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The Shortcomings of Voluntary Conceptions of CSR

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1. The conceptions of voluntary CSR.

In this paper, we intend to argue that certain conceptions of voluntary CSR – namely, the conception officially supported by the EU Commission and the so-called team production theory, supported by part of the American doctrine[1] – if taken seriously, and developed in line, undergo a series of practical and theoretical impasses, able to undermine their own viability.

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[1] We refer to the well known theory according to which a harmonious cooperation among all stakeholders who concur to the economic results of the company would allow the company itself to obtain a greater surplus than the one it would obtain in a conflicting situation. Therefore, the company and its managers would be interested in avoiding opportunistic behaviours that may ingenerate in the other stakeholders a lesser availability to cooperate. In this perspective, managers (assuming that their interest coincides with the success of the company they manage) would be naturally (that is, without need for legal intervention) led to protect the interests of all stakeholders and to voluntarily assume the role of mediators, should conflicts arise between shareholders and other stakeholders. See M. BLAIR, L.A. STOUT, *A Team Production Theory of Corporate Law*, 85 *Virginia Law Review,* No. 2, March 1999; M.M. BLAIR, L.A. STOUT, *Director Accountability and the Mediating Role of the Corporate Board,* available at http://papers.ssrn.com/abstract=266622; and the critical remarks of A.J. MEESE, *The Team Production Theory of Corporate Law: a Critical Assessment,* in *William and Mary Law Review* (March 2002), http://www.accessmylibrary.com/coms2/summary_0286-90424_ITM. More recently, see L.A. STOUT, *The Mythical Benefits of Shareholder Control,* 93 *Virginia Law Rev.*, 2007, 789.
In the Italian literature, see M. LIBERTINI, *Impresa e finalità sociali. Riflessioni sulla teoria della responsabilità sociale dell'impresa,* in *Riv. soc.*, 2009, 23; R. COSTI, *La responsabilità sociale dell'impresa e il diritto azionario italiano,* in *La responsabilità dell'impresa,* Milano, Giuffrè, 2006, 83, 96; A. BALDASSARRE, *La responsabilità etico-sociale dell'impresa privata*, in G. CONTE (ed.), *La responsabilità sociale dell'impresa*, Roma-Bari, Laterza, 2008, 28, 35.
This approach is one of the possible declinations of the more general idea that CSR is an implication of a sort of "social contract" between all interested parties. See T. DONALDSON, T.W. DUNFEE, *Ties that bind, A Social Contracts Approach to Business Ethics*, Harvard Business School Press, 1999, 25; R.E. FREEMAN, W. EVAN, *Corporate Governance: A Stakeholder Interpretation,* 19 *Journal of Behavioural Economics,* 1990, 337; R.E. FREEMAN, *The Politics of Stakeholder Theory: Some Future Directions,* 4 *Business Ethics Quarterly,* 1994, 409; T. DUNFEE, *A Critical Perspective of Integrative Social Contract Theory: Recurring Criticism and Next Generation Research Topics, Journal of Business Ethics,* 2006, http://lgst.wharton.upenn.edu/dunfeet/Documents/Articles/CriticalPerspectivesJBE.pdf.
This thesis has created a wide debate that we cannot document here. For a first analysis, see T. DONALDSON, *Book review dialogue: Tightening the Ties that Bind, defending a contractarian approach to business ethics, American Business Law Journal*, 1st April 2000; T. DONALDSON, T. DUNFEE, *Precis for Ties That Bind,* 105 *Business and Society Rev.*, 2000, 436; S. SALBU, *Ties That Bind: ISCT as a Procedural Approach to Business Ethics,* ibidem, 444; W. FREDERICK, *Pragmatism, Nature and*

For "conceptions of voluntary CSR" we mean those theories that argue the possibility that CSR develops in a relevant and positive manner without significant changes in the regulatory system. In other words, there would be no need for new laws, nor for acrobatic efforts to subvert established interpretations. Furthermore, these theories argue that such a spontaneous development of CSR would not produce further legal consequences that could significantly alter the current equilibriums. We intend to demonstrate that the two propositions which assert, respectively, the feasibility of a significant voluntary CSR, and the potential for this to happen without significant change in the legal system, are practically and logically incompatible.

