready to repeat my answer a third time, if you insist.” But the casual response of the Speaker overlooked the gravity of the question. As many readers of this Journal will well know, “[t]he European Commission for Democracy through Law — better known as the Venice Commission as it meets in Venice — is the Council of Europe’s advisory body on constitutional matters” and “provide[s] legal advice to its member states and, in particular,” helps “states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law.” The Venice Commission had already identified the very weaknesses with this law that Speaker Naryshkin refused to address. The Venice Commission noted not only that “the provisions under consideration are not formulated with sufficient precision so as to satisfy the requirement ‘prescribed by law’” such that its scope “seems not to be limited to sexuality explicit content, but to apply to legitimate expressions of sexual orientation,” but also that the Russian enactment turned fundamental principles of the Convention on their heads:

[To assert] “public morality”, the values and traditions including religion of the majority, and “protection of minors” as justifications for prohibition on “homosexual propaganda” fail[s] to pass the essential necessity and proportionality tests as required by the ECHR. Again, the prohibitions under consideration are not limited to sexually explicit content or obscenities, but they are blanket restrictions aimed at legitimate expressions of sexual orientation. The Venice Commission reiterates that homosexuality, as a variation of sexual orientation, is protected under the ECHR and as such, cannot be deemed contrary to morals by public authorities, in the sense of Article 10 § 2 of the ECHR. On the other hand, there is no evidence that expressions of sexual orientation would adversely affect minors, whose interest is to receive relevant, appropriate and objective information about sexuality, including sexual orientations.

The Venice Commission stated most emphatically that “the aim of these measures is not so much to advance and promote traditional values and attitudes towards family and sexuality but rather to curtail nontraditional ones by punishing their expression and promotion,” and thus Section 6.21 is “incompatible with the underlying values of the ECHR”, in addition to their failure to meet the requirements for restrictions prescribed by Articles 10, 11 and 14 of the Convention.
Accordingly, there can be no doubt that Russia’s Administrative Offenses Code 6.21 has a serious effect on the objectives of European human rights policies in general, and its LGBTI policies in particular — and it should have therefore created a soul-searching dilemma for MNEs such as Atos. At a time where the ECJ has focused attention on the persecution of homosexuality as a potential basis for granting asylum applications in the E.U., the Russian enactment is little more than a discriminatory law, thinly veiled with a veneer of pretext. While the Russian government speaks of the law in terms of “protecting minors” and repeats assurances that Russia will not discriminate against LGBTI athletes who attend the Sochi Olympics, other groups outside of Russia see the farce for what it is. For example, public health officials at the 2013 Meeting of the European AIDS Clinical Society (EACS) denounced the law as “discriminatory” and as an “impediment” to individuals with HIV from seeking care. At a press conference, EACS member Tamás Bereczky described Section 6.21 as “purportedly directed against propaganda for minors, but, in fact, we know that, in practice, this law is being ostensibly used for the persecution of gays in general.” University students in Europe have insightfully decoded the law as one “striking to the very core of prejudice based on sexual orientation”:

> Not only does it perpetuate the fallacy that sexual orientation is a choice, but it encourages dangerous connotations between homosexuality and sexual offences. Such discriminatory attitudes are clear from the wording of the act, including prohibition of ‘creating non-traditional sexual attitudes.’ The laughable idea of ‘creating’ a sexual identity within another demonstrates the frightening stupidity of such discrimination, which blatantly ignores reality in pursuit of a fictitious ‘traditional’ sexual orientation.

How, then, should the E.U. deal with corporations, such as Atos, which remain steadfast in supporting a regime – a member of the Council of Europe, no less – that continues to legislate against the very human rights principles on which the Convention and the Charter are founded? In Section V, infra, the efficacy of leaving CSR to purely voluntary, corporate self-regulated efforts is examined, and rejected, as is coercive efforts to use litigated compliance; in Section VI, a public-opinion driven-model of CSR social reporting, facilitated by an independent agency established by the E.U., is proposed.

**V. Can Corporate Complicity in Assisting Regimes that Violate Core European Values be Effectively Managed by a Voluntary Approach to CSR?**

“The EU and Member States,” a commentary recently observed, “are in the driver’s seat of advancing the global CSR discussion and its implementation.” This responsibility carries with it a sizable burden, however. “[B]usinesses and government trade facilitators must review and recommend how they are going to meet the challenge of a CSR policy that while at once championing the charge of social responsibility can, at the same time, create a barrier to actualization.” For example, the emphasis on voluntary CSR since the 2001 Green Paper issued has now made it “common” for “European MNEs . . . to have special CSR or sustainability departments.”