2. Voluntariness as a prominent feature of CSR: the regulatory framework.

In European law, voluntariness is the salient feature of the definition of CSR[2]. The starting points are the Green Paper (18.7.2001 COM 2001 366, n. 2.20) and Commission's Communication of July 2, 2002 (COM 2002 347, par. 3). From then on, the official notion of corporate social responsibility is described as "the voluntary integration by companies of social and environmental concerns in their business operations and business relationships with stakeholders". The characteristic of voluntariness is repeated by saying that socially responsible companies adopt "a socially responsible behaviour beyond legal requirements and voluntarily assume such a commitment because they consider it in their long-term interest". The concept has been taken up in the Communication of 22 March 2006 (COM 2006 136 final, paragraph 1) and reiterated in the European Competitiveness Report of 2008, without substantial concessions to the more dubious position of the European Parliament (Resolution of March 13, 2007 (2006/2133 (INI))[3].

Norms, ibidem, 467; B. WEMPE, *On the use of the social contract model in business ethics,* 13 *Business Ethics: A European Review,* 2004, 332; R. MARENS, *Returning to Rawls: Social Contracting, Social Justice, and Transcending the Limitations of Locke*, 75 *Journal of Business Ethics,* 2007, 63; G. SOLLARS, *The Corporation as Actual Agreement,* 12 *Business Ethics Quarterly,* 2002, 351.

In the Italian literature see the original elaboration by L. SACCONI, *Economia, etica, organizzazione: il contratto sociale dell'impresa,* Roma-Bari, Laterza, 1997; ID., *Introduzione*, in *Guida critica alla responsabilità sociale d'impresa*, Roma, Bancaria editrice, 2005; ID., *A social Contract Account for CSR as an Extended Model of Corporate Governance, I Rational Bargaining and Justification,* in *Journal of Business Ethics,* 2006, 259; *II Compliance, Reputation and Reciprocity,* ibidem, 2007.

One of the Authors has criticized this approach from a different perspective than the one offered in this paper: see F. DENOZZA, *Responsabilità dell'impresa e "contratto sociale", una critica,* in *Diritto, mercato ed etica. Dopo la crisi,* omaggio a Piergaetano Marchetti, Milano, EGEA, 2010, 269.

[2] In the *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee* of March 2006, corporate social responsibility is defined as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis". See G. DE FERRA, *La responsabilità sociale dell'impresa,* in *Riv. soc.*, 2008, 349, 350, and M. LIBERTINI, (nt. 1), 19.

Does this mean that legal rules that impose obligations (for example the obligation to disclose socially relevant information in Financial Statements) have nothing to do with CSR? (For a critical account of how we have arrived to this emphasis on voluntariness, see M. HOPKINS, *Corporate Social Responsibility & International Development*, London, Earthscan, 2007, 25). For a critical comment see also V. BUONOCORE, *Mercato e responsabilità sociale dell'impresa*, in *Mercato ed etica,* P. D'ADDINO SERRAVALLE ed., Napoli, Edizioni Scientifiche Italiane, 2009, 101, 103. See also A. ANTONUCCI, *La responsabilità sociale d'impresa,* in *Nuova giur. civ. comm.*, 2007, II, 119, 126.

[3] And see the *Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – A renewed EU strategy 2011-14 for Corporate Social Responsibility*, Brussels, 25.10.2011, COM(2011) 681 final, where the Commission, while proposing a new definition of CSR – "the responsibility of enterprises for their impact on society" – does not seem to review its voluntary nature. The Commission expressly states that "[t]he development of CSR should be led by enterprises themselves", even though it recognizes that "[p]ublic authorities should play a supporting role through a smart mix of voluntary policy

We are not aware of an official definition of CSR in the U.S., but it seems that the analysis of normative data leads to results which, although characterized by some uncertainty, are broadly similar to those that we see in Europe. Both the indications contained in the Principles of Corporate Governance of the American Law Institute, according to which directors "may take into account ... ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business"[4], and the indications than can overall be obtained from the majority of the so-called constituency statutes, and, finally, those derivable, at least according to some interpretations, from the common law, converge in admitting, but not requiring, that directors, in making their decisions, take into account the interests of stakeholders other than the shareholders [5]. Which is equivalent, in essence, to state that the consideration of the interests of third parties has to be brought back to a voluntary choice.