Other recent scholarship has argued for more aggressive policing of E.U. companies’ commerce with regimes in which a company directly aids and abets a non-E.U. nation in violating the kind of rights protected by the Convention and the Charter. For example, in examining the role of Trovicor GmbH in providing technological infrastructure and maintenance services to the Assad regime in Syria that permits the regime “to track individuals’ movements, access electronic files, and even detain and torture members of the opposi-

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75 ibid.
78 ibid.
79 ibid at 251.
tion” by “tracking a speaker’s location and identity”, a commentator argues “the [Convention] provides the ECHR jurisdiction over the extraterritorial effects of a corporation’s actions through the state agent theory” and that “Germany violated its positive obligation to respect the rights in Article 8 of the [Convention] by failing to regulate the Germany company ... after it facilitated the creation of a Syrian surveillance state.”

Of course, such allegations of direct violations of the Convention by supplying regimes with equipment and services used to effectuate human rights violations are distinguishable from the indirect facilitation of human rights violations, inconsistent with the Convention, by means of cooperating with a foreign sovereign in sponsoring a world-wide propaganda event while that same sovereign aggressively seeks to deny human rights to the LGBTI community within its borders. Particularly when the corporate entity—such as Atos—is a citizen of an E.U. country that not only is not boycotting the propaganda event, but is, to the contrary, sending an official delegation to participate in it, theories of direct-liability will be swept aside by the political cover offered by the home-state government’s sovereign policies. Moreover, theories of direct liability would in any event falter because the corporate support for the propaganda event is not, within the understanding of causation in either the common-law of torts or the civil-law of delict, the cause of the objectionable legislation, nor is that legislation a product of the corporate sponsorship. Rather, the relationship—while clear—between corporate support for the regime as it actively works to deny human rights to the LGBTI community, is also attenuated; and it would be very difficult for any member of the Russian LGBTI community, or any individual or organization that spoke favorably of the LGBTI community in Russia and was thereafter punished under Section 6.21 of the Administrative Offences Code, to show that corporate sponsors of a contemporaneous propaganda event were legal causes of their injury.

Indeed, efforts in the United States to impose direct corporate liability for aiding and abetting regimes that violate human rights have been mixed, at best, and may be entirely foreclosed by two recent rulings of America’s Supreme Court concerning the two U.S. laws most often invoked by victims in such cases, the Alien Tort Statute (ATS) and the Torture Victims Protection Act (TVPA). First, the TVPA has been interpreted not to apply to corporate entities. Second, the ATS has been interpreted not to apply to rights violations that do not occur in U.S. territory, and it remains unclear whether the ATS applies to corporations at all after one influential American federal appeals court held that it does not. Furthermore, major efforts to use litigation to hold accountable MNEs who supplied the tools that propped up South Africa’s Apartheid Regime—from IBM-supplied identification card systems to Ford and Chrysler police vehicles—have been interminable, prolix, unwieldy, and ultimately, will fail under the U.S. Supreme Court’s new, territorially-limited interpretation of the ATS. Thus, while some scholars have proposed that the E.U. needs to do what too many of the American courts have hesitated to do—declare unequivocally that the corporation should be considered an actor subject to international law, and that those corporations that qualify as MNEs are to be considered an actor subject to international law, the following cases show that efforts to impose direct liability are frustrated by the current state of international law and jurisprudence.


82 Rishi R Gupta (n 80) at 1360, 1361.
84 28 USC §1350.
85 106 Stat 73, note following 28 USC §1350.
86 Mohamed v Palestinian Authority, 132 S. Ct 1702 (US 2012). The Court noted that individual corporate directors, officers, employees or agents could be held personally liable under the statute. That is often, however, of little utility to torture victims, since identifying specific corporate agents as the wrongdoers is a daunting—often impossible—task, as is providing individual knowledge of entity wrongdoing, and since remedies against the individual actors often cannot approach the adequacy of entity liability.
87 Kiobel v Royal Dutch Petroleum Co, 133 S Ct 1659 (US 2013); see Jeffrey A Van Detta, ‘Some Legal Considerations For EU-Based MNEs Contemplating High-Risk Foreign Direct Investments In The Energy Sector After Kiobel v. Royal Dutch Petroleum and Chevron Corporation v. Naranjo’ (2013) 9 South Carolina J. Int’l L & Bus, 162.
90 Balintulo v Deimler AG, 727 F 3d 174 (2d Cir 2013).
be treated as quasi-sovereigns when their actions touch and concern a government regime’s policies that either violate international law or are repugnant to the instruments of the E.U. — the dependency of the E.U. member states on corporate activity to generate employment and prosperity makes such heavy-handed enforcement untenable as a practical matter.

What does this mean for other kinds of coercive measures that various E.U. or Council of Europe bodies, or member state legislatures, might be urged to consider as vehicles for CSR enforcement? Regardless of the viability of a court-oriented campaign to combat corporate complicity in extolling an Olympic host nation in the midst of increasing human rights violations, the tension with E.U.’s human rights policy created by Russia’s legislation remains strong. Indeed, if anything, the tension between the E.U.’s policies and the Russian legislation became both evident and acute with the November 7, 2013 release of the ECJ’s ruling, discussed in Section III.A above, that will permit LGBTIs facing persecution in their home country to apply for asylum in an E.U. member nation. It did not take long for the implications of this ruling for Russian LGBTIs and advocates for LGBTIs’ legal and social equality in Russia to see that this ruling may very well open E.U. doors to Russians seeking asylum in E.U. member nations. Nor did it take long to see how much difficulty individual E.U. member nations will have in dealing with their human rights obligations when it comes to the actions of their eastern neighbor.

A perfect example of how tensions among E.U. obligations, member states’ ambitions, and Russian power distort meaningful government action comes from the recent “about-face” by Dutch Foreign Minister Frans Timmermans. In response to legislative inquiries, “Timmermans sent a letter to [the Dutch] parliament,” in which, news reports stated, he observed that “[t]he [Russian] anti-homosexuality propaganda law has a stigmatizing and discriminatory effect and contributes to a climate of homophobia” and “[t]he circumstances of the LGBTIs, including the possible consequences of the new law, will of course be considered in evaluating asylum requests,” and may establish violations of protected rights that “would lead to the issuing of an asylum permit.” Yet, within 48 hours after those reports circulated, the Dutch Foreign Minister retreated entirely from this position, telling RAI Novosti (a Russian news company which President Putin summarily dissolved in December 2013) that his comments had been “misinterpreted” and taken out of context, and declaring that LGBTIs in Russia are not being persecuted.

One can hardly expect the E.U. authorities to regulate – or punish – corporate support for regimes hostile to principal aims of E.U. human-rights policies if E.U. member nations themselves cannot muster the

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81 See eg Sorcha McLeod, ‘Corporate Social Responsibility Within The European Union Framework’ (2005) 23 Wis Int’l LJ 541, 551-552 (‘Yet the two-pronged basis on which corporations resist the imposition of legally-binding norms is first, that they are not subjects of international law, and second, that to do so would shift responsibility from states to private actors. In the absence of voluntary corporate compliance with CSR norms, what is the solution?’).

82 One might well ask at this juncture about the possibility of direct action against the IOC for its award of games to a nation not compliant with core values contained in instruments such as the ECHR. In reality, such a strategy portends even less favorably. While recognizing that over the past 100 years, the IOC’s motives, incentives, and commitments have frequently contradicted the fundamental principles of the Modern Olympic Movement, set out in the Olympic Charter, effectuating change through the use of the courts has been futile ‘[a]s national courts have been unwilling to rule against the IOC,’ and thus other change mechanisms must be found so that the Olympic Movement’s fundamental values of fairness and equality always prevail. Jennifer Ann Cleary, ‘A Need To Align The Modern Games With The Modern Times: The International Olympic Committee’s Commitment To Fairness, Equality, And Sex Discrimination’ (2011) Case W Res L Rev 1285, 1287 (2011)(footnotes omitted).

83 See eg. Sunnivie Brydum, ‘European Court Declares Gays Can Seek Asylum In EU’—The European Court Of Justice Declared That Sexual Orientation Is A Fundamental Characteristic For Which Many People In Nations Around The World Are Persecuted, And Can Now Seek Asylum In The European Union, Advocate Com’ (Advocate, 7 Nov 2013) <http://www.advocate.com/news/world-news/2013/11/09/european-court-declares-gays-can-seek-asylum-eu> (‘Thursday’s ruling could also have implications for LGBT people from other nations with laws criminalizing an LGBT identity who want to seek asylum in the EU, including Russia, which enacted a nationwide ban on “propaganda of nontraditional sexual relations” earlier this year’); Esther Tanquintic-Misa, ‘Gays Can Seek Asylum In EU’, (IBTraveler, 11 Nov 2013) <http://au.ibtimes.com/articles/92021/20131111/gays-lgbt-lesbian-asylum-eu.htm#.Upjz3Y3QEmv>; see also Paul Sonne, ‘Russian Gays Look To U.S. For Asylum’ (Wall St J, 16 Aug 2013), at <http://online.wsj.com/news/articles/SB1000142412788732413940579016692141360158> (efforts by Russian LGBTIs to seek asylum ‘may become more common as Russia moves ahead with controversial antigay regulations, which have led some to call for a boycott of the 2014 Winter Olympics in Sochi’ including ‘the so-called gay propaganda bill, which punishes those who publicly inform minors that “nontraditional relationships” are OK,’ as well as ‘new laws [that] ban adoptions by same-sex couples and criminalize actions that insult the “religious feelings” of Russian believers’).


political will to confront them directly. Nonetheless, simply because complex questions of diplomacy and public policy may inhibit official government action, there is no reason to simply abandon E.U.-facilitated efforts to promote CSR. Indeed, none of the foregoing should be seen as suggesting that E.U. law has no role to play in Atos’s decision to remain a sponsor of the Sochi Olympic Games. What has been established simply is that Sochi sponsorship is a CSR problem that is not to be addressed practically under the rubric of direct liability for violations of the Convention or the Charter, or even by other kinds of punitive regulation by recalcitrant member-state governments.97

In Section VI, we examine an alternative to an entirely voluntary approach to CSR on the one hand, and a coercive approach on the other hand, and consider the significance of that via media approach for dealing with situations such as the one presented by Atos’s role as a high-profile sponsor of the Sochi Winter Olympic Games.