The situation does not seem to be substantially different in the United Kingdom, where the consideration of stakeholders is formally set as mandatory (as in certain U.S. States) but is still subject to assessment by the directors of the interest of shareholders; with the result that the reference to the interests of other stakeholders either plays a role in qualifying the best interests of the shareholders (the interest that they too can have towards a harmonious relationship with other stakeholders), or it ends up creating, at most, a weighting constraint, but in no case a coercion on the freedom to choose, also considering that, as generally noted by commentators, the law does not provide stakeholders with any right to bring action for an infringement to a hypothetical obligation. Moreover, it seems that neither U.S. law nor the new version of the English Companies Act, have produced any judicial precedent where the reference to the protection of the special interest of a determinate stakeholder has played an important role in the decision of the case.

Even in Germany, regarded by Anglo-Saxon scholars as the birthplace of the model of stakeholder-oriented governance, the voluntary nature of CSR has been stressed many times, at least by the dominant political party [6].

3 . Voluntary CSR as a form of charity?

If we were to stop at this level of the analysis, we should recognize that, in the end, CSR presents few problems to legal scholars and that all the talk over CSR produces from a legal standpoint (and perhaps not only from a legal standpoint) a mountain of gossip. If it all comes down to the fact that who wants to do a good deed must be regarded as free to do it, we do not

measures and, where necessary, complementary regulation, for example to promote transparency, create market incentives for responsible business conduct, and ensure corporate accountability" (see para. 3.4).

[4] For a synthetic but interesting comparison between the ALI Principles, the main positions prevailing in the different US States, and the ones prevailing in Australia, Canada, and the United Kingdom, see B. HORRIGAN, *Corporate Social Responsibility in the 21st Century,* Cheltenham, Edward Elgar, 2010, 204.

[5] See J.W. CIOFFI, *Fiduciaries, Federalization, And Finance Capitalism: Berle's Ambiguous Legacy and the Collapse of Countervailing Power*, 34 *Seattle University Law Review,* 2011, 1081, 1111.

[6] In the document entitled *Zwischenbericht zur Entwicklung einer nationalen CSR-Strategie*, prepared by the Bundesministerium für Arbeit und Soziales and approved by the Bundeskabinett on 15 July 2009, CSR is defined as "…die Wahrnehmung gesellschaftlicher Verantwortung durch Unternehmen – freiwillig und über gesetzliche Anforderungen hinaus".
In the document by the Nationales CSR- Forum of 28 April 2009, available at http://www.csr-in-deutschland.de/portal/generator/8276/property=data/2009_04_28_zweites_csr_forum_anlage.pdf, CSR receives the (mysterious) definition of "freiwillig, aber nicht beliebig". S. HISS, *Corporate Social Responsibility- Innovation oder Tradition*, in *ZFWU* 10/3, 2009, 287, 289, notes that "…stellt auch die deutsche Bundesregierung die Freiwilligkeit von CSR in den Mittelpunkt ihrer Politik".

think that the issue opens any perspective of interest. Of course one can always discuss the limits within which this freedom can be exercised and how we should allocate the responsibility for these decisions among the various corporate bodies. However, since it is clear that we don't see legions of alleged victims of excessively socially responsible behaviour by directors of their companies, this problem seems rather theoretical.

Furthermore, if we take into account the trivial observation that in a system characterized by the existence of competitive markets, a company that unilaterally decides to systematically take over the costs of solving social and environmental problems beyond what is required by law, would not be able to survive for long, the whole thing sounds likely to end in a finding of substantial irrelevance of CSR both legally, and practically.

Before embracing this conclusion, however, it has to be remarked that this is not the image of CSR presented in the works of supporters of its importance, and, for what interests us most, in the official European documents. The Commission expressly excludes that CSR can be likened to a kind of charity that anyone can do if he or she wants to [7].

The question then is: what is the difference between voluntary CSR and charity? The answer is in all the documents in which the Commission illustrates (see eg. the articulated analysis contained in the "European Competitiveness Report 2008") the economic benefits that companies may derive from the adoption of business-oriented CSR policies[8]. Therefore, it is not about the salvation of the soul, but also about the salvation of the purse. Which, as usual, can dramatically change the scenery.

4. A concept of "instrumental" CSR.

We are not able to determine whether the Commission (and authors who share the Commission's beliefs) is right in believing that the practice of CSR can lead to an increase rather than a decrease in profits[9]. However, between two different possible conceptions of the relationship with stakeholders - one, normative, and the other, so to speak, instrumental –, the Commission seems highly oriented in favour of the latter. The EU seems clearly to opt for a conception in which the respect of the interests of other stakeholders should not be conceived as a target imposed by some ethical constraint, but as a goal that can be motivated in terms of convenience, the realization of which is potentially capable of benefiting shareholders as well. We repeat that we are unable to express an opinion on the merits of this argument. However, this is the position of the Commission (and of many others) and therefore we shall refer to this position from now on, taking it for granted for now.

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[7] In the *European Competitiveness Report 2008*, discussing the relationship between CSR and competitiveness (para. 5.2.2), it is stated that "...CSR is not just philanthropy" and that, at least in certain circumstances, "CSR can contribute to cost savings" (5.3.1.3).

[8] According to the Commission, CSR policies may also benefit the economic system as a whole: in *Europe 2020, A European strategy for smart, sustainable and inclusive growth,* 15, the Commission indicates the promotion of CSR as one of the main tasks of the Commission within the implementation of an industrial policy for the globalization era.

[9] The literature exploring the relationship between CSR and financial performance is extensive, with mixed results. For an updated review, see F. DI DONATO, M.F. IZZO, *The Relation between corporate social responsibility and stock prices: an analysis of the Italian listed companies*, 16 January 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986324. The Authors find that, with regard to Italian listed companies, "a good social performance has a negative influence on stock prices" (p. 1). On the problematical correlation between corporate social performance and corporate financial performance, see J.D. MARGOLIS, J.P.WALSH, *Misery Loves Companies: Rethinking Social Initiatives by Business,* 48 *Administrative Science Quarterly*, 2003, 268.

Let's then assume that CSR may bring economic benefits and let's see what consequences may result thereof in legal terms.

Starting then from the assumption that there is a not insignificant number of practices that are able to achieve socially responsible behaviour and to increase the profits of the company that puts them in place, the first question that arises concerns the reasons why the phenomenon should be of any interest to the law. One should assume that companies are perfectly able to identify these convenient practices in theory and to put them in practice, as indeed happens in a series of situations (e.g. in the case of investments in the development of renewable energy) without need for an intervention of the legal system.

5. How to lead to the perception of the "instrumental" nature of CSR: pressure from outside?

The problem becomes more complex, and the legal issues involved potentially more pressing, if we make the reasonable assumption that CSR practices are not always clearly identifiable, and above all, that many of them are recognizable as both responsible and profitable only by those who put themselves in a particular perspective. We thus arrive at a first crossroad. If there are some individuals that are able to capture more than others the positive impact of these practices, the possibility of securing those individuals greater influence – by way of an amendment or a different interpretation of the rules that affect the balancing of powers within the corporation- becomes a potentially important legal issue.

And here comes a bifurcation. A first alternative is to rely on the mere pressures that the company may receive from outside. A second is to act on the internal mechanisms which determine the distribution of power in the company.

Let's start by examining the first alternative. The reference here is to the possible pressure that socially responsible investors and consumers may exercise on companies' decisions.

From the point of view of the desirability of an intervention by the legal system, there are two problems. The first, immediate and obvious, concerns the opportunity to enhance the action of these influence groups. Since it seems impractical to attempt to turn the external pressure into an internal constraint (as it would happen by providing for a representation of certain categories of stakeholders in the corporate bodies) it all seems to boil down to an information problem. Many of the ongoing debates on the optimal legislative framework for the disclosure by firms concerning their socially relevant activities, has to do with this aspect.

In our opinion, however, there is a potentially much more serious and complex problem, that is usually ignored and that we can dare to ignore only until the phenomenon of socially responsible investing will remain, as it is now, relatively limited. The problem can be expressed through a question. From the perspective of the overall purpose of the legal system, does it make sense to sponsor a system in which the choices of firms in socially relevant areas are exclusively or mainly conditioned by the pressure that their potential investors and consumers are able to exercise? We just briefly summarize what we think is the core of the problem[10].