VI. A Via Media Between “Suggested” and “Coerced” CSR? The Potential for an Independent Human-Rights Scoring Authority and Required “Human-Rights Labeling”

A. The Disclosure Approach to Regulation

The discussion of CSR within the E.U., as elsewhere, has generated debate over whether CSR should be accomplished by “hard” law or “soft” law.98 A better question, however, is how governments can combine both approaches in thoughtful ways to achieve a realistic middle-ground that incorporates elements of both hard and soft law.99 For some time, social disclosure by corporations, to achieve corporate social transparency, has been viewed as one such middle way.100 The goal of social disclosure is two-fold, and synergistic: organizational transparency and stakeholder engagement.101 Organizational transparency is essential to “contributing to an ongoing stakeholder dialogue.”102 That dialogue, in which “corporations and their stakeholders” discuss “appropriate firm behavior,” is the essence of stakeholder engagement.103 What has become known as “disclosure-based regulation” has proven valuable because disclosure requirements are enacted with less difficulty, cost, and unintended consequences than substantive regulation, and “disclosure schemes comport with the prevailing political philosophy” by “preserving individual choice while avoiding direct governmental interference.”104

97 For a passionate argument laying out a roadmap for advocates to use in bringing such direct-liability cases before municipal courts in the EU by relying on EU instruments, customary international law, and the municipal law of delict in individual EU member-states, see Liesbeth F H Enneking, ‘Crossing The Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases’ (2009) 40 Geo Wash Int’l L Rev 903.


102 ibid at 453, 454-455.

103 ibid at 453, 454-455.

Social disclosure has been seen to be of particular benefit to “the overall human rights project” in at least three ways. First, it is argued that corporate disclosure will “result in behavior modification on the part of decision makers.” Second, it is also argued that social disclosure has special value “in its ability to empower socially conscious shareholders who will be equipped with information that can be used to engage corporate management in dialogue and influence corporate decisions.” Third, other groups – consumers, workers, and social activists, for example – are, it is argued, likewise empowered to engage with the corporation in a variety of spheres over the impact of the corporation’s business practices as they are relevant to the concerns of each group.

Corporate social reporting and related transparency approaches to CSR also present a number of challenges. First, there is the challenge of precisely which corporations should be subject to reporting requirements, a question which itself involves clearly defining the policies to be served by the reporting measure(s). Next, there is the question of identifying the audience(s) at whom the information is aimed, and structuring reporting requirements accordingly. Then, there is the question of scope — i.e., exactly just what kind of information should be reported, and how it will be verified? Fourth, there is the issue of presentation — that is to say, does what the reporting requirement need to contain in order for members of the target audience to be able to make meaningful comparisons and contrasts among companies based on the information reported? Fifth, what are the consequences for non-compliance — e.g., failing to report, making inadequate disclosures, or submitting misleading disclosures? Sixth, there is the question of what, if any, consequences or further actions should apply based on the substantive content of the disclosures themselves, and whether such follow-up is to be carried out by corporate stakeholders and the public generally, or by some (carefully thought-out) combination of both? While a trend of “convergence” in CSR reporting among the world’s 250 largest corporations has been observed, the convergence has tended to coalesce around a pattern that may not be sufficiently broad to consistently satisfy “[t]he motivations driving CSR reporting,” which “tend to be a mixture of rational and strategic reasons as well as socially conscious values and even moral or ethical dimensions,” and could instead enable “corporations to engage in a manner of reporting that is chiefly strategic in nature” or that merely provides “ritualistic comfort to stakeholders.”

Yet, despite these challenges, the consensus is emergent that CSR disclosures do have discernible impact on stakeholder groups, including consumers. There is also evidence that compelled disclosure can be effective in motivating stakeholder groups — particularly when a governmental body not only compels the disclosure, but also shapes its content. However, even under those optimized circumstances, care and sensitivity to both culture and cognitive psychology must be exercised by regulators, to ensure that the message of the disclosures remains coherent, and the ways in which the disclosures are expressed are mentally digestible by the target audiences. Indeed, “cognitive overload” is a phenomenon that has been

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106 ibid.
107 ibid at 65-76, 81.
112 See Peggy Simcic Brønn and Albana Belliu Vroni, ‘Corporate Social Responsibility and Cause-Related Marketing: An Overview’ (2001) 20 Int'l J Advertising 207 (‘Clearly, countries that adapt practices perceived as successful in other countries without researching their own consumers’ attitudes cannot hope to succeed based on the same premises’).
observed in the increasing number and detail of disclosures required under securities-regulation laws, which provides an important, and tempering, lesson for the advocates of corporate social reporting.