The point is that even imagining a fully functioning market, the results that the market could achieve in this area would not only be limited but also very questionable. An example may be helpful to clarify the point. Let's imagine an investment market where a wide range of so-called ethical investors allows all investors to choose the criteria that should govern the allocation

[10] For a deeper analysis of this issue see F. DENOZZA, *Le fonti private del diritto commerciale tra mercato e politica,* in V. DI CATALDO, P. SANFILIPPO (eds.), *Le fonti private del diritto commerciale*, Milano, Giuffrè, 2008, 5; ID., *Il "ritorno" delle fonti private nella produzione del diritto commerciale attuale,* in S. ROSSI, C. STORTI (eds.), *Le matrici del diritto commerciale tra storia e tendenze evolutive*, Varese, Insubria University Press, 2009, 53.

of their savings. The real world as we know it is not so perfect. Investment funds follow ethical rules which are in part similar, and partly different, but we are far from the possibility for the individual investor to choose in full knowledge what he considers the best possible combination of investment criteria. However, let's disregard this difficulty, and imagine a perfect market in which each investor can give a mandate to its professional intermediary to invest or not invest in nuclear energy, in biotechnology, in gambling, in the production of alcohol, firearms, tobacco and so on. What kind of society would we end up with by the proper functioning of such a market?

To understand the problem, and correctly answer this question, we must resort to a distinction well known to philosophers, which is also very easy to understand. It is the distinction between the conception of the *good* and the conception of the *right*[11].

The conception of the *good* is the vision of each individual regarding the values that make his or her life worth living, and is specified in the plans of life that each individual thinks will help him make the most of herself and of her aspirations.

The conception of the *right* corresponds to the vision of each individual regarding the set of qualities that should characterize the most just society in which she and her fellow citizens can live better. It is obvious that the two concepts can influence each other, but they do not coincide. My conception of the good can make me believe that a life without alcohol is the one that will lead me to make the most of my projects, but this is not to say that I consider that the fact that alcoholics are neither produced nor consumed, is an essential element of a just society.

That said, the market, when it works perfectly, is certainly equipped to detect and weigh the different conceptions of the *good*, and maybe also to ensure a certain level of peaceful coexistence among those conceptions. We doubt, however, that the market is equally equipped to detect, ponder, and ensure the coexistence of different conceptions of the *right*, at least if we call *right* something different than the mere preference that each individual has for a behaviour rather than for another[12].

The development of a conception of the right should not depend on the consideration of the tastes of the majority that is typical of market mechanism, and, above all, it requires a thoughtful equilibrium that the market mechanism seems more likely to discourage than to encourage. Turning back to the alcohol example, a market can well produce a situation where investments in the production of alcoholics, opposed by the majority, are drastically reduced, thus forcing a spiteful minority to cultivate a high price for her vices. Hardly the market can rather lead to an agreement between drinkers and non-drinkers that allows the production of alcohol, but excluding sales to minors, or limiting sales in absolute terms, or restricting sale in some places and at certain times, etc.. In essence, the market may allow the coexistence of different groups, more or less isolated and conflicting with each other, but it can hardly support the creation of the shared rules that are necessary to achieve a just society.

As we can see, even in this perspective, that relies on the external pressure of the market to promote CSR practices, and that is perhaps the most minimal of all possible ones, the idea of proceeding without any legal intervention – able to steer and possibly correct the market outcomes - seems very unattractive and perhaps hardly realistic.

[11] The distinction is essential in the work of Rawls: see J. RALWS, *The Priority of Right and Ideas of the Good* 17 *Philosophy and Public Affairs*, 1988, 251.

[12] In the perspective of the gathering of preferences, the distinction between the conception of the good and conception of right is somehow blurred, since even the conception of right becomes a simple form of concretization of everyone's beliefs regarding the opportunity to live in one or the other way.

6. More on the perception of "instrumentality". The pressure from inside and the distinction between short and long term.

The second alternative is to rely on internal mechanisms. The theme of CSR seems then to collapse, with virtually no dross, into that of governance. CSR becomes a phenomenon that, from a legal standpoint, does not pertain in the first instance to the behaviour of firms, but to their internal constitution. Let the law be concerned with creating an appropriate organization. The good behaviour will follow.