In the next section, two paradigm examples of compelled, rather than voluntary, corporate social reporting are examined, and from those examples, the broad outlines of a proposal for Commission-mandated corporate human-rights disclosure and communication are derived. In this proposal, the author does not purport to have “all” of “the answers,” or even a significant part of them. The proposal is, it is hoped, a launching point for further dialogue within Europe about creating a system under which E.U.-based corporations are held to account to their stakeholders and the consuming public generally concerning the extent to which they are aiding and abetting regimes that fall short in significant ways of honoring the commitment to human rights that Europe has made in the Convention and in the Charter.

B. An Approach to Employing Disclosures in Regulating Corporate CSR to Promote Human Rights: Learning from, and Improving upon, Section 116 of France’s Nouvelles Régulations Économiques and California’s Transparency in Supply Chains Act of 2010

In looking for solutions outside of the “box” formed by political and economic realities, there must be a middle road – the proverbial via media – between a vision of CSR that involves merely appealing to the “better angels” of the natures of those who run MNEs, and a more prescriptive vision recalling the wisdom of James Madison that “[i]f men were angels, we would need no laws.” While “[t]he law, when enforced, can be used to punish,” or “to articulate social norms and standards” or even “to define and impose responsibilities,” it “can also, however, be used to change incentives.” Indeed, “[w]hen designed and implemented properly, a good law establishes an incentive structure to align legal responsibility with the actors most able to change a set of results – actors who possess the information, the institutional capacity, and the practical ability to make a difference in a situation our society seeks to improve.”

Two constituencies of European MNEs have both a practical ability and institutional capacity to “make a difference” about how those MNEs interact with regimes that are not upholding European human-rights values: [1] those with whom the MNEs do business (customers, contractors, suppliers, vendors, distributors, et cetera) and [2] institutional shareholders and the investing public generally. The challenge — and the opportunity — is for the E.U. to legislate a system by which those constituencies will be in possession of information about an MNE’s activities that raise concerns under the Convention and the Charter. That approach will require legislation to determine [1] what body will receive competency to make such determinations; [2] how such determinations will be communicated to the target constituencies; and [3] what the constituencies, and others, may do with such information to exert pressure on the MNE to bring its actions (or its failures to act) into conformance with the fundamental values of the Convention and the Charter.

As a first step, it will be important for the E.U., through an appropriate legal instrument, to make it clear that, as Professor Ivar Kolstad has argued, for human rights to be vindicated while corporations chase profits on a globalized plane, MNEs must have more than merely “negative duties” not to violate human rights; they must bear “positive duties to use their powers to pressure governments into performing their assigned duties.” Having made that positive duty obvious, even it not hertofores adopted as E.U. law, the E.U. can
establish a means of implementation that avoids the limited efficacy of the hortatory while eschewing the cost, complexity, complications, and corporate resistance that would attend to prescriptive regimes.

Models for such regulation that strike a careful via media between “suggested” and “coerced” CSR compliance, have been implemented by both an E.U.-member nation, France, and by a non-E.U. jurisdiction, the American state of California, in using non-coercive law to encourage MNEs to take CSR more seriously. Each of these approaches is examined in turn, and then a model, derived from these examples, is set out for addressing corporate conduct that aids or abets regimes that act inconsistently with the human-rights values enshrined in the Convention and the Charter.

1. Section 116 of France’s Nouvelles Régulations Économiques

The European CSR movement directly influenced France’s Assemblée Nationale to adopt Section 116 of France’s Nouvelles Régulations Économiques (NRE), and a subsequent implementing decree. The NRE mandated that in their annual reporting, publicly-traded French corporations must disclose information in four general areas, including “information, the detail of which” was to be determined “by a decree of the Council of State,” concerning “how the company takes into account the social and environmental consequences of its activities.” The subsequent decree required additional reporting on human resources, labor standards, and community interests – three issues of interest to corporate stakeholders. Included among the required “community interests” disclosures are descriptions of how the company “takes into account the territorial impact of its activities as far as employment and regional development are concerned,” as well as “the methodology utilized by the company’s foreign subsidiaries to account for the impact of their activities on regional development and populations.”

This NRE-mandated social disclosure is not, of course, nor intended to be, a panacea for the concerns that prompted its enactment in the first place. As Professor Dhooge has observed, the NRE-mandated social disclosures are “incomplete and highly dependent on corporate interpretation and stakeholder utilization of the proffered information.” Specifically, criticism has been leveled at the NRE’s limited scope that embraces only companies publicly listed in France, imposes much lessened reporting requirements on their foreign subsidiaries, and leaves unaddressed whether there is a reporting obligation as to international operations beyond France’s borders. Also, the omission of the interests of some relevant stakeholders – such as consumers and national and local governments – has drawn criticism. Similarly, the NRE-mandated social disclosures leave a great deal “dependent on the interpretation of the reporting companies of the scope of their obligations” and requires only that companies disclose “the procedures undertaken to account for the impact of their activities on surrounding communities,” rather than any active engagement not only in respecting community rights, but also, in “contribut[ing] to their realization.” Even more significantly, no disclosure appears to be required to inform consumers and other stakeholders whether “their products and services are ... utilized to commit human rights violations.”