We touch here on a topic currently widely discussed by corporate law scholars, which regards the alternative between enhancing the influence of shareholders, or that of the directors, or enhancing the freedom of managers[13]. This debate is usually framed within a conceptual framework that takes advantage of a currently very popular opposition: the one between short term and long term. Perhaps it is no coincidence that the topic (the distinction between short and long term) is becoming central not only in debates related to financial markets, but also in those relating to the regulation of companies and even in the context of antitrust law, where static, short-period efficiency is now often opposed to the (supposedly better) results that monopolistic competition is accredited – from Schumpeter onwards - to produce in the long run.

The issue of short vs. long term is also the basis of the theories that argue the convenience for shareholders to abstain from opportunistic behaviour towards other stakeholders. The idea is that opportunistic behaviour may provide some immediate gain, but at the cost of a general reduction of the collaboration of the stakeholders and the consequent production of a surplus in the future, compared to what could have been produced in the absence of the opportunistic behaviour.

It's clear, however, that if the major future gains were sure, and immediately quantifiable, their valuation, discounted for the time necessary to produce them, would be reflected in the calculations that everybody does in the present, thus making the distinction between short and long term essentially collapse.

The problem arises to the extent that one assumes that this evaluation involves considerable uncertainty and debate. Hence the issue, which is mainly debated among corporate law scholars at the moment, that refers to the identification of the individuals who are potentially able to perform this assessment objectively and with the highest probability of correctness. Which means, translated into terms that are of interest for a company law scholar, to ask if, taking this point of view for granted, it is more appropriate to increase the powers of the shareholders (or some shareholders), those of directors in general, those of managers (as opposed to shareholders and to the other directors) or even if it is necessary to opt for legal reforms that provide for the participation in the board of representatives of stakeholders other than shareholders.

We then face a problem that (apart from the last, radical, solution) seems finally to be of some potential interest for the interpreter. Given the starting point (CSR practices are profitable,

[13] Among the more recent and informative works, see S.M. BAINBRIDGE, *Director Primacy* (May 25, 201 0), UCLA School of Law, Law-Econ Research Paper No. 10-06, available at http://ssrn.com.14feb-youth.com/abstract=1615838; L.E. MITCHELL, *The Legitimate Rights of Public Shareholders*, Express, 2009, available at http://works.bepress.com/lawrence_mitchell/2; E. DURUIGBO, *Tackling Investor and Managerial Myopia* 2012, Express, available at http://works.bepress.com/emeka_duruigbo/3; L.E. TALBOT, *Shareholder Entitlement, Primacy and Empowerment* (May 12, 2010), Warwick School of Law Research Paper No. 2010/10, available at http://ssrn.com/abstract=1605252.

but there are difficulties in identifying them in concrete situations), we can ask whether this could justify interpretations that systematically give preference to solutions that provide greater powers to one or the other member of the company. The question can not be of immediate interest in systems, like the Italian one for example, where it seems difficult to imagine a systematic contrast between majority shareholders, directors and managers, but it also poses a serious theoretical problem.

But still another problem arises. Even if we identify the subject that can best perform the appropriate assessments, how do we ensure that this abstract capacity is not in concrete immediately diverted by the interest of the subject in question? The problem is not a simple and common problem of occasional departure from the models of individual behaviour desired by the legal system. This is not only due to a practical reason (the quantity and uncontrollability of the factors that may take to deviant behaviour), but especially to a legal reason, namely the absence of the legal instruments necessary to sanction any choices that favour the short term instead of the long term perspective in a patently unlawful manner. While the choice to sacrifice the benefits of the short term, when taken in a clearly unacceptable manner, results in a damage to someone who can often act to recover it (shareholders in company law or consumers in antitrust law) it seems difficult to assume the existence of a similar threat against decisions that favour the short term. It seems especially hard to imagine that the choice of an immediate benefit for the shareholders to the detriment of a non specifically protected interest of another stakeholder can be sanctioned under the company law currently in place in major jurisdictions, as it seems unlikely that the Antitrust law may sanction the behaviour of a company that has rewarded actual consumers instead of building the monopolistic trench behind which it will give course to the creative destruction advocated by Schumpeter.