Perhaps the greatest concern expressed by critics is the “absence of reporting standards or guidelines.” In reporting their social disclosures, companies have not been advised “with any degree of detail how this is to be accomplished” – such as by providing “a rating system or formula for measuring compliance with the social indicators listed in the implementing decree,” despite the “plethora of reporting frameworks,
principles and protocols” that are available. This leaves companies uncertain of what disclosures comply, unable to make meaningful comparisons between their disclosures to those of other companies, and with stakeholders who will have little ability to verify that the disclosures made are candid or to compare various companies' disclosures meaningfully.

Thus, while NRE Section 116 was, and remains, a landmark regulation as “the first legal requirement in any nation that firms develop and publicly report a ‘triple bottom line’” (i.e., social and environmental, in addition to economic), the actual output from regulated companies has been both variable and confirmatory of the criticisms. For example, one study of the filings of 36 regulated French companies, suggests that although “companies succeeded in reporting some version of the required information,” the responses “varied considerably in form, content, length, and depth,” with some reports containing “only qualitative analysis and no quantitative measures,” and a majority that did not subject the data and its sources “to verification comparable to that applied to financial accounting information.”

2. California’s Transparency in Supply Chains Act of 2010

The state of California chose to promote national, indeed trans-national, efforts to eliminate slave labor in the production of products by enacting a state statute known as the California Transparency in Supply Chains Act of 2010 (“CTSCA”). As described in a recent article by Professor Jonathan Todres, CTSCA “matters that any manufacturer or retailer with worldwide annual gross receipts of at least $100 million that is ‘doing business’ in the State of California disclose on its website its policies on, and measures undertaken to, combat forced labor and trafficked persons in its supply chain.” The Attorney General of California is authorised to seek an injunction against any corporation that does not comply, which will have the effect of making corporate officers and directors personally liable for contempt of court (a jailable offense in the United States) if they do not then bring the corporation into compliance. The benefits of laws such as CTSCA are explained well by Professor Todres:

[The Act] represents an important first step in securing broad-based private sector involvement in the fight against human trafficking. Mandating disclosure on internal policies makes information available to consumers, investors, and other businesses. In turn, they can make purchasing or other decisions with this additional information...

If investment services start considering company responses to the [Act] when providing investment advice to clients, businesses will have even greater motivation to take additional actions to combat

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134 Ibid at 483-484.
137 Ibid at 14.
139 Johnathan Todres, ‘The Private Sector’s Pivotal Role In Combating Human Trafficking’ (2012) 3 Cal L Rev Circuit 80, 81. Specifically, the act requires covered corporations to

[A]t a minimum, disclose to what extent, if any, that the retail seller or manufacturer does each of the following:

1. Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party.
2. Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.
3. Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
4. Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.
5. Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.

Cal. Civ Code § 1714.43(c).
140 Cal Civ Code § 1714.43(d).
trafficking and slave labor in their supply chains. Pressure from and campaigns by human rights organizations that highlight companies which are not doing enough in their eyes could further press manufacturers and retailers covered by the California law to do more. Over time, this disclosure law could spur meaningful changes in the private sector. Whether that happens will depend in large part on the response to companies’ disclosure by investors, customers, human rights organizations, and anti-trafficking advocates.\footnote{Todres (n 139) 97 (footnotes omitted).}

The California law has been criticized for leaving the nature and extent of the minimally compliant disclosures ambiguous\footnote{ibid 95-97.}, which some (but not all) corporations have seized upon to provide little information\footnote{See id Professor Todres has surveyed corporate disclosures made pursuant to CTSCA, and explained the range of disclosures that companies are making pursuant to it: ‘Although the full impact of any new law can take years to assess properly, because the [Act] requires companies to post their disclosure on their websites, it is possible to obtain an early picture of initial responses to the new law. Based on this early limited evidence, it appears businesses are responding to the [Act] in one of four ways. First, some businesses are detailing policies and measures in place, evidencing a commitment to combating human trafficking and use of slave labor in their supply chains. Second, some businesses are providing disclosure that suggests they may not have undertaken significant steps to date but are committing to particular actions to fulfill the intent of the new law. Still other companies are disclosing that they are taking steps, but their disclosure merely tracks the statutory language and states they are doing what the law seeks without providing any details on how they are accomplishing this. Finally, it appears that at least a few companies understand the law literally as only requiring disclosure, and its disclosure reports that it is undertaking none of the measures the law sets out to combat human trafficking and the use of slave labor in its supply chains.’ ibid at 95 (footnotes omitted).}, and which, at a minimum, will need to be strengthened by interpretative regulations from the Attorney General’s Office.\footnote{See id at 96 (‘Although at least some companies’ counsel have indicated that merely confirming the company is or is not doing anything with regard to the measures outlined in the California Transparency Act technically constitutes compliance, the state Attorney General might decide otherwise’).} Some commentators have proposed specific revisions to laws like CTSCA, including a federal version that has been discussed in the U.S. Congress,\footnote{Sophia Eckert, ‘The Business Transparency On Trafficking And Slavery Act: Fighting Forced Labor In Complex Global Supply Chains’ (2013) 12 J Int’l Bus & L 383, 399-403, 407-414.} and these proposals should be studied carefully by any E.U. body that might consider a similar enactment directed at certifying the human-rights compliance of any government or government-sponsored undertaking in which an E.U. corporation participates.


Distilling all of the foregoing discussions about CSR, LGBTI rights in the E.U., and the promise of social disclosure/transparency as an approach to regulating E.U. corporate CSR in the pursuit of promoting human rights, the following proposal is made:

1. The European Commission should propose a corporate disclosure regulation law to the European Parliament that requires companies with any E.U.-based operations to disclose whether they do business with, or participate as sponsors of, political entities that fall short of full compliance with the norms established by the Convention and the Charter. The law must also provide for the creation and implementation of a human-rights record “scoring and labeling” system that the products, services, advertising, and other business activities of each corporation must integrate so that the prescribed labeling is noticeable and conspicuous to stakeholders, customers, consumers, and the general public.\footnote{For commentators discussing the need for social disclosures to be mandated, rather than voluntary, see Joshua A Newberg, ‘Corporate Codes Of Ethics, Mandatory Disclosure, And The Market For Ethical Conduct’ (2004) 29 Vt L Rev 253, 294 (fn 201) (citing authorities).}  
   2. To further its impact, the law should provide for an authority whose work will be in creating and implementing a scoring and labeling system to give real meaning to a disclosure law.  
   3. The authority would have two principal missions. First, to provide independent, neutral ratings of how well the laws and practices of national governments and government-backed projects or
undertakings accord with both the fundamental values, as well as specific provisions, of the Convention, Charter, and related instruments and policies. It is, of course, understood that foreign governments and undertakings are not actually subject to the Convention, Charter, and other E.U. instruments and policies. The purpose of this activity is to put E.U. corporations on notice that their disclosure obligations are triggered, and to alert the public to look for such disclosures. CSR ratings and indices have been developed by private concerns for a number of years now, and those private-sector methodologies can inform the authority’s effort to establish a human-rights rating system. This will require much more than merely appropriating the private-sector ratings systems, for “diversity characterizes the field of sustainability reporting, with a variety of disclosure practices and different standards of reporting being developed and promoted.” Moreover, the authority will need to devise extensive and coordinated strategies to publicize the ratings system and gain — and hold — the relevant audiences’ attention in order for the scoring and labeling system to be more than ephemeral.

4. The second mission of the authority will be to prescribe the nature, duration, and location of the disclosures that E.U. corporations must make — and to determine how the authority can translate that information into a cognitively digestible labeling regime. This is not uncharted territory, of course. The E.U. has previously rolled out labeling in a variety of contexts, including genetically-modified foods, regional culinary traditions, and energy-consumption by consumer products. That experience should prove invaluable. That does not mean, however, the project can be simply replicated from the other European labeling regimes. Substantial questions will have to be carefully vetted and considered, such as:

a. Would the authority use disclosure of a particular human-rights violation, or a particular kind of human rights violation, as the basis for labeling? Or would the authority simply issue ratings, with the scoring system designed to reflect various kinds of human rights violations in a country’s (or a company’s) record?

b. Would the authority mandate disclosure, and correlative labeling, for corporate assistance to, or collaboration with, foreign regimes that do not fully embrace E.U. human rights standards? How would that labeling differ, if at all, from the labeling of more direct human-rights violations by the company itself?

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c. How would a disclosure or rating appear on a company’s products, services, and promotional materials? Should it be of a “demerit” nature—a warning, in effect, of the corporation’s dalliance with human-rights-violators? Or should it be a mark of distinction—reserved for those corporations who do business only with human-rights-respecters? In addition to the European experience with genetic-modification and culinary-cultural heritage ratings, the use of labels—colloquially known sometimes as “union bugs”—to identify products manufactured by employees who belong to a labor union is a long-standing practice and has generated considerable experience from which the envisioned authority might draw.\textsuperscript{154} The authority will also need to be cognizant of research on the archetypes of consumer responses to CSR disclosure.\textsuperscript{155}

d. How would the disclosure or rating appear in the company’s advertising? How would the format of the disclosure or rating be adjusted for the particular nature, and target audiences, of various media—e.g., for internet, print, broadcast communications (e.g., television, CATV, radio) or other tangible medium (signs, billboards, banners et cetera)? The disclosure or rating would have to be simple and straightforward. Media and advertising experience and expertise would be needed in order to identify and address the practical difficulties in implementing the ratings and disclosures in different kinds of media.

e. What level of business transactions or collaboration between the company and a sovereign that is non-compliant with European human-rights values would have to be present before the disclosure and labeling requirement is triggered? As just one of many paradigms that would have to be considered, would a European company whose products are distributed in one of the 32 U.S. States that retains the death-penalty have a disclosure and labeling obligation?\textsuperscript{156} (Contrast that hard case with the relatively more direct and therefore straightforward case of an MNE, one of whose subsidiaries was—at least before the E.U.’s ban\textsuperscript{157}—selling pharmaceutical chemicals to State penal authorities for use in carrying out the death penalty within that State.)