In brief, a second difficulty is the following: voluntary CSR, that relies on the far-sightedness of one or the other component of the company, is exposed, in the absence of incisive changes in the regulation currently in force, to the objection of creating the possibility of long-term choices, but at the same time leaving intact all the incentives that operate in favour of the fulfilment of the short-term objectives; with the consequence that the objective theoretically pursued is prejudiced in practice. Basically, as many argue, the result would be simply to increase the discretion of the decision maker with no guarantee that this discretion is put to good use[14].

7. Is more discretion in carrying out long-term choices a minimal, but acceptable solution?

One might observe that some possibility is better than no chance, and therefore still worth the effort to reaffirm the legitimacy of decisions in favour of the long term and to entrust power to the individual with the lowest bias in favour of the short term.

A further and more serious problem then arises. The anodyne representation of a contraposition between short and long term is actually quite misleading. We use a simple example to explain this point. If one individual has to decide between going to a movie or save the money to take a trip at a later time, this individual faces a choice between short and long term. If a group of people that controls shared resources decides that nothing more is spent on going to the movies and everything is saved so that one day those who will be members of the group can

[14] It is one of the most recurrent and substantial objections to a CSR which is not mandatory, monitored and sanctioned. See the classic work by M.C. JENSEN, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function,* 14 *Journal of Applied Corporate Finance,* No. 3, Fall 2001.

make a nice trip, this is not a question of short vs. long period, but a question of possible conflicts of interest.

It is clear that the situations we face when dealing with CSR are much more similar to the one that occurs in the second case than to that of the first. This applies not only to stakeholders, whose subject variability and heterogeneity of interests is obvious, but also for shareholders. Even leaving aside the delicate issue of conflicts among shareholders, as one of our starting points is that the benefits in the long term are not immediately perceivable nor they are quantifiable, it necessarily follows that a choice that seems negative to a part of the market, and thereby causes an immediate fall in share prices, is not a wise and neutral choice for all, but it is a choice that affects the interests of current shareholders who are not available or simply cannot wait for the long term, when the market will recognize its mistake.

If one considers this profile, the creation of incentives and disincentives (including liabilities) to rebalance the pressure towards the short or the long term, becomes not a practical problem of how to get higher or lower efficiencies, but a problem of balancing conflicting interests. Therefore, the idea of leaving this balance to the decision maker (be he a shareholder, director or manager) is much less attractive. The decision to authorize an occasional care for the long term, without rebalancing the effects in the short term, cannot be presented as a practical choice in which more is better than less, but must be seen as the choice to rely on someone to manage the interests of others in the absence of a legal intervention that directs and limits his discretion, which means in the absence of a prior balance that is generally understood, discussed and evaluated as such.

It seems to us, to conclude on this point, that the assessment of the desirability of voluntary CSR coupled with a finding of fact regarding the occurrence of non-trivial situations in which CSR can benefit the company that pursues it, should be consistently accompanied by legal measures aimed at preventing the malfunctions identified here.

8. Voluntariness with no legal obligations for anyone?

It seems to us that a final set of issues deserve to be explored. Let's start back from the voluntary nature of CSR and ask ourselves: voluntary for whom? For the individual entrepreneur, the answer is perhaps relatively easy. Is it as easy in the case of a manager – whether he is the majority shareholder, a director or a manager of a company – who acts (also) in the interest of others? If we continue to accept the premise that there are many situations in which CSR can produce a higher total surplus, the answer should be that in situations like this one the adoption of CSR practices should be mandatory for the directors and managers of the company[15]. This sole consideration undermines the absolute dogma of voluntariness. And this is obvious to anyone.

Here, we would like to pose another, far more complex and much less obvious, problem. Formulated in simple terms, the question goes like this: can we imagine the existence of an obligation binding the manager to ensure that the company behaves in a certain way, without the violation of this obligation resulting in a claim by the victims not only against the manager, but against the company itself?

[15] We do not enter into the several problems that would arise, should we create such a liability on directors; to begin with, the problem of directors' discretion and the one regarding the opportunity to let the judge decide whether a director should be held liable for having pursued the immediate interest of shareholders, and not having made a different choice that could have damaged shareholders in the short term but would have benefited them in the long term.