5. To insulate it from the distorting and wearying effect of lobbying, the authority would need to have both expertise and remoteness from Brussels or Strasbourg—it would hardly do if the authority were assailable by the onslaught of lobbying that American law firms, among others, have directed at other E.U. officials, for example.\textsuperscript{158} The authority should be able to seek advisory opinions from the Venice Commission about whether particular practices or laws are incompatible with European


After all, imagine you had to invent a jury with integrity and a lack of vanity or need for limelight. You couldn’t go too wrong with a group of Norwegian ex-politicians.

This may have been what Mr. Nobel had in mind when he selected Norway as the state to deliver his peace prize. In contrast to Sweden, where the prizes for science are awarded, Norway never aspired to rule other nations and, from very early on, supported the idea of internationalism and peace conferences.
human-rights norms, and to act on those opinions by imposing “human-rights disclosure labeling” requirements on MNEs who are supporting the government progenitors of the offending practices.

Admittedly, these are only some — surely not all — of the questions and challenges that the European Commission, and the newly created authority, would have to address. But the promise of enlisting corporations to use their vast power and influence to improve human-rights observance in non-E.U. countries to the European level will make the difficulty of the journey worthwhile.

Imagine, for a moment, the impact of a uniform, well-publicized, and prominent system of human-rights disclosure labeling, displayed in every advertisement for an MNE, in all media; in every investment prospectus in notices to shareholders, customers, clients, vendors, et cetera; on all corporate web presences; on the packaging of any product that the MNE is involved in producing; on all of the MNE’s parent and subsidiaries’ websites; and in guides promoted and made readily available throughout the E.U. The power of such a regulatory approach is particularly strong around Olympic sponsorships, which are all about MNEs getting a huge “boost” to the value and goodwill generated by their own brand in the process of associating it with the Olympic brand. However, as recent studies have shown, the affiliation of an organization’s brand with the Olympic brand is tempered by the role of “attribution judgments of the consumer into the evaluation of organizational CSR practices”.

One of the key factors influencing consumer judgments of CSR is the perception of the motives behind the MNE’s CSR efforts. When consumers perceive CSR to be implemented for strategic reasons — rather than societal and stakeholder-driven values — the effectiveness diminishes “and can even cause ‘diminishing returns’ for the organization.” In short, the “lift” that an MNE’s brand expects to receive by sponsoring a foreign government undertaking will be muted or effectively cancelled out by the disclosure that the activity is one that the neutral authority has identified as that of a government that does not conduct either governance or lawmaking (or both) in accordance with European human-rights values and provisions of European law — which is a revelation consistent with contemporary movements focusing on CSR in corporate marketing generally.

Although sketched out only in broad strokes, the approach proposed here in concept combines the public pressure engine that fuels voluntary CSR with public disclosures mandated by law to optimize the information and mobilization of public opinion and pressure — factors particularly noteworthy given the powerful “branding” benefits that MNEs, like Atos, seek through Olympic sponsorship.

VII. Concluding Thoughts on the Road Traversed, and the Road Ahead

If the sometimes elusive-to-define concept of CSR is to mean anything, it surely means that corporations must be committed to supporting human rights across the board, not only in their home countries and host nations, but in any sovereign whose land and people the activities of a corporation touch and concern. Europe’s commitment to human rights generally, and to the human rights of LGBTI individuals among its citizens and the citizens of the world specifically, is being undermined and dishonored by seemingly innocuous conduct in which Europe’s major corporations are engaged. Atos SE’s sponsorship of the Sochi Winter Olympic Games is an instructive, but by no means exclusive, example of the problem. Examining it has allowed us to “socially construct” CSR “in the specific context” of its human rights dimension. Because of the centrality of human rights to the E.U.’s very existence, the author’s CSR working definition in the human rights context must be committed to supporting human rights across the board, not only in their home countries and


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4 Indeed, Atos has already had some experience with sponsorship dilution: their sponsorship of the Paralympic Games in the UK led to unwanted publicity of their role in making controversial “fitness to work assessments” under contract with the UK’s Department of Work Pensions. See Nina Lakhani and Jerome Taylor, ‘Hundreds Protest Against Paralympics Sponsor Atos As Anger About Its Role In Slashing Benefits Bill Intensifies’ (The Guardian, 31 Aug 2012) <http://www.theguardian.com/society/video/2012/aug/31/disabled-protest-atos-paralympics-video>.
making the proposal, the author does not purport to have “all” of “the answers,” or even a significant part of them. The proposal is, it is hoped, a launching point for further dialogue within the E.U. about creating a system under which E.U.-based corporations are held to account to their stakeholders and the consuming public generally about the extent to which they are aiding and abetting regimes that fall short in significant ways of honoring the commitment to human rights that Europe has made in the Convention and in the Charter.

Thus, to borrow an *apropos* passage from one of Winston Churchill’s most famous orations, “Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.”

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