When a corporate decision harms the interest of a component or damages this component beyond the corporate interest, this component is usually deemed entitled to be compensated not only by the director, but also by the company. If there were an obligation of managers towards stakeholders, we should probably come to a similar conclusion. We then move to the following question: if there is an obligation to pursue a policy of respecting the interests of stakeholders when this policy is in the interest of the company – conceived as the interest of shareholders in the long term –, does this create a right of the stakeholders to demand that directors behave consequently? The topic is of obvious delicacy and we do not dare to propose definitive solutions. But, in our opinion, we should think more about the mechanisms of legal protection of the interests of the members of the corporation. It is well known that there are approximately two of these mechanisms. The first mechanism builds on the prohibition to harm the corporate interest and turns this principle into a legally guaranteed protection of the component that may be injured by the breach of the prohibition. The second mechanism, according to the dominant opinion, builds on the contractual relationships between the various components of the company and refers to the breach of the duties deriving from the contract. In essence, we can either take an "organic" vision in which shareholders are entitled to be compensated as a part of that whole (the corporate interest) that has been damaged, and a pluralist vision in which the source of the right to compensation is the breach of obligations that members have taken toward each other.

If we try to incorporate these mechanisms in the case of the stakeholders on the basis that the satisfaction of their interests is a part, albeit instrumental, of satisfaction of the corporate interest, what a picture are we facing? From the point of view that we have called "organic", which is practically less relevant, we would like to insinuate the doubt that the instrumental nature of the position of the stakeholders may not be an obstacle to the recoverability of the damage caused to them. Once it is determined that a certain amount of protection of the interests of stakeholders is necessary to achieve the common good, the interests of stakeholders would concur to compose the corporate interest in a manner not dissimilar from the interest of shareholders. In both cases the protection of the single interest may be configured as a reflection of the social protection afforded to the corporate interest.

In the second scenario the problem of the contract arises instead. Stakeholders as such do not have a general contract with shareholders (other than the specific contracts - labour, supply, etc. - that each of them had the opportunity to sign with the company). Nor does the discovery that the satisfaction of their interest may also benefit shareholders is in itself sufficient to create a contract, at least if we mean, as we intend to, a contract in the legal sense, and not just something similar to the philosophical "social contract".

With a certain radicalization of which we are not unaware, however, we would point out that to claim that the obligations imposed on the majority shareholders arise from contract, is little more than a fiction. The theory underpinning this claim - that of so called incomplete contracts – lacks any logical consistency. It seems similar to a theory pretending to say that all the gentlemen go by carriage. If you see a gentleman on horseback, the theory argues that it is an "incomplete carriage". Metaphors aside, "to say that contracts are incomplete is to acknowledge, by definition, that the "off - contract" plays a role in coordination" [16] . Therefore, is it necessary to pretend that there is a contract as an essential prerequisite for the establishment of a reasonable obligation[17]?

16 T. MOORE, A. REBERIOUX, *The corporate governance of the firm as an entity*, in Y. BIONDI, A. CANZIANI, T. KIRAT (eds.), *The Firm as an Entity*, London, Routledge, 2007, 362.

17 See also F. DENOZZA, (nt. 1), 284.

To make the discussion a little less abstract, let's make an example. Let's suppose that a manager decides to launch, in the long-term interest of shareholders, a program of voluntary compliance with the interests of some stakeholders. Let's then suppose that, for some reason, the program is later displaced. The question is, apart from the obvious liability for the failure to perform contractual obligations eventually assumed, can we configure a general responsibility of the company towards the damaged stakeholder? We think that it would not be absurd to say that the program may have created among the various stakeholders, including shareholders, a community of interests aimed at the same purposes and that this is not more abstract than the generic constraint that the various social components assume to each other with incorporation of the company. This reasoning could lead not to treat the codes of conduct voluntarily entered into by companies as potential contracts subject to the rule of all or nothing [in the sense that either they are accurate and mandatory or they are legally irrelevant[18]] but as creative acts of a community of interests that find their specific function in the best realization of the corporate interest and create legally protected expectations of proper pursuit of the common interest, no less concrete than the expectations that the constitution of the company creates among its various components.

There are many ifs and buts, but even in this respect the European concept of voluntary CSR could have implications far more incisive than its premise would have us believe.

[18] This seems to be the most widespread opinion at the moment: see F. DENOZZA, (nt. 1), 272, and references; S. ROSSI, *Luci ed ombre dei codici etici*, in *RDS*, 2008, 23.